Admin Review is an administrative law bulletin concerned with informing government, private organisations and individuals about developments in Commonwealth administrative law and procedure. It is produced under the auspices of the Administrative Review Council, but the views expressed in it are those of the editors or writers and not necessarily the views of the Council or any of its members or the members of its committees. Although every care is taken in the preparation of the bulletin, no liability is accepted in respect of matters published in it. The purpose of the bulletin is to provide general information, not legal advice. Readers should carefully check the detail of the legislation, cases and other material discussed in the bulletin.


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Foreword

The articles in this 59th edition of Admin Review offer a range of interesting perspectives—from politicians, administrators, practitioners and business—on the modern application and scope of administrative law. They also highlight the importance of administrative law in upholding each citizen’s democratic right to participate in government processes and challenge government decisions that affect them.

Although the Commonwealth’s administrative law system has provided a firm basis for these rights, there is room for improvement in some areas of public policy and administration. Restoring trust and integrity in government has been a priority of the Rudd Government since it was elected in 2007.

Reform of freedom of information laws, as described by my colleague Senator Ludwig in his article, is an important part of that agenda. The reforms are designed to establish a statutory basis for a culture of openness in government through provision of improved access to government information.

Ongoing consideration of the need for protection for whistleblowers is another acknowledgment by the Government of the importance of integrity in government and the encouragement of a pro-disclosure culture. The paper on whistleblower protection, by the Hon. Mark Dreyfus QC, MP, covers the recommendations made in the report of the House of Representatives committee inquiry into whistleblower protection that was tabled in early 2009.

In addition to making government information more accessible, improved access to information about the law is consistent with the Government’s approach to improving access to justice. The administrative law system already includes a scheme designed to make delegated legislation more accessible to those who might be affected by it.

The Legislative Instruments Act 2003, which has its origins in a 1992 report of the Administrative Review Council, provides for better public access to subordinate legislation through the Federal Register of Legislative Instruments. Other accountability and transparency measures ensured by the scheme arising from the Act are parliamentary scrutiny and public participation in the making of rules.

In May 2009 I tabled the report of a statutory review of the scheme. A number of the recommendations in that report are already being implemented within my portfolio—including the upgrading of the Comlaw website and the provision of improved guidance to agencies on compliance with the Act. Because the scheme has government-wide application, I will be consulting within government on the implementation of other recommendations that require changes to existing agency practices.

I thank the members of the Administrative Review Council for their efforts in putting together this collection of articles. Admin Review provides an excellent forum for us to assess how administrative law and practice can respond to the challenge of providing fair and open government in the 21st century. I hope this publication will stimulate debate that will contribute to the continuing evolution of our administrative law system which has been so well described in this publication.
Finally I would like to publicly acknowledge the valuable contribution Jillian Segal made during her four years as President of the Council. Under her leadership the Council produced a number of important reports as well as the practical guides for Better Decision-Making and the updated *Guide to Standards for Conduct of Tribunal Members* (2009). I thank her for so generously sharing her time and experience and wish her well in her future endeavours.

Robert McClelland MP  
Attorney-General
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Introduction

Jillian Segal*

This edition of Admin Review explores the vitality of administrative law as it has developed in the 21st century. Although well established, administrative law continues to evolve, sometimes in quiet, almost unnoticed small steps and sometimes in leaps and bounds.

Because of its independent statutory remit and collective expertise, the Administrative Review Council is in a unique position not only to chart this evolution but also to comment, through reports, advice and articles, on it so that the changes in administrative law do not remain unnoticed and unconsidered. Indeed, the Kerr Committee, which recommended the Council’s establishment, was of the view that the Council’s role was ‘fundamental to the proposed system of administrative review’. On the occasion of the Council’s 30th anniversary, in 2007, Sir Anthony Mason noted:

My assessment of the ARC is equally favourable. The Council’s performance has conformed closely to the expectations held of it. It has continued to monitor the system as a whole, to identify issues that need to be addressed, and to work in a cooperative way with other institutions of government. The Council’s constant and informed oversight of the system has played a very important role in the success of the system.

The major leaps and bounds in the development of administrative law are well known. In the 1970s what remain the fundamental planks of administrative review were laid down—the Administrative Decisions (Judicial Review) Act 1977, the Administrative Appeals Tribunal, the Administrative Review Council and the Ombudsman. The 1980s saw the establishment of the Human Rights Commission and the Privacy Commissioner and enactment of the first freedom of information legislation. The present decade has seen the development of federal whistleblower laws, reforms to the FOI framework, and important proposed reforms to the Commonwealth Privacy Act 1988 following the Australian Law Reform Commission’s report For

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* Jillian Segal AM, BA, LLM was President of the Administrative Review Council from September 2005 until October 2009.

1 Administrative Appeals Tribunal Act 1975 (Cth) s 51.
4 Administrative Appeals Tribunal Act 1975 (Cth).
5 ibid. Part V.
6 Ombudsman Act 1976 (Cth).
8 Privacy Act 1988 (Cth).
10 Whistleblower provisions were inserted into the Corporations Act 2001 (Cth) in Part 9.4AAA, which came into force on 1 July 2004.
Further initiatives have been foreshadowed in the area of whistleblower laws.\textsuperscript{13}

It is therefore fitting that this edition of \textit{Admin Review} begins with an article by Senator Joe Ludwig, about significant FOI reforms, and reproduces a speech by Mark Dreyfus QC, MP, expanding on the government’s important initiatives in relation to whistleblower laws.\textsuperscript{14}

This edition also includes articles by members of the Council, assisted by others with a professional interest in administrative law, looking at current challenges for and aspects of administrative law. Administrative law inevitably evolves over time — after all, the framework of administrative law has now been established for over 30 years — and as questions and problems come to notice they warrant comment and examination in order to assess their implications for the framework of rules, standards and institutions that make up this area of legal discipline.

