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MELBOURNE HOSTS AIAL NATIONAL ADMINISTRATIVE LAW FORUM

Stephen Argument*

On 7 and 8 August 2008, the Australian Institute of Administrative Law held the eighteenth National Administrative Law Forum. The Forum was held in Melbourne and organised by the Victorian chapter of the Institute. The Institute has organised Forums every year since 1991. For over 15 years, the Forum venues have alternated, with Forums being held in Canberra in odd-numbered years and being held in a State or Territory in even-numbered years. All State and Territory chapters of the Institute have organised a Forum at least once.

The Forum is now Australia's pre-eminent administrative law conference and it regularly attracts a high quality of speakers who, in turn, attract consistently strong audiences. The 2008 Forum was no exception, with an impressive array of parliamentarians, judges, senior administrators, administrative law practitioners and academics addressing the Forum and over 200 registrants attending.

The theme for the 2008 Forum was 'Practising Administrative Law' and it was chosen to encourage participants to discuss contemporary issues in administrative law, share practical experiences and consider future changes to administrative law.

The Attorney-General for Victoria, the Hon Rob Hulls MP opened the proceedings and he was followed by the President of the Victorian Court of Appeal, Justice Chris Maxwell, who posed the question 'When words fail: adequate remedies for inadequate reasons?'

In giving the keynote address, the Attorney-General for Australia, the Hon Robert McClelland MP outlined the new Government's views on issues relevant to administrative law and foreshadowed some of the initiatives that the Government would be taking in the next few years. Others speakers on the first day of the Forum included the Legal Services Commissioner for Victoria, Ms Victoria Marles, Justice Richard Tracey of the Federal Court and also the Hon Murray Wilcox QC.

As has been the practice for more than 10 years, the Forum dinner featured the famous (or infamous) Administrative Law Trivia Quiz. As always, the Quiz was hard-fought. Unfortunately, the vile spectre of cheating may have again reared its ugly head (with BlackBerrys and other hand-held devices later reported to have been in use), but certainly not by the winning table (which featured some of the Forum's illustrious speakers).

The second day of the Forum opened with a session on the Ombudsman, addressed by the Commonwealth Ombudsman, Professor John McMillan and featuring commentary by Mr John Carroll, of Clayton Utz. Other speakers on the second day included Mr Tony Piccolo MP, of the South Australian Parliament, who gave an interesting presentation on the role of MPs in practising administrative law. The second day was concluded by a session in which

* *Secretary, AIAL*

the chair of the Victorian chapter of the Institute, Mr Stephen Moloney, gave a presentation on the finality of administrative decisions and the President of the WA State Administrative Tribunal, Justice Michael Barker (a former chair of the WA chapter of the Institute), spoke about harmonising administrative law.

This concluded another most successful Forum. The Forum was a success in every respect, with excellent content, strong attendance and a solid financial outcome for the Institute. This was a credit to the Victorian chapter of the Institute, ably-led by Mr Moloney, to whom the Institute is grateful.

The Institute intends that selected papers from the 2008 Forum will be published in the *AIAL Forum*. It is hoped that the first of those papers will appear in the next issue.

As to the 2009 National Administrative Law Forum, in line with the policy of alternating the organisation of the Forum between Canberra and the State and Territory chapters, it will be held in Canberra, probably in August 2009. Preparations are already under way and a Call for Papers can be expected in the coming months.

DR HANEEF AND HIS FRIENDS AT THE AFP: AN ADMINISTRATIVE LAWYERS' FEAST DAY?

Stephen Keim SC*

An introduction: the rule of law

The Petition of Right of 1628 is a heartfelt cry for the rule of law. In clause X, the various matters canvassed earlier in the document are brought together with the following words:

> [The present Parliament assembled] do humbly pray your most excellent Majesty, that no man hereafter be compelled to make or yield any gift, loan benevolence, tax, or such like charge, without common consent by act of parliament; and that none be called to make answer, or take such oath, or to give attendance, or be confined, or otherwise molested or disquieted concerning the same or refusal thereof; and that no freeman, in any such manner as is before mentioned, be imprisoned or detained …[1]

The Petition of Right was not, immediately, a great success. The turbulence of the Civil War; the Commonwealth; the Restoration; and a series of further battles had to be endured before the principles sought in the Petition became a fundamental part of the protections contained in the Bill of Rights of 1689.[2]

I am always extremely conscious of this heritage when I head to s 20 and following of the *Judicial Review Act 1991* (Qld) or other codifications of administrative law principles. The ability to challenge government decisions and the obligations imposed on government officials to conduct their decision-making, appropriately, comprise the rule of law in action. And when our access to such remedies is restricted or excluded, the rule of law, itself, becomes muted and ineffective.

It also follows that administrative law principles are very useful in many other areas of law, especially, where government decision-making is involved.

Part 1C *Crimes Act 1914* (Cwlth): extraordinary powers

Part 1C was inserted into the Crimes Act in 1991. However, amendments passed in 2004 extended its provisions to terrorism offences. The provisions which relate to terrorism offences are different in some respects to those which deal with the other serious offences for which the legislation was originally enacted.

The purpose of Part 1C is to interfere, in certain circumstances, with the traditional rights of a criminal suspect. The traditional right of an arrested person is to be taken as soon as practicable before a justice to be dealt with according to law.[3] In practice, this means that an arrested person will be taken to the watchhouse to be processed by the staff of the watchhouse. If appropriate, the person will be given a form of watchhouse bail releasing them into the community. If watchhouse bail is not given, the arrestee is taken before the

* *Senior Counsel, Higgins Chambers, Brisbane. Notes for a talk to the Australian Institute of Administrative Law (AIAL) held at the Common Room of the Qld Bar Association, 25 September 2008*

nearest Magistrates Court to be charged. On this first appearance, a further bail application may be made and, again, the person may be allowed back into community, absolutely or conditionally, or remanded in custody which places the arrestee in the hands of the corrective services system.

Part 1C imposes a different regime. The obligation to take the arrestee before a justice is suspended. The arrestee may be detained for certain limited purposes, namely, to investigate whether the arrestee committed the offence for which the arrest was made or, in the case of a terrorism offence, to investigate another terrorism offence which an investigating official reasonably suspects the arrestee of committing.[4]

The regime created by Part 1C recognises investigation time, which is the primary period for which Part 1C was enacted. However, there is also provision for periods during which the investigation (principally, questioning of the arrestee, cannot be reasonably carried out)[5] and these downtime periods allow the detention to continue without using up the investigation time.

Section 23CB, which allows a justice of the peace or a Magistrate to specify additional periods of downtime, was added to the 2004 amending Bill after a report of a Senate Committee indicated concerns about Part 1C being used to detain persons for unreasonable periods (like more than 24 hours).[6] The Committee declined to recommend any upper limit to the period of detention. In retrospect, that may have been an error of judgement on the part of the Committee.

Part 1C contains a number of safeguards. A detainee must be treated with humanity and respect for human dignity.[7] Questioning must be tape recorded and transcripts and a copy of the tape must be made available to persons so questioned.[8] Although the Australian Federal Police appear to be still in the process of providing some transcripts of interviews with Dr Mohamed Haneef, some 15 months after the event, it does seem that both investigating police and watchhouse staff took their duties to treat Dr Haneef humanely and with respect, seriously.

One more piece of law

Dr Haneef was arrested pursuant to s 3W Crimes Act. The detention regime is dependant upon the existence of a lawful arrest. Subsection 23 CA(1) provides: 'If a person is arrested for a terrorism offence, the following provisions apply.'

Section 3W requires, inter alia, for an arrest without warrant to occur, that an arresting officer must believe, on reasonable grounds, that the person has committed (or is committing) the offence for which they are arrested.

It seems to follow that, if the status of the arrest of Dr Haneef was other than lawful, then any actions taken pursuant to Part 1C also lost their approval of Parliament. Section 3W also provides that, if at any time before the person is charged, the constable in charge of the investigation ceases to believe on reasonable grounds that the person committed the offence, the person must be released.

As Dr Haneef quickly provided explanations of any matters raised with him which might have at first raised suspicion, it is very likely that any grounds for a continued reasonable belief (if they ever existed) had evaporated within a short time after the arrest. This also would place action taken pursuant to Part 1C outside the protection of the law.

What is this thing called Part 1C?

Mr Peter Russo was engaged on the evening of Thursday, 5 July. His appearance before Mr Gordon, Magistrate, that same evening, resulted in Mr Russo being excluded from the room while the Magistrate received and read the application and supporting material for further down time to be specified. Mr Russo did not get to see the material and Mr Gordon made the requested order.

I was engaged the next day and I spoke to Mr Russo that evening. Mr Russo had a printout of Part 1C which had been provided to him by the AFP officers.

We knew that the Thursday night downtime order expired on Monday evening and that a fresh application was likely. Preparation was difficult to start in that Part 1C seemed to be missing something. I was confused because I thought the orders being made were preventive detention orders or at least I expected Part 1C to contain provisions preventing me or anyone else from speaking about the fact that Dr Haneef was being held in custody. Since everyone was talking about this fact, things didn't seem quite right.

I had printed out some articles on anti-terror laws. In reading one such article, I discovered that PDOs with their restrictions on communication were part of the 2005 amendments to the *Criminal Code* and that the detention provided for in Part 1C Crimes Act was a different animal.[9]

My preparation could now proceed although I had no application or affidavit material from the police and, apparently, I was not going to receive anything any time soon.

When in doubt, go natural justice

The hearing took place in one of the court rooms in the new Magistrates Court building on Monday morning, 9 July 2007. Although the legislation makes no indication, either way, the hearing proceeded as a closed hearing.

Mr Rendina, a lawyer working for the AFP, appeared for Mr Simms, the seconded Queensland police officer, who was making the application while I appeared for Dr Haneef.

Neither Mr Rendina nor Mr Simms nor the Magistrate explained to me what the application was. It was just handed to the Magistrate. It was just assumed that everything could be kept secret. Mr Gordon kept on referring to 'highly protected' material although no claim was ever made for public interest immunity nor was any affidavit tendered explaining why material should not be disclosed. I was trying to join a game which had been going on for a week and no one thought I needed to know the rules.

I read and filed an affidavit by Dr Haneef in which he denied any connection with terrorism, explained the birth of his daughter and the purpose of his trip to India and deposed to a willingness to allow the police to retain his passport and to attend at any reasonable time to be further questioned.

The notes which I tendered and spoke to, that day, are five and a half pages long. They point out that the power to detain is dependant upon the need to investigate specific offences which Dr Haneef was suspected of committing. A global suspicion of Dr Haneef having done something wrong was not enough.[10] The notes point out that, a week earlier, the applicant got an extension of questioning time to 24 hours. They question how the applicant could have had enough knowledge to know he needed 24 hours of questioning time, but still did not have enough knowledge to actually ask any questions.

The notes stressed that the provisions must be construed in accord with their purpose of facilitating questioning and not as a general holding provision. Section 15AA *Acts Interpretation Act* got a mention as did *Coco v The Queen*[11] on the need to avoid construing provisions in legislation which impinge on common law rights beyond what was necessitated by clear and express language.

However, it was natural justice that I talked most about during the hearing. The argument commenced with the right, expressed in Part 1C, of a detained person to make submissions (either personally or by his legal representative).[12] This right implied, it was said, a right to make informed decisions. I referred to *Kioa v West*[13] ('procedural fairness requires that he be given an opportunity of responding to the matter'); *Minister for Immigration v Kurtovic*[14] ('incumbent upon the Minister to give notice of the matters … on which he intended to rely so that submissions could be made in relation to those matters'); and *Annetts v McCann*[15] ('by defining those issues he can effectively assist the identification of the topics on which counsel can relevantly and usefully address').

Mr Rendina and Mr Simms did appear to make faces towards their support staff in the back of the room during my oral submissions. The expressions seemed to say: 'What language is this turkey speaking?'

Mr Gordon may have had the same question. In circumstances where an individual had been locked up without charge for 11 days and without any application by the legal representative in Court, instead of making a decision on the issues I had raised, Mr. Gordon offered to the AFP applicant and his legal representative an adjournment of two days to allow them to obtain legal advice.

He also made a two day interim specified down time order.

What's that other bit of natural justice called?

I was walking to the railway station on Wednesday morning, to catch my usual train to work when it struck me. Mr Gordon had spoken at some length on Monday about how he had taken control of this matter and dealt with all the search warrant applications as they arose. I recalled also that he had kicked Mr Russo out of his room while he sat with the AFP applicants, read the secret material and made his decision. I thought Mr Gordon might be prevented from continuing to make decisions in this matter. These previous contacts, in the absence of anyone representing Dr Haneef, could well give rise to a reasonable apprehension of bias.

Meanwhile the AFP had sought and obtained legal advice. A silk from Canberra rang me and said he hoped to be able to give me some of the highly protected information that had been withheld from Dr Haneef for nine days and from his lawyers for the last 5 days. I said I was going to ask Mr Gordon to disqualify himself.

That day, about midday, I received the application and supporting statutory declaration by Mr Simms that would be sworn and tendered at 2.30 that afternoon. It was agreed that I would need time to assess that material so the argument on the merits of the application would not take place that day. The applicant had managed four days further detention just by withholding information from the detained person. The application that Mr Gordon should disqualify himself was argued that afternoon.

On the recusal application, I read and filed an affidavit from my instructing solicitor, Ms Cappellano, repeating Mr Gordon's statements as to his previous involvement in issuing various search warrants and his observations that he thought the police officers were working very hard (because one of them looked tired and had told Mr Gordon the wrong time

of another search warrant application that was to be made). I also read an affidavit of Mr Russo detailing his exclusion from the earlier downtime application while the police officers remained with the decision-maker Magistrate. (Mr Rendina later filed an affidavit that said the material placed before Mr Gordon on the search warrant applications did not go beyond the adverse statements about Dr Haneef in the downtime specification applications.)

My written submissions on the apprehended bias application went to just over seven pages. As well as the facts in the affidavits, the submissions rely on the fact that the Magistrate had been given secret material on the Monday without any application for public interest immunity having been made. This meant that he had had an opportunity to absorb that material without its relevance or the basis for immunity from disclosure being established or able to be challenged by the lawyers acting for Dr Haneef. He had also expressed himself satisfied as to Part 1C criteria for the purpose of making the interim order. These factors, it was submitted, added to the reasonable apprehension that a reasonable observer might hold which could not be taken away by subsequent provision of some of that material.

The submissions relied upon *Re JRL; ex parte CJL*[16] ('It is a fundamental principle that a judge should not hear evidence or receive representations from one side behind the back of the other … [a judge] should not, in the absence of the parties or their legal representatives, allow any person to communicate to him or her any views or opinions concerning a case which he or she is hearing, with a view to influencing the conduct of the case').

The appropriate test was taken from *Livesey v New South Wales Bar Association*[17] ('The principle to be applied in a case such as the present is … that a judge should not sit to hear a case if in all the circumstances the parties or the public might entertain a reasonable suspicion that he might not bring an impartial and unprejudiced mind to the resolution of the question involved in it …')

Mr Gordon reserved his decision for two days. He promised that, if he were to accede to our application, he would arrange for another Magistrate to be available to hear the merits of the downtime application.

As it turned out, Mr Gordon was not called on to decide the question of his own disqualification. My Canberra colleague approached me (I was carrying another 16 pages of outline, this time addressing the merits) as I got to the Court, to tell me that Mr Simms was withdrawing his application for more downtime.

Mr Gordon was informed of these matters and so did not take any further steps in the matter.

Dr Haneef was questioned for 12 hours that night, using up the investigation time which Mr Gordon had approved, 10 days earlier. Mr Simms who had done everything up to that point, including conducting the 12 hours of the second interview, for reasons still unexplained, was not the person who charged Dr Haneef. The National Coordinator, Counter-Terrorism, Domestic of the AFP, Ramzi Jabbour, signed the charge sheet and swore the bail affidavit.

Despite Mr Gordon not being called upon to make his decision on the issue of apprehended bias, the AFP, through documents provided in response to Freedom of Information applications, has published the following: 'At 1350 Magistrate GORDON advised that he was intending to disqualify himself. No further application was presented by the AFP.' There is no public confirmation available of that claim.

Conclusion

The downtime applications were not the end of the process by which administrative law principles were useful to Dr Haneef. With the assistance of Nitra Kidson and Darryl Rangiah,

my two excellent juniors, an application was made to review a decision by the Minister for Immigration to cancel Dr Haneef's visa.[18] The application was successful at first instance and on appeal and the decision to cancel the visa was set aside. The new Minister, Mr Evans, declined to re-cancel Dr Haneef's visa.

In addition, it was the threat of an application to set aside the charge that was the catalyst for the Commonwealth Director of Public Prosecutions, Mr Bugg, to take a closer look at evidence or lack thereof to support the offence with which Dr Haneef had been charged. On 27 July 2008, counsel acting on behalf of Mr Bugg advised the Court that the Crown would not be presenting any evidence and the charge was struck out by Magistrate, Ms Cull.

Dr Haneef's experience, despite all of the delays which left him in detention, remains a good example of the rule of law at work in Australia. Administrative law principles are a crucial part of the content of that important doctrine.

Endnotes

1 A copy of the Petition may be found at http://www.constitution.org/eng/petright.htm .
2 A copy of the Bill of Rights may be found at http://www.yale.edu/lawweb/avalon/england.htm.
3 This normal state of affairs is recognised in s 23 CA(3)(b) Crimes Act. See also, *Williams v The Queen* [1987] HCA 36; (1986) 161 CLR 278.
4 Section 23 CA(2) Crimes Act.
5 The periods of time to be so disregarded are set out in subs 23CA(8). They include time to convey the arrestee to the police station; time to talk to one's lawyer; and time while one is waiting for one's lawyer to attend.
6 See Senate Legal and Constitutional Legislation Committee *Report into the Provisions of the Anti-Terrorism Bill 2004*, pp 20-22.
7 Section 23Q Crimes Act.
8 Section 23V Crimes Act.
9 The article was Gregory Rose and Diana Nestorovska, *Australian counter-terrorism offences: Necessity and clarity in federal criminal law reforms* (2007) 31 Crim LJ 20. See especially, p 41 for discussion of preventive detention, now contained s 105 *Criminal Code*.
10 I did not twig, at that stage, to the dependency of the powers upon a continuing lawful arrest for a specific offence.
11 [1994] HCA 15; 179 CLR 427, 437.
12 See s.23CB(6) Crimes Act.
13 (1985) 159 CLR 550, 587.
14 (1990) 21 FCR 193, 197.
15 (1990) 170 CLR 596, 601.
16 (1986) 161 CLR 342 at paragraphs 4 and 11.
17 (1983) 151 CLR 288, 293-4.
18 See Haneef v Minister for Immigration and Citizenship [2007] FCA 1273 (21 August 2007), per Spender J. and Minister for Immigration Citizenship v Haneef [2007] FCAFC 203 (21 December 2007) (Black CJ and French and Weinberg JJ.)

PARLIAMENTARY PRIVILEGE IN QUEENSLAND

Daniel Morgan*

The modern era of parliamentary privilege began with the establishment of parliamentary supremacy through the Bill of Rights 1688[1]. Although the concept of privilege had been known since the Middle Ages, the reality of the parliamentary experience had been that privilege was allowed only the extent to which the monarch had been prepared to suffer. Absolutist abuses reached their zenith during the Stuarts, and played a significant part in the outbreak of the English Civil War. The courts had been used as an instrument of royal domination and Art. 9 of the Bill of Rights was designed to ensure that the balance swung the other way.

Remarkably, it was not until the 19th century that the courts asserted their jurisdiction, culminating in an institutional clash between the courts and parliament in *Stockdale v Hansard* (1839) 9 Ad & El 1; (1839) 112 ER 1112[2]. In the intervening period, parliamentarians had abused privilege to perpetuate an oligarchy of their own, by operating above the common law and ousting the jurisdiction of the common law courts. The abuses and the underlying cause of the tensions between the courts and parliament were destroyed at a theoretical level in *Burdett v Abbott* (1811) 104 ER 501 although it took until the *Stockdale* crisis for a settlement to be implemented whereby each institution respected the other's constitutional role: it was for the courts to determine if a certain privilege existed and for the parliament to determine the occasion and manner of its exercise.

The *Stockdale* settlement was appropriate to the circumstances which existed at a specific time and place and with respect to the Westminster parliament which as a result of its historical development, is a unique institution. The question arises whether this settlement is still appropriate in different times, different circumstances, and after the sun has set on the British Empire. The Bill of Rights concepts and the *Stockdal*e settlement were received into Australian law.

Although a distinction was made with respect to the powers of the Westminster parliament and colonial assemblies, English parliamentary privilege principles survived the federation of the Australian colonies and at a federal level, the introduction of a written constitution heavily influenced by the American model of judicial oversight. The United States had, of course, gained independence from England by the time of Stockdale, but it is of interest to note that the Founders did not cut themselves off from the parliamentary heritage. Rather, with the exception of a slightly modified Art. 9 Bill of Rights, privilege was left to the common law and the courts were given an oversight role from the beginning, so that there was a hybrid structure which in some ways anticipated the Stockdale settlement. It is remarkable then that, having broken from the English system at a time when the English parliament was abusing parliamentary privilege to set itself up as a parliamentary oligarchy, the Americans were not immune from congressional abuses of privilege, notably during the mid-20th Century experiences of the Dies and McCarthy Committees. But there are similarities with the English experience, because the American courts were roused from an acquiescent

* *Dan Morgan is a Qld barrister. He recently completed his PhD titled, 'Points of tension between the Courts and Parliament: an analysis of parliamentary privilege', at the University of Queensland.*

attitude towards congressional power to one where they were required actively to challenge Congress so as to protect the fundamental rights of the individual citizen[3].

Australia has not experienced a comparable scenario where the courts had to intervene in an heroic way to champion the rights of the citizen. Although the Commonwealth Parliament and the Parliament of Western Australia were the last sophisticated jurisdictions[4] where the house itself has gaoled people[5] these cases occurred with little if any judicial fuss. Perhaps this is explicable because parliaments have been slow to use coercive powers in the modern Australian experience and consequently no instances of abuse have occurred.

It is important to pause to note one factor whose importance on one hand cannot easily be assessed but on the other is self-evident, is the role of the 'court of public opinion'. It is hard to imagine circumstances where regardless of the legal niceties, Tudor or Stuart absolutism, or the Whig oligarchy, would be tolerated today. That must be as a result of public opinion, which is part of the political dimension of the broader concept of parliamentary privilege.

The 'court of public opinion' seems to have been a nascent idea during the 17th Century, because Charles I issued pamphlets to the public at large, putting his side of the conflict with parliament when he dissolved Parliament in 1629. Jurgen Habermas[6] points to the summer of 1726 when, after political journalism began with the Tory purchase of the London Journal in1722, Swift published *Gulliver's Travels*, Pope published *Dunciad* and Gay published his *Fables*. Habermas says:-

> Thus raised to the status of an institution, the ongoing commentary on and criticism of the Crown's actions and Parliament's decisions transformed a public authority now being called before the forum of the public.

He concludes[7]:-

> [...] But by the turn of the nineteenth century, the public's involvement in the critical debate of political issues had become organized to such an extent that in the role of a permanent critical commentator it had definitively broken the exclusiveness of Parliament and evolved into the officially designated discussion partner of the delegate. Fox's speeches were made with the public in mind; 'they,' the subjects of public opinion, were no longer treated as people whom, like 'strangers', one could exclude from the deliberations. Step by step the absolutism of Parliament had to retreat before their sovereignty. Expressions like 'the sense of the people' or even 'vulgar' or 'common opinion' were no longer used. The term now was 'public opinion'; it was formed in public discussion after the public, through education and information, had been put in a position to arrive at a considered opinion. Hence Fox's maxim, 'to give the public the means of forming an opinion.'

A modern instance of the role of public opinion curbing parliamentary excesses can be seen in the Edward R Murrow broadcast *A Report on Senator Joseph R McCarthy* which was broadcast on CBS Television in the United States[8]. Murrow was critical of the way that Senator McCarthy conducted himself by 'the investigation, protected by immunity, and the half truth'. The broadcast went on to document a session before the committee which was investigating an academic who had suspected communist tendencies. One sees in the response from the witness the apprehension – real or contrived, it does not really matter - that the congressional investigation function had ancillary uses and was being used to scapegoat members of the public.

> Harris: I resent the tone of this Inquiry very much Mr Chairman. I resent it, not only because it is my neck, my public neck, that you are, I think, very skilfully trying to wring, but I say it because there are thousands of able and loyal employers in the Federal Government of the United States who have been properly cleared according to the laws and security practices of their agencies, as I was – unless the new regime says no; I was before.

Mr Murrow editorialised in the broadcast:

> No one familiar with the history of this country can deny that congressional committees are useful. It is necessary to investigate before legislating, but the line between investigating and persecuting is a very fine one and the junior Senator from Wisconsin has stepped over it repeatedly. His primary achievement has been in confusing the public mind, as between the internal and the external threats of Communism. We must not confuse dissent with disloyalty. We must remember always that accusation is not proof and that conviction depends upon evidence and due process of law. We will not walk in fear, one of another. We will not be driven by fear into an age of unreason, if we dig deep in our history and our doctrine, and remember that we are not descended from fearful men -- not from men who feared to write, to speak, to associate and to defend causes that were, for the moment, unpopular.

That broadcast effectively terminated the political viability of the McCarthyist agenda of the House Un-American Activities Committee when the committee investigations had become excessive. At the same time, the United States courts were increasingly vigilant in restricting the prosecutions that were being brought for contempt of the committee. Both public opinion and judicial attitude had been far more accommodating of Congress' powers when the communist threat was first perceived in the years following World War II. Years before, when the so-called 'Hollywood 10' were prosecuted, an unsympathetic Time Magazine recorded[9]:

> Only a few high-priced lawyers maneuvering desperately stood last week between "the Hollywood ten" and jail. Two of the noisy leftist screenwriters and directors had been convicted of contempt of Congress, fined $1,000 each, sentenced to one-year jail terms for refusing to tell the House Un-American Activities Committee their political affiliations. Last week the Supreme Court decided, 6 to 2, not to hear their appeals.
>
> While the court's action dealt only with Writers Dalton Trumbo and John Howard Lawson, it was equally decisive for the eight other members of the Hollywood ten indicted for the same offense. They had signed stipulations waiving jury trials and agreeing to be bound by the law as decided in the Trumbo-Lawson cases. Barring some unexpected legal reversal, all ten faced jail.
>
> If any of them should be sent to the Federal Correctional Institution in Danbury, Conn., they would step into as odd a situation as any they ever conceived for a movie plot. One of the inmates at Danbury is New Jersey's pudgy, broken ex-Congressman J. Parnell Thomas, who is behind bars for padding his congressional payroll and pocketing the proceeds. It was he who presided over the committee that cited the Hollywood ten for contempt.

Although Congress retains its power to prosecute for contempts, it has for some time conferred the ordinary courts of law to deal with contempts under a criminal statute. With the notable exception of Queensland, the Westminster-style parliaments have essentially not chosen to do so. Furthermore, there has not been in the modern era since *Stockdale* any large scale prosecution of contempt matters, certainly nothing comparable with the McCarthy era in America. Chief Justice Warren in *Watkins v United States*[10] noted that the different English approach of using non-political, professional Royal Commissions which do not usually have coercive powers, rather than parliamentary committees, has avoided conflict and seen 'a remarkable restraint in the use by Parliament of its contempt power.'

