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*4TH NATIONAL LECTURE ON ADMINISTRATIVE LAW*

**DEMOCRACY, PARTICIPATION AND  
ADMINISTRATIVE LAW**

*Chief Justice The Hon P A Keane\**

The Athenian poet-dramatist Aeschylus is regarded, as you know, as the Western World's first great tragedian. There were, perhaps, other great tragedians before him, but he was the first who was so exceptional that sufficient copies were made of his work for it to survive.

Aeschylus was a very interesting man. Notwithstanding the many honours which he won from the Athenians for his tragedies, the achievement of which he was most proud was his participation in the Athenian victory over the Persians at Marathon in 490 B.C. We know this from his own epitaph.

At Marathon, he, and about 22,000 other citizen soldiers of the new democracy, prevented the invasion and destruction of Athens by the mercenary armies of Darius the Great.

The remarkable thing about the battle of Marathon is that it was fought by a democracy that was only two decades old, but it was a fully-fledged democracy nonetheless.

We know that was the case because, before Marathon, Athenian aristocrats who died in battle were commemorated by life-size stone statues and boastful verses celebrating their individual prowess as warriors. After Marathon, each Athenian who died in the battle was mentioned on a stone slab only by his given name and his membership of one of the ten Athenian tribes: there was no way of telling whether they were aristocrats or artisans or peasants; the class divisions which characterised the period of the Peisistratid tyranny had lost their legal force and, it would seem, much of their social cachet.

Offices of state were filled by lot among all Athenian citizens, and the people exercised power directly through their assembly.

Aeschylus was also an extraordinarily sophisticated thinker, deeply committed to the nascent Athenian democracy. He defended it on the field of battle and he mused upon its foundation and its nature in his plays.

His greatest plays were probably the trilogy known as the *Oresteia*.<sup>1</sup>

The first two parts of the *Oresteia* touch upon the futility of violence and revenge in an heroic or aristocratic age, that is, the age when a small number of armed men dominated primitive farming communities.

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\* *The Hon P A Keane is Chief Justice of the Federal Court of Australia. This paper was presented as the 4th National Lecture on Administrative Law at the AIAL 2011 National Administrative Law Conference, Canberra, 21 July 2011.*

In the first play, Agamemnon sacrificed his daughter Iphigenia to the gods before sailing to Troy, to ensure fair winds. In the second play, Agamemnon's wife, Clytemnestra, Iphigenia's mother, murdered Agamemnon in his bath on his return from Troy.

Orestes, the son of Agamemnon and Clytemnestra, in conformity with the natural requirements of filial piety, killed Clytemnestra in revenge for Agamemnon's death. Clytemnestra's ghost, together with the Furies, demands Orestes' death in retaliation for the crime of matricide.

Orestes claimed that he was obliged by the claims of natural piety to avenge his father. Grey-eyed Athena, the Goddess of Wisdom, as well as the patron deity of Athens, heard his plea. The third part of the trilogy shows how the futility of the cycle of violence and vengeance is avoided by the trial ordained by Athena.

Hegel thought that the conflict represented in this play was the foundation of Western civilization: on one side, the Furies speaking for a primitive natural law of vendetta and blood feud which demands that the matricide be avenged; on the other side, Orestes and Apollo call for 'justice' in human terms. They appeal to Athena to decide the conflict. And she, in her wisdom, institutes the trial.

Before the trial there was a seemingly insoluble dilemma arising from the circumstance that each side's position was right in terms of the absolute claims of nature.

Aeschylus was suggesting that the civic institution of the adjudicative function, and, specifically, jury trial, is the mechanism whereby a democratic community can resolve dilemmas insoluble by aristocracy or tyranny, save by violence, which, of course, never solves anything.

Aeschylus's story of the invention of the trial is an allegory of the foundation of the Athenian participatory democracy: 'Aeschylus offers this unprecedented means of resolution as a founding emblem of Athens' moral and political ethos, the rule of communal law.'<sup>2</sup> These 'founding emblem[s] of Athens' moral and political ethos' operate through the citizens themselves.<sup>3</sup> The primitive natural world of the blood feud and the rule of might makes right were left behind with aristocracy and tyranny.

The Athenian democracy was one in which the citizenry participated fully in all the functions of government. Just as the executive and legislative functions of the Athenian polis were performed by the participation of the entire citizenry, so was its adjudicative function. There were no judges appointed for their expertise or independence. And incidentally, in order to obviate perceived impediments to the performance of the adjudicative function, lawyers were not permitted to speak. The litigant had to speak for himself or herself directly to his or her fellow citizens.

In our courts, questions of criminal guilt are still decided by juries of citizens, the apostolic number of twelve substituting for the Athenian assembly of the whole people.

Some lawyers are, of course, jury sceptics, and are happy to emphasise perceived shortcomings; but the great justification of the jury as an instrument of adjudication lies in its appeal to democratic values and the directness of the participation of citizens chosen at random in public life. As Kennedy J of the Supreme Court of the United States, said in *Powers v Ohio*:<sup>4</sup>

The jury ... invests each citizen with a kind of magistracy; it makes them all feel the duties which they are bound to discharge towards society; and the part which they take in the Government.

The pure participatory democracy of classical Athens endured for barely a century. During the subsequent twenty-five hundred years we have seen nothing like that level of participation. For most of the time there was little democracy to speak of and when it emerged, our populations had seemingly become too large and our lives too complicated to allow popular participation, save in the representative form of the jury, and then only in the most serious of litigious matters.

In those law systems where the judiciary is not elected, the performance of the balance of the adjudicative function of the state is significantly removed from meaningful participation by the citizenry.

And more immediately for Australians, as for many other modern liberal democracies, the adjudicative function of the state is performed by judges appointed by the executive government. Our Constitution as we have interpreted it, demands a strict separation of the judicial function from the other functions of government.<sup>5</sup> These arrangements serve values of expertise and independence but not democratic participation. For some liberal commentators, such as Laurence Tribe: 'The whole *point* of an independent judiciary is to be 'antidemocratic'...'<sup>6</sup>

In 2002, from the other end of the spectrum, Robert Bork, the eminent conservative commentator, wrote that 'it would have been unthinkable until recently that so many areas of our national life would be controlled by judges'.<sup>7</sup>

For those of us who have been the beneficiaries of the welfare state, the level of involvement of judges in the life of our nation appears to be a wholesome response of the rule of law to the development of the welfare state, a growing consciousness of environmental issues and a general concern about human rights.

In response to these developments, statute law has come to permeate the economic and social life of the nation. And with the expansion in legislative activity, there has grown a large administrative apparatus. In response, the body of law which we today refer to as administrative law was called into existence.

The last sixty years has been a great era in which to live in a Western liberal democracy. Many of those in this room who are over fifty years of age have been the first generation of their family to attend university. All of us have enjoyed opportunities, in terms of security and prosperity and quality of life, of which our parents and grandparents would not have dreamed.

Insofar as it is true to say that 'many areas of our nation and life (are) controlled by judges', that comment reflects the necessary and wholesome role of the judiciary as the ultimate guarantor of the legislative promises of democracy and the welfare state to its people.

That having been said, it is timely to note that there is now a shift back, in the discourse of the political theorists, to a focus on participatory democracy; in for example the book of essays published in 2008 by the American Political Science Association: 'The Age of Direct Citizen Participation'.<sup>8</sup>

I suggest, in the context of democracy, participation and administrative law, that the concerns, expressed particularly by academic lawyers in Australia, that the scope of judicial review has been unduly narrowed by judicial decisions are unwarranted.<sup>9</sup> Indeed, in one important area, privative clauses, the scope of judicial review has been expanded. The limits which are recognised by the courts on the scope of judicial review are consistent with its historical function; and there are good reasons, both practical and theoretical, in terms of democratic values for retaining those limitations.

### Public law and private law or something else?

In 2001, Sir Anthony Mason acknowledged that in the Anglo-Australian development of administrative law, the distinction between public law and private law is crucial for the availability of judicial review.<sup>10</sup> But in what sense are we speaking of public law and private law?

Sir Anthony referred to *R v Panel on Take-overs and Mergers; Ex parte Datafin Plc*,<sup>11</sup> where it was held that a decision of the Panel on Take-overs and Mergers in the United Kingdom was subject to judicial review because it operated as part of the governmental framework for the regulation of those activities in the City of London. Because that body was able to exercise a range of statutory powers, including a power to impose penalties, it was held to be under a duty to exercise its public power judicially. That decision can usefully be contrasted with the decision in *Reg v Disciplinary Committee of the Jockey Club; Ex parte Aga Khan*<sup>12</sup> where the proceedings of the Jockey Club were held not to involve the exercise of public power.

Sir Anthony went on to say:<sup>13</sup>

I have always thought that it is difficult to formulate a brightline distinction between public law and private law. That is why I do not regard the reasoning in *Datafin* as particularly convincing. On the other hand, there is much to be said for the view that bodies exercising public or regulatory powers should be subject to judicial review. What we should be endeavouring to determine is what bodies beyond those presently subject to judicial review should be exposed to judicial review and on what grounds.

It is administrative decision-making of the kind which is apt to create or alter or enforce rights, as distinct from the mere exercise by public agencies of rights available alike to public agencies and private persons, which is the characteristic of the exercise of public power amenable to judicial review.

Although this is an area where 'brightline distinctions' are indeed rare, the distinction between a decision by a public agency to alter or enforce the rights enjoyed by others and a decision by a public agency to exercise rights enjoyed by it in common with others is sufficiently stable to be of practical utility. This distinction fixes upon the difference between the exercise of sovereign authority, ie the power to change or enforce the rights of others, and the exercise of rights enjoyed by subjects and public agencies alike. I suggest that this distinction is of long-standing in the common law.

In Chapter 45 of *Magna Carta*, King John promised: 'We will appoint as justices, constables, sheriffs or other officials, only men that know the law of the realm and are minded to keep it well.'

The promise in Ch 45 of *Magna Carta* was made, in part at least, to give specific content to the earlier promise in the Charter whereby John recognised the fundamental nature of his role as sovereign as the guarantor, if not the source, of justice in his realm. In Chapter 40 of *Magna Carta*, he promised: 'To no one will we sell, to no one deny or delay right or justice.' The doing of right and justice was the obligation of the King.

At this time there was a nascent judiciary which was as directly connected to the sovereign as were the King's executive assistants. Ralph Turner observed in his book, 'The English Judiciary in the Age of Glanville and Bracton':<sup>14</sup> 'The judges recognised the monarch as the source of justice, and they often marked cases *loquendum cum rege* [to be discussed with the King].'

And while the 'royal justices were unashamedly the King's servants' they were also self-consciously a professional judiciary.<sup>15</sup> As Turner says:<sup>16</sup>

The roots of 'due process' lie in the twelfth and thirteenth centuries, planted there by professional royal servants whose energies made the *curia regis* a court for complaints of all freeman, creating a common law for all England.

No distinction was drawn in the 13<sup>th</sup> century between the judicial and administrative organs of royal government in terms of their obligations to enforce and obey the law. The point is that, even at this early time, the doing of justice through executive and judicial agents was conceived as the obligation of the sovereign.

From the beginning of a recognisable common law, there was an expectation of legal integrity in decision-making by royal servants, including the judiciary. The streams of executive and judicial power shared a common origin in the sovereign authority of the King. In time, the legal integrity of a decision-maker by the executive agents of the sovereign came to be enforced under the common law by the judicial arm of government. But the root from which these two branches stemmed was the sovereign power to make or alter or enforce laws.

In attempting to identify the evolution of judicial review as the history of an idea, I acknowledge the risk that my view is distorted by foundational myths that are, in truth, creatures of the *Zeitgeist*. By way of justification I refer to the observation of the great German scholar, Burckhardt, in a letter written in 1859:<sup>17</sup> 'Even a half-false historical perspective is worth much more than none at all.'

Even a blurred view of whence we have come may help us to gauge whither we are heading.

Broadly speaking, agencies of the executive government make two kinds of decisions: those of a governmental character (the original example of which is the exercise of the prerogative), the distinguishing feature of which is the capacity to affect rights, on the one hand; and, on the other hand, those which involve the exercise of rights which the agency holds and exercises, albeit on behalf of the community, as an equal participant in the life of the community.

In 1700 in *Groenvelt v Burwell*,<sup>18</sup> Sir John Holt CJ was speaking only of the first kind of decision-making when he said that 'no court can be intended exempt from the superintendency of the King in this Court ... [so] it is a consequence of every inferior jurisdiction of record, that their proceedings be removable into this Court, to ... see whether they keep themselves within the limit of their jurisdiction.'

It is the power to create or alter or enforce rights that is characteristic of the inferior jurisdictions to which Sir John Holt referred as being under the supervision of the King's Bench. We can now say confidently that it is a characteristic feature of the judicial function to say what the rights and duties of subjects shall be in controversies involving other functionaries of the state; and to ensure that functionaries who exercise the sovereign power will do so in accordance with the law. Anything contrary to the essence of justice in terms of fairness and reasonableness would not be worthy of the sovereign authority which is the source of authority.<sup>19</sup>

It was the capacity of decisions to alter the rights of the governed which was the characteristic feature of what I am calling the exercise of sovereign power by the agents of the Crown. What is special about the exercise of sovereign power is that it is apt to affect what the rights of subjects are. A robber baron (or, later, a railway baron) might infringe the

rights of others by his actions and thereby do wrong but he could not negate the rights of others by his decision to do wrong.

When Marshall CJ in *Marbury v Madison* said that '[i]t is emphatically the province and duty of the Judicial Department to say what the law is,'<sup>20</sup> his Honour was making the point that the enforcement of the law against executive governments (and even legislators where a written constitution limits their powers) is inherent in the very concept of judicial power in the common law tradition.

As judicial review of administrative action became one of the characteristic functions of the judiciary as an arm of government, it was routinely concerned with the effect of decision-makers, judicial or executive, upon the rights of the governed. The important point to be made here is that the judiciary did not require a grant of statutory authority to rule upon the legality of the acts of inferior courts or administrative tribunals because the necessary authority was as much a natural or ordinary incident of judicial power as the authority to interpret a statute to construe a contract or a will. This authority may be contrasted with the authority of a superior court to hear and determine appeals from a lower court which has always been the creature of statute.

### Privative clause

This discussion has ramifications for the efficacy of privative clauses at both state and federal levels: may I mention them now.

It is fair to say that, in judicial discussion of the extent to which the function of the superior courts to supervise the legality of the exercise of administrative power may be limited by the legislature, it had not been suggested, until *Kirk v Industrial Relations Commission of New South Wales*,<sup>21</sup> that the principles of jurisdictional error on which judicial review of administrative action proceeds are themselves so integral to and inseparable appurtenances of judicial power that Chapter III of the Commonwealth Constitution may invalidate legislative attempts to limit their operation.<sup>22</sup>

In *Kirk*, their Honours said:<sup>23</sup>

In *Nat Bell Liquors* [[1922] 2 AC 128 at 162], Lord Sumner said that the jurisdiction to grant certiorari could be contracted or expanded by the legislature: contracted by taking away certiorari 'explicitly and unmistakably' or limiting its availability; expanded by restoring the remedy 'to its pristine rigour by restoring to the record a full statement of the evidence'. The provisions of s 69 of the *Supreme Court Act* are a species of the latter kind of legislative step. But legislation restricting the availability of the remedy is more common.

As noted earlier in these reasons, s 179(1) of the IR Act provides that a decision of the Industrial Court, however constituted, 'is final and may not be appealed against, reviewed, quashed or called into question by any court or tribunal'. The provisions made by s 179 are expressly extended (by s 179(5)) 'to proceedings brought in a court or tribunal for any relief or remedy, whether by order in the nature of prohibition, certiorari or mandamus, by injunction or declaration or otherwise'.

Finality or privative provisions have been a prominent feature in the Australian legal landscape for many years. The existence and operation of provisions of that kind are important in considering whether the decisions of particular inferior courts or tribunals are intended to be final. They thus bear directly upon the second of the premises that underpin the decision in *Craig* (that finality of decision is a virtue). The operation of a privative provision is, however, affected by constitutional considerations. More particularly, although a privative provision demonstrates a legislative purpose favouring finality, questions arise about the extent to which the provision can be given an operation that immunises the decisions of an inferior court or tribunal from judicial review, yet remain consistent with the constitutional framework for the Australian judicial system.

Their Honours went on to mention the implications of the Commonwealth Constitution:<sup>24</sup>

In considering Commonwealth legislation, account must be taken of the two fundamental constitutional considerations pointed out in *Plaintiff S157/2002 v The Commonwealth* [(2003) 211 CLR 476 at 512 [98]]:

'First, the jurisdiction of this Court to grant relief under s 75(v) of the *Constitution* cannot be removed by or under a law made by the Parliament. Specifically, the jurisdiction to grant s 75(v) relief where there has been jurisdictional error by an officer of the Commonwealth cannot be removed. Secondly, the judicial power of the Commonwealth cannot be exercised otherwise than in accordance with Ch III. The Parliament cannot confer on a non-judicial body the power to conclusively determine the limits of its own jurisdiction.'

The aspect of the decision in *Kirk*, which is of particular interest for present purposes, is the proposition that the supervisory jurisdiction of the Supreme Courts of the States is an essential part of what is guaranteed by s 73 of the Commonwealth Constitution. So far as the text is concerned, this provision consists relevantly of the statement that:

The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the (Commonwealth) Parliament prescribes, to hear and determine appeals from all judgments ... of ... the Supreme Court of any State.

Their Honours said:<sup>25</sup>

In considering State legislation, it is necessary to take account of the requirement of Ch III of the *Constitution* that there be a body fitting the description 'the Supreme Court of a State', and the constitutional corollary that 'it is beyond the legislative power of a State so to alter the constitution or character of its Supreme Court that it ceases to meet the constitutional description'.

At federation, each of the Supreme Courts referred to in s 73 of the *Constitution* had jurisdiction that included such jurisdiction as the Court of Queen's Bench had in England. It followed that each had 'a general power to issue the writ [of certiorari] to any inferior Court' in the State. Victoria and South Australia, intervening, pointed out that statutory privative provisions had been enacted by colonial legislatures seeking to cut down the availability of certiorari. But in *Colonial Bank of Australasia v Willan*, the Privy Council said of such provisions that:

'It is, however, scarcely necessary to observe that the effect of [such a privative provision] is not absolutely to deprive the Supreme Court of its power to issue a writ of certiorari to bring up the proceedings of the inferior Court, but to control and limit its action on such writ. *There are numerous cases in the books which establish that, notwithstanding the privative clause in a statute, the Court of Queen's Bench will grant a certiorari*; but some of those authorities establish, and none are inconsistent with, the proposition that in any such case that Court will not quash the order removed, except upon the ground either of a manifest defect of jurisdiction in the tribunal that made it, or of manifest fraud in the party procuring it.'

That is, accepted doctrine at the time of federation was that the jurisdiction of the colonial Supreme Courts to grant certiorari for jurisdictional error was not denied by a statutory privative provision.

The supervisory jurisdiction of the Supreme Courts was at federation, and remains, the mechanism for the determination and the enforcement of the limits on the exercise of State executive and judicial power by persons and bodies other than the Supreme Court. That supervisory role of the Supreme Courts exercised through the grant of prohibition, certiorari and mandamus (and habeas corpus) was, and is, a defining characteristic of those courts. And because, 'with such exceptions and subject to such regulations as the Parliament prescribes', s 73 of the *Constitution* gives this Court appellate jurisdiction to hear and determine appeals from all judgments, decrees, orders and sentences of the Supreme Courts, the exercise of that supervisory jurisdiction is ultimately subject to the superintendence of this Court as the 'Federal Supreme Court' in which s 71 of the *Constitution* vests the judicial power of the Commonwealth.

There is but one common law of Australia. The supervisory jurisdiction exercised by the State Supreme Courts by the grant of prerogative relief or orders in the nature of that relief is governed in fundamental respects by principles established as part of the common law of Australia. That is, the supervisory jurisdiction exercised by the State Supreme Courts is exercised according to principles

that in the end are set by this Court. To deprive a State Supreme Court of its supervisory jurisdiction enforcing the limits on the exercise of State executive and judicial power by persons and bodies other than that Court would be to create islands of power immune from supervision and restraint. It would permit what Jaffe described as the development of 'distorted positions'. And as already demonstrated, it would remove from the relevant State Supreme Court one of its defining characteristics.  
[Footnotes omitted].

This reasoning suggests that a combination of the concept of jurisdictional error – expanded to encompass decisions unfairly or unreasonably made – and the developing jurisprudence in relation to Ch III of the Constitution will trump a privative clause.<sup>26</sup> We are left with interesting questions as to the extent to which this will be so.

In this regard, the Court in *Kirk* did not give the privative clause its quietus. Their Honours said:<sup>27</sup>

This is not to say that there can be no legislation affecting the availability of judicial review in the State Supreme Courts. It is not to say that no privative provision is valid. Rather, the observations made about the constitutional significance of the supervisory jurisdiction of the State Supreme Courts point to the continued need for, and utility of, the distinction between jurisdictional and non-jurisdictional error in the Australian constitutional context. The distinction marks the relevant limit on State legislative power. Legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power. Legislation which denies the availability of relief for non-jurisdictional error of law appearing on the face of the record is not beyond power.

### **The scope of judicial review**

The abiding concern of judicial review as it was developed in the common law has been with administrative decisions which affect the rights of subjects. Judicial review has not been concerned with decisions whereby rights which are enjoyed by all persons equally are exercised by an agent of the Crown against another person. I propose to return to discuss that point after discussing the further point. It is that concern, and not a wider concern with the quality of decision-making by public authorities generally, which also informs the scope of review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('the *AD(JR) Act*') and its State analogues.

### ***The AD(JR) Act and its analogues***

The obvious focus for discussion at this point is the High Court's decision in *Tang* and the academic criticism which that decision provoked.

In *Griffith University v Tang* ('*Tang*'),<sup>28</sup> the High Court was concerned with the ambit of judicial review available under the *Judicial Review Act 1991* (Qld), the state analogue of the *AD(JR) Act*. The question was whether the University's decision to exclude a student from the PhD candidature program was 'a decision made under an enactment' and so subject to judicial review.

The decision to exclude the student was made by committees to whom decision-making powers were delegated by the Council of the University under the *Griffith University Act 1988* (Qld). The High Court held that the decision took effect under the entitlement of the University under the general law to cease its voluntary association with the student. That decision was not expressly or impliedly required or authorised by the *Griffith University Act* and it did not create or alter legal rights in a way which derived its force from that Act.

In *Tang*, Gummow, Callinan and Heydon JJ said:<sup>29</sup>

The decisions of which the respondent complains were authorised, albeit not required, by the University Act. The Committees involved depended for their existence and powers upon the delegation by the Council of the University under ss 6 and 11 of the University Act. But that does not mean that

the decisions of which the respondent complains were 'made under' the University Act in the sense required to make them reviewable under the Review Act. The decisions did not affect legal rights and obligations. They had no impact upon matters to which the University Act gave legal force and effect. The respondent enjoyed no relevant legal rights and the University had no obligations under the University Act with respect to the course of action the latter adopted towards the former.

The point which the joint judgment makes here is not about the immediate source of the decision-making power, but that the exercise of the University's decision-making power was not apt to create or alter – as opposed merely to exercise – rights.

In referring to the ADJR's description of reviewable decisions as decisions 'of an administrative character ... made under an enactment', Gummow, Callinan and Heydon JJ said:<sup>30</sup>

There is a line of authority in the Federal Court, beginning with the judgment of Lockhart and Morling JJ in *Chittick v Ackland* and including the judgments of Kiefel J and Lehane J in *Australian National University v Lewins*, which assists in fixing the proper construction of the phrase 'decision of an administrative character made ... under an enactment'. As noted earlier in these reasons, the presence in the definition in the AD(JR) Act of the words '(whether in the exercise of a discretion or not ...)' indicates that the decision be either required or authorised by the enactment. *Mayer* shows that this requirement or authority may appear sufficiently as a matter of necessary implication. However, whilst this requirement or authority is a necessary condition for the operation of the definition, it is not, by itself, sufficient.

The decision so required or authorised must be 'of an administrative character'. This element of the definition casts some light on the force to be given by the phrase '*under an enactment*'. What is it, in the course of administration, that flows from or arises out of the decision taken so as to give that significance which has merited the legislative conferral of a right of judicial review upon those aggrieved?

The answer in general terms is the affecting of legal rights and obligations. Do legal rights or duties owe in an immediate sense their existence to the decision, or depend upon the presence of the decision for their enforcement? To adapt what was said by Lehane J in *Lewins*, does the decision in question derive from the enactment the capacity to affect legal rights and obligations? Are legal rights and obligations affected not under the general law but by virtue of the statute?

If the decision derives its capacity to bind from contract or some other private law source, then the decision is not 'made under' the enactment in question. Thus, in *Lewins*, a decision not to promote to Reader a member of the staff of the Australian National University was not 'made under' the *Australian National University Act 1991* (Cth) (the ANU Act). Lehane J explained:

'In this case, the relevant statutory power (in s 6(2)(k) of the ANU Act) is simply one 'to employ staff'. Obviously that, taken together with the general power to contract, empowers the University to enter into contracts of employment, to make consensual variations of employment contracts and to enter into new contracts with existing employees. But I cannot see how it is possible to construe a mere power to employ staff as enabling the University unilaterally to vary its contracts with its employees or to impose on them, without their consent, conditions which legally bind them – except, of course, to the extent that contracts of employment may themselves empower the University to make determinations which will be binding on the employees concerned'.

[Footnotes omitted].