In their article, Robin Creyke and Matthew Groves examine a number of administrative law developments in Australia and elsewhere, including the convergence of the adjudicative arms of government and proportionate and alternative dispute resolution and information access, which are highly relevant to the Government’s focus on access to justice and its recent announcement and continuing initiatives in this area.\textsuperscript{15}

The article by Prof. John McMillan AO and Ian Carnell discusses the common features of independent complaint and review agencies and future challenges raised by the development and emergence of a new sector. This subject is another example of dynamic evolution — the importance to government and citizens of the work of review and monitoring agencies in the current landscape. In this context, the role of the Administrative Review Council itself in monitoring developments in the administrative law system and suggesting improvements can be viewed as relevant to the integrity sector.

In his article, Peter Anderson, Chief Executive of the Australian Chamber of Commerce and Industry, in consultation with a business reference group convened for the purpose, raises a number of concerns business has with administrative law settings. In particular, business is concerned with aspects of ‘soft law’ developments — the guidelines, regulation policy, codes of conduct and other less formal rules that impose constraints and requirements on business and have a tendency to be intrusive. The Council’s report on soft law\textsuperscript{16} charts this development and suggests some particular processes, such as consultation with the groups affected and careful drafting, that can help minimise unnecessary constraints while ensuring that administrative law values are embedded in soft law rules. Peter Anderson also comments on the need for training of tribunal members and the consequences complex reasons often have for business.

Andrew Metcalfe’s article focuses on the crucial importance of education and an emphasis on cultural values in the delivery of administrative justice if administrative decisions of the


\textsuperscript{16} Administrative Review Council 2008, \textit{Administrative Accountability in Business Areas Subject to Complex and Specific Business Regulation}, Report no. 49, ARC, Canberra.
necessary quality are to be achieved by a large government department. In this context, he notes the Council’s five best-practice guides for government decision makers and the Council’s report on the use of computer-assisted systems in administrative decision making as examples of the Council’s work that have been important elements in the improvement process undergone by the Department of Immigration and Citizenship.

The contributions by Steven Lloyd, Donald Mitchell and Mark Robinson (with guidance from Melissa Perry), by Simon Daley and Nick Gouliaditis, and by Dr Matthew Groves deal with a number of topics—statements of reasons, the nature of merits review, the Hardiman principle and standing—that highlight the need to keep administrative law subject to independent commentary and review. The mechanism for giving reasons is illustrative. The rules associated with the giving of reasons could be operating today in an environment quite different from that of 30 years ago; and reasons can extend from a ministerial decision to a very large and complex resource-allocation decision. This evolution of the context of the requirement to give reasons could mean that the requirement itself needs to have greater specificity and to offer more detailed guidance than it did 30 years ago. The examples provided by the authors illustrate the need for continued sensitivity to developments in government by the guardians of administrative law, such as the Council, and the need to ensure that administrative law standards continue to evolve in a way that complements changes in commercial and government practices and principles. The Attorney-General’s current initiative on access to justice is illustrative of a commitment to modernising legal structures, requirements and procedures.

The conclusion is written by Margaret Harrison-Smith, who reflects on her six years as Executive Director of the Council and looks at some of the Council’s work during her term of office, traversing its three key roles—education, advice and innovation. In relation to innovation, she notes that some reports (for example, Government Business Enterprises and Complex Business) ‘respond to important evolutionary changes in government administration’ and explore ‘difficult and evolving areas not previously the subject of in-depth consideration’. Such reports represent useful reminders of developments in administrative law and are testament to the continuing need for expert commentary in this important area.

I will have concluded my term as President of the Council by the time this edition of Admin Review is published, and I thank all authors for their contributions and insights. Administrative law is a particularly vital and dynamic area of law, charting and regulating as it does the relationship between government and its citizens. I trust that the work of the Council will continue to be relevant and valuable to administrative law in Australia.


19 Margaret Harrison-Smith left the Council in December 2008 to pursue new directions. The position of Executive Director as at the date of writing, has not been filled. Instead, support for the Council is provided by the Attorney-General’s Department.


The Freedom of Information Act—no longer a substantial disappointment

Senator the Hon. Joe Ludwig*

In the last two years there has been a renewed focus on freedom of information laws at both the Commonwealth and the state and territory levels1, resulting in a raft of reforms. At the Commonwealth level the renewed focus is the result of the election of a Labor Government committed to restoring trust and integrity in government, including reforming FOI laws. Labor’s FOI platform was formulated largely in response to the secrecy of the Howard government, evidenced by its high-profile use of conclusive certificates to prevent the disclosure of government information.2 The Labor Government’s platform was also informed by, among other things, Australia’s Right to Know, the public campaign for free speech by a coalition of 12 major media organisations and journalists.