The Queensland experience

In the Queensland context, the two instances where a criminal prosecution was instigated or contemplated have resulted in fiascos. In *R v Pugh*[11]the political and legal consequences of the failed prosecution required the intervention of the Colonial Secretary and the Law Officers at Westminster. In the Nuttall matter, the courts were not involved in this incident, as the Minister resigned his ministry. A decision was made not to proceed against him for contempt, and s 57 Criminal Code was repealed in a special sitting of Parliament. The Supreme Court was never called upon to adjudicate on any contested matters of privilege pursuant to the Criminal Code. The spectacle, as reported in Hansard and the newspapers, is unedifying and can only weaken the public's respect for Parliament and its members.

The *Criminal Code Amendment Act 2006* (Qld.) amended the Queensland Criminal Code by repealing ss 56 (disturbing the Legislature), 57 (giving false evidence before Parliament) and 58 (witnesses refusing to attend or give evidence before Parliament or parliamentary committee). The statute also inserts a new s 717 into the Criminal Code providing that after the commencement of the amending Act, 'a person can not be charged with, prosecuted for or further prosecuted for, or convicted of, an offence against section 56,57 or 58 or punished for doing or omitting to do an act that constituted an offence'. The section goes on to say that the amendment does not prevent a person being punished by the Legislative Assembly for contempt of Parliament as defined under the *Parliament of Queensland Act 2001.*

Section 57 Criminal Code made it an offence knowingly to give false answers to lawful and relevant questions asked by a parliamentary committee. The Parliament could direct the Attorney-General to commence a prosecution under the section. The provision does not seem to have been tested before the Courts.

The amendments were precipitated by an investigation by the Crime and Misconduct Commission ('CMC') into a complaint that a minister had committed an offence against s 57. The fact that the CMC was under its legislation able to assume the power to conduct a preliminary investigation demonstrates that a fundamental constitutional principle has apparently been abridged in Queensland, namely Article 9 Bill of Rights 1688.

The amendments and the investigation itself evidence unfortunate alterations to an otherwise sound legislative structure – indeed one which the contemporary Westminster parliament now advocates – were apparently made with little awareness of the significance of such a change.

The Nuttall Crisis

The amendments were precipitated by a crisis resulting from an investigation commenced by the Crime and Misconduct Commission ('CMC'). Following evidence given by the then Minister for Health, Hon Gordon Nuttall MP, before a parliamentary committee, the Leader of the Opposition took the unorthodox approach of writing to the Officer in Charge, Brisbane Central Police Station, requesting that the Queensland Police Service launch an investigation into whether the Minister had contravened s 57 Criminal Code by his evidence before the committee. The police referred the matter to the CMC, who launched an investigation. A notice was issued under the CMC Act directing the Director-General of the Department of Health to produce the documents given to the Minister for his appearance before the Committee. The questions, which were never judicially determined, then arose as to whether or not that directive and CMC investigation infringed parliamentary privilege, and whether s 57 infringed parliamentary privilege.

The CMC report

In December 2005 the CMC released a report of an investigation it conducted into the allegations. Various opinions from Senior Counsel and the Solicitor-General were obtained by the interested parties, including the Clerk of the Parliament and the CMC, all of which were published in the CMC report *Allegations concerning the Honourable Gordon Nuttall MP:report of a CMC investigation* which was presented to the Attorney-General[12]. Counsel for the CMC was asked whether s 57 Criminal Code breached parliamentary privilege. That was answered – uncontroversially, but at length - in the negative. They were also asked whether an investigation by the CMC would breach parliamentary privilege, and concluded that it would not, with the proviso that privilege 'would prevent the coercive questioning by the CMC of Mr Nuttall in respect of the evidence that he gave.' That question was answered in the negative, relying on the CMC Act. Counsel observed: 'That being so, it can be said

that one of the very reasons why the CMC exists is to investigate such a case as the present.'

They go on to advise:-

> The express references in the CMC Act to the Legislative Assembly as a unit of public administration and to claims to parliamentary privilege in relation to the exercise of various coercive powers in the course of a misconduct investigation indicate that that Parliament did not envisage that the mere coincidence of the subject matter of such an investigation with what might also be a breach of parliamentary privilege (relevantly, the giving of false evidence to a parliamentary committee) would prevent an investigation, though certain information relevant to that investigation might not be able to be coercively obtained (e.g. if it had been brought into existence for the purposes of a 'proceeding in Parliament').
>
> It might additionally be observed of such a legislative scheme that it preserves the privilege of an individual member of parliament whose conduct in the course of a proceeding in Parliament relevantly, the giving of evidence to a committee hearing, may be under investigation by acknowledging that that member can not be forced to answer questions or produce privileged documents concerning the giving of that evidence while at the same time expressly creating an exception to article 9 by allowing a non parliamentary investigation into whether the evidence given was false. An analogous legislative scheme for the inquisitorial questioning of a proceeding in Parliament has been held not to impair the institutional integrity of a State Parliament or to contravene the implied guarantee of freedom of political discussion in a manner contrary to the Commonwealth Constitution.

The Government's response

The Queensland Government's response was to introduce the amending legislation already identified, and to repeal those provisions in the Criminal Code. The Queensland Parliament's Scrutiny of Legislation Committee addressed the bill in Alert Digest Issue No. 6 of 2006. That Committee identified another feature of the legislative scheme:

> The effects of the bill on fundamental legislative principles may be viewed positively. In terms of respect for individual rights, it means members and non-members are no longer subject to the additional possibility of prosecution through the courts for contempt of Parliament. While s.47 of the Parliament of Queensland Act precluded double punishment, there remained the possibility that a person could be acquitted in one forum but found guilty in the other. Now, members and non-members are subject only to the jurisdiction of the Assembly for contempt of Parliament.

The Second Reading Speech was given by the Attorney-General on 9 May 2006[13]. The Attorney noted that the Criminal Code provisions would be treated in the United Kingdom as breaches of the privileges of Parliament, and their inclusion in the Queensland Criminal Code appeared to have been in response to several decisions of the Privy Council in the 19th century which held that Parliament did not enjoy the power to punish for a contempt or the unconditional suspension of a member during the pleasure of the Assembly[14].

The point was made that since the 1978 enactment of s 40A *Constitution Act 1867* there was no doubt that the Queensland Parliament had the power to punish for contempt and that 'the original reasons for the inclusion of section 57 in the Criminal Code are no longer valid.' The Attorney went on to note that s 57 was 'inconsistent with a fundamental tenet of the Westminster system, embodied in section 8 of the *Parliament of Queensland Act 2001*.This tenet is that debates or proceedings in Parliament cannot be impeached or questioned in any Court or place out of the Parliament.' The reason that the Criminal Code provision was repealed was 'to ensure that the principle inherent in Article 9 of the Bill of Rights is preserved and reinforced.' As a statement of principle the Attorney concluded:

> For members, this confirms that Queensland's Parliament operates in the same way as the House of Commons, the Federal Houses of Parliament and other Australian States and Territories. Parliament has primacy and is responsible for disciplining its members. For non-members the position will be the same as for the Federal Houses of Parliament. Members and non-members will continue to be liable to be dealt with for contempt of Parliament under the Parliament of Queensland Act 2001. Members

> and non-members would be subject to the same sanctions to be imposed by parliament. Those sanctions are set out in the standing rules and orders of the Legislative Assembly. Sanctions include the imposition of a fine of up to $2,000.00. If a fine is not paid, the person involved can be imprisoned.

The Premier spoke during the debate on the Bill on 25 May 2006[15]. Mr Beattie noted that the Commonwealth did not have a provision similar to the Criminal Code provisions. He also observed that the Queensland Criminal Code as drafted by Sir Samuel Griffith had been adopted in Western Australia and Tasmania. The former had included s 57 in its entirety, but the Western Australian Crown Solicitor was said to have held the view that the provision applied only to non-members. Tasmania did not include the provision. The Premier noted that New South Wales and Victoria and the Australian Capital Territory did not have statutory provisions of similar effect. He observed:

> The reality is that we are absolutely consistent on this. Members of Parliament should have the ability to express their views, which is what the Parliament was designed to do. Find me one legislature in Australia that implement section 57 or section 58 the way those opposite want. These are antiquated pieces of legislation that were designed to protect the Parliament in an era that is different from today. They were never meant to apply to members. They were meant to apply to non-members who come here to disrupt the Parliament or its committees." [sic]

Article 9 Bill of Rights Abridged?

The point that was missed in all of this was that the CMC proceeded to investigate proceedings before Parliament in the Nuttall matter, which in itself was quite clearly a prima facie breach of Art. 9 Bill of Rights. The question of the validity of the legislation which permits such an investigation to occur is also a moot point, as the matter was never litigated. The crucial point is that if Art. 9 has in fact been abrogated by that legislation, then that abrogation was a radical change to an accepted constitutional principle apparently done without regard, sufficient or at all, to the underlying constitutional structures and balances which might be disturbed.

The jurisdiction of the then Criminal Justice Commission ('CJC') over elected officials – viz members of the Queensland Parliament, and councillors of Queensland local governments – was considered by the Parliamentary Criminal Justice Committee in 1997 in Report No. 39 – The CJC's jurisdiction over elected officials. It noted that the New South Wales Independent Commission Against Corruption ('ICAC') and the Western Australian Anti-Corruption Commission ('ACC') had wider jurisdictions over elected officials than the CJC, with respect to investigations of non-criminal behaviour of elected officials. These bodies are not responsible to Parliament in the conventional way, through ministerial responsibility to Parliament. Rather, the only supervision is by parliamentary committee and latterly in Queensland by a parliamentary commissioner.

It is armed with very significant coercive powers, including the power to examine witnesses and to compel testimony without the benefit of privilege against self-incrimination. Since the demise of Star Chamber in the17th Century, there has been no analogue in the Westminster tradition for a standing body which possesses such significant coercive powers over private and public citizens, especially in an organization outside the familiar structures of responsible government.

What is remarkable is an apparent lack of debate when the CJC/CMC legislation was first introduced and for that matter during the Nuttall controversy, about abridging Art 9, consideration of whether possible alternatives[16] existed or an awareness of the serious potential consequences of what was being contemplated. One might have expected these issues to have been raised and closely evaluated when the CJC legislation was first passed, or by the Privileges Committee or even the Scrutiny of Legislation Committee when the Criminal Code amendments were being examined. That does not seem to have occurred.

But the ham-fisted way in which the *Pugh* and Nuttall matters were approached should not detract from the sound conceptual basis for a codified privilege regime generally which also criminalises contempts and allows the courts to deal with them. The Commonwealth Parliament passed such legislation in response to the *Murphy* decisions, and the Westminster Parliament recognised that in the modern era there are sound reasons for following that approach, particularly now that human rights treaties may affect the way parliamentary privilege has previously operated.

In the Australian context, the present lack of uniformity amongst the states *inter se* and with the Commonwealth serves no purpose. Variations between the jurisdictions are merely as a result of the separate development of those jurisdictions, and now that the federation has been established for over 100 years a cohesive privilege structure, which reflects generally accepted modern constitutional theory and also recognises prevailing conditions, should be developed.

The Stockdale settlement has been so successful in establishing the peace between the courts and parliament, that the issue only ever seems to emerge unexpectedly or in times of crisis. The only significant challenge to the balance came from the judicial arm in the decisions in *R v Murphy* [17] but after the passage of Commonwealth declaratory legislation,[18] and notwithstanding some initial uncertainty[19] that seems now to have been successfully resolved[20]. There remains, however, the underlying tension between the courts and parliament which reveals itself from time to time: as McPherson JA put it in *Rowley v O'Chee* [2000] 1 Qd R 207; (1997) 150 ALR 199; (1997) 142 FLR 1, 'The conflict between legislature and judiciary that would then ensue might threaten to rival *Stockdale v Hansard* and *The Case of the Sheriff of Middlesex*. The potential for such conflict tends to appear remote, until the very day it occurs. One branch of government may not be unwilling to measure its strength against the other.'[21]

The main threat to the structural peace and stability comes from the so-called independent anti-corruption commissions which seem to be uniquely popular in Australia. Although Star Chamber was nominally a court, it was used as an instrument of coercive executive power. Since its demise in 17th Century, as part of the process of establishing the supremacy of the Westminster Parliament, there has been no analogue in the Westminster tradition for a standing body which possesses such significant coercive powers over private and public citizens, especially in an organization outside the familiar structures of responsible government.

These bodies are not responsible to Parliament in the conventional way, through Ministerial responsibility to Parliament. Rather, the only supervision is by parliamentary committee and latterly in Queensland by a parliamentary commissioner. The CJC has been prepared to litigate against other organs of government, including the Parliament of Queensland and its own parliamentary commissioner: *see Carruthers v Connolly* [1998] 1 Qd R 339; *CJC v Dick* [2000] QSC 272; on appeal [2001] QCA 218; *CJC v Nationwide News P/L* [1996] 2 Qd R 444; (1994) 74 A Crim R 569.

The crucial point is that if Art. 9 has in fact been abrogated by that legislation, then that abrogation was implicit and, it would seem, inadvertent. The question of whether its establishing legislation permits such a breach to occur remains a moot point, as the matter was never litigated.

Future conflicts

It may well be that Queensland and other Westminster-style legislatures will be forced in any event to reorganise the coercive aspects of privilege should they ever try to use them in the future. The Queensland Parliament's solution to the Nuttall crisis seems not to have been

well received in the court of public opinion, gauged by the press coverage. *The Courier-Mail* reported under the headline 'Labor uses its majority to shield Nuttall'. *The Weekend Australian* reported under the headline 'Beattie gets disgraced Minister off with apology.'[22]

The Queensland Opposition went to the media with the message that 'corruption' and 'cronyism' had been at work.[23] The Leader of the Opposition was reported as saying that the incident was 'trial by mates and not trial by jury' and that the Premier had 'today set in concrete two sets of laws – one set of laws for everyday Queenslanders and another set of laws for members of the Labor Party.' His deputy described the process as a 'kangaroo court'. The Leader of the Liberal Party said that Parliament should not act as judge and jury over alleged criminal wrongdoing and that 'we should all be equal before the law'.

While some of those comments are obviously partisan, they nonetheless underscore some of the difficulties that face a modern legislature dealing with contempts itself, especially with the modern requirements of procedural fairness and international human rights obligations. There is a political and legal imperative that justice not only has to be done but seen to be done.

In *Demicoli v Malta*[24] the European Court of Human Rights was approached by an applicant who had been charged, convicted and penalised for contempt by the Westminster-style Maltese House of Representatives. The Court found that the European Convention for the Protection of Human Rights and Fundamental Freedoms applied to the legislature and it had been breached, because the applicant had been denied a fair and independent trial, and that his right to a presumption of innocence had been infringed. It is hard to see why Articles 9 and 14 of the International Covenant on Civil and Political Rights ('ICCPR') would not apply *mutatis mutandis* in an Australian context.

In *Egan* the High Court was keen to keep out of political disputes and to limit its role to a purely legal one. There is, however, a palpable concern in the judgments to limit any potential reach of the House's powers to non-members, and to ensure that the old common law limitation of the powers of colonial parliaments to 'self defensive' measures rather than punitive ones was maintained[25] Kirby J in particular made two critical statements on the potential future direction of the law in Australia. Relevantly, with respect to the power of legislatures (or at least the Commonwealth Parliament) to punish for contempt, he observed[26]:-

> The second feature of the Australian Constitution referred to is the creation of a judicature in which is vested the judicial power of the Commonwealth including when exercised by State courts. In *Ex parte Fitzpatrick and Browne* this court held that neither the structure of the Constitution providing separately for the judicature, nor its provisions, required a reading down of s 49 of the Constitution defining the privileges of the two Houses of the Federal Parliament in terms of those of the House of Commons of the Parliament of the United Kingdom. That aspect of the decision *in Ex Parte Fitzpatrick and Browne* may one day require reconsideration. But it is not required in this case.

In a footnote, he continued the point:-

> The want of power on the part of a chamber to punish those in contempt of its orders has sometimes been explained by reference to the fact that punishment is, of its nature, judicial in character and therefore not apt to be implied as among the privileges of a legislature. See *Armstrong v. Budd* (1969) 71 SR(NSW) 386 at 393. The opposite conclusion was reached in the United States of America in an early case where the power of the Congress to punish for contempt so as to uphold its privileges was considered essential to their effectiveness. See *Kilbourn v. Thompson* 103 US168 (1880); *Jurney v. MacCracken* 294 US 125 at 152 (1935).

The Commonwealth statutory model which declares the operation of Art.9 Bill of Rights – s 16(3) *Parliamentary Privileges Act 1987* (Cth) has been effective domestically, and has been well received in the United Kingdom. It was clearly the model for ss 8 and 9 *Parliament of*

Queensland Act 2001. It is interesting to note, however, that the Commonwealth provision protects questioning or impeaching parliamentary proceedings in any 'court or tribunal' (which are terms defined in s 3 Act), while the Queensland provision speaks of any 'court or place out of the Assembly' and specifically declares that the section 'is intended to have the same effect as article 9 of the Bill of Rights (1688) had in relation to the Assembly immediately before the commencement of the subsection.' It has already been observed, however, that the weight of authority now suggests that there is no material difference between the two[27].

This restatement of fundamental principle sits uneasily with the provisions of the CMC legislation which prima facie brought Parliament within its jurisdiction. Allowing a commission or tribunal armed with coercive powers to examine proceedings in parliament without specific parliamentary authorisation is different to the situation experienced in New South Wales in the legislative scheme which was the subject of the *Arena* case. There, the Parliament specifically authorised an inquiry and effectively created a parliamentary commissioner who worked within the aegis of parliamentary privilege. The Westminster Parliament's Commissioner for Parliamentary Standards similarly works within parliamentary privilege, as the Commissioner is a parliamentary officer appointed by resolution of the House of Commons for a five year term[28].

It is unclear how the Western Australian and New South Wales analogues of the CMC would approach a similar situation as the Nuttall case. In terms of 'best practice' legislative drafting, the approach of Sir Samuel Griffith in drafting the Criminal Code provisions to include parliamentary offences was almost a century ahead of its time. Even though the terms of those provisions were probably driven more by the restricted jurisdiction of colonial parliaments than by contemporary law reform considerations Queensland had by quirk enjoyed 'best practice' legislative provisions that Westminster itself now proposes to adopt.

Both Houses of the Westminster parliament formed a joint committee which undertook a significant review of parliamentary privilege, which reported in 1999[29]. The committee was chaired by a law lord, Lord Nicholls of Birkenhead and heard submissions from the UK Westminster-style legislatures throughout the Commonwealth and the 'Parliamentarian' of the United States Congress, who performs a role similar to clerks of Westminster-style parliaments.

The important recommendations of the Committee included that parliamentary privilege should be codified and enacted into a statute, based on the Australian *Parliamentary Privileges Act 1987* (Cwlth). As part of that reform, the penal powers of parliament should be transferred to the law courts, with a limited jurisdiction being retained to arrest and detain for contempts in the face of the House.

The shift would, of course, transfer some power from parliament to the courts of law. The Committee observed[30]:-

> In the distant past each House claimed to be the sole exclusive judge of its own privileges and the extent of that privilege. This is no longer a live issue. In practice the courts already interpret the ambit of parliamentary privilege. The courts have interpreted article 9 many times in the last quarter of a century. Ever since *Stockdale v. Hansard* (1839) the courts have refused to accept that either House, by resolution, can determine the legal effect of its privileges. Never, since that case, has the House of Commons refused to admit the jurisdiction of the courts when matters of privilege arise in the course of court proceedings. Erskine May takes the view that, following this and other cases, the duty of the courts to define the limits of parliamentary privilege when cases come before the courts can no longer be disputed.

It was recommended also that the Act should clarify ancillary matters such as the enforcement of fines and the deletion of obsolete or anachronistic areas such as impeachment.

With respect to the ceding of the penal power of parliament, by way of approach it was thought that it was desirable in principle to retain a residual jurisdiction over members and non-members because parliament would not then be beholden to the courts and also because parliament is better placed to assess the degree of seriousness of a contempt[31].It was recommended that the machinery of criminalising contempt would be for the Attorney-General to initiate proceedings after being requested to do so by the presiding officer of either house acting on the advice of the privileges committee. Those committees would meet in private to avoid prejudicing any court proceedings[32]. The sanction would be a fine or imprisonment for up to three months. Importantly, the offence would apply to members and non-members. The Committee noted[33]:-

> We attach importance to the existence of a penal sanction for this type of contempt [wilfully failing to attend before the house or a committee or deliberately altering suppressing or destroying a document] although we expect this criminal offence would rarely, if ever, be committed. The circumstances should be extreme, when the evidence required was essential and all else had failed. Should such circumstances arise, fairness requires that the same penalties should be applicable for this offence whether it is committed by a non-member or a member. Members of the Commons are subject to disciplinary sanctions such as suspension and expulsion to which non-members are not subject, but we do not think this justifies excluding members from the scope of this criminal offence.

The immunity of parliamentary proceedings from outside examination by other organs of state, protected by Art. 9 Bill of Rights is such a fundamental tenet of Westminster-style parliaments (including the United States Congress) that it should not lightly be interfered with. The historical reasons underlying Art.9's creation might largely have passed from the collective memory of parliamentarians, but the protection of free speech in parliament was so hard won, and is so important for democratic government, that there should be compelling reasons for any interference at all. What has not been considered at all, it seems, is whether the addition of an organ of state such as the CMC will disturb the equilibrium which has been established by the *Stockdale v H*ansard settlement.

Rather than waiting for the next crisis to occur, and relying on a hurried and ill-considered ad hoc response, a coherent response should be developed by the Queensland and other Australian legislatures. The Commonwealth legislation does not provide for a referral of prosecutions to the courts, and expressly retains its criminal jurisdiction[34]. The Griffiths Criminal Code provisions which were repealed in Queensland provide a good starting point for codification of criminal offences concerning Parliaments which Australian legislatures should consider adopting.

Endnotes

1 (1688) 1 William & Mary Sess. 2 ch 2. See also S 16 *Parliamentary Privileges Act 1987* (Cth.);in force in Queensland pursuant to s 5 *Imperial Acts Application Act 1984*, which is repeated in modern syntax in s 8 *Parliament of Queensland Act 2001*(Q.) :-
'The freedom of speech and debates or proceedings in the Assembly can not be impeached or questioned in any court or place out of the Assembly.'

2 See also *Howard v. Gossett* (1845) 10 QB 410; (1845) 116 ER 158; (1847) 6 StateTrNS 319; *Case of the Sheriff of Middlesex* (1840) 113 ER 419.

3 See e.g. *Watkins v. United States* (1957) 354 US 178

4 That is to say, out of the United Kingdom, the United States, Australia, New Zealand and Canada.

5 Fitzpatrick and Browne in the 1950's, and Brian Easton in the 1990's.

6 Habermas, Jurgen, The Structural Transformation of the Public Sphere (1992) 60.

7 ibid., 66.

8 Transcript accessed 19 April 2007 'www.lib.berkeley.edu/MRC/murrowmccarthy.html.'

9 Monday, Apr.24, 1950.

10 (1957) 354 US 178 at 192.
11 (1860-1868) 1 Qd. Sup. Ct. R. 63; see also Charles Bernays, *Queensland Politics 1859 - 1919* (1919) 25 et seq.; Beridale Keith, *Responsible Government in the Dominions* (1928)
12 See http://www.parliament.qld.gov.au/committees/view/publications/documents/other/Nuttall.pdf.
13 Hansard, 9 May 2006.
14 Presumably cases such as. *Kielly v Carson* (1842) 4 Moo PC 63; 13 ER 225and *Doyle v Falconer* (1866) LR 1 PC 328; *Barton v. Taylor* (1886) 11 App Cas 197.
15 Hansard, 25 May 2006, p.2061.
16 Like, for instance, the UK model of the creation of a Parliamentary Commissioner for Standards.
17 (1986) 5 NSWLR 18; (1986) 64 ALR 498.
18 *Parliamentary Privileges Act 1987* (Cth.) and s 16 in particular.
19 *Laurance v. Katter* [2000] 1 Qd.R. 147; (1996) 141 ALR 447; special leave to appeal to the High Court of Australia granted in [1997] 15 Leg Rep SL1b but apparently never determined; *Rowley v O'Chee* [2000] 1 Qd R 207 ; (1997) 150 ALR 199 ; (1997) 142 FLR 1;
20 *Rann v. Olsen* [2000] SASC 83; (2000) 172 ALR 395; *Prebble v. Television New Zealand* ; *Pepper v. Hart* [1993] AC 593; *Egan v. Willis*; cf. *Erglis v. Buckley* [2004] QCA 223.
21 at Qd.R. 224. Special leave to appeal to the High Court of Australia was refused in (1998) 19 Leg Rep SL 4a
22 *The Weekend Australian*, Saturday 10 December 2005, page 6.
23 'Trial by mates riles Nats', *The Courier-Mail*, Saturday 10 December 2005, p 6.
24 (1990) European Court of Human Rights proceedings 33/1990/224/288.
25 New South Wales never introduced legislation dealing with parliamentary privilege for its state legislature, and still relies on common law principles.
26 at ALR 574.
27 See n.18 above.
28 House of Commons Standing Order 150; Votes and Proceedings of the House of Commons 26 June 2003; Mackay , Sir W. (ed.) *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (23rd Ed. LexisNexis Butterworths, 2004).
29 HL Paper 43-I; HC 214-I
30 para. 381-2
31 para. 304.
32 At para. 309.
33 At para. 311.
34 Section 3A *Parliamentary Privileges Act 1987* (Cth)

FOR YOUR INFORMATION: ALRC REVIEW OF PRIVACY LAWS AND PRACTICE

The Australian Law Reform Commission tabled its long-awaited report *For Your Information: Australian Privacy Law and Practice* in Federal Parliament on 11 August 2008[1].

In completing this 2700 page report, the ALRC considered 585 written submissions, 3 major public forums, over 200 hundred face to face meetings, roundtables with stakeholders, and held a 2 day phone in, with over 1000 members of the public calling the ARLC.

The report makes 295 recommendations which are expected to take a further 18 months to implement. The more controversial recommendations, including the introduction of the tort of privacy and removal of exemptions for some organisations, have no deadline for implementation.

Key recommendations

- Introduction of the Unified Privacy Principles- a nationally consistent set of rules related to the management of personal information by organisations, removing the overlap with the various State laws, in particular those relating to health records. The ALRC recommends that the Commonwealth *Privacy Act* should apply to the exclusion of State and Territory laws.
- A separate 'direct marketing principle' be included in the UPPs which would permit direct marketing by an organisation to its existing customers where those customers would reasonably expect the direct marketing to occur and an 'unsubscribe' mechanism is provided.
- Removal of some of the existing exemptions for small business (less than $3m turnover) and political parties from compliance, but retaining the journalism exemption.
- New regulations to govern the privacy of credit information and health records.
- The ALRC recommends that the Privacy Commissioner issue a set of rules clarifying the circumstances in which personal information can be collected for the purposes of bona fide research.
- Recommendations 71 and 72 call for changes to the Telecommunications Act, including a prohibition on charging a fee to keep a telephone number unlisted and that the use and disclosure provisions be redrafted to achieve a clearer and simpler regime.
- The report urges the Office of the Privacy Commissioner (OPC) to publish guidelines in relation to technologies that impact on privacy and to provide guidance to private sector organisations on the implications of data matching.
- Recommendation 74 introduced a cause of action for a 'serious invasion of privacy'. While the Government has not committed to a legislative timeframe, the ALRC suggested that a claimant would be required to show that:
    - there is a reasonable expectation of privacy; and
    - the act complained of is highly offensive to a reasonable person of ordinary sensibilities.