The decision in *Tang* attracted a considerable volume of academic criticism. Mantziaris and McDonald in an article in the *Public Law Review* criticised this reasoning as 'circular ... for it offers no independent justification for identifying decisions subject to jurisdiction'.<sup>31</sup>

But surely the point of this passage from the joint judgment is as clear as it is fundamental. It is that the statutory requirement that the decision be of an administrative character serves to exclude from the scope of review under the *AD(JR) Act* decisions of a legislative or judicial character, these being the other kinds of decision which involve the exercise of public power, in the sense of altering the rights and liabilities of the governed.

Some academic criticism of the decision in *Tang* was couched in unusually strong language. For example, Professor Michael Taggart commented:<sup>32</sup>

It beggars belief how a reform like the *AD(JR) Act 1977* (and its state equivalents) which was intended 'to simplify and clarify the grounds and [the] remedies for judicial review, thereby facilitating access to the courts and enabling the individual to challenge administrative action which adversely affected his interests' can be interpreted to frustrate that intention in *Tang*. You now have back many of the evils these reforms were meant to eradicate!

A disturbing feature of much of the academic criticism of *Tang*, apart from its tone, is that it fails to acknowledge the simple, indisputable fact, that when the Commonwealth and State Parliaments came to enact the legislation they chose, advisedly, to depart from the recommendations of the Kerr Committee that the legislation should authorise judicial review on legal grounds 'of decisions, including inappropriate cases reports and recommendations, of Ministers, public servants, administrative tribunals ...'

As Gummow, Callinan and Heydon JJ pointed out, the manner in which Parliament chose to implement the Kerr Committee's recommendations by 'the adoption ... of the phrase 'a decision of an administrative character made ... under an enactment' directed attention away from the identity of the decision-makers, the Ministers and public servants referred to by the Kerr Committee, and to the source of the power of the decision makers.<sup>33</sup>

There can be no doubt that the choices of the Commonwealth and State Parliaments were made deliberately. And it is also indisputably true that these legislatures have had ample opportunity, since the 1997 beginning of the sequence of Federal Court decisions which the High Court approved in *Tang*, to amend the legislation if they were so disposed.

The line advisedly drawn by the legislatures of the States and Commonwealth fixes upon the source of the power to affect rights rather than the identity of the decision-maker. That line acknowledges that some decisions by public authorities involve the exercise of the same powers that are available to private persons. Where a public authority is exercising rights it enjoys with other persons under the general law, it has long been recognised by the highest authority that the conduct of the body is not described as conduct *under* the statute which gave it legal personality and capacity.<sup>34</sup>

I should refer to some other aspects of the academic criticism of the decision in *Tang*.

Mantziaris and McDonald suggest that Gleeson CJ 'stood alone' within the majority in *Tang* by focusing upon the decision as the termination by the University of the 'voluntary association' between the University and Ms Tang; and that his Honour's conclusion that the University's decision 'took legal force and effect from *any* relevant source of law' was 'a mystery'.<sup>35</sup>

These authors contend that: 'There is no general law applicable to voluntary non-contractual and non-corporate associations in the sense that a decision to enter or exit from such an association can be said to change or modify the *legal* rights or obligations of the parties to it.'<sup>36</sup> They also assert that, on the approach taken by the majority, 'there was *no source of capacity* for the university to exclude a student.'<sup>37</sup>

There are a number of problems with these criticisms. The first of these problems is that it is abundantly clear from the passage cited from the joint judgment that Gleeson CJ was not alone in focusing upon the decision as one involving the termination of a voluntary association.

Secondly, there was nothing 'mysterious' in the approach of Gleeson CJ. The case tendered by the parties for the decision of the Courts was one in which the decision of the University

to cease its association with Ms Tang was based upon the exercise by the University of the same rights of association which any individual enjoys: the University's decision to cease its association with Ms Tang did not alter the legal basis of their association: the University simply exercised its liberty, untrammelled by contractual restraint, to cease its voluntary association with Ms Tang.

With reference to this aspect of *Tang*, Professor Aronson commented:<sup>38</sup>

*Tang's* result was entirely predictable because if *ADJR's* restriction to statutory decision-making is to mean anything, then the odds are that it excludes coverage of government's commercial powers so far as these are truly consensual. *Tang's* fault, though, was in failing to see the realities of public power behind a consensual, non-statutory facade. Consensual power should not be subject to judicial review, not because it is non-statutory, but because it is not public ... The characterisation of Ms Tang's relationship with her former university as merely consensual is nothing short of breath-taking.

On the contrary, the characterisation of Ms Tang's relationship with the University was inevitable having regard to the ground on which the parties chose to fight the case. In this regard, Ms Tang herself asserted the absence of any contract between herself and the University; and she was unable to point to any statutory entitlement to maintain the relationship between herself and the University.

Any association of persons, whether voluntary or contractual, is an exercise of legal personality: the choice of one legal person to associate or disassociate from another is an exercise of the legal capacity enjoyed by all legal persons. As the High Court said in *Lange v Australian Broadcasting Commission*:<sup>39</sup> 'Under a legal system based on the common law, 'everybody is free to do anything, subject only to the provisions of the law'. To proceed upon an assumption of freedom of choice and association is not to postulate a legal void; it is merely to recognise fundamental principles of the common law.

There is nothing at all odd about speaking of the bonds of voluntary association between persons as merely consensual. That is the view which the common law has taken of voluntary associations. In *Cameron v Hogan*,<sup>40</sup> Rich, Dixon, Evatt and McTiernan JJ said:

... [E]xcept to enforce or establish some right of a proprietary nature, a member who complains that he has been unjustifiably excluded from a voluntary association, or that some breach of its rules has been committed, cannot maintain any action directly founded upon that complaint ... There are ... reasons which justify the statement that, at common law as well as in equity, no actionable breach of contract was committed by an unauthorized resolution expelling a member of a voluntary association, or by the failure on the part of its officers to observe the rules regulating its affairs, unless the members enjoyed under them some civil right of a proprietary nature ... Such associations are established upon a consensual basis, but, unless there were some clear positive indication that the members contemplated the creation of legal relations *inter se*, the rules adopted for their governance would not be treated as amounting to an enforceable contract.

It has never been a stretch of legal language to speak of liberty of association as a right. As McHugh J said in *York v The Queen*:<sup>41</sup>

The common law's conception of liberty is not limited to 'liberty in a negative sense', that is, 'the absence of interference by others'. It extends to a conception of liberty in a 'positive' sense, which is 'exemplified by the condition of citizenship in a free society a condition under which each is properly safeguarded by the law against the predations of others'. [Footnotes omitted].

Nor is it inaccurate in this context to speak of 'rights' as synonymous with 'interests'.

Mantziaris and McDonald argue that 'if the rights/obligations test ... in *Tang* is taken literally, its application would deny procedural fairness protection to interests currently protected under the principle in *Kioa v West* (1985) 159 CLR 550.<sup>42</sup> They also assert that the decision in *Tang* leaves a gap in the scope of judicial review provided by the *AD(JR) Act* in that a

person whose interests are affected by a decision to make or withhold a government grant would have standing to challenge the decision, but the decision would not be susceptible to review under the *AD(JR) Act* because a government grant does not give rise to rights enforceable by the grantor against the government.<sup>43</sup>

With great respect, these criticisms reflect a failure to attend closely to what is actually said in the judgments. *Tang* cannot sensibly be read as denying that governmental decisions, which are apt to create or to prevent the creation of rights or obligations in respect of 'liberty, reputation, status, immigration and welfare eligibility or familial interests', are susceptible of review under the *AD(JR) Act*. That this is so is abundantly apparent from the following passage in the reasons of Gummow, Callinan and Heydon JJ:<sup>44</sup>

... [T]his construction of the statutory definition does not require the relevant decision to affect or alter *existing* rights or obligations, and it will be sufficient that the enactment requires or authorises decisions from which new rights or obligations arise ... Affection of rights or obligations derived from the general law or statute will suffice.

In the academic criticisms of the decision in *Tang*, what is remarkable is the absence of a compelling explanation of how the phrase 'under an enactment' can be read otherwise than as suggested by the Federal Court jurisprudence without at the same time depriving it of effect as a limit upon the scope of the Act. As Gleeson CJ observed in *Tang*, clearly correctly with respect, '[t]he legislation does not provide for review of all decisions of an administrative character made in pursuance of any power or authority which has its foundation in a statute.'<sup>45</sup>

### **Public power and judicial review**

The 'rights alteration or affection' test in *Tang* is consistent with the basis of judicial review as it evolved at common law.

It was not the case under the common law, that the exercise by a person of rights, enjoyed by that person, is reviewable simply because, on one view, the person exercising the right could be described in some sense as a public body.

Lord Atkin, in his classic statement of the role of the common law in supervising administrative decision-making in *R v Electricity Commissioners*,<sup>46</sup> described the agencies susceptible to judicial review as 'any body of persons having legal authority to determine questions affecting the rights of subjects ...'

As this passage suggests, the law relating to judicial review of administrative decision-making did not develop by reference to a concern to scrutinise the reasons which led an agent of the Crown to exercise rights enjoyed by all subjects of the Crown: the exercise of rights shared by all was not an exercise of the sovereign power to alter or enforce rights.

If a public authority infringes the rights or harms the interests of a subject, for example, by negligently failing to repair a gas main, the issue is whether the failure to repair the main was negligent, not whether the decision-making processes of the authority conformed to the grounds of judicial review. The case is no different from one in which a privately owned gas supplier negligently damages a customer. The quality of the decision-making process which led to the negligent act or omission is irrelevant to the vindication of the interests of the victim. The only question in each case is whether the defendant is liable for negligently causing harm to the plaintiff.<sup>47</sup> And that question falls to be answered by reference to rights and liabilities which do not depend on the authority's decisions.

It has long been a characteristic of the common law which distinguished it from other systems that, generally speaking, agencies of the State stand on the same footing as subjects so far as their rights are concerned. The line of judicial authority, which includes the famous judgment of Lord Camden LCJ in *Entick v Carrington*,<sup>48</sup> and the more recent manifestation in *Plenty v Dillon*,<sup>49</sup> establishes that the subject stands equal before the courts with the agents of the Crown.<sup>50</sup> It is this proposition which Dicey celebrated as one of the cardinal tenets of the rule of law.<sup>51</sup>

Considerations of public accountability and equality before the law do not require that the mere exercise by agencies of the community of rights enjoyed by such agencies on behalf of the community should be subject to judicial review. To the extent that the exercise of statutory functions may expose agencies of the community to liabilities because the rights of others have been infringed, the usual remedies will be available against them.

In a mixed economy and a liberal democracy the community, represented by agencies of the Crown, has rights too. A governmental agency enjoys the same rights under the general law as other persons (the substantive right to legal professional privilege in advice tendered to the executive government is an important example).<sup>52</sup> That is no less so because the agencies of the Crown are politically accountable to the community.

### **Public power and outsourcing**

Conversely, it is no answer to a claim to review a decision that does create or alter rights of others that the decision-maker can plausibly be described as a private body.<sup>53</sup> A point to be made here is that, because public power attracts judicial review because rights are being created or altered rather than merely exercised, judicial review may reach outsourced administrative decisions.

Nothing in *Tang*, or in what I have said about the evolution of the common law, warrants the concern expressed by some academics that the important purposes served by judicial review can be frustrated merely by the outsourcing of decision-making functions to privately owned organisations.

If a private company is empowered by statute to affect the rights of subjects, the exercise of that power will be a decision made under an enactment. To the extent that it is a decision which serves to execute the will of the sovereign Parliament, it may arguably be described as a decision of an administrative character; but even if it does not fall within the scope of the *AD(JR) Act*, it would nevertheless be amenable to judicial review under the common law.

In relation to the 'outsourcing' of executive functions by the Commonwealth Parliament, we may take as an example the case of a statute which creates and empowers a corporation to act in a particular field, and directs it to act independently of control by the Commonwealth executive.

It may be suggested that a decision by such a corporation adverse to a citizen would be subject to review under s 75(iii) or (v) of the Constitution; but it is, I think, doubtful whether the action of the hypothetical corporation would be an exercise of, or refusal to exercise, Commonwealth executive authority. No doubt the High Court would be astute not to allow 'colourable evasion' of s 75(iii) and (v) of the Constitution; but s 75(iii) and (v) do not deny to the Parliament the power to make a law imposing powers and duties on a person other than an officer of the Commonwealth.

It seems unlikely that ss 1 and 61 of the Constitution will be interpreted as denying the Commonwealth Parliament the power to authorise an agency other than the executive government to execute and maintain the laws of the Commonwealth.<sup>54</sup> That being so, the

better answer to the problem of unfair or unreasonable decision-making by private concerns to whom the power has been outsourced is that the exercise of public power by an 'outside' agency is subject to judicial control simply by reason of the appreciation that judicial power extends to the supervision of the exercise of power to alter or affect or enforce rights of the subject, whoever the executive agent of the parliament may be.<sup>55</sup> The control of the exercise of such power is a characteristic function of the judicial power.

### Democratic values

A close focus on the scope of judicial review under the *AD(JR) Act* is apt to obscure the importance of other underpinnings of the values of fairness and reasonableness in administrative decision-making. While the institution of judicial review is the ultimate guarantor of rationality and fairness in administrative decision-making, it is not alone in the field. These are other institutional guarantees of rule of law values in relation to administrative decision-making. These may afford more inclusionary and democratic ways to ensure the integrity of governmental decision-making.

The integrity and quality of administrative decision-making is also guaranteed by systems of internal merits review and external merits review by tribunals, and by review by ombudsmen and other non-judicial agencies charged to oversee administrative decision-making. And, last but not least, we are served by a professional civil service whose members are drawn from and representative of the people it serves. These are all important elements in what Spigelman CJ called the 'Integrity Branch of Government' in his lecture in this series in 2004. They are institutional and cultural features of liberal democracy in the age of the welfare state which were not part of the milieu in which our administrative law developed, before the welfare state. They should not be forgotten.

As Professor McMillan said recently:<sup>56</sup>

The discussion of government accountability in judicial speeches usually dwells on the tension between the judiciary, on the one hand, and parliament and the executive on the other. A related tendency in legal articles or conferences that discuss good decision-making is to assume that it equates with the grounds for judicial review. Generally, there is an untoward focus in legal scholarship on the accountability role of courts. This can present an unrealistic comparison of judicial and non-judicial oversight. An example is that few if any of the large number of articles criticise the High Court ruling in *Griffith University v Tang* that a decision of the University to dismiss Miss Tang as a PhD candidate was not reviewable under the *Judicial Review Act 1991* (Qld), mention that ombudsman offices in Australia can investigate complaints against universities, and do so frequently.

It is perhaps worth saying too that the legality/merits dichotomy, so crucial to our understanding of the legitimate scope of judicial review, serves democratic values.

In *Chevron USA v Natural Resources Defence Council Inc* ('*Chevron*'),<sup>57</sup> it was held by the United States Supreme Court that Federal Courts will defer to an agency's legal interpretation of its statutory charter so long as that interpretation reflects a reasonable appreciation of the intent of the Congress.

The *Chevron* doctrine of statutory interpretation has been rightly said by Professor Aronson to be anathema to the High Court.<sup>58</sup> In Australia, the proposition that 'it is emphatically the province and duty of the Judicial Department to say what the law is'<sup>59</sup> is understood to carry with it the corollary that each statute has only one permissible meaning and that is the meaning discerned by the court: the sovereign authority which makes and administers the law cannot speak with a forked tongue.<sup>60</sup>

But that should not prevent recognition of the democratic values which support the maintenance of the merits/legality dichotomy which keeps judges out of the merits of administrative decision-making mentioned by Stevens J in his opinion in *Chevron*.<sup>61</sup>

... policy arguments are more properly addressed to legislators or administrators, not to judges.

In these cases, the Administrator's interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies ...

Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policy making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices – resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in the light of everyday realities.

When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges – who have no constituency – have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones ...

These observations by Stevens J in *Chevron* remind us that we must put alongside the principles of fairness and rationality which are deployed in the judicial review of administrative decisions as conditions of decision-making jurisdiction, the proposition that the judges have no business second guessing the politically responsible administration on matters committed to their determination by the legislature which represents the community.

For almost as long as there have been judges recognisable as such, it has also been the case that the sovereign has acted to create and alter rights through the decisions of specialist agencies and tribunals.<sup>62</sup> The great value of such agencies and tribunals lies, as it always has, in their special knowledge in a particular field which enables them to address complex issues expertly, efficiently and expeditiously.

In *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam, McHugh and Gummow JJ* said:<sup>63</sup>

In Australia, the existence of a basic law which is a written federal constitution, with separation of the judicial power, necessarily presents a frame of reference which differs from both the English and other European systems referred to above. Considerations of the nature and scope of judicial review, whether by this Court under s 75 of the *Constitution* or otherwise, inevitably involves attention to the text and structure of the document in which s 75 appears. An aspect of the rule of law under the *Constitution* is that the role or function of Ch III courts does not extend to the performance of the legislative function of translating policy into statutory form or the executive function of administration.

This demarcation is manifested in the distinction between jurisdictional and non-jurisdictional error which informs s 75(v). Selway J has accurately written of that distinction:

'Notwithstanding the difficulty, indeed often apparent artificiality, of the distinction, it is a distinction between errors that are authorised and errors that are not; between acts that are unauthorised by law and acts that are authorised. Such a distinction is inherent in any analysis based upon separation of powers principles.'

[Footnotes omitted].

## Conclusions

May I conclude by repeating that there has been no retreat by the Australian judiciary from its historic role as the guarantor of fairness and reasonableness in governmental decision-making. One may accept that 'public power begets public accountability' to use the vivid phrase of Kirby J.<sup>64</sup> But judicial review is not the only mechanism for ensuring public accountability, much less that it is always the best available mechanism.

There is, no doubt, something to be said for the view that all the decision-making processes of agencies of executive government should be scrutinised for error, even in relation to decisions to exercise rights common to all legal persons. But that would mean that many operational functions of government would be affected by costs and delays – possibly at the behest of commercial competitors – where the decision-making processes of those competitors, who may have similar power to affect the public interest, are not subject to similar burdens in the same circumstances.

It is not self evident that the rule of law favours those who wield aggregations of private capital for private profit over agencies which act in the name of the community.

It is unlikely that rule of law values will be harmed if the judiciary is not always in the centre of the front line of the integrity arm of government. That recognition is consistent with the democratic values reflected in the distinction between merits and legality review and which favour respect for the making of policy decisions by the representative and responsible organs of government.

We must be mindful that the exclusion of judicial review from the merits of administrative decision-making is not an accidental error awaiting correction by a sufficiently robust judiciary. Judicial intrusion into the merits of administrative decision-making is not only inconsistent with the historic role of judicial review: it may also become a distraction and a diversion away from the development of more active and effective participation by civil servants and ordinary citizens in the decision-making processes of government.

## Endnotes

- 1 Katrin Trüstedt, 'The Tragedy of Law in Shakespearean Romance' (2007) 1(2) *Law and Humanities* 167.
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- 3 Christopher Collard, 'Introduction' in Christopher Collard (ed), *Aeschylus: Oresteia* (Oxford: Oxford University Press, 2002), p. xvi.
- 4 499 US 400 (1991) at 407.
- 5 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.
- 6 Laurence Tribe, *Abortion: The Clash of Absolutes* (New York: W. W. Norton and Co. Inc., 1990), p. 80.
- 7 Robert Bork, 'Adversary Jurisprudence' (May 2002) 20 *The New Criterion* 4 at 18-19.
- 8 Nancy C. Roberts (ed), *The Age of Direct Citizen Participation* (New York: Me. E. Sharpe, 2008). See also Peter Cane, 'Participation and Constitutionalism' (2010) 38(3) *Federal Law Review* 319.
- 9 Mark Aronson, 'Private Bodies, Public Power and Soft Law in the High Court' (2007) 35(1) *Federal Law Review* 1; Christos Mantziaris and Leighton McDonald, 'Federal Judicial Review Jurisdiction After *Griffith University v Tang*' (2006) 17(1) *Public Law Review* 22; Patty Kamvounias and Sally Varnham, 'Doctoral Dreams Destroyed: Does *Griffith University v Tang* Spell the End of Judicial Review of Australian University Decisions?' (2005) 10(1) *Australian and New Zealand Journal of Law and Education* 5.
- 10 Sir Anthony Mason, 'Australian Administrative Law Compared with Overseas Models of Administrative Law' (2001) 31 *AIAL Forum* 45, 54.
- 11 [1987] 1 QB 815.
- 12 [1993] 1 WLR 909.
- 13 Sir Anthony Mason, 'Australian Administrative Law Compared with Overseas Models of Administrative Law' (2001) 31 *AIAL Forum* 45, 54.

- 14 Ralph V Turner, *The English Judiciary in the Age of Glanville and Bracton* (Cambridge: Cambridge University Press, 1985), p.159.
- 15 Ralph V Turner, *The English Judiciary in the Age of Glanville and Bracton* (Cambridge: Cambridge University Press, 1985), p.1.
- 16 Ralph V Turner, *The English Judiciary in the Age of Glanville and Bracton* (Cambridge: Cambridge University Press, 1985), p.2.
- 17 Letter written to Wilhelm Visscher the Younger cited in Isaiah Berlin, *Three Critics of the Enlightenment* (New Jersey: Princeton University Press, 2000), p. 20.
- 18 (1700) 1 Salk 144, 81 ER 134.
- 19 Thus in *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82, [27], Gaudron and Gummow JJ (with whom Gleeson CJ agreed) referred with evident approval to Lord Selborne's statement in *Spackman v Plumstead Board of Works* (1885) 10 App Cas 229, 240, that if the decision-maker under a statutory power had done anything 'contrary to the essence of justice', then '[t]here would be no decision within the meaning of the statute'. In this way, said Gaudron and Gummow JJ, 'a breach of the rules of natural justice would go to the statutory jurisdiction of the decision-maker, and so was a ground of interference within the doctrine of jurisdictional error'.
- 20 (1803) 1 Cranch 137, 177.
- 21 (2010) 239 CLR 531.
- 22 Cf *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 101 [4]; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, [42].
- 23 (2010) 239 CLR 531, 578-579.
- 24 (2010) 239 CLR 531, 579-580.
- 25 (2010) 239 CLR 531, 580-581.
- 26 *Spackman v Plumstead Board of Works* (1885) 10 App Cas 229, 240; *R v Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82, [27].
- 27 (2010) 239 CLR 531, 581.
- 28 (2005) 221 CLR 99.
- 29 (2005) 221 CLR 99, 132 [96].
- 30 (2005) 221 CLR 99, 128-129 [78]-[81].
- 31 Christos Mantziaris and Leighton McDonald, 'Federal Judicial Review Jurisdiction After *Griffith University v Tang*' (2006) 17 *Public Law Review* 22.
- 32 Michael Taggart, 'Australian Exceptionalism' in Judicial Review' (2008) 36 *Federal Law Review* 1, 20.
- 33 (2005) 221 CLR 99, 113 [29].
- 34 *Board of Fire Commissioners (NSW) v Arduin* (1961) 109 CLR 105, 118; *Hudson v Venderheld* (1968) 118 CLR 171, 175; *Marshall v Director-General, Department of Transport* (2001) 205 CLR 603, 626.
- 35 Christos Mantziaris and Leighton McDonald, 'Federal Judicial Review Jurisdiction After *Griffith University v Tang*' (2006) 17 *Public Law Review* 22, 30.
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- 37 Christos Mantziaris and Leighton McDonald, 'Federal Judicial Review Jurisdiction After *Griffith University v Tang*' (2006) 17 *Public Law Review* 22, 44.
- 38 Mark Aronson, 'Private Bodies, Public Power and Soft Law in the High Court' (2007) 35(1) *Federal Law Review* 1, 23.
- 39 (1997) 189 CLR 520, 564.
- 40 (1934) 51 CLR 358, 370 – 371.
- 41 (2005) 225 CLR 466, 473 [22].
- 42 Christos Mantziaris and Leighton McDonald, 'Federal Judicial Review Jurisdiction After *Griffith University v Tang*' (2006) 17 *Public Law Review* 22, 36 – 37.
- 43 Christos Mantziaris and Leighton McDonald, 'Federal Judicial Review Jurisdiction After *Griffith University v Tang*' (2006) 17 *Public Law Review* 22, 41-42.
- 44 (2005) 221 CLR 99, 131 [89].
- 45 (2005) 221 CLR 99, 107 [10].
- 46 [1924] 1 KB 171, 205.
- 47 *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 343 – 347; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1, 39 [93]; *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 580 – 581 [162]; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 553 – 554 [6], 574 – 578 [78] – [85], 596 – 600 [146] – [154], 634 [261], 658 – 660 [310].
- 48 (1765) 19 St Tr 1030, 1066.
- 49 (1991) 171 CLR 635.
- 50 HW Arndt, 'The Origins of Dicey's Concept of the "Rule of Law"' (1957) 31(3) *Australian Law Journal* 117, 119 – 120.
- 51 AV Dicey, *Introduction to the Study of Law of the Constitution*, (London: Macmillan, 10th ed, 1959), p. 328 – 405.
- 52 *Waterford v The Commonwealth of Australia* (1987) 163 CLR 54.
- 53 *Forbes v New South Wales Trotting Club Ltd* (1979) 143 CLR 242, 264, 275; *R v Panel on Takeovers and Mergers; Ex parte Datafin plc* [1987] QB 815, 838, 847.
- 54 *Victorian Stevedoring and General Contracting Co Ltd v Dignan* (1931) 46 CLR 73, 84.