In this paper I first discuss FOI in the field of administrative law in Australia and briefly set out the main events leading to enactment of the Commonwealth’s Freedom of Information Act 1982. Second, I outline the main problems with the FOI Act in its current form and, third, I identify aspects of the reforms the Government has proposed in order to redress these problems. I conclude with a discussion of the need for cultural change in departments and agencies if the Government’s ambitious FOI reform agenda is to be realised.

The role of freedom of information in administrative law

The legislation that constitutes the system of administrative law in Australia is important in defining the relationship between citizens and their government: it not only sets out the principles governing the proper exercise by government of its decision-making powers but also provides for the right of individuals to challenge the exercise of those powers. Put broadly, administrative law provides individuals a general right of access to information held by government.

The bases of the administrative law framework are the concepts of open and accountable government. The concept of openness is based on citizens’ right to know about their government and the actions it takes or does not take on their behalf. The concept of accountability is based on government decision making being both open and subject to review.

It is well known to administrative lawyers that the recommendations of the Kerr Committee3 and the subsequent Bland4 and Ellicott5 Committees constitute the architecture of the modern

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1 Senator Ludwig is the Rudd Government’s Cabinet Secretary and Special Minister of State. After this article was sent for printing, on 13 May 2010, the Australian Information Commissioner Bill 2010 and the Freedom of Information Amendment (Reform) Bill 2010, passed through the Parliament.
2 In Queensland, the new Right to Information Act 2009 came into force on 1 July 2009 following receipt of recommendations from an expert panel chaired by Dr David Solomon AM, as contained in the report entitled The Right to Information: reviewing Queensland’s Freedom of Information Act, published in June 2008 (the Solomon report). In New South Wales, the Government Information (Public Access) Act 2009 was assented to on 26 June 2009 but is not expected to commence until early 2010. The assent followed the release on 5 February 2009 of the NSW Ombudsman’s report entitled Opening up Government: review of the Freedom of Information Act 1989. The new Tasmanian Right to Information Act 2009 will commence on 1 July 2010. This Act follows the release in March 2009 of the Tasmanian Justice Department’s directions paper entitled Strengthening Trust in Government … everyone’s right to know.
3 See McKinnon v Secretary of the Treasury Department (2006) 229 ALR 187.
system of Australian administrative law. Although enactment of the FOI Act was not a recommendation of the Kerr, Bland or Ellicott Committees, the right of access to government-held information is principally facilitated through the FOI Act. In this way the FOI Act operates as an integral part of the administrative law framework.

In 1983, in the foreword to the first annual report on the FOI Act, the then Attorney-General, Gareth Evans, described the basic purposes of FOI legislation:

- to improve the quality of decision-making by government agencies in both policy and administration matters by removing unnecessary secrecy surrounding the decision-making process;
- to enable groups and individuals to be kept informed of the functioning of the decision-making process as it affects them and to know the kinds of criteria that will be applied by government agencies in making those decisions;
- to develop further the quality of political democracy by giving the opportunity to all Australians to participate fully in the political process;
- to enable individuals, except in very limited and exceptional circumstances, to have access to information about them held on government files, so that they may know the basis on which decisions that can fundamentally affect their lives are made and may have the opportunity of correcting information that is untrue or misleading.

Although a Liberal government under Malcolm Fraser enacted the FOI Act, creation of such an Act had become Labor Party policy long before, in 1972. That policy was detailed in a speech by the then Leader of the Opposition, Gough Whitlam:

A Labor Government will introduce a Freedom of Information Act along the lines of the United States legislation. This Act will make mandatory the publication of certain kinds of information and establish the general principle that everything must be released unless it falls within certain clearly defined exemptions. Every Australian citizen will have a statutory right to take legal action to challenge the withholding of public information by the Government or its agencies.

Realising Australians’ right to have access to government information proved, however, a difficult and lengthy task. The then Attorney-General, Lionel Murphy, established an interdepartmental committee to ‘identify the modifications required and any important issues involved in adapting the United States Freedom of Information Act to the Australian constitutional and administrative structure’. The committee reported to government in September 1974. In 1975, under the Fraser government, another interdepartmental committee was established to ‘study and report … on policy proposals for freedom of information legislation, taking into account the Report of the Interdepartmental Committee on Proposed Freedom of Information legislation that was tabled in parliament in 1974’. Following provision

7 Although the Kerr Committee did not recommend an FOI Act, it did recommend that the government should enact legislation which provided for the disclosure of official documents where it was relevant to an administrative tribunal. See n 3, [343]-[344] and recommendation 28.
8 Interdepartmental Committee 1974, Proposed Freedom of Information Legislation, Commonwealth Parliament, Canberra, Appendix A.
9 ibid. 1.
of that report to government in November 1976, the first FOI Bill was introduced into the Senate on 9 June 1978. The Bill was subsequently referred to the Senate Standing Committee on Constitutional and Legal Affairs, which reported back to the parliament in 1979. Two years later, on 2 April 1981, a second FOI Bill was introduced into the Senate. That Bill eventually passed the House of Representatives on 24 February 1982 and came into force on 1 December 1982.

As is apparent from the sequence of events just described, establishing the FOI Act in Australia was a prolonged, tortuous affair. This was largely because it was such a contentious matter (as it continues to be) both within and outside government. At the heart of the contention within government is a debate about the compatibility of freedom of information with one of the strongest traditions of the Westminster system of responsible government—the provision of frank, candid and confidential advice by public servants to ministers.