- In determining whether the cause of action is made out, the ALRC acknowledged that a court should take into account the balance between the individual's privacy and the public interest.

Other recommendations

- The report recommends the adoption of consistent rules and guidelines relating to the handling of personal information by ASIO, ASIS, the Defence Imagery and Geospatial Organisation, the Defence Intelligence Organisation, the Defence Signals Directorate and the Office of National Assessments.
- The report recommends that the Australian Communications and Media Authority, in conjunction with the OPC, the Communications Alliance and the Telecommunications Ombudsman, develop protocols addressing privacy issues raised by new technologies such as location-based services, VOIP and electronic number mapping.
- Stronger penalties are recommended to enable the Privacy Commissioner to seek civil penalties for serious interference with the privacy of an individual.
- Empowering privacy beyond the Individual – namely making recommendations to address the privacy needs of Indigenous groups.
- Privacy of deceased people- recommended amendments to the Privacy Act to protect certain information relating to persons who have been dead for less than 30 years.
- A restructure and increasing of the powers of the Privacy Commissioner's office including being able to delegate its powers, being able to direct agencies to undertake privacy impact assessments, to undertake personal information audits and to make own motion investigations.

An amended 'cross-border data flow' principle to ensure that an agency in Australia which transferred personal information to another country would be accountable for the acts of third parties overseas. Restrictions on cross-border data flows would extend to the agencies or organisations would be required to notify both the Privacy Commissioner and affected individuals where they believe an unauthorised person has acquired personal information in circumstances which may give rise to a real risk of serious harm to the individual.

The full ALRC report can be found on the ALRC website at http://www.austlii.edu.au/au/other/alrc/publications/reports/108/.

REPORTING ON NEW FOI PROPOSALS FOR QUEENSLAND

Dr David Solomon*

Yesterday (20 August 2008) Premier Anna Bligh announced the results of a line-by-line review of the report by the independent Panel that reviewed Queensland's Freedom of Information law. The score was quite remarkable: of 141 recommendations, 116 were accepted in full, 23 either partially or in principle, while only two were rejected. Those two were of no consequence: one concerned charges the Information Commissioner should apply for use of office facilities by applicants; the other whether the Act should contain a schedule listing secrecy exemptions.

Of the 23 partially accepted recommendations, none of the changes that may emerge when we see detailed legislation will affect the general thrust of the legislation. For example, the costing regime will be based on the simple proposal that applicants should pay for each full page they receive, but this will be adjusted to take account of some possible anomalies that have been brought to the Government's attention particularly by the Australia's Right to Know group.

I propose to concentrate on the major matters dealt with by the Panel dealt, mentioning where the Government is proposing changes.

But first, a little history. Anna Bligh became Premier in mid-September 2007. Two days later, on a Saturday, she phoned me and asked if I would like to head a Panel to review Freedom of Information in Queensland. Two days later she took to her first Cabinet meeting as Premier a proposal to establish an independent FOI review Panel with terms of reference that could hardly have been more extensive. They included, twice, the marvellous phrase 'the Panel is to consider (but not limit itself to)…'. The Panel comprised me, as full-time Chair, and Simone Webbe and Dominic McGann who were both part-time.

My background is essentially in journalism, where I specialised in politics and law. I retired from full-time journalism several years ago. I moved from Canberra to Queensland in 1992 to become Chair of the Electoral and Administrative Review Commission (EARC). As it happens, both the other members of the Panel had worked with EARC during earlier periods. Simone Webbe moved on to become a deputy Director-General of the Department of the Premier and Cabinet. She had responsibility for management of FOI among other things and had on a number of occasions acted as the internal reviewer in FOI matters. Dominic McGann is a partner in the law firm McCulloch Robertson. In the early 1990s he had been in various departments in the State government and in 1995, while in the Department of Justice and Attorney-General, conducted a review of the FOI law as it then was.

The Panel was presented with a huge task. We had to produce a discussion paper by the end of January this year – that is, in four months – with our final report four months later, at

* *Chair, FOI Independent Review Panel, speaking at an AIAL Seminar in Brisbane on 21 August 2008.*

the end of May. The first turned out to be more than 200 pages long and the second twice that size. The report included 141 separate recommendations.

I don't think that anyone – certainly not the government, and not even the members of the Panel – could have envisaged quite what would be the nature of those recommendations.

I should try to put our proposals in context: Modern FOI began with the legislation of the early 1980s in places such as the Commonwealth and New Zealand, derived in part from the earlier US legislation. The Queensland Act, building on the experience particularly of the Commonwealth Act, was in effect the beginning of stage 2 of FOI. It was highly regarded, particularly overseas, and the original 1992 Act became a model for FOI in places like Ireland. Stage 3 of the FOI legislation began with the 21st century legislation of Britain, Ireland and India. The legislation we are proposing wouldn't so much be the start of stage 4, as the beginning of Mark 2. This is a fundamentally different model. In some respects, it is not so much evolutionary as revolutionary.

It wasn't our aim to produce radical recommendations. They eventuated because of the way we approached the review, encouraged by the broad mandate given to us in our terms of reference.

Throughout our review we were concerned with the problems with the existing legislation – problems for end-users, for Ministers and for the bureaucracy. We came up with solutions that should provide answers for the biggest problems that each group has under the present law.

We did that by trying to find what the flaws were in the current arrangements and trying to fix them by going back to basics, to first principles, rather than applying Bandaids. It was not a legalistic review analysing sections seriatim, but a policy formulation approach driven by our understanding of the law, politics and bureaucracy. We were prepared to question, and in a few cases reject, some of the accepted wisdom surrounding FOI.

I should say something about some of the problems we saw with the current law. The past 15 years had seen the original Queensland legislation changed in a number of ways, many of them, arguably, contrary to the objects of the original Act, and certainly contrary to its spirit. There is no doubt that in some cases Ministers thought they were restoring the original intention of the Act to overcome unexpected and unwelcome decisions by the Information Commissioner. However the current form of the Cabinet exemption has been soundly and rightly criticised as allowing Ministers to undermine the intent of FOI. Essentially, Ministers could hide anything by wheeling it into the Cabinet room. The matter didn't have to be on the Cabinet agenda, or be considered in any way by Cabinet. One Minister told me of an occasion when he took a number of boxes into the Cabinet room to exempt their contents from FOI, telling his colleagues they could look at the material if they wanted to. No-one did.

Another problem area concerns the administration of the Act. There can be no doubt that the message many FOI officers received from the changes to the Act made by governments and from the concerns of Ministers and senior officers, where there was any possibility of an adverse media report, was a negative one. The atmosphere did not encourage a fearless application of the legislation. The culture in some agencies was very antagonistic towards FOI.

No matter how adequately any FOI law is expressed to promote openness and accountability, it won't work that way unless there is political will for that to happen. You can adopt a host of information strategies and policies to improve FOI, and try to change the culture of the administration of FOI, but they are going to be ineffective unless, centrally

driven, there is the political will to give effect to the objects and spirit of the Act. There was no evidence of any leadership from successive governments – quite the reverse in fact – till Anna Bligh took over from Peter Beattie as Premier.

Let me now give you an overview of the legislative architecture we are proposing.

The fundamental premise of the legislation, the starting point, is the presumption that all non-personal documents are open. (I should interpolate here that we are proposing that most personal information should be accessed under a new Privacy Act, rather than under FOI.) The presumption that non-personal documents are open, is enhanced and achieved in large part through proactive disclosure of information by agencies through such policies as publication schemes, administrative release, administrative access schemes and a series of what are referred to as 'push models' that make information available either generally through an agency's website, for example, or directed to specific interest groups, for example, by email. Information also becomes available if it was restricted through being covered by an exemption, but the time dictated by an early release schedule has expired.

If information has not been made public in one of these ways, then the new Act comes into play. It provides for release of the information unless -

a) matter is exempt because it satisfies one of a limited number of exemptions and the time during which the exemption applies has not expired – the time can be extended by the Information Commissioner on public interest grounds.

OR

b) the disclosure, on balance, would be contrary to the public interest.

I will come back later to mention some important changes in the public interest test and the way it is applied. For the moment I just want to emphasise that what we are proposing is a simple two-stage test once FOI is engaged by someone wanting information. First there is a decision as to whether it falls within an exemption. If it does not, the only issue then is whether its disclosure, on balance, would be contrary to the public interest.

Let me refer to some of the exemptions that we propose to retain.

The first, and probably most important, is the Cabinet exemption. It is this that has caused so many of the problems and angst about the law and the administration of FOI.

We adopted a principled approach to the Cabinet exemption that has interesting, and very beneficial, flow-through effects for individual ministers. We decided not to recommend a return to the 1992 Queensland Act Cabinet exemption, because that would have resulted in too much uncertainty about outcomes of FOI applications. Instead, we looked at the purpose of the exemption. That purpose is about protecting the collective ministerial responsibility of ministers in Cabinet. As it happens, in Queensland, fairly uniquely, that principle is not merely an unwritten convention of Westminster government. In Queensland the principle is enshrined in the State's Constitution. What we are proposing is that the exemption for Cabinet documents is based not on the description of a particular document, but on the effect of releasing it – would its release impact on collective Ministerial responsibility? We don't recommend there should be a public interest test for this exemption. The result of applying this approach will be to wind back the exemption to something like what was intended in the 1992 legislation, though there would be much more certainty in the application of the exemption.

Individual Ministerial responsibility also needs to be protected under FOI. We proposed that principle be used to provide protection for three classes of documents. They are incoming Ministerial briefs, estimates briefs and question time briefs. There would be no need to take these to Cabinet to hide them from disclosure as happens now in some cases. We proposed the legislation should be upfront about providing them with exemption status and our report explains the principled reason for doing so.

However I understand the Government was advised that estimates briefs and question time briefs are covered by the current parliamentary privilege exemption and therefore do not need to be dealt with as we proposed. It decided incoming Ministerial briefs would be protected from disclosure for 10 years, rather than the three years we proposed.

We retain the exemption for the Executive Council and create a new exemption for material flowing between the Governor, as the Queen's representative, and the Premier. While the Governor is covered by an exclusion under the Act, this does cover vice-regal material in the hands of the Premier.

We balanced these exemptions in a number of ways. First, we disposed of the provisions allowing conclusive certificates to be issued. In Queensland there had only ever been two such certificates issued and that was relatively early in the history of the legislation. The Panel considered there was no justification for their continuation, not least because they allow a Minister to override decisions properly taken under the law by the relevant, designated authorities.

Next we proposed, as the Electoral and Administrative Review Commission had recommended on two occasions, that the Premier and Cabinet secretariat should regularly consider releasing Cabinet material, including an edited version of the Cabinet agenda.

Then, again guided by the meaning of the principles of Ministerial responsibility, we also suggested a major reduction in the 30-year rule that protects Cabinet papers and the ordinary papers of agencies to 10 years.

Another interpolation. If you read our report you will see several references to this proposal, not least in our executive summary in Chapter 1. A few weeks ago at a briefing in Parliament House, the Premier told me that this proposal was not reflected in any of our specific recommendations. How this slipped past us I don't know, but given the nature of our task and the pressure to produce our report on time I cannot say I'm surprised that a few things slipped through the net. In any event, the Government did deal with the proposal. It decided that in general the 30-year rule should be replaced by a 20-year rule. But specific Cabinet documents sought under FOI would be available after 10 years.

I should also mention that we proposed that in the transition from the present system to the new one, the existing exemption for Cabinet documents should continue to apply to all material created before the new legislation comes into effect.

We carefully considered the ever-growing list of exemptions in the present legislation. There are two types of exemptions – those that do not include a public interest test (such as the Cabinet exemption) and those that do. We proposed very few changes to the straight, 'no public interest' exemptions.

However the really significant change we did recommend is that those exemptions that <u>do</u> include a public interest test should be treated in an entirely different way from at present.

We believed that these exemptions are frequently applied in a spirit that is not in keeping with the expressed objects of the Act. The tendency in Queensland is for an FOI officer to try

to find an exemption or two, then assume there is a prima facie case against release when applying the required public interest test – that approach has official backing from the Information Commissioner, but some officers don't even bother to apply any kind of public interest test. But when they do, the presumption against release normally carries the day.

What we proposed is that these 'subject to public interest' exemptions should be reframed. Instead, of first working through the often lengthy terms of their exemption provision to see that the particular document falls within its description, and then applying a public interest balancing test after that - the harms that they are directed to preventing, would become part of the one assessment of the public interest exercise, duly and expressly weighted, to be balanced against the other public interest factors including those involved in releasing the document. There would be no prior characterisation of the document as being exempt.

The result of adopting this approach would mean there would be a radical change in the way FOI officers would deal with any application for documents. First, they would see whether it fell within any of the small number of true exemptions. If it did not, then they would apply a public interest test.

The public interest test is the next issue we addressed. At present it is vague and indeterminate. In fact, the current Queensland legislation contains three separate and supposedly distinct formulations of a public interest test. We consider there should be only one public interest test, and it should take the form -

> Access is to be provided to matter unless its disclosure, on balance, would be contrary to the public interest.

The Government supports this recommendation subject only to advice from Parliamentary Counsel.

At present, what factors might be taken into account in determining the public interest depends on the training of the FOI officers, what law books or Information Commissioner decisions or manuals they have access to, and what the agency's general attitude to FOI is. This leads to enormous differences in the application of the test, even within the one agency. The Panel decided to write a definition of sorts into the legislation, by listing the factors that an FOI officer should consider (though only a few are likely to be relevant to any particular document). These include the harm factors that were previously protected by exemptions, with a time and harm weighting guide to assist people to assess the harm that might be relevant. The other advantage of specifying these factors – those favouring disclosure as well as those telling against it - is that it allows the applicant to know what factors the FOI officer has to take into account.

We assumed that Queensland would introduce a Privacy Act, and in accordance with what the Government told the Australian Law Reform Commission in its official submission to the Privacy inquiry, the Act would conform with a nationally uniform code. The ALRC presented its report on privacy to the Commonwealth Attorney-General at the end of May. That was made public recently. We didn't know what would be in it but we anticipated it would largely follow the proposals outlined in the discussion paper published earlier this year. That leads us to recommend that requests for personal information should be moved out of the FOI system and into the privacy regime. This would have major advantages for users, who sometimes cannot access their material under FOI but would probably get it under privacy, and also for the administration of FOI, because it would remove some of the clutter – about half of all FOI applications in Queensland. Most new FOI legislation internationally adopts this separation of personal and non-personal information, leaving FOI to deal with governance and other non-personal information.

However the ALRC didn't quite match our expectations. Because it had received a reference on FOI – which has since been taken away - it decided to defer making recommendations on the interaction between FOI and Privacy though it did say its FOI review could move access to and correction of personal information from FOI to Privacy, and limit FOI to regulating access to information about third parties and the deliberative processes of government – as occurs in New Zealand. Although the Commonwealth has indicated it will be more than a year before it introduces any changes to its Privacy Act, Queensland has decided to press ahead in the first half of next year with a Privacy Act and the appointment of a Privacy Commissioner, as we proposed.

The Panel considered the ever-growing list of exclusions from the FOI Act. We noted that Britain is currently going through an exercise designed to broaden the coverage of its FOI Act, not least to take account of the way governmental functions are being increasingly performed by corporatised agencies or even private industry. We suggested that Government Owned Corporations - GOCs - should not be automatically excluded from FOI by virtue of the fact that they are created under Commonwealth rather than Queensland legislation. We also thought that many bodies that receive substantial funding from the State should have to answer under FOI at least to the extent of the services the funding enables them to provide.

The Government has gone a long way to adopting our proposals, though it plans a special exemption for the commercial competitive interests of a few GOCs. Our proposal would have given the GOCs that protection under a specific factor in the public interest test.

Time and costs: the present charging system is a disaster. It takes up a significant amount of training time for FOI officers and then a great deal of their time when they have to deal with requests. It takes more time than it is worth. The charging regime only nets a few hundreds thousand dollars each year for the Government but the latest estimates from the Department of Justice and Attorney-General suggest that FOI costs over $10 million a year.

We proposed a simplified charging system based on the number of (full) pages provided in response to a request. But to make sure the person making the request gets what is really wanted, the agency in future should produce, as a first response to a request, its schedule of the relevant documents and engage the requester to decide upfront which from the list of documents it really wants. This will cut processing time and it will cut the costs of providing material. It will reduce disputes as it forces the requester to take some responsibility or partnership in the processing side of the equation. As I mentioned earlier, the Government had adopted these proposals in principle, but will look at them in more detail over coming months.

Our proposals would also allow requests to be dealt with more quickly than at present. We propose the adoption of a shorter time frame for deciding or responding to requests, though it would be based on working days rather than calendar days, to overcome problems that sometimes arise when requests are made shortly before a holiday period.

We propose to revamp the Information Commissioner's Office and expand the functions of the Office. These proposals are not new, but pick up the recommendations in the ALRC/ARC and LCARC reports for an FOI monitor. They also reflect the experience in such places as Britain, Scotland and Ireland. The lead agency model has not worked, and needs to be replaced by an Information Commissioner that is an active and shared resource across government, as the champion of FOI. The Information Commissioner should have the power to monitor and report on the performance of agencies under the legislation and to deal with complaints – in Queensland the Ombudsman is currently prevented by the Act from responding to such complaints. And we would give the Information Commissioner a stakeholder role in information policy generally, across government. We suggest that the

Privacy Commissioner be located within the Office of the Information Commissioner to manage the inherent tensions between information access and privacy protection.

We propose that the internal review of FOI decisions by agencies should no longer be mandatory and that a requester should be able to proceed directly to external review by the Information Commissioner. However we propose that time limits should apply to the two stages of external review, mediation and (where necessary) determination.

The Queensland Government is currently considering the creation of a Civil and Administrative Tribunal to take over the functions of several dozen separate administrative tribunals. The proposed jurisdiction of that Tribunal is the subject of a report by another independent committee that the government was due to receive at the end of May. We suggested that the Information Commissioner should not be incorporated into that Tribunal. However we recommended three ways in which the Tribunal should interact with the Information Commissioner.

- First any appeals on questions of law should go to the Tribunal rather than the Supreme Court as is presently required in the legislation.
- Second, we would permit the Information Commissioner to refer questions of law to the Tribunal.
- And third we believe the Tribunal should hear any appeals from people declared by the Commissioner to be vexatious.

The Government adopted these recommendations.

We propose a number of ways to reduce the need for FOI, through the proactive release of information by agencies. We also deal with the issue of contentious issues management, suggesting guidelines for the provision of information additional to that requested, so as to improve the chances of a balanced report.

We proposed a number of sanctions and incentives directed at agencies to try to encourage the proper administration of the Act in accordance with its stated objectives. These include protecting the decision-maker from being overborne by a superior and reinforcing the importance of the penalties for deliberate breaches of the record-keeping requirements of the Public Records Act.

The Panel believes the new legislation it is proposing is more upfront and honest, with a new architectural design and greater definition that removes the structural advantage and bias in favour of government.

For both symbolic and practical reasons we suggested that there needed to be an entirely new piece of legislation to embody the major changes we recommended to FOI. It would help the Government to signal its willingness to adopt a more pro-active approach to the release of information and to move away from the unfortunate reputation now associated with the present Act. As the title of our report suggests, we proposed it should be called the Right to Information Act.

For the members of the Panel, this was an extraordinarily stimulating exercise. For the Bligh Government – and particularly the Premier herself - it has been an extraordinarily brave leap of faith. As I said at the beginning, no-one knew what we would propose, including ourselves.

Some of you may follow what Sydney consultant Peter Timmins says about FOI and privacy on his blog. For those who missed it I should repeat his summary of what the Queensland

Government is doing, and of his verdict. He wrote yesterday, after the Premier announced the Government's decisions (20 September):

> There are still steps to be taken to translate intent into law, and to change attitudes in government about the public right to access information, but this is rolled gold reform.
>
> A whole of government information policy to increase proactive release of information, with CEOs to be told to get cracking now to see what can be done straight away; a new simplified act to be called the Right to Information Act with a strong objects clause to ensure disclosure considerations don't get waylaid by "exemption creep"; clear governance responsibilities for making all this work assigned to the Premier and the Director General of her department. This is seriously good stuff.
>
> Congratulations to the Premier and the many others involved who have brought the reform package to this stage…

Not surprisingly there is room for a few quibbles but not today. For the moment at least, Queensland has set the standard for the rest of the country, where reform is still in the air. Some such as the Federal Minister John Faulkner, the ACT and Tasmanian governments have shown real interest in what's been happening in Queensland.

I should add that Tasmania has already indicated that it will be looking to our report when it conducts its FOI review. I have had some discussions with both Commonwealth and ACT officials who are working on reform proposals, at their request. The Commonwealth plans to produce an exposure draft of changes to its legislation at the end of the year. The ACT is due to produce a statement on what changes to FOI that it is proposing by the end of November.

We really are set for major changes across many jurisdictions with Queensland leading the way.

RECENT DEVELOPMENTS

Alice Mantel*

Grant guarantees free access to the law

Left to right: Philip Chung, Executive Director, AustLII; the Honourable Rob Hulls, Victorian Deputy Premier and Attorney-General; Prof Graham Greenleaf, Co-Director, AustLII; Prof Andrew Mowbray, Co-Director, AustLII; Victoria Marles, Legal Services Commissioner and CEO, Legal Services Board

Free access to the law on-line will be expanded through a major grant to the Australasian Legal Information Institute (AustLII). The Honourable Rob Hulls, Victorian Deputy Premier and Attorney-General, announced the grant of $838,927 to be provided over a three-year period from the Legal Services Board of Victoria to help make Victoria a model jurisdiction for free access to law.

Operated jointly by the University of Technology, Sydney (UTS) and the University of New South Wales (UNSW), AustLII provides free online access to Australian legal materials through more than 270 databases. The service relies on external contributions to fund its operations.

AustLII Co-Director and UNSW academic Professor Graham Greenleaf said the grant would enable AustLII to develop comprehensive and up-to-date databases of Victorian legal materials, including legislation, case law, law reform reports, law journals, and community legal materials. It is hoped the funding will have spillover effects into other Australian and international jurisdictions. 'Victoria is the first Australian jurisdiction to provide a major grant to AustLII to bring its free access legal materials to the highest possible international standards,' Professor Greenleaf said.

AustLII experienced some financial distress in 2007 because for the first time in eight years, AustLII did not obtain major funding from the Australian Research Council. ARC research infrastructure funding (LIEF) supports development of new facilities and enhancements to existing facilities and cannot be expected to be available every year. Although AustLII had considerable funding from non-ARC sources, AustLII embarked on a vigorous and public campaign to obtain funding contributions from the many different sectors that make substantial use of its services, or otherwise benefit from those services, but who had not

* *AIAL Forum editor*

previously been asked to contribute. By the end of the year, over 210 organisations and individuals contributed nearly one million dollars in funding to support AustLII's Australian services.

HREOC to be known as the Australian Human Rights Commission

The Human Rights and Equal Opportunity Commission (HREOC) has changed its name and is now known as the Australian Human Rights Commission.

Its new corporate identity is reproduced below:

The design represents an evolution from the long-standing HREOC logo and includes the positioning statement, 'everyone, everywhere, everyday', which is drawn from the Australian Human Rights Commission's new vision statement, 'Human rights: everyone, everywhere, everyday'.

The new corporate image for the Australian Human Rights Commission is the first step towards ensuring that all Australians are aware that the Commission is an independent national institution with the responsibility to protect and promote human rights in Australia.

The Commission's goals are outlined in its new vision and mission statements which can be found at www.humanrights.gov.au/about/index.html.

The Commission's legal name will remain the Human Rights and Equal Opportunity Commission.

17 September 2008

AUSTRAC releases interpretation of reporting obligations legislation

A new public legal interpretation of certain reporting obligations under anti-money laundering legislation is now available on the AUSTRAC website. The Public Legal Interpretation (PLI) series explains the provisions and obligations under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act) and the *Financial Transaction Reports Act 1988* (FTR Act).

This latest PLI focuses on the requirements to report suspect transactions and suspicious matters as part of Australia's effort to combat money laundering, the financing of terrorism and other major crime. Reports of suspect transactions are currently required from cash dealers under the FTR Act. Under the AML/CTF Act, all reporting entities will be required to submit suspicious matter reports to AUSTRAC from 12 December 2008.

AUSTRAC's Chief Executive Officer Neil Jensen said 'The PLI series is an important channel through which AUSTRAC provides guidance about some of the more complex legal issues affecting cash dealers and reporting entities. This latest topic is significant as it touches on the current FTR Act reporting requirements, as well as the reporting requirements soon coming into effect under the AML/CTF Act.'

A Bill was recently introduced into Parliament which provides for affected entities which currently report to AUSTRAC as cash dealers under the FTR Act to continue to report in the same way during their transition to the new reporting format. When enacted, the Bill will apply to suspicious matter reports (as well as the upcoming threshold transaction and international funds transfer instruction reports) made after 12 December 2008, until such time as entities are compliant with the AML/CTF reporting requirements, but not later than 11 March 2010. This would assist entities with the transition from their FTR Act reporting obligations to their AML/CTF Act reporting obligations. PLI No. 6 sets out AUSTRAC's views on:

- the obligation to report suspect transactions within the meaning of s 16 of the FTR Act;
- the obligation to report suspicious matters within the meaning of s 41 of the AML/CTF Act; and
- the general prohibition on use of these reports as evidence.

The six PLI publications and an updated list of topics for the 2008 series are available on the AUSTRAC website -www.austrac.gov.au/pli.

1 October 2008

NSW developers now must disclose political donations

The *Local Government and Planning Legislation Amendment (Political Donations) Act* 2008 (NSW) which commenced on 15 September 2008 introduced obligations on local councils to receive and make publicly available the disclosed information and must record how councillors vote on applications.

The new law requires DAs and rezoning applications to be accompanied by a declaration disclosing political donations and certain gifts over $1000. The declaration will need to cover donations made by the applicant, landowners, and any person with a financial interest in the development. The disclosure requirements also apply to individuals or entities lodging submissions in objection or support to DAs and rezoning applications. The disclosure requirements apply to donations made in the two years before the application is made and ends when the application is determined.

The new legislation will require the disclosure by applicants or persons making submissions in respect of relevant planning applications of:

- political donations to a party, elected member, group or candidate of $1000 or more (or smaller donations totalling $1000 or more);
- gifts as defined by the *Election Funding and Disclosures Act 1981*.

If the application or submission made is only to a local council, the disclosure need only be for political donations or gifts made to any local councillor or council employee – not to State government politicians.

Mandatory mediation likely to extend

An inquiry into Alternative Dispute Resolution (ADR) could result in mandatory mediation for an extended number of cases, as the Federal Government moves to curb the rising costs of litigation.

Attorney-General Robert McClelland used the National Mediation Conference to announce that the Government had charged the National Alternate Dispute Resolution Advisory Council (NADRAC) with the task of determining what incentives could be offered to encourage greater use of ADR, as well as what barriers needed to be removed and whether ADR processes should be made mandatory in some cases.

Justice Murray Kellam, chair of NADRAC, said that the inquiry, known as the Civil Procedures Reference will see NADRAC identify strategies for litigants, legal professionals, tribunals and courts, to remove barriers and provide incentives to ensure greater use of appropriate ADR processes.