- 55 Margaret Allars, 'Public Administration in Private Hands' (2005) 12(2) *Australian Journal of Administrative Law* 126.
- 56 John McMillan 'Re-Thinking the Separation of Powers' (2010) 38(3) *Federal Law Review* 423, 426.
- 57 467 US 837 (1984).
- 58 Mark Aronson, 'The Resurgence of Jurisdictional Facts' (2001) 12(1) *Public Law Review* 17 at 20. See *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 151 – 154; *Truth About Motorways Pty Limited v Macquarie Infrastructure Investment Management Limited* (2000) 200 CLR 591, 635.
- 59 *Marbury v Madison* (1803) 1 Cranch 137, 177.
- 60 *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 151 – 156 [39] – [50].
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- 62 LJ Jaffe and EG Henderson, 'Judicial Review and the Rule of Law: Historical Origins' (1956) 72 *Law Quarterly Review* 345.
- 63 (2003) 214 CLR 1, [76] - [77].
- 64 The Hon. Michael Kirby, 'Public Funds and Public Power Beget Public Accountability' (Paper presented at the Corporate Governance Conference, University of Canberra, 9 March 2006, available via <[http://www.hcourt.gov.au/speeches/kirbyj/kirbyj\\_9mar06.pdf](http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_9mar06.pdf)>).

## ELECTIONS AND ADMINISTRATIVE LAW

*Paul Pirani\**

### **Role of the AEC**

The Australian Electoral Commission ('AEC') conducts elections under a range of legislation. The main role of the AEC is the conduct of federal elections under the *Commonwealth Electoral Act 1918* (Cth) ('*Electoral Act*') and referendums under the *Referendum (Machinery Provisions) Act 1984* (Cth) ('*Referendum Act*'). However, in addition, the AEC conducts fee for service elections under the authority contained in sections 7A and 7B of the *Electoral Act*, industrial elections under the *Fair Work (Registered Organisations) Act 2009* (Cth), protected action ballots under the *Fair Work Act 2009* (Cth) and elections for the Torres Strait Regional Authority under the *Aboriginal and Torres Strait Regional Authority Act 2005* (Cth).

### **Status of the AEC**

The AEC is not a body corporate. As a matter of law, the AEC is not a legal entity that is separate from the Commonwealth of Australia. This means that the AEC is not a statutory authority and is unable to sue and be sued or to enter into contracts in its own right. This is despite what was stated in 1983 (see second reading speech for the Commonwealth Electoral Legislation Amendment Bill 1983 (Cth)) when a major reform of Australia's electoral laws took place with the amendments to the *Electoral Act*. The AEC does have some standing to appear in court, separately from the Commonwealth, in relation to non-voters (see section 245), the Court of Disputed Returns (see sections 357 and 359) and to seek injunctions to restrain persons from breaching the *Electoral Act* (see section 383). There is a brief discussion of the legal status of the AEC as being separate from the Commonwealth in *Mitchell v Bailey (No 3)* [2008] FCA 1029 (11 July 2008).

The AEC itself only comprises three persons: the Chairperson (the Hon Justice Peter Heerey QC), the non-judicial member (the Chief Statistician, Mr Brian Pink) and the Electoral Commissioner (Mr Ed Killesteyn) (see section 6 of the *Electoral Act*).

The Electoral Commissioner is the chief executive officer of the AEC and 'shall have such other functions, and such powers, as are conferred upon him or her by or under any law of the Commonwealth' (see subsection 18(2) of the *Electoral Act*). The Electoral Commissioner is the Chief Executive of the AEC for the purposes of the *Financial Management and Accountability Act 1997* (Cth) ('*FMA Act*') (see section 5) and an Agency Head for the purposes of the *Public Service Act 1999* (Cth) (see section 7 of the *Public Service Act 1999* and subsection 29(1) of the *Electoral Act*).

The *Electoral Act* provides that the AEC reports to the Minister and provides advice in a non-partisan manner. This is shown in section 7 of the *Electoral Act*, which sets out the functions of the AEC and includes:

- (b) to consider, and report to the Minister on, electoral matters referred to it by the Minister and such other electoral matters as it thinks; and
- .....

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- (d) to provide information and advice on electoral matters to the Parliament, the Government, Departments and authorities of the Commonwealth;

The issue of the relationship between the AEC and the Minister responsible for the administration of the *Electoral Act* is complex. This issue is determined by an examination of matters such as the specific powers contained in the *Electoral Act* itself, the Administrative Arrangements Order and the doctrine of ministerial responsibility.

The Administrative Arrangements Order (made by the Governor-General under section 64 of the *Constitution*) and the doctrine of ministerial responsibility to the Parliament (and to voters) results in the Minister being responsible for the policy of the *Electoral Act* (including the actions of the AEC itself). However, this responsibility does not carry with it any legislative power for the Minister to direct the AEC in the performance of its powers and functions under the *Electoral Act*. Indeed, the specific legislative power given to the Minister under the *Electoral Act* is limited to the further collocation of Divisional offices as required by section 38.

The *Electoral Act* deals with a wide range of electoral matters including enrolment, registration of political parties, nominations, voting, scrutiny, election funding and financial disclosure, electoral offences, etc. The exercise of these powers is vested in the AEC, the Electoral Commissioner or individual statutory officers. Nothing in the *Electoral Act* contains any powers for the Minister to exercise or to direct AEC staff in the performance of their powers or functions.

Over time the convention has developed whereby the AEC briefs the responsible Minister in relation to matters involving the exercise of its powers and functions under the *Electoral Act* but operates at 'arms length' from the Executive arm of the Government in relation to the actual exercise of those powers and functions. This 'arms length' approach is entrenched in guidelines and practices on a wide range of matters.

The AEC also reports directly to the Parliament through the Joint Standing Committee on Electoral Matters.

Accordingly, as a decision-maker under an enactment, with the exception of redistribution matters (see section 77 of the *Electoral Act*), decisions made under the *Electoral Act* can be subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1975* (Cth) or under section 39B of the *Judiciary Act 1903* (Cth).

### **Political neutrality**

The AEC requires all of its officers and employees to sign a *Political Neutrality* statement. This includes those temporary staff who are engaged under paragraph 35(1)(a) of the *Electoral Act* to perform duties relating to the conduct of an election, such as polling place officials engaged in duties as Officers in Charge of polling booths, Second in Charge, issuing officers and scrutiny assistants. The employment forms contain the following:

The AEC operates in a politically sensitive environment. Any person who is, and is seen to be, active in political affairs, and intends to publicly carry on this activity, may compromise the strict political neutrality of the AEC and cannot be considered for temporary employment. I have read the *Political Neutrality* statement and am eligible to be considered Yes No

In dealing with this issue, the AEC looks at whether or not a person is active in political affairs and, if the answer to this first issue is Yes, whether the person intends to 'publicly carry on this activity' while working for the AEC. Membership of a political party addresses the first issue. However, the second issue is a question of fact and degree, as to whether the

previous public display of affiliation with a registered political party has the potential to compromise the political neutrality of the AEC in the conduct of a federal election.

Prior to the enactment of the *Public Service Act 1999* (Cth), regulation 71AA of the *Public Service Regulations 1935* contained a specific exemption for the AEC in relation to discrimination in employment based on the grounds of political affiliation. This recognised that under the International Charter of Civil and Political Rights (in particular articles 25 and 26) that appears in Schedule 2 to the *Australian Human Rights Commission Act 1986* (Cth), the following appears:

*Article 25*

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

*Article 26*

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

There are two points to note. First, Article 25 refers to 'unreasonable restrictions'. Second, Article 26 refers to unlawful discrimination on the grounds of political status.

The AEC is of the view that the political neutrality requirements are not in breach of either of these requirements due to the nature of the work that is undertaken by the AEC and its staff in the conduct of an election. Indeed, the specific exemption that was previously required under the *Public Service Act 1922* (Cth) was stated as not being required due to the operation of the new APS Values and the APS Code of Conduct contained in sections 10 and 13 of the *Public Service Act 1999* (Cth).

The full AEC policy, which applies to both temporary staff and APS staff, addresses the concept of political neutrality in the powers and functions exercised by AEC staff in the conduct of elections under the *Electoral Act*.

The principles that underpin the political neutrality requirements of employees include:

- in the Australia Public Service ('APS') Values and Code of Conduct, various requirements about employees being apolitical, impartial and taking reasonable steps to avoid conflicts of interest;
- in the context of the statutory functions given to the AEC in relation to the conduct of elections and referenda, the AEC must be, and be seen to be, impartial and politically neutral;
- the Electoral Commissioner may engage employees subject to their meeting notified conditions relating to the inherent requirements of their employment;
- political neutrality is an inherent requirement of employment in the AEC. The AEC must maintain strict political neutrality and cannot engage as an employee anyone who is, or is seen to be, publicly active in political affairs;

- an employee must at all times behave in a way that upholds both the APS Values and Code of Conduct and the AEC Standard of Conduct;
- prospective employees, either ongoing, non-ongoing or temporarily engaged under the *Electoral Act* are required to comply with these values and code of conduct and, therefore, will be required to complete a pro-forma declaration of non-engagement in political affairs, impartiality and political neutrality. The onus is on the employee to bring any changes to the information in the declaration to the immediate attention of his/her manager;
- section 32 of the *Public Service Act 1999* (Cth) provides for an employee to resign if they intend to contest an election, and to have a right of return if they fail to be elected.

The APS Values contained in section 10 of the *Public Service Act 1999* (Cth) include:

- (1)(a) the APS is apolitical, performing its functions in an impartial and professional manner;  
.....
- (d) the APS has the highest ethical standards;
- (e) the APS is openly accountable for its actions, within the framework of Ministerial responsibility to the Government, the Parliament and the Australian public;
- (f) the APS is responsive to the Government in providing frank, honest, comprehensive, accurate and timely advice and in implementing the Government's policies and programs;
- (g) the APS delivers services fairly, effectively, impartially and courteously to the Australian public and is sensitive to the diversity of the Australian public;

The APS Code of Conduct contained in section 13 of the *Public Service Act 1999* (Cth) includes:

- (7) An APS employee must disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with APS employment.

The AEC is responsible for providing the Australian people with an independent electoral service capable of meeting their needs, while enhancing their understanding of and participation in the electoral process. It is, therefore, essential that all AEC employees, staff and office-holders are, and are seen to be, politically neutral. Any failure by the AEC to actually be politically neutral, or be seen to be politically neutral, runs the risk that election results could be challenged and the current trust in the services provided by the AEC could be seriously undermined.

This independence is even more important when you consider some of the statutory functions given to the AEC in relation to the conduct of elections, which include the redistribution of electoral boundaries, the registration of political parties, the acceptance and rejection of nominations, determining the formality of ballot-papers and determining ties in Senate elections by having the casting vote (see subsection 273(17) of the *Electoral Act*).

While each person's individual circumstances will be dealt with according to the relevant facts, some examples of activities that could be interpreted as conflicting with political neutrality, and which would preclude employment by the AEC, include:

- recent campaigning for a political party or candidate at either Federal, State or Territory elections eg media statements, handing out how-to-vote material, attributed statements on the Internet;
- recently standing as a candidate at either Federal, State or Territory elections;
- recent active public support for, or opposition to, a particular political party or candidate eg letters to the editor, attending political rallies, other publicly available statements of political views;

- activities which could be interpreted by a reasonable person as publicly supporting or opposing a particular political party or candidate eg regular public appearances with a candidate.

The political neutrality requirement is formally enshrined in the AEC's Standard of Conduct and Conflict of Interest Policies, as varied from time to time. All AEC recruitment advertising, selection criteria and position descriptions include a statement of the political neutrality requirement. All prospective AEC employees, staff and office holders involved in the conduct of elections are required to sign the declaration relating to political neutrality as a condition of engagement. All AEC employees, staff and office holders are required to immediately bring to the attention of their manager any situation which has the potential to impact on the perception of their political neutrality.

The *Public Service Act 1999* (Cth) and Regulations provide for employees who are or plan to be candidates at prescribed elections to resign up to 6 months prior to the closing date for nominations. Such employees have a right of return if they are unsuccessful. The Regulations 3.13 to 3.15 set out in detail the arrangements for return, however in summary:

- a prescribed election is a Commonwealth or State parliamentary election, an ACT or NT legislative assembly election, or a Torres Strait Regional Authority member or zone election under the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth);
- for a non-ongoing employee, the term of the employee's original engagement has not expired and the task has not been completed;
- they apply to return to the AEC or some other APS agency no later than 2 months after the results of the election are declared or a final decision is made on the results;
- engagement is on the same basis as when they resigned ie classification, duties, terms and conditions of employment and remuneration, (or if these have changed since the person resigned, the changed terms, conditions and remuneration);
- the resignation period counts as service for the accrual of leave entitlements.

Under the APS Values, the AEC has a responsibility to deal with political neutrality staffing issues in a fair, open and transparent manner. Complex cases in which the political neutrality of either a prospective or actual employee is at issue are required to be brought to the attention of the Electoral Commissioner.

The AEC deals with each case on its merits. The disclosure that an applicant is a member of a political party does not prevent them from being considered for work with the AEC. The issue is the public display of political alliances that could conflict with duties to conduct elections under the *Electoral Act*. The AEC is of the view that the present safeguards are reasonable and comply with existing laws.

### **Termination of an electoral officer**

Subsections 25(1) and (2) of the *Electoral Act* provide that:

(1) The Governor-General may terminate the appointment of an electoral officer by reason of misbehaviour or physical or mental incapacity.

(2) If an electoral officer:

- (a) becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors or makes an assignment of his or her remuneration for their benefit;
  - (b) is absent, except on leave of absence, for 14 consecutive days or for 28 days in any 12 months; or
  - (c) engages in paid employment outside the duties of his or her office without the approval of the Commission;
- the Governor-General shall terminate the appointment of the electoral officer.

It is noted that subsection 25(2) is couched in mandatory terminology by use of the word 'shall'.

The scope of the term 'misbehaviour' of a statutory officer has been considered by the courts in relation to statutory officer holders under a number of different statutes. These cases include such matters as *Clark v Vanstone* [2005] FCAFC 189 in relation to ATSI appointments. There is no direct case law on the term in the *Electoral Act*.

The view accepted by previous Electoral Commissioners is that the meaning likely to be given to 'misbehaviour' in relation to conduct of an Australian Electoral Officer will depend on whether the conduct has an 'effect ... on the capacity of the person to continue to hold the office', in one or both of the following aspects of capacity:

- was the conduct of the person concerned such that it affects directly the person's ability to carry out the office?
- was the conduct such that it may affect the perceptions of others in relation to the office, so that any purported performance of the duties of the office will be perceived widely as corrupt, improper or inimical to the interests of the persons, or the organisation, for whose benefit the functions of the office are performed?
- if the answer to one or both of these questions is in the affirmative, with the result that it is likely that there is 'danger ... that the office itself will be brought into disrepute as a result of the conduct of its holder', then 'the conduct is properly characterised as misbehaviour for the purposes of the relevant legislation'. However, it seems clear that mere error of judgement or even negligence would be unlikely in themselves to constitute 'misbehaviour' within the meaning of subsection 25(1) of the *Electoral Act*.

### Enrolment issues

As a matter of transparency and accountability in the electoral process, the name and address of who is eligible to vote in an election has always been publicly available. The only exceptions are for silent electors and certain general postal voters who are on operational service overseas, where the name appears but the address is suppressed. Accordingly, if an elector has reasonable grounds for suppressing his/her address details from the electoral roll (due to a risk to the personal safety of themselves or their family), then section 104 of the Electoral Act contains a process that can be relied upon.

The current regime for access to the Commonwealth electoral roll is contained in Part VI of the *Electoral Act* and resulted from concerns raised in the Parliament, particularly about privacy issues and the commercial use of the roll (see the Joint Standing Committee on Electoral Matters 'Report of the Inquiry into the Conduct of the 2001 Federal Election, and Matters Related thereto'). Those concerns led to the measures inserted by the *Electoral and Referendum Amendment (Access to the Electoral Roll and Other Measures) Act 2004* (Cth) ('*Amendment Act*'). Prior to these amendments, copies of the Commonwealth electoral roll could be purchased from the AEC and used for any purpose. However, on 21 July 2004, this ceased to be lawful and the AEC was prohibited from continuing such action.

The Second Reading Speech to the Bill that became the *Amendment Act* (see House of Representatives Hansard of 1 April 2004 page 27929, particularly at page 27930) made it clear the new regime was to cover the field in relation to access to the Commonwealth electoral roll and the then Minister stated that:

The bill will amend the roll access provisions to improve clarity, remove contradictions and improve privacy protections. Access to roll information will be set out in a tabular form. The tables will include all information that is currently provided for in the Electoral Act. They list who is entitled to roll information, what information they are entitled to and how often they will receive it....

Other safeguards to the Commonwealth electoral roll are contained in sections 390 (immunity from subpoenas), 390A (immunity from search warrants) and section 47A of the *Freedom of Information Act 1982* (Cth) (third party enrolment information is an exempt document). The *Amendment Act* also introduced a range of criminal offences that apply to the use and disclosure of the 'protected information' from the Commonwealth electoral roll where this was not for a permitted purpose. The offence in subsection 91A(1) of the *Electoral Act* for the unauthorised use of roll information carries a penalty of 100 penalty units (ie \$11,000) while the offence in subsection 91B(2) of the *Electoral Act* for the unauthorised disclosure of roll information carries a penalty of 1,000 penalty units (ie \$110,000). This level of penalties indicates the seriousness with which the Commonwealth Parliament regarded such breaches of the *Electoral Act* and the sensitivities about the 'personal information' held by the AEC as part of the database behind the Commonwealth electoral roll.

Section 90A of the *Electoral Act* provides that any person is lawfully able to attend an office of the AEC to inspect the public version of the Commonwealth electoral roll. Subsection 90B(1) of the *Electoral Act* also provides that the AEC is to provide a registered political party with copy of the Commonwealth electoral roll as soon as practicable after a general election or on request. Candidates in the House of Representatives are able to be provided with a copy of the certified list of voters for the Division in which they are seeking to be elected. This certified list will include the name and address of each elector (excluding the addresses of silent electors and certain general postal voters).

Subsection 91A of the *Electoral Act* provides that the information from the roll that is released is able to be lawfully used 'in connection with an election or referendum'. The term 'election' is further defined in subsection 91B(3) to include a State election or a local government election.

The Australian Law Reform Commission has called for a review of the access regime to the electoral roll and that political parties should be subject to the obligations contained in the *Privacy Act 1988* (Cth) (see Report No. 108 'For Your Information: Australian Privacy Law and Practice' and recommendations 16-3 and 41-1). Recommendation 16-3 states that:

The Australian Electoral Commission and state and territory electoral commissions, in consultation with the Office of the Privacy Commissioner, state and territory privacy commissioners and agencies with responsibility for privacy regulation, should develop and publish protocols that address the collection, use, storage and destruction of personal information shared for the purposes of the continuous update of the electoral roll.

The Government is in the process of responding to that report. I understand that the Department of the Prime Minister and Cabinet has carriage of that response.

The Australian National Audit Office has also commented on access to the electoral roll in its Audit Report No. 28 2009-10 entitled 'The Australian Electoral Commission's Preparation for and Conduct of the 2007 Federal General Election'. Recommendation No. 1 stated that:

ANAO *recommends* that the Australian Electoral Commission:

- (a) engage with the Office of the Privacy Commissioner to develop improved governance arrangements for the collection, processing, data-matching, distribution and management of the personal information of electors and potential electors; and
- (b) assess the extent to which broad use of electoral-roll information by non-government entities may be adversely impacting on the willingness of Australians to enrol to vote.

The name under which a person appears on the electoral roll is an issue which has been the subject of a great deal of litigation. Sections 93A(2) and 98A(2) of the *Electoral Act* provide the Electoral Commissioner with the power to refuse to include names on the roll where the name is 'fictitious, frivolous, offensive or obscene'. Decisions on the enrolment of a person are subject to merits review by the Administrative Appeals Tribunal ('AAT') under section 121 of the *Electoral Act*.

There are a number of cases on this issue with the most significant being the AAT decision in *Dent and Daryl Wight as an Australian Electoral Officer* [2007] AATA 1985. Several applications were lodged in the AAT, Federal Court and High Court by Mr Albert Langer against the actions of the Australian Electoral Officer for Victoria in refusing to place Mr Langer on the electoral roll under the name of Arthur Dent. The Federal Court has previously dismissed Mr Langer's claims in four matters. The Full Federal Court dismissed Mr Langer's various appeals in a decision handed down on 21 August 2008 in the case of *Arthur Dent v AEC and Another* [2008] FCAFC 153. Mr Langer also lodged an appeal with the High Court. The Special Leave application to the High Court was dismissed on 27 May 2009 and reported at *Dent v Wight and Another* [2009] HCL 114. In all of the Federal Court and High Court proceedings, costs orders have been made in favour of the AEC.

Other decisions on the name under which a person is entitled to enrol include *Tonite and Australian Electoral Officer for Queensland* [2002] AATA 514 and *Freemarijuana and Australian Electoral Officer for Queensland* [2001] AATA 917.

### **Party registration**

The AEC is required to maintain a register of political parties. This register lists those parties which are eligible to have the party affiliation of their endorsed candidates printed on ballot papers.

To be eligible for registration a party must be:

- established on the basis of a written Constitution that sets out the aims of the party and; either
- a parliamentary party, which is a political party with at least one member in the Parliament of the Commonwealth; or
- a political party that has at least 500 members who are entitled to be on the electoral roll and are not relied on by any other party.

Applications for registration are made to the AEC's National Office. For parliamentary parties, they may be made by the party secretary or all the parliamentary members. For other political parties, the application must be signed by ten members of the party of whom one is the secretary of the party.

The application must set out the name of the party, its abbreviation (if any), its registered officer's name, address and signature and whether the party wishes to receive public election funding. It must be accompanied by a copy of the party's Constitution and, for non-

parliamentary parties, 500 individually signed membership application/declaration forms, a membership list and a statutory declaration confirming party membership of those who signed the forms.

Parliamentary parties must include a Statutory Declaration from the secretary of the party affirming the Parliamentary members as members of the party, and also letters from the Parliamentary members that state that they are members of the party. These letters must be on Parliamentary letterhead.

An application cannot be processed by the AEC in the period between the issue and the return of the writ for a Commonwealth election or by-election. A \$500 fee must accompany registration and change of name or abbreviation applications.

When the AEC receives an application for party registration, it publishes a notice in the *Commonwealth Gazette* and major newspapers in each State and Territory. This notice invites objections on the grounds that:

- the application does not meet the legislative requirements;
- the party is not an eligible political party;
- the name (or abbreviation if any) is one which should be refused by the AEC.

Any person or organisation may object to a party being registered on these grounds by submitting reasons in writing to the AEC during the month after the date of notice.

The AEC will refuse to register a party if the name or abbreviation of the party:

- comprises more than six words;
- is obscene;
- is the name or abbreviation of the name of an unrelated recognised party;
- closely resembles the name or abbreviation of an unrelated recognised party;
- comprises the words Independent Party, or contains the word Independent together with the name of an unrelated registered party.

The AEC may de-register a party on the following grounds:

- the party has ceased to exist;
- the original registration was obtained by fraud or misrepresentation;
- a non-parliamentary party has failed to endorse candidates for election for a period of 4 years;
- the registered officer did not comply with a review notice;
- the party has less than 500 members and no Parliamentary members; or
- at the request of the party.

The *Electoral Act* provides for applications for merit review to be made in respect of decisions by the AEC to:

- grant, or refuse, a party's application for registration;
- grant, or refuse, an application to change the Register of Political Parties;

- uphold, or refuse, an objection by a former parent political party to a party's continued use of its name, or abbreviated name;

In certain cases, the decision to deregister a party may also be appealed.

People affected by an appealable decision of a delegate of the AEC may, within 28 days of becoming aware of the decision, apply to the AEC for a review of the decision:

- they must give their name and address, and the reasons they are seeking the review;
- if they are dissatisfied with the outcome of the review, they may be able to apply to the AAT for its review of the decision.

The AEC will provide persons directly affected by an adverse decision with a statement of reasons for that decision. The AEC will publish on its web site the reasons for:

- refusing an application for the registration of a political party;
- refusing an application seeking changes to a party name or abbreviation, or the inclusion of a new abbreviation in the register;
- upholding an objection to the continued use of a party name.

The actions of the AEC in its administration of the party registration provisions are subject to review by the full Commission itself, then the *Administrative Appeals Tribunal Act 1975* (Cth), the *Ombudsman Act 1976* (Cth) and judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). Information about the actions of the AEC may also be obtained under the *Freedom of Information Act 1982* (Cth).

The AEC has no role in dealing with the internal disputes of registered political parties. Such disputes are matters to be resolved between individual members and, if necessary, by resort to the Courts (see *McLean v McKinlay and Others* [2004] WASC 2, *Clarke v Australian Labor Party (SA Branch)* [1999] SASC 36 and *Coleman v Liberal Party of Australia, New South Wales Division (No 2)* [2007] NSWSC 736). While the AEC has no role in determining disputes with registered political parties, the AEC does have a role in ensuring that any action that it takes under the *Electoral Act* pursuant to requests from members of a political party is action that is a result of the provision of probative evidence of a formal decision made in accordance with the constitution and rules of the registered political party.

Being a 'registered officer' under the *Electoral Act* gives rise to a number of rights, including the right to endorse candidates for an election (see subsection 166(1) and section 169B), the right to receive a copy of the electoral roll under section 90B and the right to lodge group voting tickets under section 211. The AEC is aware that the exercise of these rights is significant with a registered political party and is normally exercised by the person who is elected by the members to the position of Federal Secretary of the party. There has been a matter before the AAT involving the Democratic Labor Party and the position of the registered officer (see *Mulholland and Australian Electoral Commission and Zegenhagen (Joined Party)* [2011] AATA 879), which will assist in providing guidance on this issue.