It cannot be denied that a tension does exist between the fundamental goal of freedom of information—namely, access to government information—and the Westminster tradition of confidentiality. Like the 1979 Senate Standing Committee, however, I believe claims that the two are incompatible are overstated. This is because the FOI Act, through the application of the exemptions and the public interest test, gives both decision makers and review bodies sufficient scope and instructive precedent to support the weighing up of competing interests.

The Australian Government’s reforms shift this balance further towards openness. It is the Government’s intention, as outlined in the following sections, to make the disclosure of government information the starting point for decision makers through its FOI reforms.

**Problems with the Act**

The Freedom of Information Act, which has remained largely unchanged since its inception, has been criticised for failing to live up to its originally expressed purposes. Sir Anthony Mason diplomatically described it in 2007 as a ‘substantial disappointment’. Others have been less kind, describing it as a ‘regime … in danger of terminal decline’, while at least one member of the fourth estate has gone so far as to describe it as ‘a sick joke, marked by delays, obstruction and a presumption against releasing documents’.

The problems with the operation of the Act and its application by decision makers are not new. In fact, many of them were noted in the 1995 joint Australian Law Reform Commission – Administrative Review Council report *Open Government*. Among those problems are the following:

- that the operation of a ministerial veto through the application of conclusive certificates is inconsistent with the objects of the Act

- that there is a need for an independent monitor and advocate for freedom of information who is responsible for promoting the Act and its philosophy

- that the costs associated with making FOI applications and seeking to have decisions reviewed both internally and externally can discourage use of the Act

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15 ibid. 99.
16 ibid. 63.
17 ibid. 181–91.
that processing delays are one of the most common problems FOI applicants experience\(^{18}\)

that the starting point for many agencies when considering an FOI application is not one of disclosure\(^{19}\)

that the Act is not universally accepted by public servants as an integral part of the way democracy in Australia operates.\(^{20}\)

To take just one example, delays in processing FOI requests continue to be a problem, although there is room for some optimism in view of recent improvements.

It was recorded in the 2007-08 FOI annual report (which covers both the former and the current governments’ terms in office) that agencies took longer to make FOI decisions than in the previous reporting period. The proportion of decisions made and notified within 30 days in 2007-08 was 67.9 per cent, a fall from 77.2 per cent in 2006-07. Further, the proportion of requests taking over 90 days more than doubled between 2006-07 (7.1 per cent) and 2007-08 (14.9 per cent).\(^{21}\)

The 2008-09 annual report shows, however, that the promptness of responses has improved markedly: 83.3 per cent of decisions were made within 30 days and only 1.77 per cent took more than 90 days during the reporting period.\(^{22}\) These figures demonstrate that there is much room for improvement in the operation and application of the FOI Act.

Problems such as delays in processing FOI requests are not unique to the Commonwealth. In fact, if not all, of the problems identified in the \textit{Open Government} report apply equally to the states and territories. These difficulties have been noted in various reports, among them the report of the Independent Audit into the State of Free Speech in Australia (conducted by Ms Irene Moss AO and commissioned by Australia’s Right to Know)\(^{23}\), the Solomon report\(^{24}\), the New South Wales Ombudsman’s report\(^{25}\) and the Tasmanian Justice Department’s directions paper.\(^{26}\)

**Restoring trust and integrity in government through FOI reforms**

In 2007 Labor in Opposition produced a detailed FOI policy, set out in the document entitled \textit{Government Information: restoring trust and integrity}.\(^{27}\) Commitments were made to do the following:

- revise the FOI Act to promote a culture of disclosure and transparency
- appoint a statutory FOI Commissioner

\(^{18}\) ibid. 84.

\(^{19}\) ibid. 30.

\(^{20}\) ibid. 35.


\(^{24}\) See n 1.

\(^{25}\) ibid.

\(^{26}\) ibid.

• rationalise the exemption provisions

• publish guidelines with the overriding principle that information is withheld only when to do so is in the public interest

• review FOI charges to ensure that they are compatible with the objectives of disclosure and transparency.28

The reality of government slowed the pace of change but, despite the pundits, real reform continued. The reforms have progressed in two stages. In stage one, on 26 November 2008 the Government introduced into the Senate a Bill to remove the availability of conclusive certificates as a device for preventing full merits review of FOI decisions to refuse access to documents. The Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act 2009 came into force on 7 October 2009.

In stage two, on 26 November 2009 the Government introduced into the House of Representatives the Information Commissioner Bill 2009 and the Freedom of Information Amendment (Reform) Bill 2009. Both Bills are products of a participatory process. The Government released exposure drafts of each Bill for public comment in March 2009 and received a number of public submissions, which were taken account of in the preparation of the final Bills introduced into Parliament.

The Bills contain wide-ranging reforms to the FOI Act, with the purpose of revitalising the Act so that it delivers on the important objects of increasing participation in and the accountability of government. A number of these reforms are discussed in the paragraphs that follow.

Removing conclusive certificates

The question of conclusive certificates had both a real and a symbolic impact during the FOI debate. The certificates were able to be issued under specific exemption provisions of the FOI Act29 and operated to establish conclusively the exempt status of identified documents.

Removing the power to issue conclusive certificates means all decisions by agencies to refuse access to documents are subject to full merits review and a minister is no longer able to override an adverse decision made by the Administrative Appeals Tribunal.