Although most courts in Australia do have the power to refer matters to mediation, the outcome of NADRAC's inquiry may see such mandatory circumstances extended further. Justice Kellam said NADRAC would also investigate where incentives and changed cost structures could be introduced to encourage greater use of ADR. NADRAC will also be investigating the potential for a greater use of private and community-based services, and how such services can meet appropriate standards.

ADR, and more specifically mediation, is fast garnering attention in Australia as mediators work to establish a national accreditation system, the ethics surrounding the position, and the role of associated professions such as lawyers and psychologists.

23 September 2008

New report into whistleblowing

A third of public servants have observed wrongdoings in their agencies they consider 'very' or 'extremely' serious, but have failed to act upon the situation by reporting it.

The news comes from a report by academics at Griffith University calling for legislative reform around public whistleblowing, as well as a revamp of the operations systems at public agencies used to manage whistleblowers, and the associated support programs.

Launching the study, Special Minister of State John Faulkner said that legislation would be the preferred model for protecting whistleblowers in the future and that the research by Griffith University would provide the framework. Based on interviews with 7500 public servants over three years, the report, *Whistleblowing in the Australian Public Sector,* is the largest study of its kind undertaken in Australia.

Mr Faulkner said that transparency was essential for accountability and that the government was committed to broadening and strengthening public interest disclosure measures through a pro-disclosure system across the Australian Government sector so that proper reporting and investigation systems were put in place.

Such reform could see the removal of criminal penalties for whistleblowers in the public sector – protecting whistleblowers from liability and offering them the ability to claim financial compensation if they suffer reprisals as a result of their disclosure.

About a fifth of those same employees have formally reported a wrongdoing in their organisation with the most likely candidate to do so being female and, surprisingly, not disgruntled by their working situation or driven to report wrongdoings due to perverse personal reasons. Of those who do make a report, 37 per cent don't believe their disclosure was investigated.

23 September 2008

Lessons learned from Cyber Storm II

A detailed report outlining Australia's involvement in the recent international cyber security exercise, Cyber Storm II, has been released by Attorney-General Robert McClelland.

The exercise, led by the United States Department of Homeland Security, allowed the governments and business sectors of Australia, Canada, New Zealand, the United Kingdom and the United States to put their e-security arrangements to the test.

'Cyber Storm II was designed to simulate a significant global incident caused by attacks on critical infrastructure systems via the Internet,' Mr McClelland said. 'The exercise proved Australia's response arrangements to cyber-attack are sound, but just as importantly, demonstrated areas where improvements can be made.'

'The world's increasing dependence on electronic communications creates new opportunities for criminals and terrorists. The lessons learned from exercises such as Cyber Storm II help ensure Australia is well placed to combat these threats."

Australia's involvement in Cyber Storm II included government agencies, state and territory governments and the largest contingent of private sector organisations ever involved in such an exercise.

The Cyber Storm II national cyber security exercise final report can be obtained at: http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_CyberStormII-September2008.

18 September 2008

Changes ensure same sex parental support for children

Same-sex discrimination will be removed from child support, under proposed amendments to s 60H Family Law Act and implementing a bipartisan recommendation by Labor and Liberal Senators on the Senate Legal and Constitutional Affairs Committee in August.

The amendments form part of the 58 areas of discrimination recommended for removal by HREOC in its landmark *Same-sex: Same Entitlements* report and continue the Rudd Government's implementation of its election commitment to remove same-sex discrimination from a wide range of Commonwealth laws.

'Children who are raised by a same-sex couple currently face financial disadvantage if the couple separates because they cannot access child support," said Mr McClelland. 'The amendments will ensure these children can have their parents recognised and have access to child support in the same way as children of opposite-sex couples who separate. This will help ensure children are protected and are not discriminated against simply because of the structure of their family.'

18 September 2008

Greater consultation on legal harmonisation

The first Standing Committee of Attorneys-General (SCAG) harmonisation conference, t was attended by 40 delegates from a range of fields including the legal profession, law reform bodies, industry, business and academia to consider issues currently before SCAG.

Attending the conference were Commonwealth Attorney-General Robert McClelland and NSW Attorney General John Hatzistergos. 'To be truly competitive on the international stage, Australian Governments need to ensure we have national solutions for national issues.' Mr McClelland said. 'It makes sense that we consult as broadly as possible in developing national solutions to issues that cut across State and Territory borders.'

'This level of direct involvement in the law reform process provides insight into practical realities, allowing us to better direct the process of legal harmonisation,' Mr Hatzistergos said.

The conference is modelled on international approaches to the harmonisation of laws, such as the Uniform Law Conference of Canada. The outcomes of the conference will be reported to SCAG Ministers at their meeting in November.

10 September 2008

Two mothers can be listed on a birth certificate

Birth certificates that carry the names of two mothers will be available for lesbian parents under new NSW laws which came into force as part of a broad package of reforms which give the children of female de facto couples equal rights.

Announcing the changes, NSW Attorney General John Hatzistergos said that the new birth certificates recognised the rights of children of female de facto couples in official documentation.

The new laws only apply to children who are conceived through artificial fertilisation and who are living in domestic situations where their parents are in a lesbian de facto relationship. The laws will be retrospective allowing lesbian mothers to be listed on birth certificates for existing children. Under current law, sperm donors do not have parental presumptions and are not listed on birth certificates. This will not change.

Previously, under the *Status of Children Act 1996*, parental presumptions for artificial fertilisation only applied to heterosexual couples. The new law also brings NSW into line with Western Australia, the ACT and the Northern Territory. New Zealand and Canada also have similar laws. The NSW Government has reformed almost 50 other laws that extend equal rights and obligations to de-facto couples, including updating anti-discrimination laws to address possible discrimination based on a person's domestic status.

Mr Hatzistergos said that the changes will give children greater protections and would also mean that female de facto parents would have a responsibility to protect and provide for their children. In addition children of lesbian couples will now have equal rights to children of heterosexual couples with regard to:

- workers compensation and victim compensation payments where one or both parents are killed or injured;
- inheritance of both of the parents' assets;
- recognition of both parents by school authorities;
- improving access to guardianship orders for elderly parents.

The new laws were recommended by the Law Reform Commission which consulted widely with stakeholders.
17 September 2008

Commonwealth reforms to procurement of legal services

The first wave of reforms to the Commonwealth's procurement of legal services. were implemented on 1 July 2008 by amendments to the Legal Services Directions 2005 (LSDs) by the Attorney-General under s 55ZF of the *Judiciary Act* (Cth)1903.

The reforms seek to further the efficient resolution of disputes as well as greater transparency and competition in the Commonwealth legal services market.

Additional expenditure reporting requirements

In addition to existing obligations in respect to recording, monitoring and publication of expenditure, each FMA agency (Commonwealth departments and prescribed agencies) must now report to the Office of Legal Services Coordination (OLSC) about the agency's legal services expenditure and legal work using a template approved by the OLSC within 60 days after the end of each financial year. This obligation extends to CAC Act bodies (Commonwealth companies and statutory authorities). The template includes a break down of expenditure on internal versus external legal services as well as counsel fees and external professional charges and disbursements. It also requires each agency to provide information on the number and value of briefs to male and female counsel.

Other amendments include an increased focus on:

- making an early assessment of the Commonwealth's prospects of success in legal proceedings and potential liability;
- even in cases where litigation is unavoidable at the outset, monitoring its progress and using appropriate methods to resolve the litigation, including settlement offers, payments into court or ADR;
- clarification where a legal service provider has carried out pro bono work against the Commonwealth;
- ensuring that persons participating in settlement negotiations have the authority to enter into settlement agreements, and
- the appointment of external legal service providers as being able to receive service in proceedings to which the Commonwealth is a party.

NSW introduces it own Model Litigant Policy

On 8 July 2008, the NSW Government introduced its own model litigant policy which applies to all NSW government agencies and largely reflects the Commonwealth equivalent prior to the recent amendments.

The NSW policy operates alongside other existing litigation policies which relate, amongst other things, to inter-agency litigation and the use of ADR. The Premier's *Memorandum 94-25* reaffirms a commitment to use ADR techniques such as conciliation, mediation or arbitration rather than resorting to litigation to reduce the time and expense of resolving disputes. Unlike the federal approach, the NSW policy permits the CEO of each agency to issue guidelines relating to its interpretation and implementation which has the potential to result in differing approaches to litigation management among NSW agencies.

25 August 2008

Like oil and water? - Religion and human rights in Australia

The Race Discrimination Commissioner, Tom Calma, called for as many Australians as possible to become involved in a discussion about the current state of freedom of religion and belief in Australia when he launched the Australian Human Rights Commission's *Freedom of religion and belief in the 21st century* Discussion Paper in Canberra .

'The fundamental human right of freedom of religion and belief is protected by a number of international treaties and declarations,' said Commissioner Calma. 'It encompasses freedom of thought on all matters and the freedom to demonstrate and express our religion and belief individually, with others, in private or in public. The intent of this discussion paper is to examine and report upon the extent to which this right can be enjoyed in Australia today by drawing from practical everyday experiences and observations,' said Mr Calma. 'This is easy for some, while others feel religion and human rights don't mix, like oil and water.'

In calling for submissions from the public, the Commissioner pointed out that the intersection of religion and belief with human rights is illustrated daily in our news headlines.

'The involvement of religious institutions in school curriculums and practices, religious and ethical concerns about scientific research, the status of Muslim communities in society since the events of September 11 2001, the involvement of religion in debates about homosexuality or abortion, and our politicians declaring their faith on the campaign trail – these are just some of the stories that involve us every day at the intersection of religion and belief with human rights,' said Commissioner Calma.

Submissions close on 31 January 2009.

Ombudsman looks at Centrelink's arrangements for banning face-to-face contact with customers

Guidelines on banning customers from entering Centrelink offices because of inappropriate behaviour are the subject of the Commonwealth Ombudsman's investigation recently released report.

Commonwealth Ombudsman, Prof John McMillan said his office had received complaints over a number of years from customers whose face-to-face contact with Centrelink staff had been withdrawn because of their behaviour.

Professor McMillan stated that after discussions with his office and consultation with peak community organisations, Centrelink implemented national guidelines for working with customers with difficult or aggressive behaviour in February 2007.

Under Centrelink's 'alternative servicing arrangements' model, staff can decide to withdraw face-to-face contact with customers where their behaviour poses a threat to the safety of Centrelink staff or other customers. In these circumstances arrangements need to be made for the customer to contact Centrelink in another way. The Ombudsman's report examines the way in which Centrelink has applied this policy.
The Ombudsman made five recommendations to Centrelink for improvement:

- reviewing letter templates to ensure customers are properly notified of their review rights and the review process
- implementing strategies to ensure relevant staff are aware of the review processes required by the guidelines, and providing further training where appropriate

- introducing an appropriate internal monitoring/review mechanism to ensure quality and consistency in the application of alternative service arrangements
- encouraging decision makers to explore the most appropriate alternative servicing arrangement for future contact before deciding to withdraw face-to-face contact
- amending the guidelines to ensure staff record an appropriate level of detail to justify their actions and decisions following an instance of aggressive behaviour.

The two agencies involved—Centrelink and the Department of Human Services—responded positively to the report and agreed with the Ombudsman's recommendations. Details of the actions Centrelink plans to take or already has in progress for each of the recommendations are set out in the report.

Constitutional challenge to NT intervention underway

Lawyers for the Federal Government have told the High Court that the Northern Territory intervention does not breach the Constitution.

The legal challenge has been launched by community elders from Maningrida, which is one of more than 70 towns that have been temporarily taken-over by the Federal Government. Their lawyers argued the takeover was unconstitutional, because the Federal Government had acquired land without offering compensation on 'fair terms'.

But the Federal Government's counsel Henry Burmeister told the court the compulsory five-year leases did not amount to an acquisition, because indigenous landowners retain the right to access the land and conduct ceremonies. He also said the plaintiffs' claims that the intervention could cut off income to traditional owners or allow Aboriginal corporation assets to be seized were nothing more than 'wild assertions'.

Chief counsel Ron Merkel QC told the Court that the abolition of the permit system opened up sacred sites, it undermined native title rights, the takeover was not done on just terms and could threaten the revenue of local Aboriginal corporations.

A successful challenge could impact more than 70 Aboriginal communities.

Indigenous law and justice advisory body to be established

As part of its commitment to Closing the Gap on Indigenous disadvantage, a new national indigenous law and justice advisory body is being established to provide high level indigenous law and justice policy advice to the Australian Government. It is anticipated the advisory body will include representation from non government service providers such as indigenous legal services and family violence support services, key justice sectors, such as police, corrections and the courts, as well as specialists in areas such as law reform, human rights and juvenile justice.

The Government is proposing that the body be appointed from nominations received after a national consultation process. The Government will invite Aboriginal people and Torres Strait Islanders with the relevant expertise and experience to nominate and to participate in consultation sessions, as well inviting written submissions from stakeholders before developing an issues paper for further discussion.

Justice Michael Kirby receives honorary degree

Justice Michael Kirby receiving his Hon Doc from UNSW Chancellor David Gonski

High Court Judge Michael Kirby has urged graduating UNSW law students to work for change in the legal system and think globally in their approach.

Justice Kirby, Australia's longest-serving judge, made the comments during the occasional address at the Law Faculty's graduation ceremony, during which he received the University's highest honour, an honorary Doctorate of Laws (*honoris causa*) for his service to the community.

Justice Kirby urged the graduates to 'scrupulously' maintain, strengthen and safeguard the tradition of the integrity of the legal system, adding that in his entire time on the High Court he had 'never been offered a bribe or an inducement or advantage to decide a case or do some official act in a way contrary to law and justice'.

'That is still true in Australia. It is not true in most countries,' he said.

Attending the ceremony were Justice Kirby's partner of 40 years Johan van Vloten, his 92-year-old father Donald Kirby, Chancellor David Gonski, Vice-Chancellor Fred Hilmer, Dean of the Faculty of Law David Dixon, and the faculty's Foundation Dean Professor Hal Wooten.

RECENT DECISIONS

Alice Mantel *

Who owns the inventions of an academic?

In *University of Western Australia v Gray* (No 20) [2008] FCA 498, the Federal Court took a narrow approach and held that the University of Western Australia was not entitled to ownership of inventions developed by Dr Gray, a member of its academic staff a professor of surgery. While employed with the University, Dr Gray, a professor of surgery, researched technology to treat liver cancer. He produced a number of inventions which were patented and ultimately acquired and developed by Sirtex Medical Limited, a publicly listed company of which Dr Gray was a director and significant shareholder.

In 2004, the University sought a declaration that Dr Gray had breached his contract of employment and that he held his shares and options in Sirtex (valued at approximately $150 million) on trust for the University and that Sirtex Medical Limited held its patents on trust for the University.

The Court accepted the University's argument that a term that intellectual property developed in the course of employment belonged to the University was automatically implied into all employment contracts with academic research staff who used University facilities. However, the Court said this was only where the employee was doing work for which was engaged. Inventions which were not the product of work for which the employee was actually engaged were not the employer's property.

The Court found that while Dr Gray was employed to conduct and stimulate research, he was not employed to invent and therefore no term vesting ownership of intellectual property in inventions developed by Dr Gray could be implied into his employment contract with the University.

The Court considered that Dr Gray's employment obligations differed from those of a person employed by a private commercial entity, whose obligations include the advancement of the employer's commercial purpose. Dr Gray was not required to advance the University's commercial purpose when selecting the research he would undertake. The University's alternative arguments, based on breach of fiduciary duty and breach of University regulations, also failed.

This decision confirmed that a duty to invent is specific and distinct from a duty to research and even though the invention was created using the employer's facilities, it will not be in the course of an employee's employment. Unless a university or government department specifically includes an express provision assigning the intellectual property rights in patentable inventions to the employer, the university or department is at risk of not being able to assert ownership over the invention.

The University is appealing the decision.

Local councils are not constitutional corporations

In a recent decision *AWU v Etheridge Shire Council* [2008] FCA 1268 (20 August 2008) (Spender J) the Federal Court determined that local councils are not constitutional corporations and therefore not 'employers' for the purposes of the *Workplace Relations Act*

1996 (Cth). The Federal Court considered whether the Etheridge Shire Council in Queensland could enter into a workplace agreement with its employees under the Federal industrial relations system.

Under the *Workplace Relations Act 1996* (Cth), the agreement could only be made if the Council was a constitutional corporation, that is, a trading or financial corporation formed within the limits of the Commonwealth.

Justice Spender held that, in determining whether the Council was a trading or a financial corporation, the primary focus was on the activities of the Council. There was evidence that while the Council's activities included providing a tourism centre, road works for the Department of Works, private works (services to residents and organisations), hostel accommodation, childcare centres, office space rental, residential property rental, sale of land, hire of halls, sale of water and services to the Federal Government, the Council was not a trading corporation,

Justice Spender held that:

- all of the above activities 'entirely lack the essential quality of trade;
- almost all activities ran at a loss ;
- all activities were directed to public benefit objectives;
- in monetary terms they were 'so inconsequential and incidental to the primary activity and function of the Council as to deny the Council the characterisation of a 'trading corporation or a financial corporation'.

The decision means that local councils cannot enter into workplace agreements under the Federal industrial relations system and are not employers for the purposes of the Federal unfair dismissal provisions.

An appeal is unlikely against the decision, due in part to legislative amendments made to the *Local Government Act 1993* (Qld) in March 2008 which expressly provided that councils are not corporations. However, for councils that have implemented Federal workplace agreements, such as in Western Australia, the Federal Court's decision is likely to cause significant uncertainty. In NSW, the government legislated to shield some public sector employees from Federal industrial relations law, but not council employees. *Etheridge* turned on the nature of local councils and their functions and provides little guidance as to the status of incorporated not-for-profit organisations.

Access to examination marking guides given

In *University Of Melbourne V McKean* [2008] VSC 325, the Victorian Supreme Court has upheld a student's claim for access to examinations papers and marking guides under the *Freedom of Information Act 1982* (Vic).

Mr McKean, a student at the University of Melbourne, sought access to the marking guides for two subjects as well as his examination paper for one of those subjects. The University refused on the basis that the marking guides were exempt under s 30(1) *Internal working documents* and 34(3)(c)*Documents relating to trade secrets* of the Act and the examination paper was exempt under s 34(4)(c) of the Act.

VCAT (Tribunal) found that neither the marking guides nor the examination papers were exempt and the University was ordered to release the documents to Mr McKean. The University appealed the Tribunal's findings in relation to s 34(4)(c) of the Act only.

Section 34(4)(c) provides,

> 'A document is an exempt document if ... it is an examination paper, a paper submitted by a student in the course of an examination, an examiner's report or similar document **and the use or uses for which the document was prepared have not been completed'** [emphasis added]

The University's submission was:

- for the two subjects in question, there is a limited amount of information that can be examined, so questions are 'recycled' from year to year
- in future years, examination papers for those subjects may contain substantially similar questions to those contained in the papers the subject of the access request or may even reproduce parts of those papers and
- disclosure of marking guides would allow students to rote learn answers without needing to understand the subject.

Importantly, it was made clear that while the past examination questions and answers were available for reuse, it was not certain that any part(s) of the three documents *would* be reused.

Kyrou J upheld the Tribunal's decision finding that it was open for the Tribunal to find that the uses for which the three documents were prepared were completed at the end of the examination assessment period when the results were published. The University did not discharge the onus of making an exemption under s 34(4)(c) of the Act. It did not satisfy the Tribunal, nor Kyrou J, that there was a further use to be made of the documents and, moreover, that the further use was a use 'for which the document was prepared have not been completed'.

Judging the High Court

According to a report presented at the Gilbert +Tobin Centre of Public Law's seventh annual Constitutional Law Conference, Crennan J held the broadest appeal as a collaborator on joint judgements across all members of the High Court during the past year.

In analysing the High Court's decisions, Dr Andrew Lynch and Professor George Williams from the Centre, part of UNSW's Faculty of Law, found that the general pattern of decision-making continued along familiar lines but that Crennan J did establish herself as a dominant part of the consensus.

Formal disagreement on the Court was present in about half of all cases last year. Justice Kirby continued in his position as the Court's outsider, dissenting in over 40 percent of matters he decided – a reduction from the year before but still much higher than the nearest judge. But while the frequency of a split bench remained steady, the Court decided far fewer matters unanimously than it had in previous years. Only 15 percent of cases were resolved with all justices agreeing in one set of reasons.

Lynch and Williams also suggested that the Rudd government may use its chance to appoint replacements for both the departing Gleeson CJ and Kirby J to effect a change in direction on the Court.

'The retirement of the Chief Justice this year presents particularly intriguing possibilities,' said Dr Lynch. 'Not only is this because Murray Gleeson has been such a consistent member of the Court's majority opinions over his tenure, but also because of the leadership capacities of the office he will be vacating.'

Dr Lynch predicted that, based on his past form, it was likely that under Robert French as Chief Justice, the Court will be ready once more to engage with the community about its complex role in the evolution of Australian law, its relationship with the other branches of government and the importance of constitutional values.

Decision signals rising tide for climate change risks

Decision-makers, local councils and project developers are on notice that failure to take into account long-term environmental risk factors - including climate change flood risk - in the planning and development approval process could leave them open to future litigation following a decision by the NSW Court of Appeal decision in *Minister for Planning v Walker* [2008] NSWCA 224. This case concerned a proposed coastal development at Sandon Point in NSW and overturned an earlier Land & Environment Court decision which had held that a Concept Plan under Part 3A was invalid because it failed to take into account the effect of climate change flood risk, including rising sea levels.

While the Court of Appeal allowed the appeal against that decision, its decision was a strong warning that failing to properly consider environmental risks such as climate change flood risk in making planning and development decisions could equate to a failure to consider the public interest and allow future decisions to be challenged.

The Court described it as 'somewhat surprising and disturbing' that the Director-General's report did not address the precautionary principle and inter-generational equity, and has warned that such principles need to be considered when making any development application. Failure to consider the potential impact of climate change could expose the decision maker to future liability in negligence.

25 September 2008

Council employees found to be biased when giving evidence

Decades of Land and Environment Court practice and procedure has been overturned in a decision that found that council staff / employees such as council planners are biased and therefore are prevented from being expert witnesses in Land and Environment Court cases.

In *Willoughby Council v Transport Infrastructure Development Corporation (No 2)* (August 2008), Lloyd J refused to allow an expert report by a council planner to be tendered in the Court proceedings as evidence. The judgment was sufficiently broad that it could be applied in almost any Land and Environment Court matter.

Justice Lloyd relied upon the *Expert Witness Code of Conduct* (requiring experts to be independent from the parties) and a High Court decision to rule that 'the existence of an ongoing or existing relationship between an expert witness and a party results in a breach of the necessary independence'.

Justice Lloyd excluded the expert report by Council's senior development planner, saying:

> In my opinion, the report of Mrs de Carvalho should be rejected. She is not independent from a party but, on the contrary, is an employee of a party…Finally, as I have already noted, the report itself contains not only facts but also partisan opinions, which demonstrate that she has clearly adopted the role of an advocate for a party. I reject the tender of the report.

The ruling in this matter stands to generally exclude Council staff from giving expert evidence or preparing expert reports, other than where they merely state factual matters and may effectively prevent Council staff from providing any 'partisan opinion'.

THE NT INTERVENTION: THE NTER REPORT RECOMMENDATIONS STILL RAISE CONTROVERSY

Alice Mantel*

Following the release on 13 October 2008 of the Report of the independent Review of the Northern Territory Emergency Response (NTER), the federal Government will continue compulsory income management as a key measure because of its demonstrated benefits for women and children. The Report of the Northern Territory Emergency Response Review Board was commissioned to report one year after the commencement of the NT Intervention.

The Report found that the situation in remote NT communities and town camps remained sufficiently acute to be described as a national emergency and the Government would continue and strengthen the NTER to protect women and children, reduce alcohol-fuelled violence, promote personal responsibility and rebuild community norms in Northern Territory (NT) Indigenous communities.

The Government accepted the three overarching recommendations of the Review Report and will act on them in progressing to the next phase of the NTER. These were:

1. The Australian and Northern Territory Governments recognise as a matter of urgent national significance the continuing need to address the unacceptably high level of disadvantage and social dislocation experienced by remote communities and town camps in the Northern Territory.

2. Governments reset their relationship with indigenous people based on genuine consultation, engagement and partnership.

3. Government actions respect Australia's human rights obligations and conform with the *Racial Discrimination Act 1975*(RDA).

In relation to this latter point, the Government response confirmed that it intended to comply with the RDA in its long-term outcomes, but that it was not prepared to disrupt current beneficial measures or place them at risk of legal challenge in the short term. In particular, it wanted to maintain the core elements of the NTER such as compulsory income management, the five-year leases, and alcohol and pornography controls and would ensure that they were either more clearly special measures or non-discriminatory and the revised measures would conform with the RDA.

The Law Council of Australia welcomed the Government's commitment to reintroduction of the RDA. Law Council President, Ross Ray QC, said the Law Council had condemned the suspension of the *Racial Discrimination Act* from the outset of the intervention and had consistently called for all protections against racial discrimination laws to be reinstated. The Law Council had been a strong critic of the suspension of the permit system, compulsory income management, prohibition against consideration of the cultural background of indigenous offenders in sentencing and compulsory acquisition of Aboriginal land.

* *AIAL Forum editor*

Law Council President Ross Ray QC said, 'The Review Board has identified several critical human rights concerns which must be addressed before the NT intervention continues. The *Racial Discrimination Act* must be reinstated in respect of all legislation governing the intervention, and it must be made clear that all actions carried out under the intervention are subject to racial discrimination laws.'

The Law Council President took a different view of the success of the Government's intervention saying, 'The report confirms the discriminatory and damaging effect of compulsory income management and the importance of fully reinstating the Aboriginal lands permit system. In addition, the report rightly calls for a guarantee of natural justice for Aboriginal people affected by decisions and measures implemented under the intervention and a commitment to genuine consultation and partnership with Aboriginal people. The Law Council welcomes this timely report and calls upon all sides of Parliament to commit to implementing its recommendations without delay.'

The Government has indicated that the current stabilisation phase of the NTER will continue for the next twelve months before transitioning to a long-term, development phase. The development phase will maintain and strengthen core NTER measures including compulsory income management, five year leases, alcohol and pornography controls, while placing a greater emphasis on community development and community engagement.

Legislative amendments to bring existing NTER legislation within the scope of the RDA will be introduced in the Spring Parliamentary session next year and will also legislate in the first half of 2009 to ensure people subject to the NT income management regime have access to the full range of appeal mechanisms afforded to other Australians, including the Social Security Appeals Tribunal and the Administrative Appeals Tribunal.

Other immediate steps include:

- The Government will immediately ask the NT Valuer-General to determine a reasonable rent for all existing five-year leases and examine the scope to reduce the current boundaries of five-year leases.
- Negotiations with traditional owners for long term leases will continue. This is to ensure that beneficial activities already under way, in particular, the Australian Government's $547 million investment in new housing, housing upgrades and reformed tenancy arrangements, can be progressed.

The Government will respond in full to the Review Board's recommendations, including future funding arrangements, over the coming months.

The Government response says that NTER has been making important progress:

- Families in remote communities report feeling safer because of the increased police presence, the reduction in alcohol consumption and additional night patrols and safe houses. There are now 51 additional police serving in communities that did not previously have a permanent police presence.
- Women say that income management means they can buy essentials for their children such as food and clothes. Shopping habits in licensed stores have changed – more is being spent on fresh food, sales of cigarettes have halved and the incidence of 'humbugging' has fallen.