The AEC notes that there is no offence under the *Electoral Act* relating to 'passing off'. In the commercial law area a 'passing off' action is where one person is seeking to prevent another person from using a symbol, colour or logo that is owned or registered for use by another. In the case of registered political parties, there is nothing in the *Electoral Act* that regulates symbols, colours or logos that are used by each registered political party. It is only the party name and abbreviation of its name that is registered under section 133 of the *Electoral Act*.

The registration of a political party under Part XI of the *Electoral Act* only has the legal effect of preserving a party name and abbreviation of that name for use on ballot-papers (see sections 169, 210A and 214 of the *Electoral Act*).

The processes set out in section 129 of the *Electoral Act* only apply at the time of registration. Further, as was made clear by three Federal Court judges sitting as the AAT in the case of *Woollard and the AEC and the Liberal Party* [2001] AATA 166, there is nothing in the *Electoral Act* that locks up the use of a particular word or applies outside its use on a ballot-paper. Paragraphs 40 to 43 of the AAT decision state:

Political parties in Australia use, and historically have used, in their names generic words such as "Australia", "liberal", "labour", "democrat", "national", "christian", "progressive", "socialist" and the like. Absent clear language to contrary effect, the disqualifying provision is not to be construed so as to lock up generic words as the property of any organisation when it comes to names that can be used on the ballot paper.

The above case went on to state that:

The presence of s 130 suggests that the confusion contemplated by s 129(d) extends to confusion as to whether some relationship exists between two registered political parties the names of which appear on the ballot paper. Section 130 is not expressly worded so as to override s 129(d), but that must be its intended effect. It provides that the Commission may register an eligible political party notwithstanding that a political party that is related to it has been registered. Unless it were intended to authorise registration of similarly-named parties when a relationship exists between them, the section appears to have no function.

The above case has recently been called into question in a matter that was listed to be heard on 28 June 2011 by a Full Bench of the AAT (comprising 3 Federal Court judges) in the matter of *Re: Community Alliance Party (ACT) & Australian Electoral Commission & Communist Alliance* (2010/1457).

The AEC's decision to register the Australian Fishing and Lifestyle Party was challenged in several applications made to the Federal Court by persons associated with the Fishing Party. The issue in these cases was whether the decision to register the Australian Fishing and Lifestyle Party was in accordance with the requirements of s. 126 and s. 129 of the *Electoral Act*. The Federal Court dismissed all of these legal challenges (see *Sharples v AEC* [2007] FCA 2102, *Sharples v AEC (No. 2)* [2007] FCA 2103 and *Sharples v AEC (No. 3)* [2008] FCA 63).

Mr Robert Smith, the registered officer of the Fishing Party, appealed against the decision of the Court of Disputed Returns ('CDR') claiming that the registration of the Australian Fishing and Lifestyle Party was an illegal practice and that the result of the Senate elections in New South Wales and Queensland were likely to be affected. The original petition was dismissed by the CDR in a decision dated 27 June 2008 in the case of *Smith v Australian Electoral Commission* [2008] FCA 953. The Court found that that the petition was defective and, as a matter of substance, was doomed to failure. Mr Smith subsequently purported to appeal the CDR's decision despite the prohibition contained in s. 368 of the *Electoral Act*. In a decision dated 1 April 2009, the Full Federal Court dismissed the appeal finding that the appeal was incompetent and awarded costs in favour of the AEC.

### **Candidacy**

To nominate for either the Senate or the House of Representatives, a prospective candidate must be:

- at least 18 years old;

- an Australian citizen; and
- an elector entitled to vote, or a person qualified to become such an elector.

The qualifications for nominating as a candidate for the Senate or the House of Representatives are the same. A member of the Senate or the House of Representatives cannot be chosen or sit as a member of the other house of parliament.

A person cannot nominate as a candidate for the Senate or the House of Representatives if they:

- are currently members of a state parliament or a territory legislative assembly and have not resigned before the hour of nomination (12 noon on the day nominations close).
- are disqualified by section 44 of the Constitution and have not remedied that disqualification before nomination.

No candidate may be appointed as an electoral officer of any description either as a permanent officer or as a polling official. If an electoral officer becomes a candidate they must vacate the office.

### ***Nomination by a party***

If a candidate is endorsed by a registered political party, the nomination form must include verification of the endorsement by the registered officer of the party. The registered officer and the deputy registered officer of a registered political party have equal powers in relation to the nomination process. If a registered officer nominates a candidate, they may request on the nomination form that the party's registered name or abbreviation be printed on the ballot paper next to the candidate's name.

If a candidate is part of a Senate group, the registered officer may request to have the party name or abbreviation printed next to the above-the-line box. Alternatively, the registered officer may provide these details in writing to the appropriate electoral officer before the close of nominations.

### ***Nomination by fifty electors***

If a candidate is not endorsed by a party, the candidate must be nominated by at least 50 electors, that is, 50 people entitled to vote at the election for which the candidate is standing. The names of the 50 electors are recorded on the nomination form.

### ***Nomination deposit***

Each nomination for the Senate and the House of Representatives must be accompanied by a deposit paid by legal tender (cash) or a cheque drawn by a bank or other financial institution on itself. Personal cheques cannot be accepted. The deposit required is \$1,000 for each Senate candidate and \$500 for each House of Representatives candidate.

### ***Review***

Electoral officers can reject a nomination if the provisions in the Act relating to:

- the mode of nomination; or
- the person to whom the nomination is made; or

- the requisites for nomination; or
- the form of consent to act has not been complied with.

A nomination will not be rejected simply because of a formal defect or error in the nomination if the officer to whom the nomination is addressed is satisfied that there has been substantial compliance with the requirements of the Act.

Decisions made in relation to the nomination of candidates are subject to judicial review. A recently reported decision on this is the case of *Noah v Campbell* [2007] FMCA 2128 (21 November 2007) which can be found at:

<http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FMCA/2007/2128.html>

The *Noah* case related to the requirements for a valid nomination of a candidate for the election. Section 166 of the *Electoral Act* requires that an unendorsed candidate must have the nomination form supported by 50 persons entitled to vote at the election in which the candidate is seeking to be nominated. In the case of *Noah v Campbell* [2007] FMCA 2128, Ms Noah attempted to argue that the decision of the divisional returning officer in rejecting her nomination was unlawful. Ms Noah attempted to argue that she is legally able to nominate herself and that she could therefore be one of the 50 persons required by s. 166 to have signed the nomination form. The Court dismissed the claim that the divisional returning officer's decision had been unlawful, indicating that plain reading of the legislation clearly favoured the view that candidates could not nominate themselves, and that there needed to be 51 people named on the nomination form: 50 nominators and one nominee.

The court also awarded costs against Ms Noah and her failure to pay those costs resulted in contempt action in the case of *Noah v Bailey* [2008] FMCA 1426. Ms Noah successfully appealed against the contempt finding in *Clampett v Attorney-General of the Commonwealth of Australia* [2009] FCAFC 151 (28 October 2009).

### The voting process

The AEC is concerned at any action that results in an increase in the number of informal votes. However, the AEC also notes that the case law suggests that each elector retains the right to cast an informal vote and that this is often used by electors to indicate their objection to the candidates, the political process and the policies of the political parties.

The AEC has received several complaints about the words of Mr Mark Latham on the *60 Minutes* program that was broadcast on 15 August 2010, he advocated that electors could cast a protest vote by not marking the ballot papers. The complaints have requested that the AEC take action to prosecute Mr Latham for advocating a method of voting that is arguably in breach of the requirements of section 233 of the *Electoral Act*. The AEC has **not** stated that Mr Latham's apparent advocacy of casting a blank ballot paper was legal. In an article written by Mr Nathan Klein of *The Daily Telegraph* on 16 August 2010 the following statement was made which accurately reflects the position of the AEC:

An AEC spokesman confirmed that the Commonwealth Electoral Act did not contain an explicit provision prohibiting the casting of a blank vote, even though it was "obviously a wasted vote".

The legal requirements that apply to voting in a federal election are contained in the *Electoral Act*. After the elector has his/her name marked-off from the certified list of voters, section 233 of the *Electoral Act* requires that the following procedures must be followed:

- (1) Except as otherwise prescribed the voter upon receipt of the ballot paper shall without delay:

- (a) retire alone to some unoccupied compartment of the booth, and there, in private, mark his or her vote on the ballot paper;
- (b) fold the ballot paper so as to conceal his or her vote and:
  - (i) if the voter is not an absent voter—deposit it in the ballot-box; or
  - (ii) if the voter is an absent voter—return it to the presiding officer; and
- (c) quit the booth.

Accordingly, the mere act of attending a polling booth and having the elector's name marked-off from the certified list of voters is not sufficient. The elector must also accept the ballot-papers, retire to a voting booth, mark the ballot-papers, fold the completed ballot-papers and place them in a ballot box.

Whether or not there is a legal requirement to record a valid vote is a rather more complex issue. The AEC notes that there are a number of Court decisions which suggest that each elector retains the right to cast an informal vote and that this is often used by electors to indicate their objection to the candidates, the political process and the policies of the political parties.

The AEC readily acknowledges that the process set out in section 233 of the *Electoral Act* requires that the elector receive a ballot paper, retire to an unoccupied compartment of the polling booth, 'mark his or her vote on the ballot paper', fold the ballot paper to conceal his or her vote, deposit the ballot paper in the ballot-box and quit the booth. However, the practical reality of the above process is that the AEC will never know which elector has chosen not to mark a ballot paper due to the secrecy of the ballot and therefore will not be able to prosecute an individual elector for lodging a blank ballot paper in the ballot-box. This situation was highlighted by Blackburn CJ in *O'Brien v Warden* (1981) 37 ACTR 13.

The comments of Barwick CJ in *Faderson v Bridger* (1971) 126 CLR 271 and Blackburn CJ of the ACT Supreme Court in *O'Brien v Warden* (1981) 37 ACTR 13 were directed to whether a failure to attend a polling place to vote (because none of the candidates on the ballot papers could be preferred) amounted to a valid and sufficient reason for failing to vote. In both decisions the Courts stated that this was not the case. It is noted that Barwick CJ stated at page 272 'Of course there is no offence committed by not marking the ballot paper in such a fashion that the elector's vote is in law a valid vote'.

Blackburn CJ at page 16 of the reported decision in *O'Brien v Warden* (1981) 37 ACTR 13 stated that:

In *Lubcke v Little*, Crockett J said at page 811: 'To record an informal vote is not an offence. To fail to mark a ballot paper so as to show preferences as shown by section 124 is not an offence.

Blackburn CJ then proceeded to state that a contrary view 'may be at least arguable'. That is, he did not conclude that there was a legal requirement to mark the ballot paper and any failure to do so was an offence. His Honour merely stated that this was 'arguable'.

Blackburn CJ went on to state that:

No doubt, it would be impossible to adduce evidence of this particular kind of failure, because of the provisions for the secrecy of the ballot; but if such failure is an offence, a person could be convicted on confessional evidence. I need say no more than that it seems to me arguable that under the Act the elector's obligation to vote is satisfied not only by his attendance at a polling booth but also by going through the whole of the procedure laid down, including the marking of a ballot paper in a manner which is not informal – i.e. in a manner which appears to express a preference. The other view, which could be called the orthodox one, is that the elector's obligation is to attend at the polling booth, go through the statutory procedure, and drop a ballot paper, irrespective of how it is marked, into the ballot box. Whichever of these views is correct, in my opinion the Act does not oblige the elector to

make a true expression of his preference among the candidates. On one view he must make an expression of apparent preference; on another he need not express himself intelligibly or at all.

There is an issue about whether or not the actions of Mr Latham could be regarded by a criminal court as being in breach of Division 11.4 of the *Commonwealth Criminal Code Act 1995* ('CCC Act') which deals with the incitement to commit an offence. However, the AEC notes that penalty for a breach of Division 11.4 of the CCC Act depends on the actual level of penalty for the offence which was incited to be breached. In the present case the only apparent offence would be the offence in section 245 of the *Electoral Act* of failing to vote. The penalty for a breach of section 245 of the *Electoral Act* is \$50. This would appear to be the only penalty that could be imposed against Mr Latham if a criminal court concluded that failing to mark a ballot paper was an actual offence under the *Electoral Act*.

### **Polling facilities**

An application to the Federal Court sought to challenge the type of voting screens used at polling booths. In the matter of *Horn v AEC* [2007] FCA 1827, the Federal Court dismissed Mr Horn's claims that the construction and layout of the polling booths used in federal elections did not adequately screen him from observation by others while marking his ballot paper, and that this was in breach of several requirements of the *Electoral Act*. The court awarded costs in favour of the AEC (see *Horn v AEC* [2008] FCA 43).

Mr Horn has been engaged in litigation since August 2006 claiming that the voting compartments provided by the AEC in polling booths should be either fully enclosed or have curtains to maintain the secrecy of the ballot. Mr Horn has argued that the current voting screens are unlawful and breach the requirements of sections 206 and 331 of the *Electoral Act*. At all times Mr Horn has been represented by Counsel on what the AEC understands has been a pro bono basis.

The first legal proceedings brought by Mr Horn in 2006 were rejected by Justice Nicholson on procedural grounds (see *Horn v AEC* [2006] FCA 1778). Mr Horn commenced fresh proceedings in the Federal Court in 2007, which were eventually dismissed by Justice McKerracher making specific findings that the voting compartments were not in breach of the requirements of the *Electoral Act* (see *Horn v AEC* [2007] FCA 1827). In a subsequent decision (*Horn v AEC* [2008] FCA 43) Justice McKerracher awarded costs against Mr Horn, rejecting arguments that there should be no orders as to costs because this was public interest litigation. At paragraph 22 of this decision His Honour concluded that '*the alleged breach was without substance*'.

Mr Horn was convicted in the Magistrates Court of Western Australia in 2008 for failing to vote, in breach of the requirements of section 245 of the *Electoral Act*. Mr Horn appealed that decision to both the Supreme Court of WA and the WA Supreme Court of Appeal on the basis that his concerns about the voting screens amounted to a 'valid and sufficient reason' for his failure to vote at the November 2007 election. Both of these Courts upheld the conviction and rejected Mr Horn's arguments. The decision of Mr Justice McKerracher was taken into account in the decision of the WA Supreme Court of Appeal which upheld the conviction against Mr Horn's decision not to cast a vote (*Horn v Butcher* [2010] WASCA 67). The three judges of the Court of Appeal concluded that Mr Horn's view about the voting compartments not meeting the requirements of the *Electoral Act* was '*unsound, not well-founded, has no force, weight or cogency, lacks authority and is not sustainable in law*'.

## The ballot count

The task in dealing with disputed ballot-papers has three levels.

The first level is the actual count on polling day. Each party and candidate is able to appoint scrutineers who may be present at the checking and counting of the ballot papers after the close of polling. Scrutineers have the right to inspect the condition of and observe the sealing and opening of ballot boxes. Ballot boxes containing votes taken by electoral visitors in hospitals and prisons and by mobile polling teams in remote divisions are either forwarded to the relevant electoral officer or returned to the divisional office. These ballot boxes are opened and the scrutiny conducted in a divisional office or a counting centre.

Scrutineers have the right to observe the counting of ballot papers on election night, including the two-candidate-preferred count conducted after the counting of first preference votes. Scrutineers may also observe the counting of ballot papers following election night, including the fresh scrutiny, the preliminary scrutiny of declaration votes and any recount of ballot papers. During the scrutiny, scrutineers must not:

- handle ballot papers in any way; or
- unreasonably delay or interfere with the counting of votes.

Scrutineers may object to the admission or rejection of any ballot paper. The electoral officer conducting the scrutiny will then decide whether the vote is formal or informal and mark the ballot paper 'admitted' or 'rejected'. The electoral officer may reject a ballot paper as informal even if no scrutineer has objected to it.

The initial scrutiny conducted at the polling place on election night is routinely followed by a 'fresh scrutiny' or recheck of votes conducted by the relevant electoral officer in the days following polling day. The exact time will be advised by each electoral officer to candidates and their scrutineers. At this stage, some ballot papers earlier treated as informal may be admitted to the scrutiny by the electoral officer, and some ballot papers originally treated as formal may be reclassified as informal. Any person approved by the officer conducting the fresh scrutiny may be present, as well as duly appointed scrutineers.

The second level is called a recount. Under the *Electoral Act* candidates may request a recount of ballot papers in an election, although the electoral officer is not automatically obliged to accept the request. The official also has the power to direct a recount at his/her discretion without waiting for a request.

In the absence of specifically alleged errors, it is unlikely that a recount would be required at either a House of Representatives or a Senate election, no matter how close the margins in the scrutiny had been. Given the checks and balances in the scrutiny systems for each type of election, significant sorting errors are highly unlikely to go undetected.

The general guidelines observed in evaluating requests for a recount are as follows:

- a recount may take place where there are valid and specific grounds for supposing that it could change the result of the election in the division or state or territory or where there are specific grounds for determining the need for a recount of specific ballot papers (such as in response to specific allegations or incidents);
- a request for a recount that does not plead any valid and specific grounds should be refused;

- wherever possible, the grounds pleaded by the candidate requesting the recount should be used to narrow down to as small a category as possible the ballot papers that need to be re-examined;
- there is no minimum number of ballot papers under which a recount will automatically occur;
- only one recount of any set of ballot papers will occur; and
- requests for recounts will only be considered, and actioned, in the period after the completion of all scrutines and before the declaration of the poll in the division (for House of Representatives ballot papers) or state or territory (for Senate ballot papers).

Electoral officers may initiate a recount, or be directed by the Electoral Commissioner or the Australian Electoral Officers at any time before the declaration of a result of a House of Representatives election to recount all or some of the ballot papers. The electoral officer must notify each candidate of the time and place of any recount. If an electoral officer or an Australian Electoral Officer refuses a request to conduct a recount, then the candidate can appeal to the Electoral Commissioner to review that decision.

The electoral officer conducting a recount has the same powers as if the recount was the original scrutiny, and may reverse any decision in the scrutiny to admit or reject a ballot paper.

The electoral officer may, and at the request of a scrutineer must, reserve any ballot papers for the decision of the Australian Electoral Officer under subsection 279B(5) and section 281 of the *Electoral Act* when engaged in the conduct of a recount. The Australian Electoral Officer ('AEO') must decide whether any ballot paper reserved for their decision is to be admitted or rejected. If a ballot paper is considered admitted by the AEO, then the ballot-paper is remitted to the electoral officer who then determines to whom the first preference has been allocated, if this is unclear.

### **The Court of Disputed Returns**

The final level of review in all matters that affect the outcome of an election is the Court of Disputed Returns. Petitions can be lodged with the High Court of Australia, sitting as the CDR, challenging the result of an election. The Petition must set out the facts relied on to invalidate the election and, if they allege illegal practices, must show how these could have affected the election result. The Court may also consider any ballot paper reserved for the decision of the AEO, but may only order a further recount if it is satisfied that a recount is justified.

His Honour, Mr Justice Tracey in the case of *Mitchell v Bailey (No. 2)* [2008] FCA 692 (see <http://www.austlii.edu.au/au/cases/cth/FCA/2008/692.html>) described the task for a decision-maker in determining the formality of ballot-papers under the *Electoral Act* as requiring the decision maker to ascertain from the markings on the ballot-paper the 'real intention of the voter'. His Honour (see paragraph 51) stated that in performing this task the decision-maker is:

....required to examine ballot-papers which have been completed by people of differing ages, health standards, cultural backgrounds and educational levels to mention but a few of the many variables which obtain. These voters annotate their ballot-papers with such a wide variety of different marks which cause the formality of the ballot-papers to be called into question that it is not possible to frame prescriptive 'rules' to resolve disputes. Value judgments informed by principle are required.

His Honour went on to state in paragraph 52 that the principles to be applied by the decision-maker are:

In my view the two cardinal principles are those identified by Gummow J in *Langer v Commonwealth* namely 'that the ballot, being a means of protecting the franchise, should not be made an instrument to defeat it and that, in particular, doubtful questions of form should be resolved in favour of the franchise where there is no doubt as to the real intention of the voter.' These principles are given statutory force by s 268(3) of the Act. Other, subordinate, principles may be identified which assist in giving effect to the two cardinal principles. These are:

- When seeking to determine the voter's intention resort must be had, exclusively, to what the voter has written on the ballot-paper.
- The ballot-paper should be read and construed as whole.
- A voter's intention will not be expressed with the necessary clarity unless the intention is unmistakable and can be ascertained with certainty. A Court of Disputed Returns must not resort to conjecture or the drawing of inferences in order to ascertain a voter's intention.

The clear points made by His Honour can be summarised as follows:

- each ballot-paper is to be examined having regard to the many variables relating to the people who have completed the ballot-papers and requires the decision-maker to exercise 'value judgements' to identify the marks used;
- the real intention of the voter should be ascertained;
- doubtful questions of form should be resolved in favour of the franchise to give effect to the real intention of the voter;
- when determining the voter's intention, resort must be had exclusively to what the voter has written on the ballot-paper;
- the ballot-paper should be read and construed as a whole;
- in a general sense, the voter will have the intention to vote formally, or in some exceptional cases informally (eg lodging a blank or defaced ballot-paper). Normally it is appropriate to assume that the intention of the voter was to vote formally. If the ballot-paper discloses an intention to vote in a manner consistent with the Act then it will be formal;
- the clear intention of the voter is to be discerned from an examination of the ballot-paper and the decision-maker must not substitute his/her own speculative opinion as to what the voter is presumed to have intended;
- variants of numbers written on the ballot-paper are to be considered as long as they are intelligible;
- where a number has been overwritten, then provided that the overwritten number is clearly legible, the overwritten number should be treated as expressing the real intention of the voter;
- the examination of the numbers that appear on the ballot-paper should not be conducted in isolation from the other numbers that appear on the ballot-paper. If the number in question 'bears a reasonable resemblance' to the missing number, then the ballot-paper will be formal;
- if the mark in the box bears no reasonable resemblance to the missing number in the sequence required for a formal vote, then the decision-maker should not assume that it is the missing number;
- initials on a ballot-paper only result in the ballot-paper being informal where a person who is authorised to access the ballot-paper is able to identify the voter; and

- ballot-papers that do not contain the official markings will be informal unless the Divisional Returning Officer has annotated the ballot-paper stating 'I am satisfied that this is an authentic ballot-paper'.

### Illegal practice

On 2 July 2008, the Federal Court, sitting as the CDR, handed down a decision on the McEwen petition in the matter of *Mitchell v Bailey (No.2)* [2008] FCA 692. The Court decision affirmed that Ms Bailey was duly elected and returned as the Member for McEwen with a margin of 27 votes. However, in reaching this decision the Court changed the decision of the AEO for Victoria on 154 of the 643 ballot-papers that were reserved for his decision under section 281 of the *Electoral Act*. The Court found that the AEO for Victoria engaged in an 'illegal practice' in relation to the 12 ballot-papers that were wrongly included in the count and the 142 ballot-papers that were wrongly excluded from the count.

This finding was based on the broad definition of an 'illegal practice' contained in subsection 352(1) of the *Electoral Act*, which means 'a contravention of this Act or the regulations'. The contravention of the *Electoral Act* in this case was the mistaken application of the formality requirements contained in section 268 of the *Electoral Act* and which were required to be applied by the AEC under subsection 279B(7) as part of the requirement to 'scrutinize the ballot-papers'. At paragraph 19 the Court stated that if the AEO failed to correctly admit or reject ballot-papers in accordance with section 268 of the *Electoral Act*, this will be a contravention of the Act and would constitute an 'illegal practice'.

At paragraph 20 the Court states, in part, that:

I stress that any reference to 'illegal practices' on the part of the AEO involved no more than the suggestion that the AEO has **made bona fide but mistaken judgements** about the formality of reserved ballot-papers. [Emphasis added].

Any finding of an 'illegal practice' by the Court carries several specific consequences including:

- that if the Court is satisfied that 'illegal practice' was likely to have affected the outcome of an election, either the election of a named candidate may be declared void and another candidate declared to be elected or the specific election could be declared void and a new election ordered (subsection 362(3) of the *Electoral Act*); and
- that the Court in finding that there has been an 'illegal practice' must 'forthwith report the finding to the Minister' (section 363 of the *Electoral Act*).

The scope of what is an 'illegal practice' under the *Electoral Act* is defined in subsection 352(1) and means 'a contravention of this Act or the regulations'. The argument raised by the Petitioner was that the AEO for Victoria incorrectly applied the requirements of the *Electoral Act* in relation to whether or not each of the reserved ballot-papers should have either been admitted or rejected due to the formality rules contained in section 268 of the Act.

The word 'contravention' was previously considered by the High Court in the case of *Sue v Hill* (1999) CLR 462 and was held to mean 'failure to comply with a provision of the Act'. A similar phrase contained in the legislation that regulated ATSIC elections was held by the Federal Court in the case of *Shaw v Wolf* (1998) 83 FCR 113 to mean 'an act of infringing or transgressing'. However, both of these court decisions make it clear that the term 'illegal practice' does not carry with it any requirement of intent or criminality, or any necessary inference of moral blame or turpitude. Indeed, there is case law (*Bourne v Murphy* (1996) 92

LGERA 329) that suggests that the issue of formality can often be reliant on the experience and judgment of the particular person looking at the ballot-papers and that any differences could merely be based on the particular opinion and judgement of the person examining the ballot-papers.

Any finding of an 'illegal practice' would not necessarily change the results of the election. The Court would need to go the extra step to change the election result (or void the election) by making an actual finding of fact that 'the result of the election was likely to be affected'. However, the mere finding of an 'illegal practice' requires the Court to notify the Minister and the High Court Registry under section 363 of the *Electoral Act* that such a practice has occurred.