Modernising the objects of the Act

It is more than a quarter of a century since the FOI Act came into operation. The Government proposes to amend the objects of the Act to more accurately reflect the modern philosophy that is the basis of FOI laws. This will be achieved by including in the objects clause the purposes of the legislation and by removing the existing references to limitations on the right of access to information being limited by exceptions and exemptions, so as to reflect the Government’s proposed emphasis on disclosure.

The purposes to be included in the objects clause are as follows:

• to promote Australia’s representative democracy by contributing to increased public participation in government processes, with a view to promoting better informed decision making and increasing scrutiny, discussion, comment and review of government’s activities

• to recognise that information held by government is to be managed for public purposes and is a national resource

28 ibid. 5.
29 Sections 33 (‘Documents affecting national security, defence and international relations’), 33A (‘Documents affecting relations with states’), 34 (‘Cabinet documents’), 35 (‘Executive Council documents’) and 36 (‘Internal working documents’).
to facilitate and promote public access to information, promptly and at the lowest reasonable cost.

Although the proposed objects clause does not import any obligation on decision makers to construe exemption provisions narrowly\(^{30}\), other proposed amendments in the FOI Reform Bill require agencies to have specific regard to the Act’s objects clause when they determine what material to publish in accordance with the proposed publication scheme and when decision makers apply the public interest conditional exemptions.\(^{31}\)

**Establishment of the Office of the Information Commissioner**

The centrepiece of the Government’s FOI reforms is the establishment of the Office of the Information Commissioner. This will, for the first time, bring oversight of both the privacy and the FOI regimes together in a single office. The office will be headed by a new statutory officer, the Information Commissioner, who will be vested with both FOI and privacy functions.\(^{32}\) The Information Commissioner will be supported by the Privacy Commissioner, who will mainly perform the privacy-related functions. The Information Commissioner will also be supported by a new FOI Commissioner, who will mainly perform the FOI-related functions.

The Information Commissioner will have the additional responsibility of providing to government advice on broader information management policy and will report to the Cabinet Secretary on matters relating to government information policy and practices.\(^{33}\)

Among the FOI functions of the Information Commissioner are the following:

- promoting the FOI Act
- issuing guidelines on the administration of the FOI Act, including operation of the publication scheme (discussed shortly) and application of the public interest test
- providing training to FOI decision makers
- providing assistance to members of the public and agencies handling FOI requests.

The Information Commissioner will also be responsible for investigating complaints made by applicants in relation to agencies’ handling of FOI requests. Further, the commissioner will have the power to conduct own-motion investigations into agencies’ compliance with the Act. The Ombudsman will continue to have jurisdiction to investigate FOI matters where appropriate — for example, when an FOI complaint forms only a small part of a larger complaint against an agency.

**Creation of a publication scheme**

Another important element of the Government’s proposal is the establishment of a new information publication scheme for the proactive publication of government information. This scheme — which embraces the notion of the ‘push model’ identified in the Solomon report — reconceptualises the role of freedom of information in facilitating access to government

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\(^{30}\) See, for example, *News Corporation Ltd v National Companies and Securities Commission* (1984) 1 FCR 64; *Arnold v Queensland* (1987) 73 ALR 607 (Arnold); *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 36 FCR 111.

\(^{31}\) Freedom of Information Amendment (Reform) Bill 2009 (Cth), proposed ss 9A and 11B(3).

\(^{32}\) Commonwealth Ombudsman Prof. John McMillan AO was appointed Information Commissioner Designate on 26 February 2010.

\(^{33}\) The Information Commissioner’s functions, as set out in s 7 of the Information Commissioner Bill 2009, include reporting to the Cabinet Secretary on any matter that relates to the ‘Commonwealth Government’s policy and practice with respect to: the collection, use, disclosure, management, administration or storage of, or accessibility to, information held by the Government; and the systems used, or proposed to be used for … [those] activities …’
information. It does this by establishing an entirely new scheme that requires agencies to routinely and proactively publish information in the absence of FOI requests.

Under the proposed reforms every agency will be required to prepare a plan showing what information it proposes to publish and how and to whom it is to be published. Plans are to be kept up to date and, in conjunction with the Information Commissioner, agencies must review the operation of their schemes not less than every five years.

Agencies will also be required to publish various categories of information, including the information in documents agencies routinely provide to parliament or to applicants in response to FOI requests.

**Two-tier merits review**

The FOI Reform Bill establishes a two-tier system of merits review, the first tier being conducted by the Information Commissioner and, if a party is not satisfied, the second being conducted by the Administrative Appeals Tribunal.

It is envisaged that, on receipt of an application for review of a decision to refuse access, the Information and FOI Commissioners will first try to resolve the dispute through mediation and, failing resolution, make a decision. Although there will be the capacity for the Information Commissioner to conduct formal hearings, it is envisaged that the vast majority of these reviews will be conducted on the papers. Applicants will be able to elect not to seek internal review of an agency decision to refuse access to documents and go directly to the Office of the Information Commissioner.

The objective of this reform is to give applicants a quick, free mechanism for resolving access disputes, while at the same time, and if needed, affording both applicants and agencies the opportunity to resolve disputes in a fully contested hearing in the Administrative Appeals Tribunal.

Considering that more than 50 per cent of all applications to the AAT for review of FOI decisions in the three years to 2008–09 were resolved by consent or were withdrawn without a hearing\(^{34}\), it is expected that the majority of contested FOI applications will be resolved by the Information Commissioner.