- The 'BasicsCard', which has recently been introduced, is making it easier for customers to shop with their income managed funds. More than 4000 BasicsCards have been issued to date.
- School nutrition programs are providing breakfast and lunch for children in 68 communities and associated outstations and ten town camp regions.
- In total, 12,097 Child Health Checks including Medical Benefits Scheme (MBS) checks, representing 70% of eligible children have been conducted.
- Audiology follow-up services have been provided to 1,309 children. Non-surgical dental services have been provided to 1,750 children; 109 children have undergone ear, nose and throat surgery and 178 children have undergone dental surgery.
- Additional funding has been allocated in 2008-09 and the following year to improve health services in remote communities in the NT.
- 200 additional teachers are being recruited. The first of these teachers are now in place.

ODGERS' AUSTRALIAN SENATE PRACTICE REVIEWED

Stephen Argument*

Odgers' Australian Senate Practice is an enduring and invaluable text, having first been published in 1953. It is also the only comprehensive work on the history and operation of the Senate and its 21 chapters deal with practical issues related to the Senate and its committees, including:

- meetings of the Senate;
- conduct of proceedings;
- motions and amendments;
- debate;
- voting and divisions; and
- how the Senate deals with legislation.

There are also extensive chapters on Senate committees, the procedures applying to witnesses before Senate committees and how delegated legislation is managed.

It should be remembered, however, that *Odgers'* deals with 'lore' (a term used in the order form) rather than law and that the reference very much represents the views of the Senate and, on some issues, the views of its current editor, the Clerk of the Senate, Harry Evans. A few examples may assist in giving a flavour of those views.

The Preface to the 12th edition opens with the following statement:

> At the end of the preface to the eleventh edition of this work, it was noted that the then government had gained a party majority of one in the Senate in the 2007 general elections, and the possible effect of this on the performance by the Senate of its essential task of holding the executive government accountable was mentioned. A detailed study of Senate activity during the period between that majority taking effect and the following general election concluded, unsurprisingly, that the accountability function was diminished. It is almost a law of nature that executives will seek to avoid accountability, and that independent legislatures are needed to impose it. The structures and measures built up by the Senate over many years to achieve accountability, however, remained in place during that time. The party majority was lost in the general elections of 2007, and the Senate returned to what is now regarded as the normal situation of no party holding a majority. It is to be hoped that this situation will support the Senate's accountability role. This work, as with previous editions, seeks to perform the task of recording the Senate's accountability and other activities in the past as a guide to the future.

The Preface concludes with the following statement:

> This edition appears when the country is entering upon an era of life-and-death policy issues and extremely difficult decisions. As always, there are demands for power to be concentrated in the hands of the central executive government, supposedly to allow it to solve the problems that must be confronted. As always, such demands are misconceived. In this era, scrutiny and accountability of

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* *Stephen Argument is a Canberra lawyer (and a former employee of the Department of the Senate). He reviewed the 12th edition, 2008), edited by Harry Evans (763 pages, $55.00, published by the Department of the Senate, Canberra.*

> government will be more vital than ever. The greater the policy issues and the more difficult the decisions, the more likely it is that mistakes will be made, and parliamentary scrutiny and control is essential to disclose and remedy those mistakes. Government itself is weakened by lack of accountability. The Senate and its processes provide a large part of the scrutiny that will be required. The means by which it may do so are here recorded.

The latter statement is quoted on the order form.

The Preface to the equivalent text in 'the other place', *House of Representatives Practice* (5th edition, 2005, edited by Ian Harris) contains no such lofty statements. The only vaguely similar statement is the following:

> The work of the House and its committees is important to the good government of Australia.

An issue of interest to lawyers is what *Odgers'* has to say about parliamentary privilege. The most important recent development in parliamentary privilege was the passage of the *Parliamentary Privileges Act 1987*. As *Odgers'* notes (at p 34), the Act 'was enacted primarily to settle a disagreement between the Senate and the Supreme Court of New South Wales over the scope of freedom of speech in Parliament as provided by article 9 of the Bill of Rights of 1689'.

Two pages are devoted to discussion of the 'disagreement', which was manifested in two NSW Supreme Court decisions in 1985 and 1986, by Hunt and Cantor JJ in the context of the prosecution of Lionel Murphy J for attempting to pervert the course of justice. Article 9 of the Bill of Rights came into issue because there had been two Senate committee inquiries prior to the criminal proceedings and there was a question as to the extent to which evidence taken in the parliamentary proceedings might be used in the criminal proceedings. Mr Evans was the Secretary to both Senate committee inquiries.

Article 9 provides:

> That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.

Odgers' states that '[t]he history of the establishment of freedom of speech [ie as articulated in Article 9] makes it clear that the parliamentary intention was to exclude examination by the courts of parliamentary proceedings' (at p 35). In the relevant two cases, the Senate took issue that witnesses before the parliamentary proceedings were cross-examined about their evidence to the parliamentary committee, including as to the truthfulness and the underlying motives of that evidence. This occurred in spite of the opposition of, and criticism by, the Senate.

Having set out this background, *Odgers'* states (at p 37):

> The judgments, even in the absence of statutory correction, did not represent the law. It was unlikely that they would be followed by other courts, and subsequently there were contradictory judgments, including one by another judge of the Supreme Court of New South Wales.

Lawyers might find this statement a curious way of reflecting on judgments that the author clearly did not agree with. It is one thing to say 'I do not agree with the judgments'. It is another thing to assert that they did not represent the law. It is also (as a matter of law) incorrect. Clearly, unless over-turned, either by a superior court or by statute, the two judgments did represent the law, whether Mr Evans likes it or not.

House of Representatives Practice deals with the issue of the two judgments in Ch 19 (at pp 721-2) in five paragraphs that lack the editorial flourishes exemplified above. While this may be thought to reflect the fact that the Senate had a greater interest in ensuring that the

difficulties created by the two judgments were resolved, the fact remains that the value of the discussion in *Odgers'* is undermined by the contestable, personal views of the author. For the record, the Parliamentary Privileges Act settled the 'disagreement' between the Senate and the New South Wales Supreme Court by 'enact[ing] the traditional interpretation of article 9'. This was largely achieved in s 13 of the Parliamentary Privileges Act, which provides (in part):

> **Parliamentary privilege in court proceedings**
>
> **16 (1)** For the avoidance of doubt, it is hereby declared and enacted that the provisions of article 9 of the Bill of Rights, 1688 apply in relation to the Parliament of the Commonwealth and, as so applying, are to be taken to have, in addition to any other operation, the effect of the subsequent provisions of this section.
>
> **(2)** For the purposes of the provisions of article 9 of the Bill of Rights, 1688 as applying in relation to the Parliament, and for the purposes of this section, *proceedings in Parliament* means all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee, and, without limiting the generality of the foregoing, includes:
>
> (a) the giving of evidence before a House or a committee, and evidence so given;
>
> (b) the presentation or submission of a document to a House or a committee;
>
> (c) the preparation of a document for purposes of or incidental to the transacting of any such business; and
>
> (d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.
>
> **(3)** In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of:
>
> (a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;
>
> (b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or
>
> (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.

Later on in the *Odgers'* chapter on parliamentary privilege, the following statement appears:

> Contrary to academic misconception, findings by a court, on evidence lawfully before it, which indirectly call into question parliamentary proceedings (for example, a finding that a statement outside parliamentary proceedings was false, which would mean that a similar statement in the course of parliamentary proceedings was also false), are not prevented by parliamentary privilege (*Mees v Roads Corporation* 2003 FCA 306).

As no particular 'academic misconception' is identified presumably all 'academics' who have written about parliamentary privilege are equally guilty of 'misconception'. On the subject of academics, it is interesting to note that the chapter contains no reference to Professor Enid Campbell's excellent 2003 text, *Parliamentary privilege*. It contains a single reference to Professor Campbell's 1966 text on the same subject.

Leaving aside the question of parliamentary privilege, there was recently a 'disagreement' between the Clerk of the House of Representatives and the Clerk of the Senate as to whether a Bill introduced in the Senate by the Opposition, the effect of which would have been to increase pensions, was constitutional. Mr Evans took the view that it was. The Clerk of the House of Representatives, Ian Harris, editor of the 5th edition of *House of Representatives Practice*, took the view that it was not.

Mr Evans was subsequently asked about the disagreement in Senate Estimates, where the following exchange took place:

> **Senator FIFIELD**— …. I am just wondering if you have had the opportunity to examine the advice that the Clerk of the House furnished and, if that is the case, if you could take us through where you think that the advice of the Clerk of the House was in error.
>
> **Mr Evans**—First of all, I do not know that it is right to characterise it as a dispute between the two houses. I think it was a dispute between the majority of the Senate and the government, which is often the case with these things.
>
> **Senator FIFIELD**—Between the majority of the Senate and the government?
>
> **Mr Evans**—Yes.
>
> **Senator FIFIELD**—I am missing the distinction there.
>
> **Mr Evans**—I think the government took a position on it and said that the government had advice on it, and the motion in the House of Representatives was moved by the government and there was no debate on the motion—the debate on the motion was gagged. So there was not really an opportunity for a House position to be expressed, even if there were a House position—but I pass over that, anyway.
>
> …
>
> **Senator FIELDING**—Perhaps I should have characterised it as a disagreement between the clerks of the two houses.
>
> **Mr Evans**—As I have said before, over many years I have discovered it is an amazing coincidence that when government has advice on these matters—and it is governments of all persuasions—the advice always supports the position of the government of the day. It is an amazing coincidence, but there we are.[1]

It is surprising that such statements could be made (and possibly more surprising that they should go unchallenged). More recently, the former Official Secretary to the Governor-General, Sir David Smith, was quoted as having asserted that Mr Evans had 'claimed the right to use a reference book on the Senate as a vehicle for [his] personal opinions'[2] There is ample evidence that Mr Evans not only has opinions but is not backward in expressing them.

Regardless of these criticisms however, *Odgers'* is an invaluable resource for those who deal with the Senate and its committees. Importantly, it is a resource that is also available on-line (and at no charge), at http://www.aph.gov.au/Senate/pubs/odgers/index.htm.

To the extent that *Odgers'* reflects personal opinions, those opinions are vital to understanding the likely approach of the Senate on any particular issue, as the persons expressing the opinions are also the persons advising the Senate. As the order form notes, it is 'lore' that *Odgers'* deals with, not law.

Endnotes

1 See the Proof *Hansard* of the Senate Standing Committee on Finance and Public Administration's Supplementary Budget Estimates hearing on 20 October 2008.

2 See Ramsey, A, 'Correspondents pack an epistle', *Sydney Morning Herald*, Weekend Edition, 1-2 November 2008, page 35.

VALUE RENEWABLE – A CASE FOR FOI AND PRIVACY LAWS

Paul Chadwick*

The invitation

To whom did John McMillan, our Commonwealth Ombudsman, extend the invitation to give this talk?

Was it the young man who took to the new FOI laws in the 1980s with some ferocity, probing their possibilities for better journalistic scrutiny of Executive Government and encouraging others to do the same?

Was it the public interest advocate from the non-profit Communications Law Centre who played occasional bit parts as FOI statutes appeared throughout the States and Territories in the late 1980s and 90s?

Or was it the man who, with others, revised the journalists' code of ethics in the 1990s and was privileged to be given an opportunity to think through fundamental questions about the purposes and limits of disclosure and discretion in a free society?

Perhaps it was the middle-aged man who, as first Victorian Privacy Commissioner, found that events far away on 11 September 2001, ten days after the law he was appointed to administer came into effect, caused a recalibration of liberty and security, with effects on privacy and FOI, of which he could have had no inkling when he accepted the five-year term.

Surely the invitation was not extended to the man who recently accepted a new role at the national broadcaster, with responsibilities involving its adherence to its editorial policies, containing as they do commitments – to be found in all standard media codes - to uphold fundamental values, including participatory democracy through the provision of information and respect for persons through, among other things, respect for privacy.

The invitation was issued to all these men, for they all comprise me and my experiences with freedom of information and privacy law and policy.

But who among them will speak first, who clearest, in these next 18 minutes or so?

Like you, perhaps, I will be listening carefully for the answer.

The reflections that follow amount to a case for freedom of information law and privacy law as they apply to Executive Government. I will steer away from the texts of the statutes. Of course they may need to be renovated over time, and we must always be open to evidence,

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* *This paper was presented at the 2007 National Administrative Law Forum, Canberra. Paul Chadwick is a journalist and lawyer. He established the system of FOI use at the Melbourne Age newspaper in the 1980s, was founder of the Victorian operations of the non-profit Communications Law Centre, first Victorian Privacy Commissioner (2001-2006), and is currently inaugural Director Editorial Policies at the Australian Broadcasting Corporation.*

review and debate about change. Denis O'Brien makes worthwhile points in his contribution today about necessary amendments to the *Freedom of Information Act*. The Australian Law Reform Commission is currently reviewing privacy law. I lack both the current knowledge (especially in today's company) and, if I understood the invitation correctly, the mandate to give a paper about technical reform. Instead, I plan to draw on my mixed experience with these laws, in effect, to restate their value. Scarred as I am by them both, I still contend that FOI and privacy laws, and the principles that underlie them, remain important to the structures we use to try to run a democratic community tolerably well.

The paper[1] goes like this: I begin by drawing some distinctions, then set out what I regard as values of enduring relevance. I restate them because my observation is that unless refreshed they get smothered by detail, a wood lost in trees. Next, where some may see mismatch, I suggest unusual compatibility. Finally I suggest that, more than the mere existence of these laws or their operation in particular cases, I find now that their greatest contribution is in their plodding and mostly unglamorous processes.

The distinctions

FOI and privacy statutes, as they evolved in Australia, share some common origins but it helps to distinguish them and some of the concepts they employ.

Privacy is not the same as secrecy. The philosopher Sissela Bok put it like this:

> …privacy need not hide; and secrecy hides far more than what is private. A private garden need not be a secret garden; a private life is rarely a secret life. Conversely, secret diplomacy rarely conceals what is private, any more than do arrangements for a surprise party or for choosing prize winners.[2]

Only natural persons have privacy rights, not governments or corporations.

FOI compels openness; its exemptions are comparatively rough-hewn. Privacy law is fine-grained about discretion. Under FOI, anyone can seek access. Under privacy laws, only the subject of the personal information can seek access.

FOI is basically about disclosure and, less often, correction. Information privacy is more sophisticated, and deals also with collection, use, quality, security, transfer and matching of personal information.

I think these distinctions matter because privacy law is sometimes wrongly cited as the reason that disclosure of information is denied. Or privacy is 'blamed' when it is some other law – perhaps an exemption under FOI, properly applied, or an older statutory confidentiality provision – that is the legal reason that access to information is not granted. FOI exemptions, properly applied, are usually upholding a value most people would acknowledge as valid – say, effective law enforcement or privacy for medical data.

Over time, misuse and misconception can eat away at support for laws which we might think would have universal support and, properly explained, usually do. As a journalist and later as a privacy commissioner I often encountered this phenomenon.

Enduring value, unusual compatibility

It is not necessary to restate the enduring value of the principles underpinning freedom of information laws: informed electorate, accountable government, participatory democracy etc. Instead, I draw attention to a new, scholarly treatment of transparency and public policy by three academics from Harvard's Kennedy School of Government. They elaborate and review what they call 'targeted transparency' measures. More stringent financial disclosure

laws are an example. Their term 'targeted transparency' distinguishes such measures from generic laws such as the *FOI Act*. Of the United States, the authors say –

> We find that three factors have helped to propel this new generation of transparency into mainstream policy. First, the maturing of an early generation of right-to-know transparency measures helped to prepare the way for targeted transparency policies. Second, crises that called for urgent responses to suddenly revealed risks or performance problems helped to overcome political forces that favored secrecy and that limited innovation. Finally, a generation of research by economists and cognitive psychologists helped to provide a rationale for government action.[3]

I speculate that Australia might hold a similar story. Many of you will have spent significant time in FOI law and policy. Am I too optimistic in suggesting that implicit in what the authors have distilled is an indication that values that gave birth to FOI here in the 1970s are renewable? I mean, in particular, the value that holds: seek and spread information in order better to understand and address problems, notwithstanding opposition.

Forgive me if I spend a little more time on the enduring value of privacy than I have on FOI. It is a deliberate response to the times through which we are passing, marked by fear of terrorism and increasingly enabled with technologies of surveillance. In such times a relatively 'shy' human right like privacy can be easily neglected or too readily discounted.

Basically, privacy serves three purposes –

1 Privacy is essential to our sense of self. We have a conversation with ourselves in our heads, then we speak and act among others. By being allowed privacy, we can create and restore our individual self.

2 Privacy enables intimacy between individuals. We create intimacy partly by giving away some of our privacy freely to those whom we regard as close to us. They might be a partner in a relationship, a family member or a friend. The closeness of the relationship determines how much we say to them of our inner worries and hopes, how much we relax and just 'be ourselves' in their company. In this role, privacy calibrates social relationships. In the security of a trusting relationship we may 'think aloud', putting on hold our sense of reserve. In relationships privacy becomes shared. It is no longer associated only with solitude or the nurturing of selfhood. But common to privacy in both of these settings is the notion of control. We reveal of ourselves as *we* choose. The essence of feelings of indignity and humiliation resulting from breach of privacy is very often, at core, a feeling of loss of control. I saw examples of these reactions often enough as a privacy commissioner. I hope I did not cause them unjustifiably as a journalist.

3 Privacy serves liberty. Here, the value of privacy goes wider than individuals alone or in intimate relationships. Privacy is an instrumental freedom. Unless privacy is respected, particularly by governments, it can be difficult to exercise the various freedoms that have come to comprise liberty in our times. This is partly why a right to privacy is to be found in all the leading international human rights instruments (and in the human rights statutes of the ACT and Victoria). Think of it in practical terms: freedom of belief or of conscience means little without privacy. Freedom of association, at an organisational level, requires respect for privacy. Odd as it may sound, privacy is a pre-condition to freedom of expression too. Authors consult, compose, draft, rethink, revise – all *before* they publish. We can all think of historical episodes – some in the not-very-distant past – in which the interplay of privacy and the practical enjoyment of other freedoms have been made clear by the denial of privacy. One acronym, Stasi, evokes what I mean. Legal phrases familiar to us all – 'unreasonable search and seizure', for instance – sprang from experience of the harms that disdain for privacy breeds.

Yes, in particular cases the value privacy may be in tension with the value freedom of expression. Choices must be made. But at the level of principle I regard them as compatible and often interdependent. The cultivation and protection of sources by journalists is an illustration.

And, of course, privacy in society cannot be absolute. Other values, including security, compete with liberty and its component parts. Compromises are made. The legitimacy of the compromises depends partly on the transparency of the process through which the compromises are reached, and partly on the accountability of those who will exercise new powers. Here too FOI and privacy laws have parts to play. It is to processes, plain and unexciting, that I now turn.

Processes can be their own reward

In times of fear or crisis, FOI law and privacy law need to be refreshed, not overlooked, still less downgraded. They are among the necessary checks and balances that ought to be in good working order when democratic societies confront serious problems.

Regardless of the issue, debate about what and how much to change to tackle the issue depends at least in part on access to information about what is already being done or not done, about the proportionality of safeguards in relation to anticipated risks, and about the adequacy of oversight. Of course, there will be unavoidable limits on disclosure for certain proper purposes, but it remains the case that information is necessary to ensure that the *process* of making changes (whatever the result may be) is perceived to have been legitimate.[4]

For simplicity's sake, let me use the term 'access laws' from now on to mean FOI or privacy laws in the sense that privacy laws give an individual enforceable rights to seek access to his or her personal information and to test its quality.

History shows that the access laws of some jurisdictions have been enacted or strengthened following periods of excess by the Executive. Constriction of information flows has been found to have worsened the problems by blocking the system's safety valve - that is, its capacity to consider evidence, to have second thoughts, to alert relevant decision-makers to the need for correction or change, and to pressure them if they are reluctant or tardy. To illustrate: the US *Freedom of Information Act 1966* was strengthened by Congress in 1974 after it had learned of the excesses of the Nixon Administration. In Australia, the FOI laws of two of the States, Queensland and Western Australia, were direct results of the recommendations of Royal Commissions into serious corruption at senior levels of the Executive.

Access laws do not lubricate democracies only by causing the Executive to disgorge information in a more detailed or more timely way than it might prefer. Access laws are essential to society's health in a more subtle way. Access laws reinforce for everyone the salutary principle of dispersal of power, of checks and balances. And they do so in relation to that most powerful commodity, information.

When legislatures create or amend access laws, they tend to set out the basic rules with a general presumption of openness. Then they create specialist regulators such as information commissioners, privacy commissioners or ombudsmen and give them a relatively small chunk of power to administer individual cases that arise between individuals and the Executive. To the extent the statutory regulators act independently, power has been – and can be seen to have been – dispersed somewhat.

But legislatures will also usually provide for judicial review, so that the courts also have a role. The courts can interpret the rights the legislature has conferred and, if necessary, adjust the way the Executive or the regulator has administered the scheme in particular cases. By these means, and by attendant media coverage, the legislature may learn of controversies involving the Executive which can be further investigated by more traditional parliamentary methods such as questions with or without notice, or committee inquiries.

In these ways, access laws disperse among the branches of government pieces of the power to disclose information, or, as James Madison put it, 'the power knowledge gives'. I think we can say that good government is assisted – partially at least, and in a modest way - by *the design and processes* of access laws generally as well as by particular *results of those processes*.

Individual cases may or may not result in the timely disclosure or correction of relevant information such that accountability is enhanced and objectives of access laws are fulfilled. But (assuming always that the various actors can and do play their proper parts), I argue that society benefits from the mere assertion and adjudication of enforceable access rights.

When the law provides for open forums in which claims to secrecy can be tested, other factors tend to come into play. Information seeps out. People blow whistles. Ministers succumb to spin doctors' advice to cut losses and may countermand the bureaucracy's preference for persisting with a secrecy claim. Democratic government is an untidy business, and there is a certain comfort in that fact alone.

Let us turn now from the general point to a contemporary illustration of it. You may be aware of reports from the United States that the National Security Agency (NSA) has collected a vast amount of records from telecommunications companies about phone calls and emails made and received by millions of Americans. This disclosure adds to reports in December 2005 that the NSA had eavesdropped, without judicial warrant, on international calls to and from the US. President Bush authorised the measures after 11 September 2001. Reports indicate that the NSA has not listened to every call or read every email, but instead has amassed an enormous amount of data showing which phone numbers called which other numbers, and the dates and times of calls. Linking phone numbers to individuals associated with those numbers is relatively straightforward. By applying the power of computers and pattern recognition software to this data, it is possible to work out, or to infer, who has called whom, and when. Data mining emails can produce richer data. In response to these disclosures, journalists in the US have expressed concern that government mining of their records may disclose their confidential sources, with a consequent chilling effect. Similar questions arise about the privacy of activities of Members of Congress and their staff, and about those in civil society organisations who from time to time may oppose government policies or seek to have them amended.

Let us leave to one side the issue of whether it would be lawful, without judicial warrant, for the telecommunications companies to provide the data of millions of Americans to the US Government's technologically sophisticated spy agency. And we will pass over the issue of whether it would be lawful for the NSA to collect and process that data as reported. Court proceedings have been instituted in the US. An initial decision by a District Court judge is that the activity is not lawful.[5] That decision has been appealed by the Administration and we must await the result. It is to the fact of these processes, rather than their outcome, that I wish to draw your attention.

A brief diversion: turn your thoughts to the implications for privacy of the practices attributed to the NSA if such practices were to become widespread. We leave vast amounts of data behind us as we use many of today's technologies – ATMs, credit cards, loyalty programs run by airlines and retailers, new types of ticketing, GPS-equipped vehicles, consumer items

with RFID chips embedded in them, and mobile phones. Who is to have access to that data? How are they to be authorised to sift it for the facts, or inferences, that the data may seem to reveal about how we live? Will we know it happens? Who will test the accuracy? Can we see the data about ourselves, and the conclusions that may be drawn from the data? May we appeal the consequences of the decisions made on the basis of those conclusions?

The scope and speed of new information technologies heightens the need for enforceable rights to seek information.

The democratic mechanism I described – debate, decide, try, gather evidence, review, try again – can only work well if fuelled by sufficient information. As change accelerates, so must the supply of the information.[6]

I have watched the operation of FOI and privacy laws from several angles for over 25 years. I believe that they have their legitimate parts to play[7] and that they must be assessed with subtlety and renewed with regularity.

Endnotes

1 This paper draws on talks I gave as Victorian Privacy Commissioner 2001-2006, most to be found at www.privacy.vic.gov.au, go to Publications then Speeches. I have also used material delivered at the Saskatchewan Institute for Public Policy, University of Regina in September 2006, a version of which appeared as 'The Value of Privacy' in *European Human Rights Law Review* (2006) Number 5.

2 *Secrets: On the Ethics of Concealment and Revelation* (Vintage, 1989) p 11.

3 Archon Fung, Mary Graham, David Weil, *Full Disclosure – the perils and promise of transparency* (Cambridge University Press, 2007) p 19.

4 From amongst a burgeoning literature in relation to one issue, the re-balancing of liberty and security in response to terrorism, see, for instance: Michael Ignatieff's *The Lesser Evil – Political Ethics in an Age of Terror* (Edinburgh University Press, 2004), Tony Coady and Michael O'Keefe eds. *Terrorism and Justice – Moral Argument in a Threatened World* (Melbourne University Press, 2002); Victorian Privacy Commissioner, Submission to the Victorian Parliament's Scrutiny of Acts and Regulations Committee in relation to the Terrorism (Community Protection) Bill, March 2003, [and submission on an amending Bill, January 2006] available at www.privacy.vic.gov.au >Publications>Reports and Submissions>Submissions; Lord Carlile, UK Independent Reviewer in relation to terrorism measures, 'Counter-Terrorism Legislation in the UK Human Rights Context', address to the Sweet and Maxwell Human Rights Conference, London, 17 October 2003 and *Proposal by Her Majesty's Government for changes to the Laws against Terrorism, Report by the Independent Reviewer*, 6 October 2005; Lord Steyn, 'Democracy, the Rule of Law and the Role of Judges', Attlee Foundation Lecture, London, 11 April 2006; and the Congressional Record of the proceedings of the US Senate during the passage of the *Military Commissions Act 2006* (S3930), 28 September 2006.

5 *American Civil Liberties Union v NSA*, Case No. 06-CV-10204-ADT-RSW, Document 70, Filed 08/17/2006, United State District Court Eastern Michigan, Southern Division (Detroit) Hon. Anna Diggs Taylor. Documents relating to the same issue, litigated in the Northern District of California (no. C-06-0672-JCS), may be located through www.eff.org

6 For an extended treatment of this deceptively simple assertion, see Cass Sunstein, *republic.com* (Princeton University Press, 2001).

THE IMPACT OF EXTERNAL ADMINISTRATIVE LAW REVIEW: TRIBUNALS

Linda Pearson*

External review of administrative decisions on the merits is an accepted part of the Australian administrative law landscape. The reforms made in the Commonwealth sphere during the 1970s included the establishment of the Administrative Appeals Tribunal, and lead to the creation and development of generalist and specialist review tribunals both in the Commonwealth and the States. The significance of these reforms is still recognised by, and influencing reforms in other jurisdictions. Most recently, the Leggatt Review of tribunals in the United Kingdom drew on the Australian experience, commenting:[1]

> We found general agreement that the AAT had had a thoroughly beneficial effect on the development of administrative law, establishing a valuable tradition of individual treatment of cases, and of test cases. That had enabled the development of a distinctive process of merits review which all tribunals used in their separate jurisdictions.