### **Injunction power**

The absence of admissible evidence that clearly points to a prima facie 'illegal conduct' in breach of the *Electoral Act* precludes the AEC from being able to initiate any legal proceedings. This is despite the specific power given to the AEC under section 383 of the *Electoral Act*. The reason for this is because of the requirements contained in the *Legal Services Directions 2005* issued by the Attorney-General under the *Judiciary Act 1903* under which the AEC (as an agency covered by the *FMA Act*) is required to operate. This includes the requirement to act as a model litigant.

The material required by the AEC to commence legal proceedings must include evidence that could be admissible in a court in relation to an injunction application. The requirements for an injunction were clearly set out in the case of *ABC v Lenah Game Meats Pty Ltd* [2001] HCA 63 in that in order to secure such an injunction the plaintiff must show (1) that there is a serious question to be tried or that the plaintiff has made out a prima facie case, in the sense that if the evidence remains as it is there is a probability that at the trial of the action the plaintiff will be held entitled to relief; (2) that he will suffer irreparable injury for which damages will not be an adequate compensation unless an injunction is granted; and (3) that the balance of convenience favours the granting of an injunction.

### **AEC's role in litigation**

The AEC has always acted in Court of Disputed Returns matters as though it was subject to the approach as set out by the High Court in *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13. This results in it not being appropriate for the AEC to be presenting arguments on such matters as the Constitutional validity of challenged provisions in the *Electoral Act*. The AEC's role in all legal proceedings is to assist the Court. The AEC has since 1983 clearly been accepted by the High Court as appropriately being involved in matters involving arguments about whether facts as pleaded disclose any illegal practice that may have lead to the results of the election being likely to have been affected. This test necessarily involves the Court having regard to expert evidence from the AEC about the election and counting processes. Accordingly, the position taken by the AEC is not inconsistent with the principles in *ex parte Hardiman* irrespective of whether or not the AEC is a 'tribunal'.

Support for this view can be found in the transcript of the High Court in the case of *Roach v Electoral Commissioner* [2007] HCA 43 where a Judge criticised the AEC's Counsel for going too far and entering the dispute as a contradictor. His Honour Justice Kirby in the High Court transcript of 13 June 2007 stated as follows:

**KIRBY J:** I must say that I took the view that the Commissioner is a neutral officer and, indeed, one of the most important, if not the most important, in the Executive.

**MR HANKS:** On this basis, your Honour, that there is a presumption of validity and the answers would go to that presumption, only on that basis, your Honour. We do not wish to engage in any of the argument.

**KIRBY J:** I just want to know what interest the Electoral Commissioner has to disenfranchise many citizens of this country.

**MR HANKS:** His interest, your Honour, is to administer the law as enacted by the Parliament and to proceed on the assumption that that law is valid. For that reason we support the answers that are proposed by the Commonwealth and for no other reason.

**KIRBY J:** If a tribunal or a court came here and said that they supported the position of the Executive Government they would be given the rounds of the kitchen. I ask myself is it different in the case of the Electoral Commission? I would have thought with the Auditor-General, the Electoral Commissioner, perhaps the Ombudsman and a few others they are in a position analogous to courts. Anyway, that is just my opinion.

The AEC's role in litigation dealing with the registration of political parties was also the subject of guidance from three Federal Court judges sitting as a Full Bench of the AAT in the case of *Woollard and Australian Electoral Commission and Anor* [2001] AATA 166. At paragraph 20 the AAT stated:

It is rather the integrity of the electoral process and, associated with that, the interests of electors in making choices unaffected by confusion or mistake that are protected. In this context the role of the Commission as a party to proceedings before the Tribunal is in theory wider than that of a registered political party which will be primarily concerned with its own interests and those of its candidates. The Commission, however, should be at pains not to compromise the reality and appearance of its impartiality in the role it takes in defending its own decision on a question of registration. Where a political party is joined in the proceedings it may well be that it takes the primary role of contradictor, with the Commission assisting the Tribunal as to the construction of the Act and considerations relating to the electoral process generally. Of course, if there is no other contradictor, then the Commission may be left in the position of having to put all arguments to the Tribunal that fairly bear upon the considerations relevant to the decision. It is of particular importance to note that pursuant to s 43, the Tribunal, even though comprising three judges of the Federal Court, is sitting as an administrative body in effect in the place of the Commission. Its task is to make the correct or preferable decision having regard to the provisions of the Act and the factual circumstances. See *Drake v Minister for Immigration and Ethnic Affairs* [1979] AATA 179; (1979) 24 ALR 577, at 589 per Bowen CJ and Smithers J. In the present case, senior counsel appearing for the Commission had filed written submissions going to the merits of the decision. Nevertheless, he accepted that the Commission's role in this case should be limited to addressing the Tribunal on questions of construction and any particular omission or difficulties arising out of the submissions put on behalf of the Liberal Party of WA.

## Recent cases

### *Media reporting*

Following the 2008 by-election for the Division of Lyne, Mr Scott-Irving, a candidate in the by-election, lodged a petition with the CDR seeking to have the election voided due to an illegal practice. Mr Scott-Irving argued that the media coverage by the ABC of the candidates leading up to the by-election was not conducted in an equitable manner in accordance with the ABC charter and that the results of the by-election should be voided. The High Court remitted this matter to the Federal Court to determine as the CDR. The petition was dismissed by the CDR in a decision dated 15 May 2009 in the case of *Scott-Irving v Oakeshott and Others* [2009] FCA 487 with the court finding that none of the alleged facts pleaded by Mr Scott-Irving disclosed any breach of the requirements of the *Electoral Act*. The Court also awarded costs in favour of the AEC.

### ***Close of rolls***

In the matter of *Rowe v Electoral Commissioner* [2010] HCA 46, the High Court dealt with a legal challenge by Ms Rowe and Mr Thompson (apparently funded by GetUp Limited) seeking a declaration that certain provisions of the *Electoral Act* effecting cut-off dates for consideration of applications for enrolment and transfers of enrolment as an elector were invalid. While the Electoral Commissioner was named as the First Defendant, the AEC took no part in making substantive submissions. This was left to the Commonwealth of Australia as instructed by the Attorney General's Department and the Department of Finance and Deregulation. The Western Australian Attorney-General also intervened.

One of the challenged provisions (subsection 102(4)) prevented the AEC from considering new claims for enrolment lodged after 8pm on the date of the issuing of the writs for an election until after the close of polling. Another challenged provision (subsection 102(4AA)) prevented the AEC from considering claims for the transfer of enrolment from 8pm on the date fixed in the writs for the close of rolls until after the close of polling. A third provision (section 155) was challenged as it provided that the date fixed in the writs for the close of rolls must be on the third working day after the date of the issuing of the writs for an election. All of the challenged provisions were inserted into the *Electoral Act* by the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth). This action followed several reports by the Joint Standing Committee on Electoral Matters (including the October 2002 report entitled 'The Integrity of the Electoral Roll' and the October 2004 report on the conduct of the 2004 election) which, despite no actual evidence of inaccuracies on the roll, concluded that the 7 day period of grace provided an opportunity to manipulate the roll at a time when the AEC was unable to check the integrity of all claims. This was despite evidence from the AEC to the contrary.

On 6 August 2010, the High Court ordered that the amendments made by the 2006 Act were invalid and that the previous 7 day close of rolls period was still in force.

To give effect to the High Court decision, just fewer than 100,000 individuals who missed the close of rolls deadlines were now entitled to have their claims considered by the AEC if they had been received prior to 8 pm on 26 July 2010. The AEC concluded the processing of these claims on 13 August 2010 and sought the Governor-General's agreement to issue a Proclamation under section 285 of the *Electoral Act* so these 100,000 electors could appear on supplementary certified lists on the same basis as other electors.

### ***Electronic signatures***

In the matter of *GetUp Ltd v Electoral Commissioner* [2010] FCA 869 the Federal Court examined the legal status of electronic signatures on enrolment forms that were received by the AEC. The Court held that the particular technology and methodology used by Ms Trevitt (a laptop with access to the internet and with a device known as a digital pen that was used on the laptop's trackpad) met the requirements of the *Electoral Act*. As a result of the Court decision, Ms Trevitt was enrolled.

In the lead up to the hearing the Electoral Commissioner had written to GetUp Limited offering to meet to discuss the technology they were promoting and the issue of balancing of the convenience of electors with the integrity of the voting system (eg matching signatures on enrolment forms with signatures on declaration envelopes at preliminary scrutiny). The GetUp Ltd OzEnrol website went live without any prior notice or discussions with the AEC. It was taken down on 17 July 2010, but apparently remained accessible for GetUp Limited volunteers to use. The original methodology used a mouse track based signature which did

not result in a clear image or the use of similar biomechanical motions to reproduce a signature.

However, the Federal Court proceedings did not involve the use of the mouse track based methodology but rather the use of a digital pen. Since the Federal Court decision, the AEC has met with representatives of GetUp Limited to discuss the implications of the Federal Court's decision and the use of methodologies that comply with both the requirements of the *Electoral Act* and the *ratio decidendi* of the Federal Court's decision.

### **Party issued Postal Vote Applications**

There are a number of sections in the *Electoral Act*, which authorise political parties and candidates to issue Postal Vote Application forms ('PVAs'), to have them returned to their offices and then to forward these to the AEC for the issuing of the resultant postal vote itself. During each election campaign, the AEC receives many complaints about the use of PVAs and whether it is permissible that PVAs be returned to the AEC via a political party.

In the matter of *Peebles v Honourable Tony Burke MP and Others* [2010] FCA 838 (4 August 2010) the Applicant (a Senate candidate in NSW for the Christian Democratic Party (Fred Nile Group)) argued that the sending out of this material by the Hon Tony Burke MP and the Australian Labor Party ('ALP') involved misleading and deceptive conduct. This was because the PVAs failed to clearly state the source of the PVA or that it would be returned to that source before being sent to the AEC. In reasons for decision His Honour stated that there was considerable force in at least some of those contentions. However, the Federal Court dismissed the application referring to the limited scope of section 329 of the *Electoral Act* which deals with publications that are likely to mislead or deceive an elector in relation to the casting of a vote and held that the act of applying for a postal vote did not fall within the scope of this section.

Ms Peebles subsequently lodged an appeal from the Federal Court decision to the Full Federal Court. This appeal was subsequently withdrawn and replaced with action in the CDR following the 21 August 2010 general election, as the orders sought in the appeal included discarding all votes that were received by the AEC as a result of PVAs issued by the ALP in New South Wales. Costs were awarded in favour of the AEC in *Peebles v Honourable Tony Burke (No 2)* [2010] FCA 861.

### **When is an MP an MP for electoral advertising?**

Mr Faulkner has for many years raised concerns about the legal effect of the dissolving of the House of Representatives under section 28 of the *Constitution* and whether this results in it being misleading and deceptive for a candidate who was formerly a Member of the House of Representatives being able to continue to describe themselves as an MP. In the matter of *Faulkner v Elliot and Others* [2010] FCA 884 (17 August 2010), Mr Faulkner (an Independent candidate for the Division of Richmond) sought urgent orders from the Court restraining Ms Justine Elliot from describing herself as a 'Federal Member of Parliament', the 'Member for Richmond', 'MP', 'current Member', 'sitting Member' or 'Incumbent'. Mr Faulkner argued that the use of these descriptions in publications was misleading and deceptive and in breach of section 329 of the *Electoral Act*.

The Federal Court dismissed Mr Faulkner's application finding that the use by a candidate seeking re-election to the House of 'MP' is an appropriate description to present to electors in each Electoral Division. The Court accepted the existence of a protocol that the continued use of 'MP' might avoid confusion and operate as a proper matter of courtesy in all the circumstances. The Court held that a contravention of section 329(1) of the *Electoral Act* required conduct by Ms Elliot that was likely to mislead or deceive an elector in relation to

the 'casting' of a vote as opposed to influencing the 'formation of a judgment' by an elector of for whom to vote. The Court concluded that the use of the phrase 'MP' was not in breach of section 329(1) and dismissed the application.

### ***The CDR petitions***

The 40 day period for lodging petitions with the CDR following the return of the last writ for the 21 August 2010 election ended at close of business 27 October 2010. The High Court (which is the CDR) advised that five petitions were filed within the 40 day period, one in the Hobart registry and four at the Sydney registry.

The petition lodged at the Hobart registry involved an allegation that Senator Abetz had not renounced his German citizenship and was disqualified from standing as a candidate for an election under section 44 of the *Constitution*. This petition was subsequently withdrawn in November 2010 without proceeding to a hearing.

The four petitions lodged at the Sydney registry were all lodged by the same firm of solicitors who appeared to be acting on behalf of the Christian Democratic Party (Fred Nile Group). Three of the petitioners were candidates for this Party (Mr Graham Freemantle, Ms Robyn Peebles, and Mr Andrew Green) at the 2010 general election and the final petitioner (Mr Greg Briscoe-Hough) was an elector who previously stood for the Family First Party in NSW. The petitions sought to invalidate the elections for the Divisions of Banks, Lindsay and Robertson in NSW and the Senate election in NSW.

All four petitions focused on issues that were previously raised and dismissed by the Federal Court in the case of *Peebles v Honourable Tony Burke and Others* [2010] FCA 838 where arguments were run that the issuing and return of Postal Vote Applications ('PVAs') by political parties breached several provisions of the *Electoral Act*. The Federal Court held that the issuing/return of PVAs by political parties was not in breach of section 329 of the *Electoral Act* (ie was not misleading or deceptive in relation to an elector marking a ballot paper) and that the declaration used on the forms was consistent with the requirements of sections 183 and 184 of the Act. These arguments were again being used as the basis for the four petitions.

There were several other grounds raised in the initial petition including that the use of parliamentary allowances by Members of Parliament to print and distribute these PVAs was in breach of section 48 and 49 of the *Constitution*.

Only the petitions lodged on behalf of Andrew Green and Graham Freemantle proceeded to a hearing with the petitions lodged on behalf of Robyn Peebles and Greg Briscoe-Hough being withdrawn. The decisions on the two petitions of Green and Freemantle can be found at *Green v Bradbury* [2011] FCA 71 and *Fremantle v O'Neill* [2011] FCA 72. In short the Court held that there were no facts pleaded in the petition that disclosed any illegal practice that could have affected the results of the election. The orders as to the payment of the legal costs in the petitions involving Green, Freemantle and Peebles were resolved in favour of the AEC in *Green v Bradbury (No 2)* [2011] FCA 469.

## INCORPORATION OF HUMAN RIGHTS IN ADMINISTRATIVE DECISION-MAKING: THE IMPACT OF HUMAN RIGHTS INSTRUMENTS IN VICTORIA AND THE ACT

*Joanna Davidson\**

The *Victorian Charter of Human Rights and Responsibilities Act 2006* (the 'Victorian Act') and the *ACT Human Rights Act 2004* (the 'ACT Act') impose obligations on public authorities to act compatibly with human rights and to give proper consideration to relevant human rights when making decisions.<sup>1</sup> Failure to comply with the obligations can be a basis for legal proceedings to challenge an act or decision of a public authority. In the ACT there is a direct cause of action for breach of the obligations.<sup>2</sup> In Victoria, breach of the obligations potentially gives rise to new grounds upon which to seek judicial review of the decision.<sup>3</sup>

This paper considers how the obligations may operate in practice and how they may impact upon review of decisions by courts.

### **The obligations**

Section 38 of the *Victorian Act* provides:

- (1) Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.
- (2) Subsection (1) does not apply if, as a result of a statutory provision or a provision made by or under an Act of the Commonwealth or otherwise under law, the public authority could not reasonably have acted differently or made a different decision.

Example: Where the public authority is acting to give effect to a statutory provision that is incompatible with a human right.

Section 40B of the *ACT Act* provides:

- (1) It is unlawful for a public authority—
  - (a) to act in a way that is incompatible with a human right; or
  - (b) in making a decision, to fail to give proper consideration to a relevant human right.
- (2) Subsection (1) does not apply if the act is done or decision made under a law in force in the Territory and—

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- (a) the law expressly requires the act to be done or decision made in a particular way and that way is inconsistent with a human right; or
- (b) the law cannot be interpreted in a way that is consistent with a human right.

Note: A law in force in the Territory includes a Territory law and a Commonwealth law.

Each of the Acts imposes a substantive obligation (to act compatibly with human rights) and a so-called procedural obligation (to give proper consideration to relevant human rights). However, neither obligation can override a legislative provision. Public authorities must give effect to legislation<sup>4</sup> even if it is incompatible with human rights. The provisions are intended to preserve the sovereignty of Parliament,<sup>5</sup> an important feature of the models adopted by Victoria and the ACT.

### **The substantive obligation**

In the author's view, the question of (in)compatibility with human rights must be determined by reference to the terms of the right in question and whether it is reasonable in the particular circumstances to limit the right.

### ***The terms of the right***

Each right contains terms which must be interpreted in order to determine whether the right covers the conduct in question.

All rights contain terms that define whether or not the right is engaged or triggered in the particular circumstances. For example, the right to a fair hearing applies to civil proceedings and to criminal charges. In other jurisdictions, the question of whether there is a criminal charge which will engage or trigger the fair hearing right is not determined by the classification in domestic law but has regard to the substance of the law. In Victoria, the courts have so far taken an expansive view of what is regarded as a 'civil proceeding', with the potential for the right to be engaged by certain administrative decision-making.<sup>6</sup>

Many rights also contain terms that define the extent of the right. These terms are often referred to as 'internal limitations'. Accordingly, the right to a fair hearing applies to the determination of all criminal charges but only requires a 'fair' hearing. The question of whether a hearing is 'fair' has regard to the triangulation of the interests of the accused, the victim and society. It does not require a trial with the most favourable procedures for the accused.<sup>7</sup>

### ***Reasonable limitations***

Section 7(2) of the *Victorian Act* and s 28 of the *ACT Act* provide that human rights may be subject only to reasonable limits that can be demonstrably justified in a free and democratic society. The Acts set out a number of factors that are to be taken into account in assessing reasonableness:

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;

- (d) the relationship between the limitation and its purpose;
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

In my view, a public authority only acts incompatibly with a human right if it imposes a limit on the right that does not satisfy the general limitations provisions in the relevant Act. Whatever may be said about the interpretive rule, the extrinsic material with respect to the *Victorian Act* makes clear that where a right is reasonable and demonstrably justified in a free and democratic society by reference to the factors in s 7(2), 'then action taken in accordance with that limitation will not be prohibited under the Charter Act, and is not incompatible with the right'.<sup>8</sup> This appears to be accepted by the majority of the High Court in *Momcilovic v The Queen*.<sup>9</sup> As Bell J explained:<sup>10</sup>

One reason for concluding that compatibility with human rights for the purposes of the Charter is to be understood as compatibility with the rights as reasonably limited under s 7(2) is the improbability that Parliament intended to make unlawful the demonstrably justified acts of public authorities which reasonably limit a Charter right.

I acknowledge that some commentators have argued that the question of compatibility should be determined by reference only to the terms of the right, and not by reference to the reasonable limitations provision. Others have questioned whether the courts should be involved in assessing compatibility by reference to internal limitations. Concerns have been raised about the extent of evidence required to be called in order to consider whether a limit upon a right is reasonable,<sup>11</sup> and that determination of such issues involves policy questions that courts may be ill-equipped to handle. In my view, such concerns are overstated.

As to the role of evidence, the Court of Appeal in *R v Momcilovic* appears to have adopted the Canadian approach to the type of evidence that may be required in order to justify a limit upon a right imposed by legislation.<sup>12</sup> This approach can be contrasted with that of the United Kingdom courts where a more restrictive and pragmatic approach is taken to justificatory material.<sup>13</sup>

Whatever approach is taken with respect to justifying legislative restrictions upon rights, the same concerns do not arise in respect of justifying limitations imposed by a public authority. In such cases, the courts will have access to direct evidence from the public authority as to the reasons for the limitation in the particular circumstances.

As to the potential for a reasonable limits analysis to intrude inappropriately upon the role of the executive in making social policy decisions, as I explain later in this paper, there are existing administrative law principles that can be applied in the human rights context in order to maintain an appropriate balance between the respective branches of government.

### **The procedural obligation**

While the substantive obligation is similar to obligations in comparable human rights instruments, the obligation to give 'proper consideration' to relevant human rights is unique to the Victorian and ACT Acts.

In other jurisdictions, the focus is on substantive compliance with rights. Provided the outcome is compatible with human rights, it does not matter that the public authority did not properly consider human rights or even that the public authority failed altogether to consider human rights. However, the absence of an express procedural obligation does not mean that public authorities in other jurisdictions can feel free to ignore human rights in decision-making. As I explain later in this paper, courts in other jurisdictions have developed principles of affording 'deference', 'weight' or 'margin of discretion' to the primary decision

maker in order to maintain an appropriate balance between the courts and the executive. Where public authorities have given careful consideration to human rights at the time of making the decision, the decision is much more likely to survive scrutiny by the courts.

There are a number of questions that arise with respect to the procedural obligations in the Victorian and ACT Acts.

Firstly, to what 'decisions' will the obligation apply? Will it apply to all decisions made by public authorities, including day to day operational decisions?

Secondly, what is meant by proper consideration? In my view, as with natural justice and procedural fairness, what will be required will depend on the circumstances and, especially so, if 'decision' is given a broad meaning.

### ***Case law concerning 'proper consideration'***

#### *Victoria*

The leading case in Victoria in respect of the obligation to give proper consideration to human rights is *Castles v Secretary to the Department of Justice ('Castles')*.<sup>14</sup> The case involved a prisoner who sought declaratory relief to enable her to resume the IVF treatment she underwent prior to her incarceration. In determining whether the decision to deny the plaintiff access to the treatment was unlawful, Emerton J undertook a detailed examination of the 'proper consideration' limb of s 38 of the *Victorian Act*.

Emerton J considered the scope of the obligations in s 38 and recognised its potential to apply to a wide range of decisions at all levels of government. In light of the fact that consideration of human rights is intended to become 'a 'common or garden' activity for persons working in the public sector, both senior and junior ... proper consideration of human rights should not be a sophisticated legal exercise'.<sup>15</sup> Emerton J considered that:

Proper consideration need not involve formally identifying the 'correct' rights or explaining their content by reference to legal principles or jurisprudence. Rather, proper consideration will involve understanding in general terms which of the rights of the person affected by the decision may be relevant and whether, and if so how, those rights will be interfered with by the decision that is made. As part of the exercise of justification, proper consideration will involve balancing competing private and public interests. There is no formula for such an exercise, and it should not be scrutinised over-zealously by the courts.

Her Honour concluded that while 'proper consideration' entails that the public authority must do more than simply pay lip-service to *Victorian Act* rights and the terms of s 7, it does not require a comprehensive or detailed analysis.<sup>16</sup>

While I accept that the requirement in s 38(1) to give proper consideration to a relevant human right requires a decision-maker to do more than merely invoke the Charter like a mantra, it will be sufficient in most circumstances that there is some evidence that shows the decision-maker seriously turned his or her mind to the possible impact of the decision on a person's human rights and the implications thereof for the affected person, and that the countervailing interests or obligations were identified.

As to whether the decision of the Secretary of the Department of Justice met the requirements of s 38, Emerton J held:<sup>17</sup>

I am satisfied that the Secretary gave proper consideration to Ms Castles' human rights from the detailed manner in which the competing interests of Ms Castles and what could be described as public interests are weighed up in the briefings that were sent to her, along with the Secretary's own statement that she considered Ms Castles' human rights and weighed them against the rights and obligations imposed by the Corrections Act in making her decision.

Emerton J gave further consideration to the s 38 obligation in *Giotopolous v Director of Housing*. The case concerned an appeal from a decision of the Victorian Civil and Administrative Tribunal ('VCAT') to decline to order the respondent to enter into a tenancy agreement with the applicant under s 232 of the *Residential Tenancies Act 1997* ('RT Act').<sup>18</sup> In the course of its decision to decline the appellant's application, VCAT had concluded that, because s 233 operated to enhance a person's rights rather than to limit them, Charter rights were not engaged at all.<sup>19</sup> Emerton J held that that constituted an error on the part of VCAT: the decision to make or not to make a tenancy order did engage the right to non-interference with the tenant's home and family and their entitlement to be protected by society and the State.<sup>20</sup> Emerton J then proceeded to consider whether VCAT had given proper consideration to the rights of the appellant and, in doing so, her Honour applied the test previously outlined in *Castles*.

Her Honour first noted that 'the obligation imposed by s 38(1) is distinct from and additional to the obligation to interpret legislation compatibly with human rights, as required by s 32 of the Charter'.<sup>21</sup> Turning to the decision of VCAT, Emerton J noted that '[n]owhere in its reasons does the Tribunal expressly consider the obligation to act compatibly with human rights in exercising the discretion under s 233 of the [RT] Act'.<sup>22</sup> Her Honour continued:<sup>23</sup>

The Tribunal, despite this error [its decision that Charter rights were not engaged] purported to carry out a proportionality analysis in relation to interference in home and family in the penultimate paragraph of its reasons. This analysis, which consists almost entirely of a recitation of the terms of s 7(2) of the Charter would, if taken in isolation, have been insufficient to satisfy the requirements of s 38(1) of the Charter...I note however, that there was considerable material before the Tribunal to enable the proportionality analysis to be undertaken and that the Tribunal, in identifying and comparing the respective hardships of Mr Giotopoulos and the Director, went some way to analysing whether the refusal to grant a tenancy order and give Mr Giotopolous security of tenure would be 'justified' in the relevant circumstances of this case.