**Rationalising, reorganising, narrowing and clarifying exemption provisions**

A major focus of the Government’s reforms is ensuring that the right of access to documents under the FOI Act is as comprehensive as possible, limited only when a stronger public interest lies in refusing access. It is this philosophy that has guided the Government’s proposed reforms to the Part III request regime.

Consistent with recommendations in the *Open Government* report, the Government will repeal the exemptions for Executive Council documents and documents arising out of companies and securities legislation.

The exemption provisions will be reorganised into two categories—all those that are subject to a public interest test, referred to as ‘public interest conditional exemptions’, and those that are not, referred to simply as ‘exemptions’. Further, a public interest test is to be added to the personal privacy, business affairs (but not trade secrets or commercially valuable information) and research exemptions, as well as to the reformulated national economy exemption.

Additionally, there will be a single formulation of the public interest test, in contrast to the three formulations at present in the FOI Act. The proposed formulation of the test is as follows: ‘The

agency or Minister must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest’. This test makes it abundantly clear that disclosure is the starting point for decision makers when considering whether or not to release conditionally exempt documents.

The test is further clarified by listing in the FOI Reform Bill specific matters that must not be taken into account when deciding whether access to a document is contrary to the public interest, as well as specifying matters that favour disclosure of a document in the public interest. The factors favouring non-disclosure are not listed because most of the conditional exemptions encapsulate a harm threshold that in itself is a factor against disclosure. The reformulated national economy exemption, for example, states in part that a document would fall within that category of exemption only if ‘its disclosure … would, or could be reasonably expected to, have a substantial adverse effect on Australia’s economy’. The fact that the disclosure of a document would reasonably be expected to have a substantial adverse effect on Australia’s economy would undoubtedly weigh strongly against disclosure when applying the public interest test. For conditional exemptions that do not contain a harm threshold—for example, the ‘deliberative process’ exemption—the process of identifying factors against disclosure might be more contested.

The proposed factors that cannot be taken into account when deciding whether access to a document would on balance be contrary to the public interest are as follows:

- that access to the document could result in embarrassment to the Government or cause a loss of confidence in the Government
- that access could result in any person misinterpreting or misunderstanding the document
- that the author of the document was or is of high seniority in the agency
- that access could result in confusion or unnecessary debate.

Among the factors favouring access to a document are where giving access would:

- promote the objects of the FOI Act
- inform debate on a matter of public importance
- promote effective oversight of public expenditure
- allow a person access to their own personal information.

The Government also proposes a reformulation of the Cabinet exemption. Under the reformulation, the exemption will be narrowed so as to apply only to documents brought into existence for the dominant purpose—as opposed to the single purpose—of submission for consideration by Cabinet. In line with this amendment, the proposed exemption will not apply to documents just because they are merely attached to Cabinet documents.

The existing scope of the Cabinet exemption will also be extended to make it clear that briefing notes created for the dominant purpose of briefing a minister on Cabinet submissions or proposed submissions are excluded. In addition, drafts, copies or extracts of Cabinet documents will also be exempt.

35 Freedom of Information Amendment (Reform) Bill 2009 (Cth) cl 11A(5).
Eliminating prohibitive costs and delays

Prohibitive costs and delays have regularly been identified as major impediments for FOI applicants.

The Government proposes to deal with the question of costs in two ways. First, all FOI application fees will be removed. The first hour of decision-making time will be free of charge for all applicants, and journalists and not-for-profit organisations will receive five free hours of decision-making time. Individuals’ FOI requests for their own information will be processed completely free of charge, a measure that is particularly significant in view of the fact that the vast majority of FOI applications are made by individuals seeking access to their own information.36

Applicants will, at no cost, be able to seek full merits review by the Information Commissioner of decisions by agencies and ministers to refuse FOI requests in full or in part. This contrasts with the current situation whereby applicants wishing to seek an external merits review by the Administrative Appeals Tribunal must first pay an application fee of $682. There is no doubt that this fee operates as a substantial impediment to merits review.

Second, the Government has announced that it will ask the Information Commissioner to carry out a full review of the FOI charging regime within 12 months of the commissioner’s appointment, offering the potential for further reforms to FOI fees and charges.

On the question of delays, the FOI Reform Bill proposes that agencies unable to process an FOI request within the required period of 30 days because the request is complex or voluminous must seek an extension of time from the Office of the Information Commissioner. If agencies fail to process FOI applications within the required time frame, including as extended, they must process those applications free of charge.

Other important transparency measures in the FOI Reform Bill

The Government proposes to amend the Archives Act 1983 by changing the open access period for most government records, including Cabinet documents, from 30 years to 20 years and for Cabinet note books from 50 years to 30 years. Access is to be phased in over 10 years, with the first multi-year release beginning on 1 January 2011.

The Government also proposes to extend the FOI Act to cover documents of contracted service providers and subcontractors delivering services for and on behalf of the Commonwealth insofar as the documents relate to the delivery of those services to members of the community. Although FOI requests for such documents will be made to the relevant agencies, it will be incumbent on the agencies to ensure that suitable contractual measures exist with the contracted service providers in order to facilitate access.