Review of administrative decisions by an external, independent, tribunal which would have the power to substitute the 'correct or preferable' decision was seen by the Kerr Committee in 1971 as the key to correcting 'error or impropriety in the making of administrative decisions affecting a citizen's rights'[2]. The focus was on redressing individual grievances, and only incidentally in playing a role in improving administrative decision-making. The Kerr Committee expressed the hope that the recommended reforms should 'tend to minimise the amount of administrative error', and that the right to challenge administrative decisions should 'stimulate administrative efficiency'.[3]

By the time of the ARC *Better Decisions* report,[4] improving the quality and consistency of agency decision-making was seen as one of four specific objectives of the merits review system, the others being providing the correct and preferable decision in individual cases, providing an accessible mechanism for merits review, and enhancing the openness and accountability of government.

This paper raises three questions for consideration:

1. Why are we concerned about the impact of external tribunal review, whether on an individual level or on administration more generally?

2. What do we mean by 'impact' and how might we measure it?

3. What do we know about how agencies respond to tribunal review decisions?

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1. Why does impact matter?

External review by tribunals is only one part of the Australian system of administrative law (other key elements being the courts, and the Ombudsman). And those external review mechanisms are themselves only a part of what has come to be described as 'administrative justice', a term which has many meanings.[5] Adler has defined administrative justice as referring to 'the principles that can be used to evaluate the justice inherent in administrative decision-making'. Those principles comprise both procedural fairness, concerned with the process of decision making, and substantive justice, which refers to the outcomes of the decision making process.[6] Adler has argued that the external review mechanisms are not particularly effective on their own in achieving administrative justice:[7]

> This is, in part, because few of those who experience injustice actually appeal to courts, tribunals or ombudsmen; in part because court, tribunal, and ombudsman decisions have a limited impact on the corpus of administrative decision-making. As a result, as Ison (1999:23) points out, "the total volume of injustice is likely to be much greater among those who accept initial decisions than among those who complain or appeal".

While external review may have a limited role to play on its own in achieving administrative justice, it is important to acknowledge that the various external review mechanisms require continuing commitment of significant resources, financial and otherwise, by governments and individuals. They also represent for many individuals the most direct opportunity available to participate in, and question, government decisions which affect them. So there is a need to understand the impact of external review, both in the individual case, and more broadly.

There is a clear shift from Kerr to *Better Decisions* in acknowledging that tribunal review could, and should, have consequences beyond the resolution of an individual dispute. There are several explanations for that. Sir Gerard Brennan, as the first President of the AAT, played an early and crucial role. In the second Annual Report of the AAT in 1978 Sir Gerard noted that '[t]he way in which the system can serve the individual and the administration must be learned, and learning is difficult'.[8] Sir Gerard saw the Tribunal's influence on administrative decision-making as arising primarily from its determination of individual cases, and through the quality of its reasons for decision. In 1979 Sir Gerard stated:[9]

> The objective of administrative review on the merits is to improve the quality of decision-making, both in the particular case and, by precept, generally.

In 1996, at a seminar held to mark the 20th anniversary of the AAT, Sir Gerard commented:[10]

> The AAT was intended not only to give better administrative justice in individual cases but also to secure an improvement in primary administrative decision-making. This had to be achieved by the quality of the AAT's reasoning. Departments, like any organised human activity, tend to have an inward focus and the corporate culture tends to be the most powerful influence on the conduct of individuals engaged in that activity. External review is only as effective if it infuses the corporate culture and transforms it. The AAT's function of inducing improvement in primary administration would not be performed merely by the creation of external review. Bureaucratic intransigence would not be moved unless errors were clearly demonstrated and a method of reaching the correct or preferable decision was clearly expounded. AAT decisions would have a normative effect on administration only if the quality of those decisions was such as to demonstrate to the repositories of primary administrative power the validity of the reasoning by which they, no less than the AAT, were bound. Any effect that the AAT might produce in primary administration would depend upon the reasoning expressed in the reasons for AAT decisions.

Other factors were at play during the 1980s and into the 1990s, not the least of which was the changing focus of public administration. Chief Justice Gleeson noted in his speech marking the 30th anniversary of the AAT in 2006 that the AAT does not operate in a static context, and commented:[11]

> There have been major developments, since 1976, in the principles and practice of public administration. Methods of performance review and accountability within the public sector have changed, and continue to change. Privatisation,and the outsourcing of functions, have placed many activities affecting citizens outside the scope of the legislative scheme conceived in the 1970s.

Adler has described these changes as a challenge to the bureaucratic, professional and legal models of decision-making accepted in the early 1980s, by a managerial model associated with the rise of the new public management, a consumerist model focussing on increased participation of consumers in decision-making, and a market model that emphasises consumer choice.[12] The consequence of these challenges is a continuing focus on cost, and efficiency. For example, the 2007 Productivity Commission *Report on Government Services* on its Review of Government Service Provision, focuses on outcomes from the provision of government services - whether through government funding of service providers or the provision of government services directly - in an attempt to measure whether service objectives have been met. Outcomes are to be measured against indicators of equity, effectiveness, and efficiency.[13]

More generally, as the administrative review system has become entrenched, more is expected of it than simply delivering justice in the individual case. There is an expectation that tribunal decisions and decision-making have a role to play in ensuring that there is fairness and consistency in the treatment of individuals by government; that there is an improvement in the quality and consistency of agency decision-making beyond the individual case; and that there is an improvement in administration generally through the adoption of the values inherent in administrative review.[14]

2. How do we measure 'impact'?

There is a growing body of empirical work, much of it coming from the United Kingdom, assessing the impact of judicial review. Some of the empirical studies have focussed on the impact of judicial review as a mechanism for handling individual grievances, examining the ultimate outcomes for applicants. Others have focussed on judicial review as a mechanism for addressing systemic bureaucratic failings.[15] Attempts to understand or measure 'impact' in this context have shifted between considering judicial review as a process, to bureaucratic reaction to particular decisions or series of decisions, or to the impact of judicial review as a system of values and legal norms.[16] The central requirement is that there is a clear understanding of what is being evaluated: impact *of* what, and impact *on* what.

Any evaluation of impact, whether it be of judicial review or tribunal review, must acknowledge that external review is only one influence on administrative decision-making. The 'administrative soup'[17] of influences on decision-making includes factors such as resources, policies, and personal pressures, and the principles and values that lawyers associate with external review change as they mix with those other factors.

While many of the approaches to assessing impact of judicial review are helpful, evaluating the impact of tribunal review raises some different issues. Judicial review as a process involves the interaction between two clearly separate branches of government, as expressed by Brennan J in *Church of Scientology v Woodward,* [18]

> Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly.

The relationship between a tribunal and the agency whose decisions it reviews is more complex than that between a court and that agency, and any attempt to evaluate the impact of tribunal review must reflect those complexities.

Tribunals are part of the system of adjudication, and they resolve disputes by methods of application of law to facts similar to those used by the courts.[19] The principle that tribunals should not seek to defend their decisions on review, but simply submit to such order as the court may make is perhaps a reflection of that.[20] However, those tribunals which review administrative decisions on the merits do so, most clearly in the federal context, as an exercise of executive power. The High Court decision in *Craig v South Australia* (1995) 185 CLR 163 draws a distinction between inferior courts and other decision-makers, including tribunals, for the purposes of identifying jurisdictional error, and there is now little room for a tribunal to make an error of law which is not jurisdictional.[21] Under this approach tribunals are clearly part of the executive, and are accountable to the courts in the same way as other executive decision-makers. While tribunals are independent of the decision-making structure within which primary administrative decisions are made, they are still part of that structure – and some have described that position as at its apex.[22] However, tribunals occupy a distinctive role within the administrative decision-making structure. Tribunals are not simply correcting errors (whether of fact or law) made by the primary decision-maker:[23]

> Tribunals overturn departmental decisions for many reasons including: new evidence; applicants taking the process more seriously once they have received a negative decision from the department; changes in the law due, for example, to court decisions; applicants feeling the need to defend their credibility; and different exercise of a discretion.

Further, the ability of a tribunal to depart from government policy and guidelines sets it apart from primary decision-makers. In this regard, the traditional dichotomy of tribunals and primary decision-makers needs to be revisited, to reflect the development of government agencies which act simply as deliverer of services, with the real policy framework provided from outside.[24]

3. What do we know about impact or how agencies respond to tribunal review?

In Australia, after some early work on evaluating tribunals,[25] Creyke and McMillan have led the way in evaluating impact. Their study of the outcomes of judicial review focussed on outcomes for applicants. [26] The related part of their study on executive perceptions of administrative law looked at impact more broadly and included responses to tribunal review as well as the other external review mechanisms.[27] Apart from this work (referred to below), we are left primarily with anecdotal observations, to a large extent contained in the proceedings of the AIAL and those of the 1987 conference which provided the impetus for its formation.[28] The many contributions to those conferences and seminars over the years reflect a range of perspectives of external merits review, from impatience, and sometimes hostility, to a more positive recognition of the role of external merits review in clarifying principles and exposing deficiencies.

Cost has always been a concern, as reflected in the criticisms made by then Minister of Finance Senator Peter Walsh in 1987 of 'the capricious nature and considerable cost' of some AAT decisions.[29] Senator Walsh was referring to both the direct costs of running the system, and the broader costs to public programs of some AAT decisions. While there was early acknowledgement that the system would cost money, there has been little analysis of the real costs and benefits of administrative review.

The costs of running the tribunal system are difficult to calculate, as different measures are used by each tribunal and administrative arrangements with other agencies complicate the picture. However, based on the information provided in Annual Reports for 2005-2006, the following points can be made.

In the federal sphere, total operating costs for the AAT, Social Security Appeals Tribunal (SSAT), Veterans Review Board (VRB), Migration Review Tribunal (MRT) and Refugee

Review Tribunal (RRT) were close to $90,000,000, and these tribunals finalised a combined 30,356 matters. The average cost per finalisation ranged from $1563 for the VRB to $5962 for the RRT. The State sphere is more complex, as tribunals combine both merits review and other jurisdictions, including civil claims. The NSW Administrative Decisions Tribunal has a retail leases jurisdiction; the Victorian Civil and Administrative Tribunal (VCAT) includes planning decision-making (which is handled in NSW by the Land and Environment Court) and guardianship (which in NSW is handled by the Guardianship Tribunal). The VCAT and the WA State Administrative Tribunal both deal with residential tenancy issues, which in NSW are handled by the Consumer Trading and Tenancy Tribunal. The residential tenancy decisions swamp all other jurisdictions in VCAT and also in those heard in the NSW CTTT.

The total operating cost of the federal tribunal system, some $90 million in 2005-2006, obviously does not include the costs to the agencies whose decisions they review, or to the individuals who apply to, or appear before, them. The total number of matters, 30,356 (which would include some double counting, for applications made to the AAT for review of decisions of the SSAT and VRB) are a small proportion of the number of decisions made by Commonwealth decision-makers which might affect the interests of an individual or organisation. To take the social security jurisdiction as an example, Centrelink has over 25,000 staff and 6.5 million customers; sends 90 million letters each year, and distributes $60 billion in payments.[30] In 2002-3 there were a minimum of 109,000 reconsiderations by the original decision-maker, which flowed on to 39,383 reviews by authorised review officers.[31] In that year, the SSAT received 9,576 applications, and 1,869 applications were made to the AAT.

It is equally difficult to compare results. For the SSAT, in 2005-2006 35.3% of decisions in jurisdictions involving at least 10% of the Tribunal's work were set aside or varied,[32] as a percentage of set aside, varied or affirmed.[33] There were appeals to the AAT from 21.7% of appealable decisions (7% by the Secretary); of those, 20.4% were set aside or varied. More than half the matters determined in the AAT are by consent, and in those matters 57.1% are set aside or varied. For those matters that proceed to a decision, in 28.7% of cases the decision under review is set aside or varied. In the VRB, 28.2% of entitlement decisions are set aside, while in 48% of assessment decisions the rate increased, and reduced in 0.7% of matters. For those matters that go on to the AAT, the percentage set aside or varied by consent is similar to the overall rate; for matters finalised by decision, however, 36.9% are set aside or varied. In the MRT 51% of decisions are in the applicant's favour (ranging from 22% of decisions concerning bridging visas to 68% of partner visa decisions). For the RRT, an average of 30% of matters are determined in the applicant's favour (ranging from 2% for applicants from Malaysia, to 97% from Iraq).

The general point that can be made about these statistics is that an individual has a reasonable prospect of having an adverse decision changed and that this remains so if there is more than once chance at review and those opportunities are pursued. However, those individuals who directly benefit in this way are only a small proportion of those affected by administrative decision-making. The direct costs and benefits to those individuals who obtain a more favourable outcome, are only part of the picture. Chief Justice Spigelman has warned against the dangers of 'pantometry', or the belief that everything can be counted: '…not everything that counts can be counted. Some matters can only be judged – that is to say, they can only be assessed in a qualitative way'.[34] Qualitative assessments of tribunal review would include fairness, and the value of participation of individuals in decisions which affect them, sometimes for the first time.[35]

The ARC commented in *Better Decisions* on the need to foster cultural change within agencies, noting that 'at the primary decision-making level many agency decision makers remain sceptical of the value of merits review'.[36] This may be an unwarranted assumption, as the empirical research conducted by Creyke and McMillan since then has found a high

level of approval of external review.[37] The outcomes were summarised by Creyke in the following terms:[38]

> Overall there was a firm rejection of the following propositions, all of which were couched in the negative. That is, four out of five respondents disagreed or strongly disagreed with the proposition that external review bodies undermine government policy; more than half disagreed with the suggestion that external review bodies give too little focus to the economic and managerial imperatives of government; and nearly two-thirds rejected the proposition that external review bodies give too much emphasis to individual rights when they make decisions.
>
> However, although this was not the majority view, a significant number (around one-third) of respondents were critical of external review bodies, particularly tribunals, for their lack of understanding of the context for and pressures on government decision-making, and just over half the respondents considered that external review undesirably prolongs disputes.

In 1987 Derek Volker, then Secretary of the Department of Social Security, commented on how few people had used the various avenues of access to information or review of decisions: explained in part by the complexity of the system, but also by what he saw as rapid and significant improvements driven by external scrutiny of decisions in the quality of decisions, the reasons for decision, and clarification of legislative provisions and policies.[39] In 1998 Michael Sassella, then First Assistant Secretary in the Department of Social Security, agreed that clarification of the legislation had been positive, however, he was critical of the tribunals' 'lack of sufficient interest in government and departmental policy and practice'.[40] This criticism echoes a concern expressed in 1993 by Kees de Hoog, who commented that the tribunals involved in review of social security decisions tended to focus on legal technicalities and the individual facts before them, rather than on consistency and the needs for efficiency at the primary decision-making level.[41]

These comments reflect the impact of tribunal review as a mechanism for handling individual grievances. Consideration of tribunal review as a mechanism for addressing broader administrative issues has so far focussed on two factors: the influence of a tribunal's reasons for decision, and the need to build a bridge between tribunals and government agencies.

Tribunal reasons

Better Decisions identified two ways in which review tribunal decisions could have a broader effect on agency decision making: by ensuring that tribunal decisions are reflected in other similar decisions, and by taking into account review decisions in the development of agency policy and legislation.[42] The ARC argued that agencies need to have organisational structures and procedures to enable them to take account of tribunal decisions. The 'appropriate organisational systems' identified by the ARC required that agencies have in place processes for:[43]

- receiving review tribunal decisions and analysing their potential effects on agency decision making (including determining whether further review should be sought of, or an appeal made against, particular review tribunal decisions);
- effective and timely distribution of relevant review tribunal decisions (or a synopsis of decisions where that is sufficient), and identification of changes to legislation, guidelines and policies which should arise from those decisions; and
- training staff (particularly primary decision-makers) in appropriate aspects of administrative law, including the role of external merits review.

The ARC discussed appropriate agency responses to tribunal decisions, noting that there is a range of possible responses, including a change in agency policies or guidelines. The ARC accepted that there may be legitimate reasons why an agency which believes that a tribunal decision is not correct does not pursue available appeal rights or seek Parliamentary

clarification of its policy intention. However, the ARC commented that it is unsatisfactory for an agency to respond to a tribunal decision which it believes to be incorrect only by advising its decision makers not to follow the decision in future similar cases. Such a response does not resolve any difference of opinion between the agency and the tribunal, may lead to different results for individuals depending on how far they pursue their appeal rights, and may diminish the credibility of the tribunal in the eyes of both agency decision makers and tribunal users.[44] Appropriate responses would be to amend policy or seek an amendment to the law; to appeal or seek review of the tribunal decision; or to make a public statement of their position in relation to the tribunal decision.[45]

The other side of the equation is that tribunals need to deliver 'high quality and consistent decisions'.[46] Bayne has identified three ways in which tribunals can, through the process of making decisions, have a normative effect on primary administration:[47]

> First, in relation to the process followed, to reduce the possibility of error or injustice; secondly, in relation to the correct application of the law; and, thirdly, in relation to the kinds of considerations and policies which inform the making of discretionary judgments.

Creyke and McMillan observed from their empirical work that there was general satisfaction with the quality, length and comprehensibility of the reasons for decision of review bodies (courts and tribunals). However there were some concerns expressed about variations in the quality of reasons, and greater approval of reasons provided by the courts than those provided by the tribunals, with the AAT faring better than the specialist tribunals.[48] The study included questions intended to gauge the agencies' responses to the recommendations of the ARC. Those questions elicited the rather disappointing outcome, that only one third of agencies had address the specific recommendations concerning appropriate responses to tribunal decisions, or the recommendations for implementing appropriate organisational processes.

Communication between tribunals and agencies

The Kerr Committee recommended that one of the three members constituting its proposed Administrative Review Tribunal should be an officer of the department or agency whose decision was subject to review. This was seen as being of benefit to the tribunal, as it 'would ensure that particular knowledge of the area of administration which produced the decision under review would be available to the Tribunal'.[49] Feedback from the tribunal to the agency was considered only in the context of the limited role that the Kerr Committee perceived for review of government policy:[50]

> It may also be desirable that the Tribunal should be empowered to transmit to the appropriate Minister the opinion of the Tribunal that although the decision sought to be reviewed was properly based on government policy, government policy as applied in the particular case is operating in an oppressive, discriminatory or otherwise unjust manner.

The AAT and the other merits review tribunals adopted quite a different role in deciding whether or not to apply government policy.[51] That led to criticism both of the tribunals' independent role in determining the legality of policy, and whether its application in a particular case would result in injustice, and to charges that the tribunals were failing to consider government policy at all. Much of the force of these criticisms has waned, in part because policy guidelines are now more readily available both to tribunals and the public as a result of the requirements of Freedom of Information legislation, and advances in technology.

The call for better communication between tribunals and agencies has been consistent over the years, and has come from all quarters, including the administration,[52] the tribunals,[53] and government.[54] Tribunals must retain independence from the agencies whose decisions they

review, however many tribunals are closely linked with those agencies through funding and other administrative ties. Most tribunals have established liaison procedures with relevant agencies. As the ALRC noted in the context of the ability of tribunal to obtain information from the department whose decision is subject to review, formal and transparent links are less of a threat to independence than informal links.[55]

Some tribunals now have formal agreements with their portfolio agencies, however these are not uniformly publicly available. The Memorandum of Understanding between the Department of Immigration and the MRT and RRT is available on the tribunals' website, and includes provision for regular meetings. Much of the detail in this Agreement concerns information exchange, technology, and financial arrangements, and makes minimal reference to the organisational matters raised in *Better Decisions*. Para 3.6 rather cryptically states 'The agencies [ie, the department and the tribunals] shall endeavour to assist each other in increasing the quality and efficacy of decision making and decision making processes'.

We do have some understanding of the processes by which some agencies respond to review tribunal decisions. At the 2004 AIAL National Forum, Pat Turner outlined the processes for consideration of SSAT and AAT decisions by Centrelink and the then Department of Family and Community Services. Under those processes, there is consultation between the program branches and the Legal Services Branch in considering whether a decision of the tribunals which changes the original decision should be appealed. Centrelink makes recommendations to client agencies both as to whether a decision should be challenged, and whether policy or legislative change is warranted. Further, the SSAT receives copies of the comments on individual tribunal decisions.[56] The Centrelink/SSAT Administrative Arrangements Agreement sets out comprehensive liaison and feedback arrangements, intended to facilitate the shared goal of making the correct or preferable decision at either the primary stage or on review.

Overall, however, it is discouraging to note that while lawyers, administrators, tribunals and courts have been talking about these issues for thirty years, there is still limited evidence beyond the anecdotal. There is a need for a more concerted and coherent attempt to measure the effectiveness of the tribunals, and not just in terms of financial cost.[57] Creyke and McMillan have made a start, however their review of executive perceptions addressed all external review avenues, and for various reasons did not focus on outcomes for individual specialist tribunals. Any future empirical work needs to understand current feedback mechanisms, and to build on that in developing a protocol for appropriate mechanisms for dialogue between tribunals and agencies.

Endnotes

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23 S Tongue "An Era of Opportunities: The Role of the Administrative Review Process in Addressing Complexity, Accuracy and Consistency in Decision-Making" (1999) 93 *Canberra Bulletin of Public Administration* 54 at 54-5.
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MAKING THE AAT MORE RELEVANT - REFELECTIONS ON ITS 30TH ANNIVERSARY

The Hon Justice Garry Downes AM*

Introduction

On 1 July 2006, the Administrative Appeals Tribunal celebrated its thirtieth anniversary. A commemorative ceremony was held in Old Parliament House to mark what is, for any organisation, a significant occasion. For an organisation that was such a bold experiment at the time of its establishment, I suggest that it is quite an achievement and a testament to the vision of the members of the Kerr and Bland Committees.

While the commemorative ceremony provided an opportunity to reflect on the Tribunal's history, the Tribunal is also firmly focused on the future and has been actively reviewing its operations. The Tribunal must ensure that its review process continues to be effective and efficient and that its decisions are of the highest quality. In this way, the Tribunal will continue to be an institution that is valued and relevant in contemporary Australia.

Tribunal practice and procedure

The jurisdiction and workload of the Tribunal have grown considerably since it was established in 1976. Presently, the Tribunal has jurisdiction under some 400 Acts and other legislative instruments. In the last financial year, the Tribunal received more than 8,500 applications.

The workload of the Tribunal is diverse. This diversity extends beyond the many different types of decisions that are subject to review. It relates also to the different types of parties that participate in the process and the extent to which they may be represented. The nature of the cases and the type of material that it may be relevant for the Tribunal to consider also vary. To illustrate the point, an application lodged by a self-represented person seeking review of a social security decision is quite different from an application lodged by a large company seeking review of a decision as to its tax liability where all parties have high-level legal representation.

The Administrative Appeals Tribunal is required to provide a mechanism of review that is 'fair, just, economical, informal and quick'.[1] How these objectives will best be achieved for cases of a particular type and in individual cases will necessarily vary. The Tribunal therefore employs considerable flexibility in the procedures it adopts. Let me give you two examples of proposals to meet these objectives.

- *Review of practice and procedure*

The majority of applications lodged with the Tribunal have been managed for many years in accordance with the General Practice Direction. This document sets out the way in which the Tribunal usually progresses cases towards resolution.

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The Tribunal has decided that the General Practice Direction is no longer the most appropriate means of managing its diverse workload. Each of the Tribunal's major jurisdictions – social security, taxation, veterans' entitlements and workers' compensation – has particular characteristics that impact on the way in which those cases proceed towards resolution. These are not reflected in the procedures specified in the General Practice Direction.

The Tribunal is accordingly conducting a review of practice and procedure in each of its major jurisdictions. The review of each jurisdiction will result in the publication of a guide which sets out general information about the way in which the Tribunal will manage cases in that jurisdiction. Specific requirements to be met in individual cases will be set by Conference Registrars or Tribunal members and tailored to the particular case so that it progresses in the most effective and efficient manner.

The first stage of the review involved a review of practice and procedure in the workers' compensation jurisdiction. The Tribunal released a draft of the proposed guide for comment and received positive responses on the development of jurisdiction-specific guides. The 'Guide to the Workers' Compensation Jurisdiction' was published in March this year and the Tribunal has now commenced its review of practice and procedure in the social security jurisdiction.

Producing jurisdiction-specific guides enables the Tribunal to identify how its procedures will usually operate in that jurisdiction without hindering the flexibility necessary to manage individual cases appropriately. The guides will assist to ensure that the case management process is best adapted to the nature of the case.

- *Concurrent evidence*

When I first addressed this Forum in 2003, I noted that the Tribunal had commenced a study into the use of the concurrent evidence procedure in hearings. As you will be aware, concurrent evidence involves two or more experts giving evidence at the same time. It provides a forum in which, in addition to providing their own evidence, experts can listen to, question and critically evaluate the evidence of other experts.

Concurrent evidence is not a new concept but it is one that has been embraced by the Administrative Appeals Tribunal. It has been successfully employed in several cases that I have decided. One case involved sixteen expert witnesses on animal behaviour. They were collectively examined over four hearing days. Before the hearing, each witness prepared an expert report. They then met to identify areas of agreement and disagreement. At the hearing each witness was asked to outline their argument on areas of disagreement. The process was time-effective, helped to clarify the issues in dispute and assisted in decision-making.

The benefits of the use of concurrent evidence are obvious in large and complex cases of the kind that I have referred to. However, the Tribunal's study related to the use of concurrent evidence in Tribunal hearings more generally. Almost all of the cases included in the study were veterans' entitlements or workers' compensation cases involving expert medical evidence.

The Tribunal released its report on the study in November 2005. The study found that Tribunal members were satisfied with the procedure in almost all of the 48 cases in which it was used. Most Tribunal members reported that the process improved the quality of the expert evidence presented, made the comparison of evidence easier and enhanced the decision-making process. In relation to its impact on the overall hearing time, the study revealed that the procedure led either to time savings or was neutral in most cases. It was

noted, however, that individual experts tended to spend longer giving evidence which can have an impact on costs for the parties. A majority of representatives and experts expressed general satisfaction with the process and support for its continued use.

The Tribunal is currently developing guidelines relating to the use of the concurrent evidence procedure. The guidelines will address how the Tribunal will identify and select cases in which the procedure will be used and the actual processes to be followed in taking concurrent evidence.

Communicating effectively with Tribunal users

Communicating effectively with the parties and their representatives is an essential aspect of ensuring that the review process operates efficiently. The review process will proceed more smoothly if the parties understand how the Tribunal operates and what is expected of them.

There is great diversity among the users of the Tribunal. There are self-represented parties from a wide range of backgrounds who are likely to be applying to the Tribunal for the first time. There are representatives of parties who may not usually practice in the Tribunal and there are representatives of individuals and decision-makers who appear frequently in the Tribunal. Each of these groups has diverse information needs.

In light of this diversity, the Tribunal communicates with its users in a variety of ways and using different media. Parties are provided with a range of written materials during the course of the review process, including leaflets and letters, many of which are tailored specifically for self-represented parties. The Tribunal contacts self-represented parties by telephone at different stages of the review process to provide information about the Tribunal's processes and answer questions they may have about procedural issues. A DVD showing how the Tribunal operates is also made available to self-represented parties. Practice directions, leaflets and a range of other written information are available on the Tribunal's website.