The case illustrates that substantive consideration of human rights, through identifying and weighing the competing interests at issue, is likely to be more important to satisfying the procedural obligation than formal recitation of the provisions of the *Victorian Act*.

In *Patrick's Case*,<sup>24</sup> Bell J agreed with the comments of the Court in *Castles*<sup>25</sup> and reinforced the view that the consideration of human rights required by s 38 can be done in a variety of ways to suit the particular circumstances. Referring to United Kingdom authority, Bell J noted that decision-makers 'are not expected to approach the application of human rights like a judge "with textbooks on human rights at their elbows"'.<sup>26</sup>

However, Bell J makes some comments which suggest that the requirement to give proper consideration is not merely a procedural one. In respect of the 'so-called procedural obligation', Bell J observed that:

A consideration by the person who did the act or made the decision will not be 'proper', however seriously and genuinely it was carried out, if the act or decision is incompatible with human rights in terms of s 7(2).

### ***Australian Capital Territory***

As in Victoria, there has been relatively little jurisprudence in the ACT in respect of the public authority obligations.

Section 40 B of the *ACT Act* was considered in *Canberra Fathers and Children Services Inc v Michael Watson*.<sup>27</sup> The case raises a number of interesting and controversial issues with respect to the appropriateness of Administrative Tribunals scrutinising decisions for compliance with the obligations in s 40B of the *ACT Act*; these are beyond the scope of this paper. It nevertheless illustrates the potential role that internal guidelines and policies may

play in ensuring compliance with the public authority obligations and evidencing that compliance.

The case concerned an attempt by Canberra Fathers and Children Services Inc ('CANFaCS'), a community organisation which provides emergency accommodation for fathers and their children, to terminate an occupancy agreement with the respondent. The respondent had refused to vacate the subject premises and CANFaCS applied to the Australian Capital Territory Civil and Administrative Tribunal ('ACAT') for a termination and possession order. The respondent argued that CANFaCS's decision contravened the right to privacy in s 12 of the *Human Rights Act 2004* (ACT). That section states:

Everyone has the right—

- (a) not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily...

ACAT began its inquiry by noting that, as a public authority, it was required to give proper consideration of relevant human rights.<sup>28</sup> On this basis ACAT considered it was able to enquire into whether the primary decision maker, also a public authority, had acted compatibly with and given proper consideration to relevant human rights, particularly in giving the notice to vacate.

The right to privacy in s 12 of the *Human Rights Act 2004* (ACT) operates to provide persons with protection from arbitrary interferences. As ACAT observed, interference will not be arbitrary 'if it is governed by clear pre-existing rules and by procedures that are predictable and foreseeable by those to whom they are applied'.<sup>29</sup> The absence of any consistent or objective guidelines upon which decisions to evict were made was a significant factor in finding that CANFaCS had failed to give proper consideration to relevant human rights.<sup>30</sup>

### **Review of administrative decisions**

The ability to challenge decisions for incompatibility with human rights potentially gives courts much greater scope to review administrative decisions. It involves a consideration of the concept of proportionality, the identification and balancing of competing interests and determination of where the balance should lie. This potentially involves greater scrutiny of administrative decisions than traditional *Wednesbury* unreasonableness would otherwise allow. Given that many of these decisions involve questions of difficult social policy, particularly in respect of rights such as privacy, it is understandable that courts may be reluctant to engage in a proportionality analysis, either under internal limitations (eg 'arbitrary' interferences with privacy) or under the general limitations provisions.

However, the experience of other jurisdictions illustrates that courts can engage in such analyses while not intruding inappropriately upon the role of the executive. Principles of 'deference', affording weight or latitude, or a margin of discretion, have been developed in other jurisdictions to ensure that courts do not embark on merits review and that an appropriate balance between courts and the executive is maintained.

While the Canadian doctrine of deference may not be appropriate for Victoria, the Victorian and ACT courts can draw from overseas jurisprudence (particularly the United Kingdom and New Zealand) and develop existing administrative law principles in order to ensure that courts do not inappropriately intrude upon the role of the executive.

***Margin of appreciation - an international law concept***

Before discussing the jurisprudence in relation to domestic human rights instruments, it is appropriate to mention briefly the 'margin of appreciation' concept that is often referred to in jurisprudence of international courts and tribunals.

The term is most commonly used in relation to decisions by the European Court of Human Rights ('ECHR') to limit its scrutiny of the conduct of member states when applying a proportionality analysis to cases concerning the scope of Convention rights in developing areas of law. By conceding a margin of appreciation to each national system, the court has recognised that the Convention, as a living system, does not need to be applied uniformly by all states but may vary in its application according to local needs and conditions.<sup>31</sup> United Kingdom courts have regarded the ECHR's margin of appreciation mechanism as being unavailable to national courts when considering Convention issues arising within their own countries.<sup>32</sup> For the same reasons, it is not appropriate in Victoria or the ACT.

***Domestic concepts of deference, weight etc***

In other jurisdictions, including the United Kingdom, Canada and New Zealand, courts have developed principles whereby weight may be given to the findings of the primary decision maker. These principles are variously described as 'judicial deference', affording 'weight' or 'latitude', and affording a 'margin of discretion'.

United Kingdom courts have recognised that, in assessing whether a public authority has acted compatibly with human rights, the courts' role is different from that of the primary decision maker. As explained by Beatson et al.<sup>33</sup>

Proportionality is not treated as a pure question of law or fact. Therefore an appeal from a proportionality determination on a point of law will neither succeed simply because the appeal court would have taken a different view, nor will it fail simply because the lower court's determination cannot be shown to be perverse. It is necessary to examine the lower court's reasons and identify an error in analysis, such as whether it applied the wrong test or standard.<sup>34</sup> In *Huang v SSHD*, the House of Lords held that the task of the appellate immigration authority in immigration appeals<sup>35</sup> is neither that of a primary decision maker nor a secondary reviewing function. However, it was appropriate for the appellate court, in balancing the competing considerations, to give appropriate weight to judgments made by the Secretary of State as to the importance of countervailing public interest considerations.<sup>36</sup> The exercise of giving weight to an assessment or judgement made by a primary decision maker is an exercise that is also carried out in judicial review claims and ordinary civil (or indeed criminal) cases, although in these cases it has often attracted the label of 'deference'.<sup>37</sup>

The United Kingdom courts have recognised that some 'deference' to the legislature or executive is likely to be necessary in order to maintain an appropriate balance between the judicial, legislative and executive branches of government. As Lord Hope has stated:<sup>38</sup>

[I]n the hands of the national courts also the Convention should be seen as an expression of fundamental principles rather than as a set of mere rules. The questions which the courts will have to decide in the application of these principles will involve questions of balance between competing interests and issues of proportionality. In this area difficult choices may have to be made by the executive or the legislature between the rights of the individual and the needs of society. In some circumstances it will be appropriate for the court to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention.

However, United Kingdom courts have criticised the use of the term 'deference' and it is now more common to refer to affording weight or latitude to the decision maker. In *R (ProLife) v BBC (ProLife)*, Lord Hoffman expressed disapproval of the 'overtone of servility' implied by the term 'deference' and, instead, described the principle as involving a determination 'that a decision is within the proper competence of the legislature or executive'.<sup>39</sup>

In *Patrick's Case*, Bell J characterised the principle of weight and latitude that operates in relation to the United Kingdom Human Rights Act as 'a flexible concept of comity and respect reflecting the different institutional functions of the judiciary, the parliament and the executive in the constitutional framework.'<sup>40</sup>

### **Australia**

Lord Hoffman's description of the principle of deference as it operates in the United Kingdom is similar to the approach of the High Court of Australia, which has recognised that:<sup>41</sup>

The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.

The High Court has emphasised that this is not the product of any doctrine of 'deference', in the sense developed in Canada, but of 'the basic principles of administrative law respecting the exercise of discretionary powers.'<sup>42</sup> Accordingly, while it is for the court to determine whether a primary decision maker acted within jurisdiction,<sup>43</sup> recourse to the findings of the administrative body, while not required, is open to a court in the case of a jurisdictional challenge on an issue of fact where the evidence is 'in all significant respects, substantially the same' as that presented at first instance.<sup>44</sup>

The High Court's approach to judicial review of administrative decisions on traditional grounds applies equally to the review of such decisions on the basis of lawfulness by reason of s 38 of the *Victorian Act*. While there will be some aspects of the reasonable limits analysis that involve pure questions of law (eg the question of the nature of the right) in respect of which it will not be appropriate to afford weight to the primary decision maker, others involve mixed questions of fact and law which lend themselves to the application of the principles enunciated by the High Court. In particular, courts are likely to afford considerable weight to the primary decision maker's assessment of whether there are 'less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve'.

### ***Circumstances when it is appropriate to afford weight to the primary decision maker***

The High Court has made it clear that the weight to be given to the findings and decision of the primary decision maker will depend upon the particular circumstances of the case.<sup>45</sup> However, a number of factors have been identified, including:<sup>46</sup>

- (a) the field in which the tribunal operates;
- (b) the criteria for appointment of its members;
- .....
- (d) the materials upon which it acts in exercising its functions; and
- (e) the extent to which its decisions are supported by disclosed processes of reasoning.

### **Relationship between the substantive obligation and the procedural obligation**

It is the last factor identified by the High Court that results in a strong link between the so-called procedural obligation and the substantive obligation.

If, in making its decision, the public authority gives careful consideration to human rights, including balancing competing interests, the assessment of where the balance should lie will

be given weight by a reviewing court. The reviewing court is unlikely to interfere and should not interfere, unless the assessment lies completely outside the acceptable range.

### **Examples**

#### *United Kingdom*

As already explained, the United Kingdom's *Human Rights Act 1998* does not impose an express obligation on public authorities to give proper consideration to human rights. However, the authorities make it clear that decisions are much more likely to survive scrutiny for compatibility with human rights where the public authority has given careful consideration to human rights.

The case of *R (SB) v Governors of Denbigh High School* ('*Denbigh High School*') illustrates this point. The school had a significant number of Muslim students. In choosing its uniform, the school engaged in extensive consultation with the community and religious leaders. The school provided options for Muslim students but did not allow the full burqa to be worn. A student challenged the decision to refuse to allow her to wear the full burqa. The school's decision was upheld. The House of Lords recognised the complexity of the issue, and the difficult balancing exercise involved. Because of the extensive consultation with the community and the careful consideration of the issues by the school, their Lordships were prepared to give significant weight to the decision of the school.

As Lord Bingham remarked:

if it appears that such a body [a head teacher or school governor] has conscientiously paid attention to all human rights considerations, no doubt a challenger's task will be the harder.<sup>47</sup>

The significance of giving careful consideration to human rights in decision-making was also discussed by the House of Lords in *Belfast City Council v Miss Behavin' Ltd*. Baroness Hale began with the general rule that it is for the court to determine whether or not a claimant's Convention rights have been infringed, but continued:<sup>48</sup>

In doing so, it [the court] is bound to acknowledge that the local authority is much better placed than the court to decide whether the right of sex shop owners to sell pornographic literature and images should be restricted ... But the views of the local authority are bound to carry less weight where the local authority has made no attempt to address that question. Had the Belfast City Council expressly set itself the task of balancing the rights of individuals to sell and buy pornographic literature and images against the interests of the wider community, a court would find it hard to upset the balance which the local authority had struck. But where there is no indication that this has been done, the court has no alternative but to strike the balance for itself, giving due weight to the judgments made by those who are in much closer touch with the people and the places involved than the court could ever be.

Lord Mance agreed and added that, where a decision maker has not addressed the balance between competing rights, the court is deprived of the assistance and reassurance provided by the primary decision maker's considered opinion on Convention issues. His Lordship stated that the court's scrutiny is bound to be closer, giving weight to such judgments as were made by the primary decision maker on such matters as he or it did consider.<sup>49</sup> Similarly, Lord Rodger stated:<sup>50</sup>

where the public authority has carefully weighed the various competing considerations and concluded that interference with a Convention right is justified, a court will attribute due weight to that conclusion in deciding whether the action in question was proportionate and lawful.

Lord Hoffman asserted:<sup>51</sup>

If the local authority exercises that power [to licence pornography vendors] rationally and in accordance with the purposes of the statute, it would require very unusual facts for it to amount to a disproportionate restriction on Convention rights.

*South Buckinghamshire District Council v Porter and another* concerned an appeal against injunctions granted to local planning authorities, which prevented the appellant gypsy families from living in caravans on land they had acquired.<sup>52</sup> The Court of Appeal held that where a planning authority applied for an injunction to restrain a breach of a planning control, the court was required by the *Human Rights Act* to take into account the likely effect on the human rights of the appellants. Specifically, although the court was not concerned with the planning merits of the case, it had to be satisfied that the injunction was sufficiently necessary for the legitimate aim of protecting the environment to justify overriding the appellants' right to respect for their home and family life.<sup>53</sup> In detailing the relevant factors to be considered, Simon Brown LJ (with whom Peter Gibson and Tuckey LJ agreed) said:

the relevance and weight of their [the local council's] decision will depend above all on the extent to which they can be shown to have had regard to all the material considerations and to have properly posed and approached the article 8(2) [right to respect for home and family life] questions as to necessity and proportionality.<sup>54</sup>

#### *Victorian Civil and Administrative Tribunal ('VCAT') cases*

Two recent judgments of VCAT indicate the relationship between the requirement to give proper consideration under s 38 of the *Victorian Act* and the weight that reviewing courts will afford primary decision makers.

The case of *Smith v Hobsons Bay City Council and Ors* concerned an application to delete a condition attached to a planning permit granted by the Council. The condition required the applicant to attach a screen to the balcony of his property to prevent overlooking of the property of the applicant's neighbour.<sup>55</sup> The applicant's neighbour, Mr Davey, claimed that the proposed balcony—if not screened—would breach his right to privacy under s 13 of the *Victorian Act*. That issue was referred to VCAT as a question of law.

Deputy President Dwyer considered the Council's planning scheme, and held that the framework was such that compliance with it would amount to 'proper consideration':

Although a person's right to privacy in his or her home is fundamentally important, and this is now reinforced by the Charter, the effective application of the planning regulatory framework in Victoria is also important. That framework seeks to balance public and private rights, and seeks to provide for the fair, orderly and sustainable development and use of land by imposing certain restrictions on the use and development of land that most would consider justified in a free and democratic society

...

Any decision that properly considers all relevant planning considerations, including in this case [the relevant clause]...of the Hobsons Bay Planning Scheme, would in my view represent a reasonable, proportionate and justifiable limitation on Mr Davey's right to privacy.<sup>56</sup>

*Magee v Boroondara City Council and Anor* concerned an application objecting to the Council's decision to grant a permit to construct nine dwellings on land adjoining the applicant's property.<sup>57</sup> The objector's application contended that in granting the permit, the Council failed to give proper consideration to the objector's rights to privacy and a fair hearing.

In relation to the right to privacy, although the Council officer's report contained a bald statement that 'there are no implications under the Victorian Charter of Human Rights and Responsibilities' and contained no reference to the right to privacy, the consideration of the relevant interests had occurred in accordance with the provisions of the planning scheme. Acting President Rickards noted that:<sup>58</sup>

[U]nder the provisions of the planning scheme there are specific requirements required to be considered when assessing interference to privacy...[including] a requirement to consider such

matters as overlooking. The Council planner in her report assessed the application and its impact on surrounding properties and considered impacts in relation to 'overshadowing and overlooking'. I am therefore unable to conclude there has been any failure to consider the applicant's right to privacy.

## Conclusion

The obligations upon public authorities to act compatibly with and give proper consideration to human rights have the potential significantly to impact upon administrative decision-making and the review of such decisions. There is now much greater scope for courts to scrutinise decisions that impact upon human rights.

Judicial decisions to date indicate that courts are likely to apply the procedural obligation in a flexible way having regard to the broad range of decision makers who are subject to the obligation. Early decisions make it clear that substantive consideration of rights issues is more important than formalistic recitation of statutory provisions of the relevant human rights legislation. Substantive consideration involves identification and consideration of the competing interests and forming a judgment about where the balance lies. It is likely that internal policies and guidelines will need to be adapted in order to incorporate human rights considerations and ensure compliance with both the procedural and substantive obligations.

Giving proper consideration to human rights is likely to be important, not only to avoid the decision being quashed for breach of the express procedural obligation but also to defend challenges to administrative decisions on the basis that they are incompatible with human rights. Where public authorities have given careful consideration to human rights and competing interests, their conclusion as to where the balance should lie is much more likely to be given weight by a reviewing court.

## Endnotes

- 1 Section 38 of the *Victorian Act*; s 40B of the *ACT Act*.
- 2 Section 40C of the *ACT Act*.
- 3 Section 39 of the *Victorian Act*.
- 4 Interpreted in accordance with the interpretative rules in s 32 of the *Victorian Act* and s 30 of the *ACT Act*.
- 5 In respect of the equivalent provision in the *Human Rights Act 1998* (UK), see *R (Hooper) v Secretary of State for Work and Pensions* [2005] 1 WLR 1681.
- 6 See *Kracke v Mental Health Review Board* [2009] VCAT 646, [406]-[419].
- 7 See *DPP v Mokbel*, Ruling of Whelan J, 22 February 2011.
- 8 Second Reading Speech, Charter of Human Rights and Responsibilities Bill 2006 (Vic), Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006 (Mr Hulls, Attorney-General), 1291.
- 9 (2011) 280 ALR 221. Both Bell J and Heydon J expressly held that s 7(2) applies to the concept of incompatibility in s 38 of the *Victorian Act*: see Bell J at [681] and Heydon J at [416]. While not expressly addressing s 38, Gummow J (with whom Hayne J agreed) considered that the requirement to interpret legislation compatibly with human rights included, where it was engaged, s 7(2): at [165]-[168]. The same reasoning would apply to the concept of incompatibility in s 38. Only French CJ considered that s 7(2) did not play a role in the concept of incompatibility in s 38: at [32]-[34]. Crennan and Kiefel JJ did not express a view on the issue.
- 10 *Ibid* [681].
- 11 See *R v Momcilovic* (2010) 265 ALR 751, [143].
- 12 *Idem*.
- 13 See *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816, 842-843 [62]-[70] per Lord Nicholls, 865-866 [142] per Lord Hobhouse.
- 14 *Castles v Secretary to the Department of Justice* [2010] VSC 310.
- 15 *Ibid* [185].
- 16 *Ibid* [186].
- 17 *Ibid* [187].
- 18 *Giotopolous v Director of Housing* [2011] VSC 20.
- 19 *Ibid* [85].
- 20 *Ibid* [87].
- 21 *Ibid* [84].
- 22 *Ibid* [84].
- 23 *Ibid* [90].
- 24 *PJB v Melbourne Health ('Patrick's Case')* [2011] VSC 327.

- 25 Ibid [312].
- 26 Ibid [312].
- 27 *Canberra Fathers and Children Services Inc v Michael Watson* [2010] ACAT 74.
- 28 Ibid [19].
- 29 Ibid [37].
- 30 Ibid [73].
- 31 See eg *Sahin v Turkey* (2004) 41 EHRR 109, 131–132.
- 32 *R v Director of Public Prosecutions; ex parte Kebliene* [2000] 2 AC 326 at 380 per Lord Hope.
- 33 Beatson et al (eds), *Human Rights: Judicial Protection in the United Kingdom* (Sweet & Maxwell, London, 2008) 3–92.
- 34 *A v SSHD* [2005] 2 AC 68, [44] per Lord Bingham. See also at [131] per Lord Scott, at [173] per Lord Rodger. The Court of Appeal had refused to overturn the assessment of Special Immigration Appeals Commission on the basis that it had made a finding of fact as to the necessity of detention powers which it could not easily reverse. *A v SSHD* [2004] QB 335, [35] per Lord Woolf CJ, at [91] per Brook LJ, at [150] per Chadwick LJ.
- 35 The appeal concerned section 65 of the *Immigration and Asylum Act 1999* (UK). The same reasoning applies to the 'one-stop' appeal under section 65 of the *Immigration and Asylum Act 1999* (UK). *Huang v SSHD* [2007] 2 AC 167, 181–182.
- 36 Ibid 185.
- 37 For further discussion of weight and latitude in such cases see Beatson et al (eds) above n 7 at 3-182–3-247; Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press, Cambridge, 2009) at 167ff.
- 38 *R v Director of Public Prosecutions; ex parte Kebliene* [2000] 2 AC 326, 380–381.
- 39 [2004] 1 AC 185, 240.
- 40 *PJB v Melbourne Health* [2011] VSC 327, [324].
- 41 *Corporation of the City of Enfield v Development Assessment Commission and Another* (2000) 199 CLR 135, 153 per Gleeson CJ, Gummow, Kirby and Hayne JJ, citing *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 36 per Brennan J. The majority noted that Mason J spoke to similar effect when he observed: 'The limited role of a court [in] reviewing the exercise of an administrative discretion must constantly be borne in mind': at 153–154, citing *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24, 40 per Mason J.
- 42 Ibid 153.
- 43 Ibid 155.
- 44 Ibid.
- 45 Ibid, 154–155.
- 46 Ibid.
- 47 [2007] 1 AC 100, 116.
- 48 *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420, 1432.
- 49 *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420, 1434. Lord Neuberger explicitly agreed with Lord Mance and Baroness Hale on this issue, at 1444.
- 50 [2007] 1 WLR 1420, 1429.
- 51 *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420, 1426.
- 52 [2002] 1 WLR 1359.
- 53 *South Buckinghamshire District Council v Porter and another* [2002] 1 WLR 1359, 1377.
- 54 [2002] 1 WLR 1359, 1377.
- 55 (2010) 175 LGERA 221.
- 56 *Smith v Hobsons Bay City Council and Ors* (2010) 175 LGERA 221, 229.
- 57 (2010) 177 LGERA 92.
- 58 *Magee v Boroondara City Council and Anor* (2010) 177 LGERA 92, 111.

## CORPORATISATION AND ELECTRONIC RECORDS: ON A COLLISION COURSE WITH ADMINISTRATIVE JUSTICE?

*Sven Bluemmel\**

Two major developments in the modernisation of public administration have the potential to weaken government transparency and accountability. The first of these is the increasing corporatisation of government, not only through practices such as outsourcing, but also through striving for efficiency and effectiveness by deliberately imbuing some agencies with a culture seen as more akin to the private sector. The second is the increasing use of electronic records. Both of these developments can bring benefits in the form of better service delivery, greater responsiveness and reduced cost. However, if allowed to develop unchecked, both may pose a threat to administrative justice. This article examines these developments, outlines the potential threat by reference to some specific occurrences and examines potential solutions to balance performance and accountability.

The topic of administrative justice has been the subject of several papers at previous AIAL conferences and the AIAL Forum contains a number of quality papers on this topic. In choosing a definition for the purposes of this article, I have chosen to quote from Chief Justice French's paper *Administrative Justice – Words in Search of Meaning* presented at last year's AIAL forum<sup>1</sup>. In that paper, his Honour notes that a minimalist approach to administrative justice would suggest that an administrative decision affecting rights or liabilities will meet the requirements of the law if the decision is made:

- in accordance with the rules which the law prescribes;
- rationally;
- fairly (particularly from a procedural perspective); and
- intelligibly, by the provision of reasons for the decision.

His Honour notes that the last element of intelligibility is crucial to allow one to ascertain compliance with the first three elements. This element is, of course, closest to my heart as Information Commissioner and I shall unashamedly use it as the main criterion to ascertain whether corporatisation and electronic recordkeeping are on a collision course with administrative justice. I would submit that ascertaining compliance with any other aspects of administrative justice, such as efficiency, timeliness, accessibility and affordability similarly demands a measure of intelligibility and transparency.

### **Corporatisation**

For the purposes of this article, I will adopt a broad and unscientific interpretation of the concept of corporatisation. I certainly do not intend it to refer to terms of political theory such as corporate statism or corporate nationalism. Instead, I use the term to refer to certain

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efforts undertaken by many Western governments in the last few decades in an attempt to make their operations more efficient and responsive through approaches such as outsourcing, privatisation and the creation of state owned companies to deliver essential services. Examples in my jurisdiction of Western Australia include the operation of a prison by a private sector provider, the use of State-owned companies to produce and distribute water and energy, and the delivery of some public health services by the private sector.

In addition to the structural changes identified above, there has also been a more subtle shift in the attitude and language used by parts of government and the public sector in trying to develop a corporate culture. Examples of this include increasing reference to citizens as 'customers' as part of developing a customer focus in government.

Unlike structural shifts to outsourcing or privatisation, more subtle cultural changes are rarely driven by an overarching whole-of-government policy or program. They often grow organically, usually out of a desire to improve services, to save public money or to keep up with trends discussed among and between elements of the public sector. They find their outlet in vision statements, strategic plans, brochures, signage, job descriptions, annual reports, codes of conduct and even the names of agencies.

This article does not seek to comment on the desirability of the corporatisation of government services. Its purpose instead is to highlight the ramifications of such developments on the ability to deliver administrative justice to those who are affected by services provided and decisions made by the state.

Describing citizens or businesses who deal with government as customers is generally done for laudable reasons, such as a desire to increase service standards. However, the use of the term 'customer' carries with it much more meaning. A true customer has the freedom to choose his or her service or product from a competitive marketplace. A person interacting with government generally does not. Often, a person is required to interact with government as a result of a legislative obligation. Examples include the payment of taxes, the application for a licence or the submission to a compliance regime in exchange for the right to carry on a particular type of enterprise. A person does not have the ability to choose their tax regime (without leaving the jurisdiction) nor are they able to obtain a driver's licence from any one of a number of competing licensing authorities. This monopoly position of the state is counterbalanced by the state's behaviour being subject to limitations and scrutiny which do not apply to the private sector. These include obligations of transparency under Freedom of Information ('FOI') laws and the Parliamentary process, as well as the review of agency decisions by courts and tribunals. These obligations reflect the inherent differences between public and private spheres of service delivery. The potential danger in embracing a more corporate mindset is that the importance of these differences may be downplayed or even pushed aside.