The importance of cultural change

It is well understood that agencies have varying approaches to freedom of information. Some agencies appear to have embraced the philosophy underpinning the FOI Act, but it seems that others have been slower to do this. Mr Andrew Podger, a former public servant who held several senior positions in the Public Service between 1990 and 200537, recently referred to attempts in

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37 Between 1993 and 1996 and 2002 and 2004 Andrew Podger held the positions of Secretary of the Department of Administrative Services and the Arts and the Department of Health and Family Services and was the Australian Public Service Commissioner. In addition, he was Chair of the Review of Health Services Delivery in the Department of the Prime Minister and Cabinet between 2004 and 2005.
departments to thwart FOI applications, including by destroying documents.\textsuperscript{38} Another mechanism involved establishing ‘systematic arrangements to tie as much policy advice to Cabinet papers as possible’ in an attempt to gain the benefit of the Cabinet exemption.

Although the Government’s proposed legislative reforms will, if passed, result in extremely important pro-disclosure changes to the FOI Act, the reforms will not of themselves achieve the Government’s stated aim of restoring trust in and the integrity of government: they must be accompanied by cultural change. And if cultural change is to occur there must be leadership not only from the Government but also from senior management within agencies. To this end, my predecessor Senator Faulkner wrote personally to all agency heads, calling on them to:

… take a lead role in facilitating the Government’s policy objective of enhancing a culture of disclosure across agencies. This includes making it clear to FOI decision-makers in your department or agency that the starting point for considering FOI requests should be a presumption in favour of giving access to documents.\textsuperscript{39}

In addition, Senator Faulkner called on FOI practitioners to support the Government’s reform objectives:

I also seek your support … Those of you handling or advising on FOI applications have a vital role to play in ensuring that changes in FOI law are carried through to changes in FOI practice. We will be relying on you to ensure that these reforms actually deliver more open and more accountable government.\textsuperscript{40}

The Government also recognises that a major focus of both the Information Commissioner and the FOI Commissioner will be bringing about the required cultural change. It is envisaged that the commissioners will do this by deploying various mechanisms, among them high-level contact with agency heads, provision of training, issuing of guidelines, reviewing of decisions and investigation of FOI administrative practices.

\textbf{Conclusion}

The legislation now before the Parliament comprises a strong package of measures to improve public access to government-held information. The legislation will achieve the Government’s goal of greater openness and transparency in government through the FOI Act. To ensure that the reform package does bring about effective change, the FOI Act and the Information Commissioner Act will be reviewed two years after the reforms are introduced.

Transparency and accountability are cornerstones of good governance. They are principles that have great importance for administrative law, and they underlie the purpose of FOI legislation. I am confident that the revitalised FOI Act, combined with leadership from the Government, the Office of the Information Commissioner and the senior levels of the Public Service, will lead to the development of a greater pro-disclosure culture throughout government.

\textsuperscript{38} Andrew Podger 2009, \textit{The Role of Departmental Secretaries: personal reflections on the breadth of responsibilities today}, 128.


Whistleblower protection for the Commonwealth public sector

Mark Dreyfus QC, MP

When the Rudd Government was elected in November 2007 it had already committed itself to high standards of integrity, transparency, responsiveness and accountability. Since the election a range of measures have been introduced with the intention of ensuring high standards of accountability and integrity within government.

As part of these reforms, in July 2008 the Attorney-General—on behalf of the then Cabinet Secretary, Senator the Hon. John Faulkner—asked the House of Representatives Legal and Constitutional Affairs Committee to inquire into and report on whistleblowing protections in the Australian Government public sector. As chair of the committee, I oversaw the inquiry and presented the resultant report to the House of Representatives in February 2010. In this contribution to Admin Review I take the opportunity to provide an overview of the committee’s recommendations and offer some observations on furthering an agenda of accountability and transparency in government.

Protection of public interest disclosures is part of an array of integrity reforms that are being carried out by the Government. It is useful to outline some of the reforms so far.

- For the first time integrity and governance functions have been brought together under a single minister, the Cabinet Secretary and Special Minister of State. This includes the agencies of the Commonwealth Ombudsman, the Privacy Commissioner, the Australian Public Service Commissioner, the Inspector-General of Intelligence and Security, the Auditor-General and the National Archives of Australia.

- The Government has introduced the Evidence Amendment (Journalists’ Privilege) Bill 2009, which amends the professional confidential relationship provisions in the Evidence Act 1995 by inserting an objects clause stating that the object of Division 1A is to achieve a balance between the public interest in the administration of justice and the public interest in the media communicating facts and opinions to the public and, for that purpose, having access to sources of facts.

- The Government has introduced legislation containing the first stage of reforms to the Freedom of Information Act 1982, including the abolition of conclusive certificates.  

- On 29 March 2009 the Government released an exposure draft of its FOI reform legislation. This represents the most substantial overhaul of the federal freedom of information regime since the Act’s inception. The structural reforms proposed in the draft legislation—including the appointment of an Information Commissioner and an FOI Commissioner—will bring about a major change in FOI administration and are directed at creating a ‘pro-disclosure’ culture.

- In April 2009 the Special Minister of State wrote to all agency heads to advise them that the starting point for considering FOI requests should be a presumption in favour of giving access to documents.

* Following is the edited text of a paper presented by the Chair of the House of Representatives Legal and Constitutional Affairs Committee, Mark Dreyfus QC, MP, at the National Administrative Law Forum, ‘Administrative Law Reform’, Canberra, 6 August 2009.