The Tribunal is currently undertaking a review of the way in which it communicates with its users. The first stage of the review has involved engaging a consultant to assess the Tribunal's existing communication strategies and information products. The Tribunal received the consultant's report last week. The report appears to confirm that the Tribunal's general approach is sound and emphasises the value of personal contact with self-represented parties. The report does identify, however, a number of ways in which existing strategies and products can be improved as well as a number of additional strategies and products that would address particular information gaps. These include further jurisdiction-specific material.

The Tribunal will now consider the report's recommendations and commence the development of an implementation plan. The review has been a valuable exercise that will assist the Tribunal to ensure it is providing parties and their representatives with relevant and helpful information.

Making high-quality decisions

The effectiveness of the Tribunal's review process is crucial to its successful operation, particularly given that only a relatively small proportion of cases are determined by way of a Tribunal decision following a hearing. However, this is not to diminish in any way the significance of the decision-making function of the Tribunal. It is the presence of predictable, high-quality decision-making which facilitates earlier consensual resolution. I would now like to refer to a number of developments that will ensure the continued quality and relevance of the Tribunal's decisions.

- *Expertise of the Tribunal membership*

The Tribunal's jurisdiction is very broad. While the majority of the work relates to social security, taxation, veterans' entitlements and workers' compensation, the Tribunal is called upon to review many other kinds of decisions. A few examples include agricultural and veterinary chemicals, civil aviation and environmental matters.

One of the Tribunal's strengths has been the appointment of members who have special knowledge or skill in areas that are relevant to the Tribunal's jurisdiction. Current members have expertise in a range of areas including accountancy, aviation, engineering, medicine, pharmacology, science more generally, military affairs and public administration. The Tribunal's ability to draw on this expertise when reviewing decisions contributes significantly to the quality of its decisions. It is also valuable for alternative dispute resolution processes, such as neutral evaluation and case appraisal, where the issues in dispute are specialised in nature.

I have been keen to increase the range of expertise available to the Tribunal. Recent advertisements for membership vacancies in the Tribunal have included reference to specific types of expertise that are desirable. I have also been exploring other ways of bringing vacancies to the attention of potential candidates, including making contact with relevant professional organisations. These particular initiatives have resulted in the recent appointment of an actuary and a vet. I will continue to monitor the needs of the Tribunal for members with particular expertise.

- *Professional development of members*

The Tribunal clearly benefits from the appointment of members from a range of backgrounds and with a range of skills and experience. Many of the members appointed to the Tribunal will not have worked in a tribunal previously and some will not have worked in a legal environment. Members need to be adequately trained and supported over time to carry out their role effectively. Providing adequate training and support will contribute significantly to high-quality outcomes in relation to both the procedural and substantive aspects of cases.

Members' Professional Development Program

The Tribunal has developed a Members' Professional Development Program. It comprises induction and mentoring for new Members and an appraisal scheme for all Members which is supported by regular professional development activities and training and development opportunities.

The Professional Development Program is based on a Framework of Competencies which sets out the skills, knowledge and behavioural attributes required of Tribunal members to perform their functions competently. Adapted from a set of competencies originally developed by the United Kingdom Judicial Studies Board, the Tribunal's competencies were the subject of extensive consultation with the membership. There are seven key competencies for Members:

- law and procedure;
- fair and equal treatment;
- communication;
- conduct of hearing;
- evidence;
- decision-making; and
- facilitation and case management.

Shortly after appointment, new Members attend a three-day seminar outlining the operation of the Tribunal and the role and duties of Members. The seminar is presented by Members and registry staff of the Tribunal. The induction program involves both theoretical and practical elements. The topics typically covered include:

- overview of the Tribunal and the operation of the *Administrative Appeals Tribunal Act 1975*;
- the Tribunal's case management process;
- conducting a hearing;
- decision-writing and giving oral reasons; and
- law and practice in the major jurisdictions.

New Members undertake a practical orientation program involving observation of pre-hearing events and hearings and participating in hearings with more experienced members. New Members may also undertake internal or external training on specific skills such as alternative dispute resolution. New Members are matched to an experienced Member who acts as a mentor throughout the induction phase.

The appraisal scheme assesses Members' competence across the seven key competencies listed above. It involves self-appraisal and peer review with the aim of identifying current competency and devising a self-development plan to enhance competence. The appraisal is conducted by a Member at an equivalent or more senior level. The process is confidential. Only the President has access to material relating to each appraisal.

Tribunal Members are involved in regular professional development activities. Professional development meetings on topics of interest are held at the Tribunal on a regular basis. In addition, the Tribunal holds a national conference every two years. Members are also able to attend internal courses presented on relevant topics as well as external courses, seminars and conferences on an ad hoc basis.

The Professional Development Program is designed to be a holistic program which provides appropriate training and support on appointment, assists Members to develop skills and reflect on their own practice over time and offers a range of opportunities for continuing education.

Decision-writing

Decision-writing has been a particular focus of professional development within the Tribunal in recent times. Tribunal Members have attended external courses and a number of internal courses have been offered, the majority of which have been led by Professor James Raymond, a leading thinker and trainer in this area.

Decision-writing is an important aspect of the work of a Tribunal Member. In my view, reasons for decision should provide a simple, clear explanation of the issues and their resolution. A well-written decision should:

- be easily readable;
- interest the reader;
- state the issues at the outset, not the history of the litigation; and
- resolve the issues with the minimum of detail.

Adopting this approach will be of greatest benefit to the parties to the proceeding, particularly in assisting the party that is not successful to understand why the decision was made. However, it will also assist those who may otherwise read the decision, including those

undertaking case law research who will be able to identify whether a case is relevant to their purpose.

COAT Practice Manual and induction course

In addition to being President of the Tribunal, I was the Chair of the Council of Australasian Tribunals from June 2003 until last week. In April 2006, the Council published the COAT Practice Manual for Tribunals. The manual was designed to be a practical resource for tribunal members and covers topics that are relevant to a broad range of tribunals, such as statutory interpretation, procedural fairness, conduct of hearings and decision-making. From the positive feedback that the Council has received, it appears that the manual will be a useful resource for members, including the members of the Administrative Appeals Tribunal.

The Council's next major project will be the development of an online induction course for new Tribunal Members based on the content of the Practice Manual. The precise content of the course, how it will operate and the method by which it will be delivered will be investigated in the coming months. This is another area in which the Council is developing resources that will benefit a broad range of tribunals but particularly those smaller tribunals that may not have resources to invest in significant amounts of training or other professional development.

Conclusion

These are some of the recent initiatives of the Administrative Appeals Tribunal directed towards ensuring that it provides effective and efficient administrative review. We are continually reviewing and adapting our review process to the needs of Tribunal users. We provide resources and support for Tribunal Members to ensure that Tribunal decisions are of the highest quality. With these and other developments, hopefully the Tribunal will be well-positioned to celebrate further landmark anniversaries in the future.

Endnote

1 Section 2A of the *Administrative Appeals Tribunal Act 1975* (Cth).

ADMINISTRATIVE LAW IN THE ENERGY SECTOR ACCOUNTABILITY, COMPLEXITY AND CURRENT DEVELOPMENTS

Peter Nicholas*

Introduction

Competitively sourced and reliable energy is central to the Australian economy and the day-to-day lives of almost every Australian. Energy market reform was recognised as a key part of the Competition Policy Reforms in the 1990s because of the monopolistic nature of the industry and the potential for reform to deliver tangible economic benefits. Energy, particularly electricity, had traditionally been supplied by State and Territory governments through vertically integrated monopolies. The 1990s and early 2000s heralded disaggregation, a competitive spot market for electricity in eastern Australia, access regulation for electricity and gas networks and some privatisation.

The legislative vehicle for many of these reforms was cooperative Commonwealth, State and Territory legislation under the oversight of the Council of Australian Governments (COAG) and each jurisdiction's energy Ministers who came together as the Ministerial Council on Energy (MCE) in 2001. The political landscape for the latest efforts in energy reform is underpinned by the Australian Energy Market Agreement 2004 as amended in 2006 and numerous directives in COAG communiqués. Through consensus approaches, energy market reform is a key example of co-operative federalism in practice.

This paper attempts to sketch out the role of administrative law and in particular rule-making and review mechanisms in ensuring the accountable delivery of the objectives of energy market reform. The focus on the paper is principally on the economic (i.e. price) regulation of the monopoly gas and electricity network infrastructure - the poles, wires and pipes which bring competitive sourced gas or electricity generation to consumers.

There are currently over $50 billion worth of electricity and gas network assets whose service charges are regulated and whose next price reset will be conducted by the Australian Energy Regulator (AER - a Commonwealth body) under a revised national framework for electricity and gas. In electricity, network charges are over 50% of an end user's bill. Accordingly, the administrative law surrounding the rules which define the AER's regulatory task, the ability to amend those rules and the ability to challenge the regulatory decisions of the AER has been hotly debated in the reform program. The regulation of networks is also central to promoting competition in upstream (i.e. electricity generation and gas production) and downstream (e.g. retailing) markets.

This paper will not look specifically at the particular administrative law issues associated with the resources sector (such as those facing upstream gas or coal production), and has a domestic focus rather than looking at those parts of the sector which are export orientated.

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Minerals and upstream issues are coordinated at an intergovernmental level by the Ministerial Council on Mineral and Petroleum Resources (MCMPR). The resources sector has a number of access issues to contend with, each with their own administrative law difficulties, particularly with regard to ports, road and rail infrastructure. Some of these are dealt with in State or Territory regulation,[1] others have become subject to the access regime under Part IIIA of the *Trade Practices Act 1974* (TPA).[2]

There are also numerous issues in the application of the general competition prohibitions in the TPA to the energy and resources sector and the accountability framework for the ACCC in relation to those issues which are not dealt with in this paper. Additionally, new policy initiatives in resources and energy such as carbon capture and storage, water policy and emissions trading have their own administrative law complexities for which it would be premature to comment. Nonetheless, all these areas both need to interrelate with, and can usefully learn from, the strengths and weaknesses of the administrative law framework in network regulation so as to most effectively deliver their policy objectives.

Objectives of energy reform and the relevance of administrative law

There will necessarily be differences in the accountability framework for government control over a refugee versus a large monopoly service provider of an essential service. Administrative law is often discussed and argued by lawyers in a legal framework centred around the controls on government action to achieve general objectives of good public governance, accountability, transparency and the protection of individual rights. Much of the administrative law literature and principles have been developed from the testing and analysis of cases where government action infringes on the rights and liberties of individuals.

In the energy sector, while treatment of individual consumer rights (e.g. protections from wrongful disconnection) is a key part of the framework, one of the recent challenges for the MCE has been establishing an accountability framework, through administrative law mechanisms, which deals with the rights of a network service provider to be involved in the development of the rules under which they are regulated and allows them to challenge the decisions of the government regulators who determine how much they can earn. While government accountability in relation to large business interests is by no means a new issue,[3] the market, engineering, commercial, technical and legislative complexities surrounding gas and electricity infrastructure necessitates that administrative law be understood and analysed also by reference to the particular policy objectives in this area.

The most vivid example of the need to adapt administrative law mechanisms to the energy market framework was the debate surrounding whether or not to allow merits review of economic regulatory decisions. Because of the power asymmetries involved, consumer groups were opposed to any review rights beyond judicial review whereas network businesses strongly advocated merits review rights to promote investment in the sector.

The political statement of energy reform objectives comes from the objectives of the AEMA:

> 2.1 The objectives of this agreement are:
>
> (a) the promotion of the long term interests of consumers with regard to the price, quality and reliability of electricity and gas services; and
>
> (b) the establishment of a framework for further reform to:
>
> (i) strengthen the quality, timeliness and national character of governance of the energy markets, to improve the climate of investment;

(ii) streamline and improve the quality of economic regulation across energy markets to lower the cost and complexity of regulation facing investors, enhance regulatory certainty, and lower barriers to competition;

(iii) improve the planning and development of electricity transmission networks, to create a stable framework for efficient investment in new (including distributed) generation and transmission capacity;

(iv) enhance the participation of energy users in the markets including through demand side management and the further introduction of retail competition, to increase the value of energy services to households and businesses;

(v) further increase the penetration of natural gas, to lower energy costs and improve energy services, particularly to regional Australia, and reduce greenhouse emissions; and

(vi) address greenhouse emissions from the energy sector, in light of the concerns about climate change and the need for a stable long-term framework for investment in energy supplies.

The sub-objectives most relevant to the administrative law mechanisms needed for the energy sector are (b)(i) - governance and (b)(ii) - quality of economic regulation along with the general commitment to further the engagement of consumers/end users in (a) and (b)(iv). It is also important for the framework to provide certainty which facilitates efficient investment referred to in (b)(iii).

The AEMA objectives are implemented through a variety of policies and regulation at Commonwealth, State and Territory level. In the cooperative legislative framework for national electricity[4] and gas regulation these objectives are given effect to by the national electricity/gas objective. The national electricity objective provides as follows:

> The objective of this Law is to is to promote efficient investment in, and efficient operation and use of, electricity services for the long term interests of consumers of electricity with respect to –
>
> (a) price, quality, safety, reliability and security of supply of electricity; and
>
> (b) the reliability, safety and security of the national electricity system.

The objective was confirmed as the basis for the gas and electricity national frameworks by the Expert Panel on Energy Access Pricing (Expert Panel) which reported to the MCE in April 2006.[5] The objectives are designed to recognise that promoting all aspects of economic efficiency is the best way of delivering benefits for the long term interests of consumers in the gas and electricity energy markets. The regulatory design has been focused upon this single objective to avoid the uncertainty of regulatory and rule-making bodies being asked to balance conflicting objectives in carrying out their functions.

MCE documents have also emphasised that particular social and environmental objectives, which often involve cross-subsidies in economic terms, are best dealt with outside of the national economic regulatory framework through separate initiatives and instruments.[6] Accordingly, the Carbon Pollution Reduction Scheme and expanded renewable energy target are being implemented outside of the cooperative legislative framework. This allows

the energy market framework to focus on an efficiency framework which minimises the costs of these external instruments. [7]

The Australian Competition Tribunal in *Re: Application by ElectraNet Pty Limited (No 3*) [2008] ACompT 3 (30 September 2008) (ElectraNet (No 3)) recognised the centrality of the national electricity objective in carrying out its review function and the particular economic focus of the legislation:

> The national electricity objective provides the overarching economic objective for regulation under the Law: the promotion of efficient investment in the long term interests of consumers. Consumers will benefit in the long run if resources are used efficiently, i.e. resources are allocated to the delivery of goods and services in accordance with consumer preferences at least cost. As reflected in the revenue and pricing principles, this in turn requires prices to reflect the long run cost of supply and to support efficient investment, providing investors with a return which covers the opportunity cost of capital required to deliver the services. [8]

The key tensions in the design of the energy regulatory framework from an administrative law perspective have been:

(a) the extent to which key parts of the framework and government powers are set out in legislation (and hence hard to change in an environment requiring unanimous agreement of all governments) as opposed to those matters that can be dealt with by statutory rules;

(b) the role of the community and the statutory rule–maker in the process of amendment to the statutory rules which bind regulatory bodies and the community alike;

(c) the flexibility/discretion provided to the AER and regulated business under the rules in the context of the level of prescription that is appropriate or possible; and

(d) the nature of the review mechanism for decisions of the AER and whether such a review mechanism will promote outcomes that are in the long term interests of consumers given the asymmetries of interest and information between business, the regulator and consumers.

Consideration of all these issues has resulted in a number of innovative resolutions to attempt to best meet the reform objectives. This paper will look at the role and influence of administrative law in arriving at a position on each of the issues, starting with a general background of the legislative framework and dealing with the four issues in turn. All of these have benefited from extensive engagement with stakeholders through submissions, working groups and consultation sessions run by officials from the Ministerial Council on Energy.

Co-operative legislative structure

The electricity and gas regimes hinge upon a complex co-operative scheme which takes it outside of the ordinary relationship between Parliament and the Executive. The complexities of setting up the scheme and making it work within constitutional and practical limitations have key implications for the administrative law mechanisms suitable to ensure decision makers are accountable.

The current gas and electricity regimes

The current gas and electricity regimes are co-operative Commonwealth, State and Territory legislative schemes. The Commonwealth and all the States and Territories are part of the gas access regime and all, with the exception of Western Australia and the Northern Territory, participate in the electricity regime. The electricity regime was amended on

1 January 2008 and the gas regime was amended on 1 July 2008 to create consistency between the governance models for electricity and gas and to make other policy changes to both regimes.[9] Under the AEMA, all changes to the collective legislative schemes and their application in each jurisdiction (both laws and regulations) are subject to the unanimous agreement of all energy Ministers.

The schemes work through 'lead' legislation in South Australia:

(a) the *National Electricity (South Australia) Act 1996*; and

(b) the *National Gas (South Australia) Act 2007*.

The Schedule to the lead legislation is then applied as the law in the other States and Territories through 'Application Acts'. The Schedules are referred to as the National Electricity Law (NEL) and National Gas Law (NGL) respectively. Western Australia has not yet applied the revised gas access regime, but expects to do so shortly. [10] The Commonwealth currently applies the regimes to the offshore area through the *Australian Energy Market Act 2004* (the AEM Act).[11]

The current electricity and gas regimes give functions and powers to a statutory rule-maker and market development body, the Australian Energy Market Commission (AEMC), established by the South Australian *Australian Energy Market Commission Establishment Act 2004,* and to the energy regulator the AER, established by Part IIIAA of the TPA. The Commonwealth Parliament consents to the conferral of functions and powers and the imposition of duties on the AER and other Commonwealth bodies through the TPA and AEM Act to overcome any issues raised by the decision in *R v Hughes*. [12]

The National Electricity Rules (NER) are made under the NEL to provide detailed operational regulatory requirements for electricity transmission and distribution and the operation of the wholesale spot market for electricity. The NER have force of law wherever the NEL is applied[13]. They can be amended by the AEMC after a rule-change process defined in the NEL.[14] They currently run to 1151 pages and allow a myriad of other technical, operational and regulatory matters to be dealt with by other guidelines, standards and methodologies promulgated by the AER or the market operator, currently NEMMCO.[15]

There are also a limited number of Regulations made under the *National Electricity (South Australia) Act 1996* and applied in each jurisdiction dealing with machinery matters including aspects of the rule change process and the prescription of civil penalty provisions.

Both the NER and Regulations are not subject to parliamentary disallowance[16] because it is not considered appropriate for the Parliament of one jurisdiction to disallow a legislative instrument that applies to all jurisdictions. The accountability for rule-making is discussed below. The power to make regulations is seen as being constrained by the requirement to unanimous agreement of MCE Ministers and the limited subject matters for which regulations may be made.

All of the instruments are also subject to a comprehensive special interpretation schedule, currently Schedule 2 of the NEL.

The new gas regime implements the governance arrangements agreed in the AEMA consistently with the NEL. The AEMC is responsible for rule–making and market development, while the AER is responsible for economic regulation and enforcement. Additionally, Ministers and the National Competition Council (NCC) retain their existing roles in relation to whether regulation is applied to particular gas networks.

Consistent with the electricity regime, the NGL is supplemented by National Gas Rules (NGR) and a limited number of regulations dealing with minor matters and the prescription of civil penalties. The initial NGR were made by the South Australian Energy Minister on the recommendation of the MCE. The AEMC is now responsible for the ongoing administration of the NGR, under powers given to the AEMC in the NGL. This new framework replaces the current *Gas Pipelines Access (South Australia) Act 1997* and the National Third Party Access Code for Natural Gas Pipeline Systems (Gas Code).[17]

Western Australia will continue to apply the access related parts of the NGL, and differ only in respect to institutional arrangements, namely retention of its local regulator, the Economic Regulation Authority and an independent arbitrator for access disputes.

Designation of matters in the NEL and NGL

As mentioned before, a key tension has been to find the right balance between what powers and accountability mechanisms should be provided for by the NEL and NGL themselves and what matters should be delegated to the other subordinate instruments. The scope for Parliamentary and/or Ministerial oversight of the different subordinate instruments has been a key concern for governments and stakeholders in this process. Put simply, the laws are essentially a reflection of the policy choices of the politically accountable executive governments through the MCE process whereas the rules are subject to the policy choices of the AEMC subject to the guidance and constraints provided by the laws. The challenge is finding the appropriate means of providing discipline on the decision makers in the regime to provide an appropriately transparent level of accountability. Broadly, the architecture for the regimes after the amendments is as follows:

Matters governed exclusively in the law

The objective of the law and high level economic principles	The objective and other high level economic principles (form of regulation factors and revenue and pricing principles) are set out in the law and the law requires the AER and AEMC to take them into account in particular circumstances.
Rule-making	The scope of the power to make rules (s 34 of the NEL) and the power for the AEMC to amend the rules in accordance with detailed consultation requirements is in the law (Part 7).
Enforcement powers of the AER	These include — investigation powers (including search warrants); — general information gathering power (s 28 of the NEL); and — powers to commence proceedings and issue infringement notices.
Advisory/review powers for the AEMC	The ability for MCE directed reviews and reviews by the AEMC on their own initiative.

Review of decision-making of AEMC, AER and other regulatory decisions	Judicial review is provided for AEMC decisions and AER decisions (through *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act). A limited merits review model is provided for AER economic regulatory decisions and a few other regulatory decisions.
Treatment of confidential information by regulatory bodies	Dealing with protection and disclosure of confidential information.
Matters for Regulations	
Machinery and whole of government matters	These include — prescribing civil penalty provisions; — minor details of the rule change process (e.g. information requirements) — Savings and transitional issues; and — Liability/immunity issues concerning the market operator/AEMC.
Matters for law and rules	
Requirements for registration to participate in the national electricity market (NEM)	There are detailed registration requirements in chapter 2 of the NER, however the obligation to be registered rests in the NEL.
The scope of regulation	Coverage in gas and the definition of the networks in electricity is in the laws, with more minor or technical issues in the rules. Limited 'greenfield' exemptions from regulation are in the NGL.
Form of regulation	A differentiation between upfront price control and a negotiate/arbitrate framework is set out in the laws with further details in the rules.
AER regulatory information powers	The power to require information to be maintained, kept and produced to the AER in particular forms is in the laws. There is a limited role of rules to clarify one of the tests regarding who may be issued with a notice.[18]
Provision for access disputes between a network and user	The high level framework for the AER to resolve disputes about access to a network is in the laws, with additional detail in the rules.

Performance Reporting	The power for the AER to prepare performance reports on the operation and financial performance of network service providers is in the law but is subject to limited consultation requirements in the rules.
A number of high level competition and operation separation requirements	High level competition law prohibitions (such as a prohibition on preventing and hindering access) and separation requirements (ring-fencing) are in the laws, with further details in the rules.
Safety and security issues in the NEM	High level powers of NEMMCO to ensure system security and operation are in the laws with further detail in the rules.

Matters contained in the rules

Electricity market operation and trading	Extensive rules on the wholesale market, market system security and metering of electricity. A process for resolving market disputes is in Chapter 8 of the NER.
Network planning and access requirements	Extensive rules in electricity, more limited rules in gas concerning facilitation of request for access.
The content, consultation requirements and guidance for economic regulation of networks	Subject to a requirement in the laws to take into account the revenue and pricing principles, the rules govern all other aspects of the AER's functions and powers in this area.

The objective of the framework is that traditional executive governmental powers are enshrined in legislation whereas market and complex regulatory issues are left to the subordinate rules. Governments have ensured that review mechanisms for decisions that affect a party's interests are in the law, while the actual rules that govern the AER's decision-making are within the power of the AEMC to amend and develop over time through the rules.

Institutional 'separation of powers'

Another key achievement of this delegated rule-making function is to enshrine separation between rule-making, and hence policy development, and the task of applying and enforcing the rules. This 'separation of powers' is another institutional innovation of the energy reforms to deal with the perception of regulatory creep by government agencies without the need to refer more matters back to the scrutiny of Parliament. However, this does not prevent the AER from having other functions to promulgate additional detailed requirements, methodologies or guidelines delegated to it by the rules.

The key feature and accountability mechanism of these additional requirements is that they always remain subject to the guidance, limitations and constraints imposed by the rules and are subject to amendment through the rule change process. A flexible and market driven process for amending the rules means scrutiny of the outcomes of every AER decision can

be assessed to determine if there are any rules which should be amended before their next application to the same or another business. The threat of a rule change needs to be seen as an ultimate administrative law accountability mechanism imposed upon the AER in relation to the exercise of its powers.

Delegated rule-making

The process for amending a rule is a key administrative law innovation in the energy sector to provide an appropriate accountability framework for the AEMC's significant role in the market. To accommodate the development of the rules to further the policy objectives of MCE, the architecture of the rule change process in the laws is as follows:

(a) the process for amending a rule may be initiated by any person, although the AEMC may not initiate a rule change other than for corrections of errors or non-material changes;

(b) rule change applications must be accompanied by a justification for the changes proposed;

(c) final determination by the AEMC with optional public hearings or other consultative mechanisms; and

(d) the AEMC may only make a Rule if it is satisfied that the Rule will or is likely to contribute to the achievement of the national electricity/gas objective - the rule-making test.

(e) The AEMC must also have regard to:

- the revenue and pricing principles and form of regulation factors in the law when making particular types of rules; and
- any MCE Statement of Policy Principles issued under the law (such as the May 2008 MCE Statement of Policy Principles in regard to smart meters); and

(f) AEMC decisions must be fully justified with detailed reasons.

The above architecture is intended to make the AEMC responsive to requests for changes from all those affected by the rules and make the AEMC the impartial decision maker between competing views. While the AEMC cannot initiate rule changes, the recent amendments clarify that the AEMC can respond to a rule change request by making the rule which better achieves the statutory objective rather than just make incremental improvements suggested by the original proponent (referred to as a more preferable rule).

By utilising an open and transparent rule change process, the model is designed to better accommodate the ultimate goal of furthering the long-term interests of consumers and service providers. Because rule-making, even within the bounds of its enabling legislation, is essentially a policy matter, judicial rather than any merits review is provided for decisions of the AEMC. This accords with the Administrative Review Council Guidelines 'What Decisions Should be Subject to Merits Review?' which indicates that legislation-like decisions should not be subject to merits review.[19]

The AEMC has dealt with over 50 rule changes since July 2005 and currently has 21 rule change applications on foot. Despite the fact that there is ‘open standing’ for anyone to request changes to the rules, there has not been a flood of frivolous or vexatious applications to the AEMC. The fact that submissions from almost all stakeholder groups

have been critical of particular aspects of decisions taken by the AEMC is more an indication of the lively debate and magnitude of the decisions taken in the rules for the economic interests of each stakeholder rather than a failing in the administrative law accountability model applicable to the AEMC.

Despite being strictly guided by the objective, the AEMC has considerable discretion in making policy choices for the future development of the rules. This discretion is underlined by the fact that the AEMC in making a rule can weigh up different aspects of the national electricity/gas objective as it considers appropriate in the circumstances.[20] Accordingly, the AEMC is primarily accountable through its appointment and reporting to the MCE, legal requirements for making rules that contribute to the achievement of the objective, public consultation and scrutiny requirements and the ability for guidance through an MCE Statement of Policy Principles.

A 'fit–for–purpose' decision making model for setting revenue/price of networks

The decision-making model, and in particular the roles of the AER and regulated business, has been one of the most vexed issues of energy market reform. The key interests from an administrative law perspective are the role of prescription in enhancing accountability and the role that the nature of the individual decision rules play in determining whether merits review is necessary to complement the inherent existence and recourse to judicial review remedies.