Two examples of the impact of corporatisation on the scrutiny of publicly funded services are in the form of NBN Co and the National e-Health Transition Authority ('NeHTA'). The media have reported that both bodies are currently outside the document access regime prescribed by the Commonwealth *Freedom of Information Act*<sup>2</sup>. The situation with the cross-jurisdictional NeHTA is complicated by its governance arrangements, raising complex issues of jurisdiction which do not arise in a purely intra-state context. In respect of NBN Co, it now appears likely that the company will be subject to FOI in the future, following significant media scrutiny<sup>3</sup>.

There are also cases where the structural corporatisation of government services has been done in a way which ensures that the scrutiny remains intact from the start. There are different mechanisms which can achieve this outcome. One mechanism is defining certain outsourced service providers as 'agencies' for the purposes of Freedom of Information

legislation. This was done with private operators of prisons in Western Australia. The private operator has all the FOI obligations of a government agency and applications for access can be made directly to it. Similarly, government-owned utilities meet the definition of 'agency' in the Western Australian Freedom of Information Act, and there is no doubt that they are covered by the document access regime in that Act.

The non-structural changes to a more corporate culture may not alter the legal requirements of accountability and transparency, but they can have an impact on how those rights are administered. Agency decision makers, imbued with a corporate culture, may be more ready to claim that disclosure of their documents would place them at a competitive disadvantage. Such a claim could be dismissed if the agency, regardless of its quasi-corporate nature or relative autonomy from government, enjoys a statutory monopoly in the delivery of its operations. However, this may not occur unless a decision refusing access on this basis is challenged by appealing to the Information Commissioner.

The potential problem may be compounded by underlying structural changes which result in the loss of corporate memory or a dilution of a culture of accountability and transparency. For example, an agency may be encouraged to attract staff from outside the sector by allowing it to offer flexible employment arrangements which need not comply with traditional public sector management legislation, or its management may report to a board made up largely of members chosen from outside the public sector for their expertise or profile. Such initiatives may have benefits but they also have the potential to result in a culture which is not as fully steeped in the need for government transparency and accountability as in more traditionally governed agencies.

One illustration of the problem relates to the environment within which an agency makes administrative decisions. In a recent Freedom of Information dispute in Western Australia, a state-owned utility argued that disclosure of a document would compromise the agency's ability to act on commercial principles, which it was required to do under its governing legislation<sup>4</sup>. This highlights the often conflicting pressures placed on agencies, which are expected to operate with a commercial mindset but still remain government funded organisations expending public money on issues of public importance. The increasing use of corporate language has the potential to obscure the latter consideration at the expense of the former.

As noted earlier, this article does not argue for or against the merits of public sector bodies being imbued with a culture or practices which seek greater alignment with the corporate sphere for the purposes of achieving greater efficiencies, effectiveness or flexibility. Rather, the purpose of the foregoing discussion was to highlight that efforts along these lines need to be considered in the context of the accountability landscape. In particular, any corporatisation of government should seek to avoid placing agencies in a situation of actual or perceived conflict when making administrative decisions.

### **Electronic recordkeeping**

In recent years there has been tremendous growth in the use of electronic documents in government. All aspects of government administration have felt the impact of this development. The newer generation of public servants may find it difficult to imagine a world where the dusty paper file was the primary embodiment of the government record.

The potential benefits of electronic recordkeeping are many, including greater efficiency, flexibility and searchability. Whether all of these benefits are achieved all of the time is another question, but there is no doubting their appeal. The exponential development of communications technologies has also contributed to the revolution in how government communicates, interacts, records, remembers and forgets.

From an accountability perspective, electronic records have the ability to enhance transparency and accountability. I would argue that governments now publish much more information of public interest than several decades ago, as a direct result of electronic records and digital communication. Examples include the rapid publication and dissemination of reports, financial statements, issues papers, policy proposals and the like. As just one example of how this can contribute to accountability, the Western Australian Department of the Premier and Cabinet makes publicly available detailed quarterly reports on official travel, showing the instances and costs of all official travel by Ministers and their staff, Members of Parliament and public servants. These reports routinely run into hundreds of pages. It would be hard to imagine such broad and deep information being compiled and published before the widespread use of electronic records and online communications. The cost of compilation, printing and distribution would have been considerable, if not prohibitive. Further, the electronic version of the document allows an interested party easily to search for travel entries relating to a particular department, individual, destination or event and obtain an instant result. This again enhances transparency and accountability.

All Australian jurisdictions place obligations on the public sector governing the creation, storage and destruction of records. In the Western Australian context, the relevant legislative instrument is the *State Records Act 2000*. The State Records Act requires government organisations to develop and observe recordkeeping plans. The State Records Commission, of which the Information Commissioner is an *ex-officio* member, plays a role in reviewing and approving agencies' recordkeeping plans. The *State Records Act*, like the Western Australian *Freedom of Information Act*, uses technologically neutral language. It clearly applies to all manner of electronic and non-electronic records. It could certainly apply to some of the more recently developed channels such as text messages and tweets.

While having the ability to enhance accountability, the increasing use of electronic records also has the potential to lead to problems. These arise from an overreliance on a technology or a system at the expense of human judgment. An example of this relates to how agencies search for documents when responding to a Freedom of Information request. A report on the administration of Freedom of Information tabled in the Western Australian Parliament noted that ineffective recordkeeping can fundamentally undermine the intent of Freedom of Information<sup>5</sup>.

Under the Western Australian *Freedom of Information Act*, an agency needs to consider all relevant documents in its possession or control when responding to an access request. This includes documents which the agency is entitled to access, even though they may not be in the agency's physical possession. It is therefore a routine first step in most agencies to undertake searches of its records management system to locate documents which fall within the scope of the request. This may be an entirely appropriate step in the process, but problems can arise when the results of such a search are assumed to be correct and complete, without applying further human judgment and analysis. John McMillan, in his capacity as Commonwealth Ombudsman, touched on a related issue in a paper he presented to the AIAL National Administrative Law Forum in 2008<sup>6</sup>. In that paper, he noted the dangers of officers 'uncritically [accepting] erroneous information retrieved from an information technology system, or [drawing] the wrong conclusion when information about a person could not be found on the system', ultimately leading to wrongful immigration detention<sup>7</sup>.

In my experience, there are at least four ways in which an inappropriate reliance on electronic recordkeeping systems can lead to poor outcomes.

The first is where the person interrogating the system uses search parameters which are unlikely to find all relevant documents. Most commonly, this occurs when an operator uses search terms which are too narrow, for example by only looking for documents which contain

an exact phrase rather than looking for documents which contain all (or any) of the relevant words. The problem can be compounded by an inappropriate choice of keywords or other descriptors when a document is first entered into the system. In some cases, the person interrogating the system may be able to search the content of all stored documents, in other cases the person may only be able to search on keywords and descriptors. To illustrate the effect this can have, I took a sample of six recent Freedom of Information disputes before my office, in which the quality of electronic searches were an issue. Across those six matters, the agencies had identified a total of 60 relevant documents following searches of relevant recordkeeping systems. Broadening the relevant search terms at the direction of my office produced an additional 33 documents which were within the scope of the applicants' Freedom of Information requests. Those documents should have been identified and considered by the agencies from the outset.

A second way in which undue reliance on searches can potentially result in an injustice is where documents have, for whatever reason, not been entered into the agency's records management system. This may be due to perfectly legitimate factors, such as the documents having only very recently been created or received. Or it may simply be due to poor recordkeeping practices. In any event, the Western Australian *Freedom of Information Act* applies to all documents of an agency, not just those which have been entered into a recordkeeping system.

A third and more subtle set of circumstances is where the nomenclature applied to the subject matter of a Freedom of Information request has changed. This can occur in relation to the names of government agencies, decision-making bodies or the names of initiatives themselves. A body which is initially known as a consultative committee may become a steering committee, or a project to construct a hospital may become a project to develop a health campus. Depending on the wording of the access application and the sophistication of the applicant, it may be incumbent on the agency to consider such developments in searching for documents and making a decision on access.

The fourth way in which searches for documents can lead to poor outcomes is where the system being interrogated uses some form of auto-archiving function. An example of this involves email systems. Many widely used email systems use some form of auto-archiving. This results in emails which are older than a certain age being moved to an archive folder. The emails usually remain accessible to the user but a search across the user's email account may not find them unless the search is specifically configured to search across archive folders. Again, there have been a number of instances of this in disputes which have come before me.

An important step which agencies can take to reduce the risk of electronic recordkeeping resulting in an injustice is to ensure that records management is seen and valued as a crucial element of effective organisational governance. Staff need to be sufficiently trained, competent and supported in their records management function<sup>8</sup>. Particular thought also needs to be given to staff turnover in this area; this can have detrimental effects on the ability of the agency to be transparent and accountable if the issue is not proactively managed.

More fundamentally, the negative impact of all of the above scenarios can be minimised or even eliminated by treating electronic searches as merely one element of identifying relevant documents when dealing with an application for access to government documents. The searches should always be supported by informed human judgment and analysis. In a small agency, this may be as simple as the Freedom of Information officer consulting with his or her colleagues about the subject matter of an access request and thus tapping into their recollection of what documents might exist and how they could be found. In a larger agency, it may require discussions with those officers most directly involved in the subject matter,

together with well informed searches of electronic and hard copy records. In either case, a clear and complete record of all such searches and discussions should be kept.

The potential for electronic records to hamper accountability and transparency is far outweighed by the benefits which electronic recordkeeping has brought in terms of accessibility and usefulness of information. However, systems and their use are rarely perfect and shortcomings should be acknowledged and managed. The issues identified above highlight the need to remember the human element in creating, managing and finding records. Electronic recordkeeping systems should never be thought of as complete or infallible. They are useful and necessary tools in ensuring accountability but must always be supported by tapping into the knowledge and memory of individuals within government organisations.

### Conclusion

The title of this article asks whether corporatisation and electronic records are on a collision course with administrative justice. My answer to that question is that they do not have to be. However, to chart a course which avoids the collision requires us to acknowledge some fundamental issues about the relationship between government and those who are governed.

In the case of the corporatisation of government, we must always acknowledge that government is not the same as the private sector. It is almost certainly desirable to strive for the highest possible standards of service and efficiency. But we must not pretend that the provision of services by a single provider under a statutory monopoly can be directly compared to the provision of services in a competitive marketplace. The former must continue to meet higher standards of transparency and accountability, regardless of how energetically the provider seeks to embrace a corporate culture.

When it comes to reliance upon electronic records, we must acknowledge that decisions are ultimately made by people, not systems. Recordkeeping systems are a wonderful tool which can strengthen transparency and accountability but they cannot be relied upon without their output being subject to critical human analysis, memory and judgment.

### Endnotes

- 1 <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj22july10.pdf>.
- 2 'Legal Expert Questions Decision to Exempt \$35.9 billion NBN from FOI laws', *The Australian*, 18 January 2011; 'NEHTA Exempt from FOI Laws', *The Australian*, 22 February 2011.
- 3 'Mistakes on FOI Limit Transparency', *The Australian*, 18 March 2011.
- 4 *Re Roderick Douglas McKay and Kathleen Glenys McKay and Water Corporation* [2009] WAICmr 35, [29].
- 5 *The Administration of Freedom of Information in Western Australia*  
<http://www.foi.wa.gov.au/Materials/FOI%20Review%202010%20-%20Comprehensive%20Report.pdf>.
- 6 John McMillan, 'Ten Challenges for Administrative Justice' (2009) 61 *AIAL Forum* 23.
- 7 Commonwealth Ombudsman, *Lessons for Public Administration: Ombudsman Investigation of Referred Immigration Cases*, Report No 11/2007, 4-5.
- 8 *The Administration of Freedom of Information in Western Australia* at 39.

## HOW THE ABSENCE OF A GENERAL MERITS REVIEW TRIBUNAL IN SOUTH AUSTRALIA MEASURES AND IMPEDES PUBLIC ENGAGEMENT AND PARTICIPATION IN ADMINISTRATIVE DECISION-MAKING

*Susannah Sage Jacobson\**

South Australia is now one of only 2 states in Australia that does not have a general merits review tribunal.<sup>1</sup> Instead it retains a complex array of tribunals, boards and commissions to review State administrative decision making. Beyond the justifications of cost and the dearth of political will, there is some evidence to suggest that the absence of administrative justice reform reflects failures in democratic process and a lack of public participation in government decision-making. Given the intrinsic relationship between community engagement and merits review, the absence of a general administrative tribunal also creates further impediments to access to justice in South Australia.

This paper suggests that moving away from failed arguments about access to justice and focussing on public administration and the proven benefits to participation delivered through merits review, may be [the](#) only way forward to achieve administrative reform for South Australians.

### **Odd one out against a proven model**

South Australia has prided itself on its history of legal innovation, particularly in the areas of social justice and law reform.

South Australia was the first place in the world to allow women to stand for Parliament, and one of the first places to allow women to vote. In 1976, it was the first place in the English-speaking world to ban rape in marriage. The list of Australian firsts is equally impressive. South Australia was the first state to introduce income taxes and the first place to have public archives, in 1920. In relation to social justice initiatives, South Australia was the first state to prohibit sexual and racial discrimination in access to goods and services, to decriminalise homosexuality in 1975, to introduce aboriginal land rights legislation, and to appoint the first Indigenous Australian governor, Sir Douglas Nicholls.<sup>2</sup>

However, in 2011, South Australia is currently an anomaly in the Australian civil and administrative justice landscape, for all the wrong reasons. When, in December 2009, the Queensland Civil and Administrative Tribunal ('QCAT') was established, it marked national acceptance that amalgamated generalist tribunals provide the best model of administrative review of government decision making in Australia. In a move similar to the establishment of each of the differing models in the other states,<sup>3</sup> QCAT amalgamated 18 tribunals and 23 jurisdictions into one single tribunal, including areas such as comprehensive administrative review, guardianship, residential tenancies and civil small claims decisions.

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The birth of QCAT also coincided with a comprehensive 20 year review of Australia's oldest State 'super' tribunal, the Victorian Civil and Administrative Tribunal ('VCAT'). While it was not an independent review, the 2009 VCAT Review analysed the growth and acceptance of VCAT and was able to expose some weaknesses and make proposals for reform. In doing so, however, the Review also highlighted the true value of a generalist model. It displayed the broad scale performance measurement, transparency, accountability, and community engagement with government decision making and merits review provided by a 'one stop shop'.

### **What does South Australia have instead?**

In South Australia, administrative review of government-decision making is currently provided through a myriad of disparate boards and tribunals that operate in a manner which, through their management structures, do not appear to be entirely independent of Government.<sup>4</sup> In addition to these, Ministers and other public officials and Courts, including the Supreme Court, the District Court, the Environment Resources and Development Court and the Magistrates Court, also conduct administrative review in specific jurisdictions. In particular, the District Court of South Australia operates a merits review function through its Administrative and Disciplinary Division ('ADD').

The ADD of the District Court was established in 1991 and represented a significant decision by the South Australian Government of the time to locate administrative review in the Court system rather than in a tribunal.<sup>5</sup> The establishment of the District Court's new jurisdiction did not consolidate any existing boards or tribunals but simply sought to remove the administrative appeal and review jurisdiction of the Supreme Court. This move perhaps represented a cross roads for the progression of administrative justice in South Australia away from the national norm by avoiding the proposals for reform.<sup>6</sup>

While it is not my intention in this paper to critique the performance of the ADD or any of the individual merits review bodies in South Australia, there are a few unique features of the South Australian system of administrative review that impact broadly on its overall operation. In relation to the ADD of the District Court, a striking feature is the development of a different test for merits review than appears either in Commonwealth or interstate administrative review. Section 42E(3) of the District Court, enacted in 2000, states that the Court is required to 'give due weight to the decision being appealed against and the reasons for it and not depart from the decision except for cogent reasons'. This test contrasts with the scope and nature of merits review as to determining the 'correct or preferable' decision<sup>7</sup> and has been interpreted to imply that in South Australia the original decision should not in the ordinary course of events be departed from. It is beyond the scope of this paper to discuss the jurisprudence of this interpretation, however, the fact that the test within South Australia has remained so markedly different to the rest of the nation is in itself worthy of note.

In relation to the administrative boards and tribunals, there is no common coordinated approach to practice or procedure, all are separately resourced and funded and there are not necessarily any common members of any of these bodies. To illustrate the scale of this problem: as of 2008, there were still 31 administrative tribunals/boards operating in South Australia, 8 of which were managed and resourced by the ADD, while not in fact being formally part of the Court.<sup>8</sup> There are currently approximately 70 Acts that confer review functions on the ADD. Despite the complexity of this structure, there is also a dearth of accessible public information about the availability of administrative review. No clear instructions are provided anywhere by South Australia government or the Courts as to which body reviews which type of government decisions.

Finally, due to its piecemeal nature, the current system in South Australia is proving unable to adapt and grow as needs arise in public administration and regulation. For example,

recent regulation requirements under a new National Health Practitioners scheme were simply rolled into established tribunals in other states alongside all other occupational and professional regulations. In South Australia, yet another new tribunal needed to be established to meet this need.<sup>9</sup>

### **Why the resistance to a generalist tribunal in South Australia? The common excuses**

Most South Australian public lawyers and administrators readily identify a few simple reasons why there has been no general administrative tribunal established in South Australia. These are the cost, small population and a lack of leadership from government in administrative justice policy. However, a closer analysis suggests these may not in fact be the critical factors.

It is true that South Australia has good reason to cry poor in the face of the justice budgets of the other States of Australia.<sup>10</sup> However, a single tribunal to replace the complex system of administrative bodies and Courts in South Australia<sup>11</sup> has cost saving advantages, even in the short to mid-term, and in some jurisdictions cost has proved an incentive rather than an impediment to administrative justice reform.<sup>12</sup> In addition, the idea that our small population has not yet reached a critical point for significant reform in court administration must be an argument only plausible to those outside the justice portfolio, as those within struggle with an overworked, under resourced Court system. While the lack of an independent law reform commission to push civil law reform initiatives<sup>13</sup> and successive attorneys-general focussed on crime and punishment in South Australia are disappointing, such political failings are phenomena unique to South Australia. Further, other significant lobby groups in the South Australia legal fraternity and justice sector<sup>14</sup> have demonstrated that they are just as active, skilled and persistent in pursuing this issue as has happened in other jurisdictions in Australia.

### **Lack of a coherent administrative justice policy framework**

Another factor that has had an effect on the development of the administrative justice system in South Australia, is the lack of a conceptual policy framework to occupy the 'civil and administrative justice' space between the powers of government and the jurisdiction of the Courts. An analysis of the established models of generalist administrative tribunals in other Australian States demonstrates coherent pathways between these two branches of government that are facilitated and enhanced by the establishment of a generalist administrative tribunal. This conceptual administrative justice framework does not currently exist in South Australia and, more importantly, the value of these pathways to administrators has not yet been publically recognised by the South Australia Government.

To illustrate this by way of both contrast and example, in Victoria the readily available VCAT 'Values Statement' unequivocally explains to the public where VCAT sits in the established framework of both government and the justice system.<sup>15</sup> The location and position of VCAT is also confirmed by the broader 'Civil Justice Strategy'; VCAT is recognised by government as playing a role which both reflects and generates community engagement and participation.<sup>16</sup> These policy documents confirm that the Victorian Government and its administrative decision-makers have come to recognise the value of the 'super' tribunal in ensuring public confidence and support in their performance as well as an improved understanding of government decision-making and review rights. The administrative justice landscape in Victoria (as in some other jurisdictions) has, therefore, demonstrably moved beyond simply representing a cheaper civil dispute resolution alternative to the Courts to become an integrated tool of the government to promote transparency and community participation in decision-making.

In South Australia, this link is the value to the South Australian Government of administrative review to improve government process or, more particularly, public participation and engagement, has not yet been made in public in civil justice policy statements.

### **Public participation and engagement in South Australian government decision-making?**

As a lawyer, not a political scientist, it is beyond my ambit to adequately analyse the South Australian Government's performance with reference to complex democratic theory, such as attempting to measure 'public participation'. There are, however, some basic observations that I am able to make about the about community involvement in current government decision-making processes, relevant to administrative justice in South Australia.

For almost 10 years a defining feature of the Rann Labor government in South Australia<sup>17</sup> was its political rhetoric on public engagement and community consultation on policy initiatives. For example, the South Australia government conducted the largest 'public' consultation ever conducted in the State's history on the South Australia Strategic Plan.<sup>18</sup> A further characterising and controversial feature of this Labor Government was the external 'independent' advisory boards, of private non-government 'experts' formed to inform policy, and seek innovative community-led solutions for public administration. An example of this structure in the area of participation is The Community Engagement Board, which exists to promote the involvement of individuals and organisations outside State Government in South Australia's Strategic Plan.<sup>19</sup> The Community Engagement Board comprises a representative of the following eleven high level South Australian Government boards and committees, including the Social Inclusion Board.

The Social Inclusion Board itself is a policy initiative unashamedly adapted from Blair's UK model. While the Attorney-General or indeed any justice policy representative does not get a seat at this table, the Social Inclusion Initiative contains many social justice issues that directly impact on the justice sector. The Initiative's strategy states:

In Australia's system of government, as with other countries based on the Westminster system, departments inevitably approach issues through the lens of their own departmental responsibilities. Progress in developing and implementing policy is often measured through internal refinements to individual systems. This departmental approach frequently leads to systems operating in isolation and ultimately, fragmentation in service delivery. There is often little incentive for collaborative action across multiple agencies on policy development and service delivery. For many highly disadvantaged people, this means that their complex, multi-dimensional and inter-linked needs are not properly met.<sup>20</sup>

Further, the Social Inclusion Initiative's Foundation Principles 8 & 9 are, relevantly, as follows:

- Systems and bureaucracies must always be orientated to SERVE people and community and not vice versa.
- Joined-up working can address more effectively the complex and inter-related needs of people. The organisational structures of systems and bureaucracy that create barriers must be addressed.<sup>21</sup>

In 2008 the South Australian Government's initiatives around social inclusion and participation seemed to culminate when a 'Thinker in Residence 2008', Geoff Mulgan, considered the issue of 'Social Innovation: Meeting Unmet Needs' in South Australia and asserted that South Australia had a great history of social innovation and one that had gained new momentum in the 2000s.<sup>22</sup>

A basic survey of all the recent policy statements concerning public participation, from an administrative lawyer's perspective, readily shows that there is no stated role for the civil

justice and/or Court system in achieving broader social justice aims. In all the initiatives seeking to encourage government to 'join up and serve the community', civil and administrative decision-making processes are not mentioned at all.

Further and perhaps even more tangible evidence of the omission of administrative decision-making from a developed civil justice policy strategy, from an administrative lawyers' perspective, may also be identified in the analysis and outcomes of the Constitutional Reform Convention held in Adelaide in 2003. The Convention, held to review the South Australian State Constitution, was an anomalous event, held as a direct result of a deal the Rann government made with an independent MP in order to secure a minority government<sup>23</sup>. The panel of experts was originally charged to consider, amongst five related questions, 'Measures to improve the accountability, transparency and functioning of government' this was then consolidated into the broader question of 'measures to improve parliament and government'.<sup>24</sup>

As of 2003 in South Australia, despite the established role of administrative tribunals interstate and at a Commonwealth level, the Discussion Paper identified the possible 'transparency measures' as including Parliamentary Committees, an Auditor General, an Ombudsman, Freedom of Information and the Courts. There was no mention of the role of administrative merits review in improving public participation at all, even in a reform proposal context. A perhaps self-fulfilling finding of the Convention was that there was 'declining faith in our democratic systems and concern in the electorate about accountability'<sup>25</sup>. More generally, MacIntyre and Williams concluded their analysis of the Convention as follows:

The task for reformers is to convince the Members (and the Government) that certain reforms are worthwhile and should be accepted.... When the causes of some of the most significant recent reforms in the South Australian Parliament are considered it can be seen that it was public opinion (albeit opinion led by articulate advocates of reform like Dunstan) that pushed the Parliament along the road to change.... Perhaps, if the mood for reform generated by the Convention can be maintained and encouraged, there is some prospect that the Parliament of South Australia may, in time, recognise the need to embrace those reforms that will improve its transparency and accountability. Until then it stands at a pace behind other jurisdictions that have undertaken significant steps to modernise their colonial heritage.<sup>26</sup>

## Conclusion

The reasons why South Australia lags behind the national agenda in administrative justice reform may indeed include lack of leadership, political will or lack of need due to our relatively small population. I would argue, however, that what is lacking more importantly is the recognition by government and administrators of the fundamental connections between state accountability, public participation and administrative tribunals. South Australia's decision to retain the court system to review government decision-making back in 1991, rather than following the national trend of establishing administrative tribunals, avoided the development of a coherent civil justice policy that could provide a consistent and defined conduit between the courts and government decision-makers.

The South Australian government needs to publicly recognise that the establishment of a generalist merits review tribunal is not actually a question of court administration and that the experience in other jurisdictions identifies administrative tribunals as an essential function of government accountability. Rather than being a law and justice question, administrative merits review may be equally aligned with the issues of community participation and social inclusion. It is difficult for lawyers to conclude that the current absence of a general merits review tribunal in South Australia provides a measure of public participation in administrative decision-making. The experience of the 'super' tribunals in other states, however, does provide evidence that not having one in South Australia is an impediment to further

development of a flexible and robust administrative justice system that encourages community engagement and access to justice.

In conclusion, and to retreat to my true loyalties as declared at the start of this paper, while South Australia currently stands well off the National agenda on [Administrative Tribunals](#), what has been striking about the many recorded examples of social innovation in South Australia is a strong notion of 'catch up'. While the historical cases of social justice and law reform in South Australia were undoubtedly innovative and ground-breaking, they often only happened after the social need that they addressed had been neglected for quite some time. I therefore consider maintaining South Australia's self-image of social innovation is not yet out of reach in the sphere of administrative justice. As South Australia's longest serving Premier, Sir Thomas Playford, acknowledged in relation to his achievements:

... the city [of Adelaide] was badly provided with social services and the country even worse ... So that, when you're behind scratch, it is easier to make a spectacular advance.<sup>27</sup>

### Postscript

On Friday 26 August 2011, the South Australian Attorney-General John Rau announced to the Law Society of South Australia that a Steering Committee to review the State's administrative boards and tribunals had been established. The Review will investigate and present a proposal to establish an amalgamated generalist merits review tribunal. The Committee is expected to report to the Attorney-General in early 2012.

### Endnotes

- 1 Remaining States are SA & Tasmania. In 2011 the AG in Tasmania appointed a Committee to investigate a proposal for a 'super' tribunal.
- 2 Full list of SA social innovations see Manwaring, R "A collaborative history of social innovation in South Australia" in Bloustien, G (Ed) *The proceedings from the History and Future of Social Innovation Conference*; Adelaide 2008; Published online at <http://www.unisa.edu.au/hawkeinstitute/publications/social-innovation/20/7/11>.
- 3 The jurisdictions of each of the State Tribunals differ according to the need and efficiency issues within the state. For details, see State Administrative Tribunal of WA at [www.sat.justice.wa.gov.au](http://www.sat.justice.wa.gov.au) ; Administrative Decisions Tribunal of NSW at [www.lawlink.nsw.gov.au/lawlink/adt/ll\\_adt.nsf/pages/adt\\_index](http://www.lawlink.nsw.gov.au/lawlink/adt/ll_adt.nsf/pages/adt_index) ; Victorian Civil and Administrative Tribunal at [www.vcat.vic.gov.au](http://www.vcat.vic.gov.au).
- 4 As a basic example, in the 2010-2011 Annual Report of the Guardianship Board of South Australia p.28 they include in their organisational structure the Attorney-General and three senior bureaucrats as direct employers of Guardianship Board Members with no further explanation as to the nature of this relationship.
- 5 For a comprehensive overview of the jurisdiction see Byrt, C "An Analysis of The Nature of the Administrative Appeal Jurisdiction of the District Court of South Australia" Unpublished thesis, MALP University of Sydney 2006. Copy available from author.
- 6 Significant to note that the Final Report of the South Australian Law Reform Committee, prior to its abolition in 1984, recommended the establishment of an amalgamated generalist tribunal.
- 7 Test as set out in *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60.
- 8 See overview at Byrt (2006) (n 5 above).
- 9 The South Australian Health Practitioners Tribunal, established July 2010, located in and administered by the Industrial Relations Tribunal of South Australia, at [www.healthpractitionertribunal.sa.gov.au](http://www.healthpractitionertribunal.sa.gov.au).
- 10 By way of example, on the basic Annual Report data 2009-2010, the current expenditure of VCAT alone was \$36.79m, compared to \$94,723m expenditure for the entire SA Courts Administration Authority.
- 11 An excellent overview of the myriad of administrative bodies in SA is provided by Byrt, C "Should we have a "Super" Tribunal in SA?" Unpublished Paper presented to COAT(SA) November 2008. Copy available from author.
- 12 The process of establishment of QCAT proved cost-neutral ie the budget of the new tribunal has not exceeded the cost to the State to administer the previous administrative review system.
- 13 South Australian Law Reform Committee was abolished in 1984 (Final Report recommended the establishment of an amalgamated generalist tribunal). A new 'Law Reform Institute' was established in 2011 by the Attorney-General in partnership with Law Society South Australia and Adelaide University Law School.
- 14 The Administrative Law Committee of the Law Society of South Australia, in particular, has engaged in ongoing lobbying on this issue and has provided detailed written submissions to the AG on this issue in 2004, 2006 and 2011.

- 15 See VCAT website for Service Charter and other statements; [www.vcat.vic.gov.au](http://www.vcat.vic.gov.au).
- 16 [www.lawreform.vic.gov.au/resources/4/a/4ad3ac00404a1067a258bf5f2791d4a/vlrc+civil+justice+review+-+report.pdf](http://www.lawreform.vic.gov.au/resources/4/a/4ad3ac00404a1067a258bf5f2791d4a/vlrc+civil+justice+review+-+report.pdf) 2008.
- 17 The Hon Jay Weatherill was officially sworn in as new SA Labor Premier on 21 October 2011.
- 18 The 2007 Summary of Targets for the SA Strategic Plan ('SASP') only includes political participation not government or policy participation (Target 5). For a critical evaluation of the 2006 public consultation on SASP within the framework of democratic theory, see Manwaring, R "Unequal Voices: 'Strategic' Consultation in South Australia" (2010) 69(2) *Australian Journal of Public Administration* 178. Manwaring suggested that the SA government has carefully driven and retained tight control over both the strategic agenda and public feedback, consulting primarily with 'elites'.
- 19 See <http://saplan.org.au/pages/45>.
- 20 <http://www.socialinclusion.sa.gov.au/>.
- 21 [http://www.socialinclusion.sa.gov.au/files/SA\\_SII\\_book\\_2009.pdf](http://www.socialinclusion.sa.gov.au/files/SA_SII_book_2009.pdf).
- 22 <http://www.thinkers.sa.gov.au/thinkers/mulgan/default.aspx>.
- 23 See discussion of background in MacIntyre, C & Williams, J "Lost Opportunities and Political Barriers on the Road to Constitutional Reform in South Australia" (2005) 20(1) *Australasian Parliamentary Review* 103-16
- 24 MacIntyre, C "Deliberating on the Constitution" 2003 Published by: Australian Policy online, accessed 20/7/11 at <http://www.sapo.org.au/pub/pub202.html?q=MacIntyre>.
- 25 See papers at MacIntyre, C & Williams, J (eds) *Peace, Order and Good Government: State Constitutional and Parliamentary Reform* 2003, Wakefield Press, Adelaide.
- 26 MacIntyre & Williams (2005) at 114.
- 27 Cockburn, S. (1991) 'Playford: Benevolent Despot' Axiom Publishing, p.175; as quoted in Manwaring (2010) (n 18).

## FOR NOW WE SEE FACE TO FACE: THE CONSTITUTIONAL DIVIDE

*Robert Lindsay\**

Whilst it may be that the High Court has turned its face against intense scrutiny of substantive merits in executive decision making, recent cases establish how determined the Court has been to prevent unwarranted executive interference in the exercise of judicial power.

### **The use of privative clauses**

To declare what the law is has always been an important part of the judicial function. Yet Parliament, whether Federal or State, has frequently sought to close off appellate and review avenues by the use of privative clauses. In recent times the High Court has become increasingly vigilant in ensuring that avenues of judicial review are preserved where it is deemed necessary to prevent finality.

Last year in *Kirk v Industrial Relations Commission*<sup>1</sup> the High Court reviewed the law relating to privative clauses in both the Federal and State jurisdictions and efficacy of such privative clauses as applied to both Courts and Tribunals. Where a privative clause is found, the question arises as to whether there is 'jurisdictional error' of such a kind that the privative clause will not protect against a superior court intervening to review the findings of the decision maker. As the plurality said in *Kirk* 'the principles (of jurisdictional error and its related concept of jurisdictional fact) are used in connection with the control of tribunals of limited jurisdiction on the basis that a tribunal of limited jurisdiction should not be the final judge of its exercise of power; it should be subject to the control of the courts of more general jurisdiction'<sup>2</sup>.

### **Jurisdictional error before tribunals**

In *Kirk*, the Court referred to its earlier decision in *Craig v South Australia*<sup>3</sup> in which it had been said:

if .... an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material, or at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it<sup>4</sup>.

It was reiterated in *Kirk* that the above reasoning was not to be 'a rigid taxonomy of jurisdictional error'.<sup>5</sup> For example, it was recognised that in some cases failure to give reasons may constitute a failure to exercise jurisdiction.<sup>6</sup> So too, natural justice requires that both sides be heard.

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### Jurisdictional error before courts

Conversely, a failure by an inferior Court to take into account some matter which it was, as a matter of law, required to take into account in determining a question within jurisdiction, or reliance by such a court upon some irrelevant matter upon which it was, as a matter of law, not entitled to rely in determining such question, will not ordinarily involve jurisdictional error<sup>7</sup>.

However, an inferior court falls into jurisdictional error 'if it mistakenly asserts or denies the existence of jurisdiction or if it misapprehends or disregards the nature or limits of its functions or powers in a case where it correctly recognises jurisdiction does exist'<sup>8</sup>.

Section 179(1) of the *Industrial Relations Act (NSW)* provided that a decision of the Industrial Court 'is final and may not be appealed against, reviewed, quashed or called into question by any Court or Tribunal'; this section was held to be invalid.

The basis of the distinction between Courts and Administrative Tribunals was identified, in *Kirk*, in the lack of authority of an Administrative Tribunal to determine authoritatively questions of law or to make an order or decision otherwise than in accordance with the law.<sup>9</sup>

### Commonwealth legislation

In 2002, the Howard Government had sought by a privative clause to prohibit appeals from decisions made by the Refugee Review Tribunal to the Federal Court, and then onto the High Court by way of judicial review. In *Plaintiff S157/2002 v the Commonwealth*<sup>10</sup> Gleeson CJ said that a privative clause may involve a conclusion that a purported decision is not a 'decision .... under this Act'. The majority said that a privative clause cannot protect against a failure to make a decision required by the legislature, which decision on its face exceeds jurisdiction.<sup>11</sup> If a privative clause conflicts with another provision, pursuant to which some action has been taken or decision made, its effect will depend upon the outcome of its reconciliation with that other provision.<sup>12</sup> A specific intention in legislation as to the duties and obligations of the decision maker cannot give way to the general intention in a privative clause to prevent review of the decision.<sup>13</sup> Their Honours said that the expression 'decisions... made under this Act' must be made so as to refer to claims which involve neither a failure to exercise jurisdiction nor an excess of jurisdiction. An administrative decision which involves jurisdictional error is 'regarded in law as no decision at all'.<sup>14</sup> Section 474(2) of the *Migration Act 1958 (Cwth)* required that the decision in question be 'made under [the] Act', and where the decision made involved jurisdictional error such a decision was held not to be a decision protected against judicial review.<sup>15</sup>

In *Plaintiff S157/2002* it was said with reference to section 75(v) of the Constitution, which authorised prerogative relief against a Commonwealth officer:

First, the jurisdiction of this Court to grant relief under s 75(v) of the Constitution cannot be removed by or under a law made by the Parliament. Specifically, the jurisdiction to grant s 75(v) relief where there has been jurisdictional error by an officer of the Commonwealth cannot be removed. Secondly, the judicial power of the Commonwealth cannot be exercised otherwise than in accordance with Ch III. The Parliament cannot confer on a non-judicial body the power to conclusively determine the limits of its own jurisdiction.<sup>16</sup>

### State legislation

In *Kirk*, the Court considered how far, under State legislation, it was necessary to take account of the requirements under Ch III of the *Constitution*. The Court said that at Federation each of the Supreme Courts had a jurisdiction that included that of the Court of Queen's Bench in England and, whilst statutory privative provisions had been enacted by

Colonial legislatures which had sought to cut down the availability of certiorari in *Colonial Bank of Australasia v Willan*<sup>17</sup>, the Privy Council said of such provisions:

It is, however, scarcely necessary to observe that the effect of [such a privative provision] is not absolutely to deprive the Supreme Court of its power to issue a writ of certiorari to bring up the proceedings of the inferior Court, but to control and limit its action on such writ. There are numerous cases in the books which establish that, notwithstanding the privative clause in a statute, the Court of Queen's Bench will grant a certiorari; but some of those authorities establish, and none are inconsistent with, the proposition that in any such case that Court will not quash the order removed, except upon the ground either of a manifest defect of jurisdiction in the tribunal that made it, or of manifest fraud in the party procuring it.

In *Kirk*, the Court said that: 'legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power'<sup>18</sup>.

Both at Federal and State levels the scope of judicial review affords scope to Courts exercising a supervisory jurisdiction to ensure that procedural fairness as expressed in the principles governing jurisdictional error, is observed both by courts and tribunals.

Recently, in *MIMIA v SGLB*<sup>19</sup> the Court considered once more the question of whether a privative clause was consistent with the obligation of a decision maker to discharge 'imperative duties' or to observe 'inviolable limitations or restraints'.

The Court said in other cases the nature of the alleged error will turn upon the legislative criteria in the jurisdiction, making the construction of the legislation the primary and essential task.

Prior to *Plaintiff S157/2002* it had been thought that the three provisos<sup>20</sup> referred to by Dixon J in *R v Hickman*<sup>21</sup> constituted the only basis upon which a privative clause might be defeated, but, as the Court said in *SGLB*<sup>22</sup>, they formed a minimum requirement that unless they were satisfied a privative clause would be rendered ineffectual, and it did not follow that if they were satisfied the provision would always be sufficient.

### **Procedural fairness in serious and organised crime legislation**

Where the High Court has believed that the executive is intruding too markedly upon the exercise of a judicial power, such as directing a Court to eschew natural justice as expressed in procedural fairness, the Court has struck down offending legislation. Traditionally the Court has been reluctant to find invalid State legislation. In large part this is because there is no recognised separation of powers under the State *Constitutions*.

The natural justice principle may be viewed as an integral part of the Ch III judicial power under the Commonwealth *Constitution*.

In *Leeth v the Commonwealth* Mason CJ, Dawson and McHugh JJ said:

It may well be that any attempt on the part of the (Commonwealth) legislature to cause a court to act in a manner contrary to natural justice would impose a non-judicial requirement inconsistent with the exercise of judicial power, but the rules of natural justice are essentially functional or procedural and, as the Privy Council observed in the *Boilermakers' Case*, a fundamental principle which lies behind the concept of natural justice is not remote from the principle which inspires the theory of separation of powers<sup>23</sup>.

Until recently any State legislature's encroachment upon the exercise of judicial functions appeared to be treated with some forbearance by the High Court. In *Kable v DPP of New South Wales*<sup>24</sup> *ad hominem* legislation directed at conscripting the New South Wales judiciary to exercise powers inconsistent with the normal and appropriate judicial process

against Mr Kable was held to be invalid legislation and, as such, impugned the institutional integrity of the State Court. It was there said that since State Courts were clothed with the exercise of Federal powers there was an obligation upon the State Courts to preserve their institutional integrity and not to allow that reputation to 'be borrowed by the political branches to cloak their work in the neutral colours of judicial action'.<sup>25</sup>

However, it was thought for many years that *Kable* might be 'a constitutional guard dog that would bark but once'.<sup>26</sup> In 2009, it barked for a second time with *International Finance Trust Company v New South Wales Commission and Ors*<sup>27</sup> and by a narrow majority of four to three section 10 of the *Criminal Assets Recovery Act 1990 (NSW)* was held invalid. This provision enables a Court to make a restraining order freezing the assets of a person suspected of a serious crime. An application can be made 'ex parte' accompanied by an affidavit of an authorised officer, stating that the officer suspects a person has engaged in a 'serious crime', and where a Court considers that the affidavit discloses reasonable grounds for any such suspicion a freezing order may be made against the suspect property. Such an application must be heard, if the Commission so directs, by the Court without permitting a hearing to the person affected. Although ex parte orders are unexceptional, the majority considered that this legislation set up a special regime, and did not provide an appropriate mechanism for dissolving the ex parte order at a later time, and thereby did not provide the party against whom the application was directed an opportunity to be heard before the order was made.

French CJ said in *International Finance Trust*:

Procedural fairness or natural justice lies at the heart of the judicial function. In the Federal Constitutional context, it is an incident of the judicial power exercised pursuant to Ch III of the *Constitution*. It requires that a court be and appear to be impartial, and provide each party to proceedings before it with an opportunity to be heard, to advance its own case and to answer, by evidence and argument, the case put against it<sup>28</sup>.

His Honour considered that for a State Court to be required to hear and determine an application for a restraining order, without notice to the party affected, is incompatible with the judicial function of the Court and that, in directing the Court as to the manner of its jurisdiction, the legislation distorted the institutional integrity of the Court and affected its capacity as a repository of Federal jurisdiction.<sup>29</sup> Gummow and Bell JJ said a court must be alert to see that its jurisdiction is not being conscripted to the service of any arbitrary or unfair action by the State, and the legislation did not provide for a clear means for curial supervision of the duty to disclose material facts on an ex parte application.<sup>30</sup>

Heydon J, the fourth member of the majority, cited Megarry J in *John v Rees*<sup>31</sup>:

It may be that there are some that would decry the importance which the Courts attach to the observance of the rules of natural justice. ... [A]s everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, some how, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.

Of the last sentence Lord Hoffmann had observed: 'most lawyers will have heard of or read or even experienced such cases, but will also know how rare they are. Usually, if evidence appears to an experienced tribunal to be irrefutable, it is not refuted'. Heydon J said that both Megarry J and Lord Hoffmann may have been guilty of a little exaggeration, but even if Lord Hoffmann's reasoning is completely correct it did not destroy McGarry J's point.<sup>32</sup>

A similar argument to that which succeeded in the *International Finance Trust* case was raised in *Director of Public Prosecutions (Cth) v Kamal*<sup>33</sup> in relation to Commonwealth Proceeds of Crime legislation in the WA District Court. Eaton DCJ ruled the Commonwealth

legislation invalid, but the DPP was successful on appeal to the Full Court and Mr Kamal decided not to apply for special leave to appeal to the High Court.

### The bikie cases

Last year in *South Australia v Totani*<sup>34</sup> South Australian legislation permitted the State Attorney General to make a declaration in respect of an organisation if satisfied the members of the organisation associated for the purpose of engaging in serious criminal activity, and the organisation represented a risk to public safety and order. Section 14 of the *Serious and Organised Crime (Control) Act 2008 (SA)* said that the Magistrates Court must, on application by the Commissioner of Police, make a control order placing restrictions on freedom of association of a defendant if satisfied the defendant was a member of a declared organisation under s10(1) of that Act. In the earlier decision of *Gypsy Jokers*<sup>35</sup>, Gummow, Hayne, Heydon and Keifel JJ had said legislation which purports to direct the Courts as to the manner and outcome of the exercise of jurisdiction is apt impermissibly to impair the character of the Courts as independent and impartial tribunals.<sup>36</sup> In *Totani* it was now held that s14(1) of the Act was invalid because the Magistrates Court was called upon, effectively, to act at the behest of the Attorney General to an impermissible degree, and thereby to act in a fashion incompatible with the proper discharge of its Federal judicial responsibilities and with its institutional integrity.<sup>37</sup> Only Heydon J dissented from this conclusion.

In *Wainohu v New South Wales*<sup>38</sup> the *Crimes (Criminal Organisations Control) Act 2009 (NSW)* provided that the Attorney General may, with the consent of a Judge, declare a Judge of the Supreme Court to be an 'eligible Judge', for the purposes of the Act. The Commissioner of Police may apply to an 'eligible Judge' for a declaration that a particular organisation is a 'declared organisation' and the Judge may make a declaration that this is so, if satisfied that members of a particular organisation are engaged in serious criminal activity and that the organisation 'represents a risk to public safety and order'. The Act said that the eligible Judge is not required to provide any grounds or reasons for making a declaration and once made, the Supreme Court may, on the application of the Commissioner of Police, make a control order against individual members of the club. The Act was held to be unconstitutional in that it impaired the institutional integrity of the Supreme Court.

Mr Wainohu was a member of the Hells Angels Motorcycle Club. Under the Act there was no appeal from the Judge's decision, and a broadly expressed privative clause purported to prevent a decision by an eligible Judge from being challenged in any proceedings, though it was acknowledged by counsel that this would not protect the decision against jurisdictional error in light of the earlier *Kirk* decision<sup>39</sup>. A declaration may be made partly upon information and submissions not able to be disclosed to the members of the club. It was said by French CJ and Kiefel J:

A state legislature cannot, consistent with Ch III, enact a law which purports to abolish the Supreme Court of a State or which excludes any class of official decision, made under a law of the State, from judicial review for jurisdictional error by the Supreme Court of the State. Application of the *Kable* principle has the result that the State legislatures cannot validly enact a law which would effect an impermissible executive intrusion into the processes or decisions of a Court; which would authorise the executive to enlist a court to implement the decisions of the executive in a manner incompatible with that court's institutional integrity; or which would confer upon any court a function (judicial or otherwise) incompatible with the role of that court as a repository of federal jurisdiction<sup>40</sup>.

Gummow, Hayne, Crennan and Bell JJ adopted what Gaudron J had said earlier, that confidence reposed in judicial officers 'depends on their acting openly, impartially and in accordance with fair and proper procedures for the purpose of determining the matters in issue'.<sup>41</sup> Heydon J dissented.

It can be seen therefore that the High Court is looking at the exercise of judicial power with emphasis upon the need for procedural fairness, manifested in an obligation to provide a fair hearing to a party and observance of a requirement for reasons to be given.

In *Polyukhovich v The Commonwealth*, Deane J, in a dissenting judgment, said: 'the provisions of Ch III are based on an assumption of traditional judicial procedures, remedies and methodology'<sup>42</sup>.

The recent decisions of the High Court reveal an intention that the State legislature, notwithstanding the absence of a formal separation of powers at the State level, permits the State Courts to observe the same traditional judicial procedures and methodology as are required at the Commonwealth level.

### **Liberty before security**

In his book 'The Rule of Law', the late Lord Bingham, the Senior Law Lord, said that the former English Prime Minister, Mr Blair, on leaving office had an article published in which he described it as a 'serious misjudgement' to put civil liberties first. Mr Blair said that to do so was 'misguided and wrong'.

Lord Bingham said: 'while neither he nor other ministers have, I think, quoted Cicero directly, their guiding principle has been Cicero's phrase '*Salus populi suprema est lex*' (the safety of the people is the supreme law) ... and his successor, Mr Gordon Brown, paraphrased Cicero when he said: 'The first priority of any Government is to ensure the security and safety of the nation and all members of the public'.

This is a view which many support, in Britain and the United States but John Selden (1584 – 1654), who did not lack experience of civil strife, observed 'There is not any thing in the world more abused than this sentence'. A preferable view to Cicero's, perhaps, is that attributed to Benjamin Franklin, that 'he who would put security before liberty deserves neither'. We cannot commend our society to others by departing from the fundamental standards which make it worthy of commendation'.<sup>43</sup>

The observance of the principles of natural justice must surely be numbered amongst those 'fundamental standards'.

### **Endnotes**

- 1 2010 HCA 1.
- 2 *Kirk* supra French CJ, Gummow, Hayne, Crennan, Keifel & Bell JJ at [64].
- 3 *Craig v South Australia* (1995) 184 CLR 180.
- 4 *Kirk* supra at [67].
- 5 *Kirk* supra at [74].
- 6 *Kirk* supra at [63].
- 7 *Craig v South Australia* (1995) 184 CLR 163, 180.
- 8 *Kirk* supra at [72].
- 9 *Kirk* supra at [68].
- 10 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476.
- 11 *Plaintiff S157/2002* per Gleeson CJ at [57].
- 12 *Plaintiff S157/2002* at [60].
- 13 *Plaintiff S157/2002* at [65].
- 14 *Plaintiff S157/2002* at [76].
- 15 *Plaintiff S157/2002* at [86].
- 16 *Plaintiff S157/2002* at [98].
- 17 *Colonial Bank of Australasia v Willan* (1874) LR 5PC 417, 442.
- 18 *Kirk* supra at [100]. See also *Seddon v Medical Assessment Panel* [2011] WASC [53]-[61] for analysis on how jurisdictional error may arise.
- 19 *MIMIA v SGLB* (2004) 207 ALR 12.

- 20 Dixon J said 'no decision ... is ... invalidated ... provided always the decision is a bona fide attempt to exercise its power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power given to the body'.
- 21 *R v Hickman* (1945) 70 CLR 598.
- 22 SGLB supra Gummow & Hayne JJ at [57].
- 23 *Leeth v The Commonwealth* (1992) 174 CLR 455 at [30].
- 24 *Kable v DPP of New South Wales* (1996) 189 CLR 51.
- 25 Kable per Gummow J at [54] citing *Mistretta v US* 1989 488 US 361, 407.
- 26 *Baker v The Queen* (2004) 223 CLR 513 Kirby J at [54] cited by Martin CJ at [10] in *DPP (Cth) v Kamal* (2011) WASCA 55.
- 27 2009 240 CLR 319.
- 28 *International Finance Trust* supra at 345 [28].
- 29 *International Finance Trust* supra French CJ at 355 [56].
- 30 *International Finance Trust* supra at 365 [92] and [93].
- 31 1970 Ch 345 at 402.
- 32 *International Finance Trust* supra Heydon J at 381 [143] and [144].
- 33 2011 WASCA 55.
- 34 2010 HCA 39.
- 35 2008 234 CLR 532.
- 36 *Gypsy Jokers* at p 536.
- 37 *Totani* supra at [149].
- 38 2011 HCA 24.
- 39 *Totani* supra at [15].
- 40 *Totani* supra at [46].
- 41 *Totani* supra at [41].
- 42 *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 per Deane J at [32].
- 43 Tom Bingham, *The Rule of Law*, (Penguin Books, 2010) 236.

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