The decision-making model was one of the core questions debated and commented upon by the Expert Panel. The debate has been compartmentalised into possible AER decision-making models:

(a) 'consider–decide' (also called submit-determine or receive-determine) where the fundamental premises is that the ultimate discretion for an aspect or the whole of a regulatory decision rests with the AER within the guidance and limitations offered by the law. In this model, the AER may prefer what it considers the best solution, value or mechanism rather than be limited by first needing a ground to reject the proposal of the service provider;

(b) 'propose–respond' where the AER's task is to assess a proposed aspect or the whole of a regulatory decision and is forced to accept the proposal where it is within the bounds defined by the rules.[21] In this model the AER cannot prefer what it considers a better outcome if the service providers proposal is compliant with the test in the rules; and

(c) 'fit-for-purpose' where the rules use a combination of consider-decide and propose-respond decision making models in a way that best achieves the objectives and revenue and pricing principles. This is essentially a hybrid approach and leaves the scope of the AER's discretion in the hands of the AEMC.

The Expert Panel warned that an unconstrained propose-respond model was likely to result in a 'systemic increase in the returns of regulated entities relative to the receive-determine/consider-decide model'[22] but equally warned against enshrining a consider-decide model. It is unsurprising that consumer/user groups prefer consider-decide and regulated entities have lobbied for a propose-respond framework. The MCE policy position is to adopt the Expert Panel recommended 'fit-for-purpose' framework in the laws such that the AEMC determines how the AER exercises its economic regulatory functions through its open consultation process.

The AEMC has already applied its understanding of 'fit-for-purpose' in its decisions on the regulation of electricity transmission services[23] and the MCE applied its understanding of the

fit-for-purpose framework for the initial rules for the regulation of distribution networks by the AER and in the initial NGR in light of the AEMC's work to date. The NGR implement the decision through a meta-decision rule:

> **40 AER's discretion in decision making process regarding access arrangement proposal**
>
> **No discretion**
>
> (1) If the Law states that the AER has no discretion under a particular provision of the Law, then the discretion is entirely excluded in regard to an element of an access arrangement proposal governed by the relevant provision.
>
> **Limited discretion**
>
> (2) If the Law states that the AER's discretion under a particular provision of the Law is limited, then the AER may not withhold its approval to an element of an access arrangement proposal that is governed by the relevant provision if the AER is satisfied that it:
>
> (a) complies with applicable requirements of the Law; and
>
> (b) is consistent with applicable criteria (if any) prescribed by the Law.
>
> **Full discretion**
>
> (3) In all other cases, the AER has a discretion to withhold its approval to an element of an access arrangement proposal if, in the AER's opinion, a preferable alternative exists that:
>
> (a) complies with applicable requirements of the Law; and
>
> (b) is consistent with applicable criteria (if any) prescribed by the Law.

Nonetheless, the debate over 'fit-for-purpose' is to some extent a time-consuming distraction from the real task of defining the AER's role with respect to each aspect of a revenue/price proposal from a regulated entity. Generally, the greater the level of prescription, the more confident the regulated businesses feel with the AER having discretion in a particular area with regard to the application of those rules. The result of the 'fit-for-purpose' framework in electricity transmission is that the rules enshrine some of the most detailed aspects of complex regulatory methodology with the force of law. They are probably the most detailed rules for economic regulatory methodology in the world which are not made by the body which also carries out the regulation task itself.

How the AER makes economic regulatory decisions

The current 'building blocks methodology' for electricity transmission involves a process of at least 13 months to develop a five year price path based on revenue and/or price constraints. To settle on an 'allowable revenue' over the five year period the following need to be determined:

(a) the exact assets/services which fall within the scope of revenue regulation and those which fall within a negotiate/arbitrate or unregulated framework;

(b) operating and capital expenditure forecasts for the next 5 years (potentially billions of dollars each for some network businesses);

(c) the capital asset value of the business, amended to take into account past and future efficient investments;

(d) an appropriate rate of return on the capital asset value commensurate with the regulatory and commercial risks involved;

(e) the treatment of depreciation of the assets within the regulatory asset base;

(f) a treatment of taxation for the five year period;

(g) what events will impact or change the revenue allocation over the five year period;

(h) applicable service, efficiency and demand management incentive mechanisms to counter incentives created by the building blocks approach that would be inconsistent with the objective; and

(i) how the allowable revenue will be turned into prices (i.e. price cap or revenue cap).

There are also annual limitations on how particular prices are charged (i.e. pricing rules) which further guide how a regulated business recovers its allowable revenue. These essentially answer the question of 'who pays' for a particular service/revenue allowance.

The AEMC's fit-for-purpose model essentially:

(a) decides some of these matters in the rules themselves (e.g. fully regulated services are prescribed and a formula and values for the return on capital (WACC) are listed in the rules);

(b) gives the AER the discretion to determine aspects of the decision in a way it thinks best (generally consider-decide), usually through empowering the AER to issue models, schemes or methodologies (e.g. efficiency benefit sharing and service performance incentives);
(c) gives weight to aspects of a service providers proposal, such that amounts, values or estimates of a service providers proposal must be accepted if they meet the detailed requirements of the rules (e.g. capital and operating expenditure).

The necessary complexity of the regulatory process for such large and significant services makes end user involvement in the regulatory process difficult. Draft and final decisions frequently run into hundreds of pages. The Expert Panel recognised an information asymmetry between business and regulator and even greater asymmetry between the business and users due to the confidential nature of much of the information. The uncertainty inherent in the regulatory model which attempts to predict and regulate five years into the future is also another key pressure of decision-making and accountability arrangements. The key concern for the rule-maker and the regulator is to strike the appropriate balance between allowing a service provider to earn an appropriate return with incentives to make further efficiency gains without compromising reliable service delivery while ensuring consumers pay no more than is necessary for this outcome.

The rest of this paper will look at how administrative law review mechanisms operate on this complex legal environment to contribute to the achievement of the reform objectives.

Complexities of judicial review in the energy sector

Judicial review of all governmental decisions in the energy sector is a given accountability measure upon which all stakeholders agree. The actions of the AEMC, AER and other regulatory bodies (e.g. the NEM dispute resolution panel, National Competition Council, NEMMCO and energy Ministers) are all subject to judicial review. State and Territory bodies are subject to judicial review in State or Territory Supreme Courts[24] and Commonwealth bodies are subject to judicial review through the inclusion of the electricity and gas regimes in Schedule 3 of the ADJR Act. The test for standing in the both cases is the 'person aggrieved' test.

The administrative law debate in the energy sector over the last four years has centred on the question of whether or not judicial review is a sufficient review mechanism or whether some form of merit review is required. [25] As acknowledged in the October 2005 MCE consultation paper, the nature of the regulator's task and the level of prescription in the rules will be a key determinate of the effectiveness of judicial review as being an appropriate and useful accountability discipline on the decision maker. It is undeniable that the additional criteria and prescription in the rules for the AER in exercising its discretion as the result of the application of the 'fit-for-purpose' model provide a far greater number of rules whose application could be subject to judicial review challenge.

Nonetheless, the significance of the economic regulatory decisions of the AER and their legal and economic complexity will continue to pose significant challenges to administrative lawyers and the courts in judicial review applications. In assessing the application of the rules, Courts may be asked to assess the application of complex and specific formula such as:

$$\mathrm{WACC} = \mathrm{k_e}\,\frac{E}{V} + \mathrm{k_d}\,\frac{D}{V}$$

or

$$\mathrm{ETC_t} = (\mathrm{ETI_t} \times \mathrm{r_t})\,(1 - \gamma)$$

or be asked to look at the assessment by the AER of large amounts of future expenditure against economic principles of efficiency, prudence and realistic assumptions of demand growth. [26] The decision of *Re Michael; Ex parte Epic Energy (WA) Nominees Pty Ltd* [27] demonstrates the traps for a regulator to fall into errors of law in interpreting and giving effect to layers of objectives and principles in the previous gas access regime.

Nonetheless, despite their prescription the 'fit-for-purpose' rules do still give the AER significant discretion to exercise in assessing complex factual matters and allow the weighing up of criteria to come up with on-balance outcomes. Even with very detailed rules, the economic regulatory framework remains complex and subject to judgement calls by the regulator on key parts of the building block methodology. It is particularly with regard to these factual and judgement matters that service providers have emphasised that a judicial review model would be unable to provide the necessary level of oversight and accountability to adequately protect their legitimate businesses interests and create a climate for continued investment in the sector.

Additionally, in the more detailed regulatory framework, the issue of when and how expert evidence can be used will always be complex. This is demonstrated by the relevant case law:

(a) In *Re Michael; Ex parte Epic Energy (WA) Nominees Pty Ltd*[28] the Full Court of Western Australian Supreme Court noted the usefulness of expert economic evidence in assisting the court to understand the economic concepts used in, and underlying, the current gas access legislation yet had significant problems with the particular evidence lead which went beyond the interpretation task or applied economic theory without close connection with the precise form of the legislation being examined.[29]

(b) In *BHP Billiton Iron Ore Pty Ltd v National Competition Council (No 2)*[30] the NCC was ordered to pay some of the costs of the applicants because the Court did not see any use of its expert economic evidence on the concept of what was a 'production process' under Part IIIA of the TPA. The original decision stated that:

> No party asserted that the term 'production process' has a technical or specialised meaning in economics. On that basis, it is not possible for the Court to construe those words other than in accordance with their most ordinary and natural meaning. It is therefore not permissible to receive the views of witnesses, expert or lay, as to their preferred interpretation or to explain how the words of a statute would be expected to be applied to the circumstances of the case: *Royal Insurance Australia Ltd v Government Insurance Office (NSW)* [1994] 1 VR 123 at 133-4. Such evidence is nothing more than submission and argument and indeed an attempt to usurp the judicial function.[31]

(c) In *TXU Electricity Ltd v Office of the Regulator General & Ors* [32] the issue of the 'CPI-X' building blocks methodology needed to be explained by reference to expert economic evidence for the legislative scheme to make any sense.

To the extent judicial review of decision-making in the energy sector becomes more prevalent, the Courts will continue to come to terms with how to unpick the problem and apply administrative law principles effectively and efficiency to the issues raised.

The 'limited merits' review model

In June 2006 MCE made a policy decision that judicial review was not a sufficient review mechanism for the economic regulatory decisions of the AER and that a limited merits review model would best achieve its reform objectives. In coming to this decision, the MCE decision noted its decision was based on the following criteria for developing an appropriate review scheme which were in turn based upon its own reform objectives:

(a) maximising accountability;

(b) maximising regulatory certainty;

(c) maximising the conditions for the decision-maker to make a correct initial decision;

(d) achieving the best decisions possible;

(e) ensuring that all stakeholders' interests are taken into account, including those of service and network providers, and consumers;

(f) minimising the risk of 'gaming'; and

(g) minimising time delays and cost.[33]

The limited merits review model is largely based upon the merits review model operating in the previous gas access regime[34] but has been adapted to better achieve the reform objectives and criteria for assessing the merits review model. The drafting of the provisions establishing the merits review model was subject to consultation in the exposure drafts of the

NEL and NGL. The architecture of the review model and the concerns of stakeholders which the model attempts to address are set out below.

Key stakeholder concerns with merits review

During consultation stakeholders raised a number of criticisms of merits review models for the energy sector with consumer and user groups being most vocal that a merits review model would not promote their long-term interests. These concerns were essentially based on the complexity and asymmetries in the regulatory review process outlined above. In particular:

(a) regulated service providers are able to 'cherry pick' key aspects of a decision because of their asymmetric information advantage over other parties. The result is all upside for the regulated business;

(b) regulated service providers have a direct interest in improving every aspect of a regulatory decision whereas the costs to end users of these changes will be minimal in overall terms (i.e. a minor change in the rate of return would have a huge financial impact to the service provider but would be smeared over the customer base);

(c) the ordinary standing arrangements prohibit broad involvement of end users in the process whereas the regulator's decision has been the result of extensive consultation and consideration for over a year;

(d) a regulated service provider will essentially pass on the costs of litigation through its regulated fees and charges with the implication that customers pay twice in opposing a merits review challenge;

(e) regulated service providers may forum shop between judicial and merits review to take advantage of the relative complexities;

(f) a tribunal, which necessarily has less staff and access to expertise than the regulator, may misapply the complexities or facts of particular cases to the detriment of consumers; and

(g) the concern that the fear of complex and expensive merits review challenges will make the regulator err in favour of regulated service providers who are most likely to appeal.

Addressing concerns - standing and costs

Standing to commence proceedings and intervene in proceedings once commenced is an important area where the review model attempts to bring consumer groups into the limited merits review framework. Standing to commence or intervene in proceedings has been a significant concern for user/consumer groups in the current gas access regime and other State review regimes. In *Application by Orica IC Assets; re Moomba to Sydney Gas Pipeline (No 2)*[35] the Australian Competition Tribunal refused standing to the Energy Users Association of Australia (EUAA) and Energy Action Group (EAG) noting that merely having objects and purposes directly related to the decision in question was not a ground to granting standing.[36] Under the new regime the following persons will have standing to commence proceedings:

(a) the service provider themselves;

(b) users or end users whose commercial interests are materially affected by the decision; and

(c) a user or consumer association (a body with members who are users or end users and which promotes their interests in relation to the provision of regulated services).

These persons will also have to demonstrate that there is a serious issue to be tried, the error alleged is material to the operation or effect of the decision[37] and that they had been involved in the original decision making process. Leave may also be refused to a service provider who has withheld information, mislead the decision maker, delayed the decision or failed to comply with directions of the decision maker. The aim is to have a fair but relatively narrow gate for the commencement of proceedings. However, broader intervention powers are available for:

(a) anyone with a 'sufficient interest' in the decision being reviewed (including the service provider themselves);

(b) a Minister of a participating jurisdiction; and

(c) user or consumer associations and interest groups (where interest groups do not need to have members but have objects or purposes to represent and promote the interests of users or end users).

The wide intervention powers are designed to ensure all relevant matters are brought to the Tribunal's consideration in a review and the service provider's choice of initiating a merits review will not always be a win-win situation. To further facilitate the intervention by user or consumer associations representing small to medium consumers, those organisations along with the original decision-maker will not be subject to any costs orders unless they conduct their case regardless of the costs, time and arguments of the applicant.

The role of Ministers in intervening in the merits review process is also a feature of the public policy implications of the regulatory decisions and is analogous to the standing attributable to members of the EU in competition law matters through Article 230 of the European Convention.

Costs will remain another deterrent for other parties to a review although a proposal for there to be a presumption of indemnity costs was dropped by the MCE.

Addressing concerns - role of the decision-maker and grounds of review

As another counter-balance to the position of the regulated entity and the Tribunal, the original decision-maker, in most cases the AER, has been made a full party to proceedings to counter the limitations which the *Hardiman* principle may impose[38]. The depth of expertise of the regulator in explaining and justifying its position was seen as essential to a better outcome being achieved by the Tribunal. Additional aspects to enhance the role of the original decision-maker include:

(d) the Tribunal is required to have specific regard to any public policy document relied upon by the original decision-maker in making its decisions;

(e) the original decision-maker may also raise other matters related to a ground of review or outcomes or effects consequential to the issues already raised;

(f) the review application will not stay the operation of any price or revenue determination coming into effect; and

(g) the Tribunal will be able to refer complex matters back to the original decision- maker to correct an error rather than do its own calculations.

The grounds for the Tribunal to overturn a decision are also limited, further emphasising the appropriate deference to the views of the regulator in coming to its view on matters where reasonable minds may differ. Any applicant for merits review will need to establish that:

(a) the original decision-maker made an error of fact in its findings of facts, and that error of fact was material to the making of the decision;

(b) the original decision-maker made more than 1 error of fact in its findings of facts, and that those errors of fact, in combination, were material to the making of the decision;

(c) the exercise of the original decision-maker's discretion was incorrect, having regard to all the circumstances;

(d) the original decision-maker's decision was unreasonable, having regard to all the circumstances.

These grounds were expected to retain the meaning set out by the Full Federal Court in interpreting essentially the same grounds in the Gas Pipelines Access Law in *ACCC v Australian Competition Tribunal.*[39] This was broadly confirmed by the Tribunal in ElectraNet (No 3) at [64] – [79]. Accordingly the finding of fact grounds (a) and (b) will include:

(a) the existence of an historical fact being an event or circumstance;

(b) the existence of a present fact being an event or circumstance; and

(c) an opinion about the existence of a future fact or circumstance.

The Full Federal Court made clear that the third aspect of facts 'should encompass opinions formed by the ACCC based upon approaches to the assessment of facts or methodologies which it has chosen to apply' (at [171]). The Full Federal Court at [176] explained that the Tribunal when considering whether the 'incorrect' or 'unreasonable' grounds (which will be (c) and (d) above) are made out, has to do more than simply prefer a different outcome to overturn the regulator's discretion. However, the Full Federal Court rejected the argument that the unreasonable ground was limited to *Wednesbury* unreasonableness[40]. The Full Court explained that:

> The concept of 'unreasonableness' imports want of reason. That is to say the particular discretion exercised by the ACCC is not justified by reference to its stated reasons. There may be a error of logic or some discontinuity or non sequitur in the reasoning. It may be that the discretion has an element of arbitrariness about it because there is an absence of reason to explain the discretionary choices made by the ACCC in arriving at its conclusions.[41]

The Tribunal in ElectraNet (No 3) also added that:

> In addition, of course, the exercise of a discretion may miscarry because it is based upon a misconstruction or misapplication of the relevant principles or methodologies or factors required to be considered by the Law or by the Rules, or by a failure to have regard to a mandatory relevant factor as prescribed by the Law or by the Rules, or where its exercise is affected by the regulator taking into account a factor extraneous to those relevant by reason of the Law and the Rules.[42]

The Tribunal also saw the unreasonableness ground as an overarching ground of review such that '[t]he unreasonableness must be of the AER's decision itself, not of a step in its factual findings or its reasoning. It is important to recognise that it is the AER's decision which must be unreasonable having regard to all the circumstances before that ground is enlivened.'[43]

Overall, the grounds of review and the other mechanisms for the decision-maker to be involved in the review should ensure that appropriate deference is given to the expertise and findings of the regulator in light of the consultative process. This should still providing significant scope for the Tribunal to correct regulatory errors which would not be dealt with through judicial review.

Addressing concerns - admissible evidence

Another core limitation for the merits review model is that evidence and submissions will be limited to matters raised before the original decision maker in making out a ground of review. However, once a ground of review is made out the review body may allow new information or material if the material would assist it in making a determination and was not unreasonably withheld from the decision-maker. The limitation on evidence is aimed at addressing risks of information gaming by regulated service providers. The basic limitation on new evidence is replicated from the GPAL and has been narrowly interpreted to preclude attempts to bring in additional evidence into the review framework.

In *Envestra ltd v District Court of South Australia and Anor* [44] the South Australian Supreme Court determined that the provisions did not allow the calling of an expert witness whose report had previously been considered by the South Australian regulator. The restrictions on evidence were recognised and incorporated by COAG into the Competition Principles Agreement on 13 April 2007.[45]

Which decisions - the challenge of pre-decisions

The MCE clearly committed to limited merits review of the administrative revenue/price setting decisions of the AER (i.e. the application of the law/rules to an individual business) while at the same time deciding that the policy orientated rule-making decisions of the AEMC were not suitable for review. The issue that was debated extensively in the finalisation of the NEL and NGL was in respect to where the rules set out pre-decisions on aspects of a regulatory proposal (e.g. agreeing on a form of price control before the submission of a detailed proposal) or where an industry-wide policy decision has been delegated to the AER through the rules (such as a review of the parameters for applying a market wide rate of return for all businesses in electricity transmission). Network businesses argued that all AER decisions should be reviewable because of their significant financial impact across the market. The MCE decided not to make such pre-decisions or industry wide decisions reviewable because reviews of pre-decisions would compromise the regulatory process and industry wide decisions were considered essentially legislative in character in the sense of setting out general rules rather than the application of the rules to particular facts.

Broader context of accountability

The decision to introduce a limit merits review should also been seen in the context of other administrative law accountability mechanisms in place to achieve the reform objectives. The October 2005 consultation paper noted that apart from the review model and more prescriptive rules:

> Transparent, fair and reasonable decision-making that also produces economically efficient outcomes is [also] a product of:
>
> i. Strong institutional structure of the decision-makers: eg. AER member appointments and external policy accountabilities, internal management, public reporting requirements and financial accountabilities;
>
> ii. Role clarity for decision-makers within the energy sector via the statutory conferral of functions and powers;

iii. Clear and effective procedural and consultative requirements in the NEL and the NE Rules and in the Gas Pipelines Access Regime as to how the decision-makers will perform their economic functions. [46]

Conclusion

Under the new national framework the AEMC has been delegated significant power by Parliament to shape the future regulation of electricity and gas network charges representing a significant part of each end users' bill. The AER in applying the rules also has an incredibly complex task for which there will always be power and information asymmetries to contend. The choice of administrative review mechanisms - judicial review for rule-making and limited merits review for economic regulatory decisions of the AER has been driven by the complexities inherent in a framework for regulating such important essential services which can only be provided through monopoly infrastructure (with the possible exception of some gas transmission networks). The cooperative scheme has also limited the role of Parliaments in the development and ongoing involvement in the detail of the scheme.

In agreeing to the limited merits review model, the MCE also agreed to thoroughly review its operation before 2015.[47] Accordingly, the role and outcomes generated by administrative law accountability mechanisms will be a continuing source of debate and analysis in the energy sector. With so much at stake and a climate of inherent uncertainty, the framework must remain open to change and further assessment in light of the objectives it was established to achieve.

Endnotes

1 Note in particular the port facilities at Dalrymple Bay regulated by the Queensland Competition Authority - see www.qca.org.au
2 Note in particular the Mt Newman and Goldsworthy railways lines declaration decision and related proceedings - see www.ncc.gov.au.
3 Note that the Administrative Review Council recently done some work on most effective and efficient administrative accountability mechanisms for decisions in areas of complex and specific business regulation.
4 Note that WA and the NT do not currently participate in the legislative arrangement for electricity. These jurisdictions are not inter-connected with the national grid in the other States and Territories and have separate regulatory arrangements which are cognisant of the reform objectives.
5 For the full report see www.mce.gov.au. The report also has a very good summary of the Energy Reform process and legislative structure.
6 See in particular the Standing Committee of Officials (SCO) response to the submissions of the National Gas Law and National Electricity Law.
7 With this in mind, the AEMC is currently reviewing the energy market framework in light of the Carbon Pollution Reduction Scheme and expanded renewable energy target to determine what changes might be necessary.
8 At [16] The Tribunal also gave particular emphasis to the objective in paragraph 201 where it stated '[e]fficient investment in the long term interests of consumers will not be promoted if investors perceive a significant risk that the rules will change and they will not be able to recover the opportunity cost of capital reasonably invested. The minimisation of regulatory risk, consistent with the promotion of efficient investment, is one of the tenets that has driven the development of regulatory regimes in Australia. That tenet is reflected in the objective of the Law and in the revenue and pricing principles embodied in the Law.'
9 *National Electricity (South Australia) (National Electricity Law – Miscellaneous Amendments) Amendment Act 2007*.
10 The National Gas Access (Western Australia) Bill 2008 was introduced into the Western Australian Parliament before the election but lapsed when the Parliament was prorogued.
11 See the *Australian Energy Market Amendment (Gas Legislation) Act 2007*(Cwlth).
12 (2000) 202 CLR 535. See ss 29BA and 44AI of the TPA.
13 See s 9 of the NEL which gives the rules the force of law.
14 See Part 7 of the NEL and the discussion at para 0 following.
15 See version 22 of the NER on the AEMC website. NEMMCO is a Corporations Act company which operates the wholesale trading market and performs system security functions. It is intended to be replaced by an Australian Energy Market Operator (AEMO) - see COAG Communique, 13 April 2007.
16 See ss 11(5) and 13 of the *National Electricity (South Australia) Act 1996.*

17 Note that the Schedules of the *Gas Pipelines Access (South Australia) Act 1997* which include the Gas Code are collectively known as the Gas Pipelines Access Law (GPAL).
18 See s 28B(2)(f) of the NEL.
19 See also p 22 and 23 and Annexure C of the Review of decision-making consultation paper released in October 2005 – www.mce.gov.au .
20 See s 88(2) of the NEL.
21 The 'propose-respond' model has been seen to have been the result of the decision in *Application by GasNet Australia (Operations) Pty Ltd* [2003] ACompT 6 (23 December 2003) which stated at [29] 'Different minds, acting reasonably, can be expected to make different choices within a range of possible choices which nonetheless remain consistent with the Reference Tariff Principles. … it is beyond the power of the Relevant Regulator not to approve the proposed AA simply because it prefers a different AA which it believes would better achieve the Relevant Regulator's understanding of the statutory objectives of the Law.' The upward bias is seen to come from the service provider always choosing the most favourable choice with the acceptable range of responses.
22 Expert Panel p 78.
23 See archived AEMC rule changes on 'Economic Regulation of Transmission Services' and 'Pricing of Prescribed Transmission Services' at www.aemc.gov.au. A number of legal advices concerning the models appear on the AEMC website including advices from Stephen Gaegler SC, Neil Williams SC and an AGS opinion from Robert Orr QC and the author to the Department of Industry, Tourism and Resources.
24 See s 70 of the NEL. However, in relation to the Commonwealth application of the regimes in the offshore area, review is in the Federal Court.
25 For some of the early academic debate see Justin Gleeson SC and John Tamblyn's papers entitled 'Administrative Law Meets the Regulatory Agencies: Tournament of the Incompatible?' presented to the 2004 Public Law Weekend Administrative Law Conference.
26 See rules 6A.6.6(c) and 6A.6.7(c) for the latter point, and rules 6A.6.2 and 6A.6.4 for the use of the formulas.
27 (2002) 25 WAR 511.
28 supra.
29 See in particular paragraphs [107] - [110].
30 [2007] FCA 557 (19 April 2007).
31 *BHP Billiton Iron Pty Ltd v National Competition Council* [2006] FCA 1764 at [168].
32 [2001] VSC 153 (17 May 2001).
33 See the MCE Decision on Review of decision-making in the gas and electricity regulatory frameworks on the MCE website - www.mce.gov.au at p 3. The decision has a very extensive discussion on the considerations for in the MCE and the reasons for choosing the particular merits review model in light of previous decisions.
34 See ss 38 and 39 of the GPAL.
35 (2004) ATPR 41-991.
36 At [12]. Consumer groups have also been refused standing under the Essential Services Commission Act 2001(Vic) because of the nature of the review mechanism.
37 See *Re: Application by ElectraNet Pty Ltd* [2008] ACompT 1 (23 June 2008) at [39] – [42] and [60] – [63]. For revenue errors the materiality must be at least $5m or 2% of the annual regulated revenue of a network service provider.
38 *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13.
39 [2006] FCAFC 83 at [169] to [180].
40 At [177].
41 at [178]. This was also quoted in *Electranet (No 3)* at [65].
42 At [66].
43 At [74].
44 [2007] SASC 177 (18 May 2007)
45 The Competition Principles Agreement now reads as follows:
6(5)(c) Where merits review of decisions is provided, the review will be limited to the information submitted to the original decision-maker except that the review body:
(i) may request new information where it considers that it would be assisted by the introduction of such information;
(ii) may allow new information where it considers that it could not have reasonably been made available to the original decision-maker; and
(iii) should have regard to the policies and guidelines of the original decision-maker (if any) that are relevant to the decision under review.
46 See p 2.
47 See s 71Z of the NEL.