• The Government has strengthened the Standards of Ministerial Ethics and introduced for the first time a Ministerial Staff Code of Conduct, and on 1 July 2008 a Lobbying Code of Conduct came into force.

• The Government has established the Public Service Ethics Advisory Service to work with all Australian Public Service agencies to increase ethical awareness and improve decision-making capabilities.

• In the case of electoral and party fundraising, the Government has proposed measures aimed at lowering disclosure levels and thus increasing transparency, although these measures are yet to be passed by the Senate.

The purpose of each of these reforms is to increase openness, accountability and transparency in the Commonwealth Government.

Openness, accountability and transparency in government are important for at least two reasons. First, application of these principles helps to maintain confidence in our system of government — public confidence in people’s elected representatives as well as public confidence in the Public Service. Second, these principles lead to better outcomes in public policy and administration.

**Whistleblowing**

Protecting whistleblowing — or public interest disclosures — is part of this broader integrity framework and should be an essential feature of any modern democracy.

The Whistle While They Work project defined whistleblowing as ‘disclosure by organisation members (former or current) of illegal, immoral or illegitimate practices under the control of their employers, to persons or organisations that may be able to effect action’. At present the Commonwealth is the only Australian jurisdiction that does not have legislation dedicated to facilitating public interest disclosures and protecting those who make them.

The House of Representatives Legal and Constitutional Affairs Committee was asked to consider and report on a preferred model for legislation designed to protect public interest disclosures within the Australian Government public sector. The committee sought submissions from Commonwealth and state and territory agencies, non-government organisations, relevant professional associations, media bodies, unions, academics, and whistleblowers themselves. It also held 11 public hearings, in Melbourne, Canberra, Sydney and Brisbane. The hearings included two roundtable discussions, one with public administration experts, lawyers and academics, held on 9 September 2008, and the other with representatives of media-related organisations, held on 27 October 2008.

The committee’s primary recommendation was that the Australian Government introduce legislation to provide whistleblower protections in the Australian Government public sector and that it do so as a matter of priority.

**Principles**

As a starting point, the committee recommended a number of principles it felt should guide legislation aimed at protecting whistleblowers:

• It is in the public interest that accountability and integrity in public administration are promoted by identifying and responding to wrongdoing in the public sector.

• People working in the public sector have a right to express concerns about wrongdoing in the sector, without fear of reprisal.

• People have a responsibility to raise those concerns in good faith.
Governments have a right to consider policy and administration in private.

Government and the public sector have a responsibility to be receptive to concerns that are raised.

Who should be covered?

Limited protections against victimisation and discrimination are provided to Australian Public Service employees who report breaches of the APS Code of Conduct under current whistleblower provisions (s 16 of the Public Service Act 1999). It is of note, however, that only two-thirds of the 232,000 Commonwealth public sector employees are in the APS and covered by these whistleblower provisions. Employees of organisations subject to the Commonwealth Authorities and Companies Act 1997 are at present excluded. Among these organisations are the Australian Broadcasting Corporation and the Australian National University. Former employees, contractors, consultants and the staff of members of parliament are also excluded.

The committee recommended that the categories of people who could make protected disclosures be expanded to include Commonwealth public sector employees who are currently excluded. It also recommended that a person who has an ‘insider’s knowledge’ of official misconduct be deemed a public official for the purposes of the legislation. This could include a volunteer or an employee of a state government entity who has inside information about misconduct in the Commonwealth public sector.

What should be protected?

Evidence presented to the inquiry revealed strong support for the types of disclosures outlined in the inquiry’s terms of reference. The committee recommended that, with one exception, all those disclosures be protected. The exception was for ‘official misconduct involving a significant public interest matter’: the committee refrained from recommending this because significance or seriousness might not be something that is immediately obvious, and making a report conditional on significance or seriousness could set too high a threshold and discourage people from coming forward.

In keeping with the evidence received, the committee considered that grievances about internal staffing are not matters that concern the ‘public interest’ and should be dealt with through separate mechanisms such as existing workplace personnel processes.

What protections should be available?

The committee recommended that the legislation provide for protection against detrimental action—including victimisation, discrimination, discipline or an employment sanction—and immunity from civil and criminal liability.

Unfair treatment of whistleblowers is a workplace matter that should be dealt with through existing industrial relations law. Some limited protections are provided in the Workplace Relations Act 1996 and, since 1 July 2009, the Fair Work Act 2009.

Industrial relations law might provide better protections for whistleblowers than a unique scheme. This is why the committee recommended that the right to make a public interest disclosure be recognised as a workplace right, and infringements of that right ought to be dealt with by the relevant workplace authority, which is now the Fair Work Ombudsman.

Compensation and the existing rights of whistleblowers are to remain within the types of compensation and rehabilitation provisions available to employees generally; mediation and dispute settlement would also be within the scope of provisions available to employees generally.
If a person does not come within the jurisdiction of the industrial courts or tribunals — for example, a member of the Defence Force — the Workplace Ombudsman may still investigate and issue an evidentiary certificate that adverse action has occurred.

**Conditions**

The committee came to the view that the main condition that should apply when determining whether a disclosure is protected is the honest and reasonable belief of the whistleblower. It also came to the view that decision makers should have discretion to protect a person who materially fails to comply with the procedures for making a disclosure if that person has nonetheless acted in good faith in the spirit of the legislation.

The proposed public interest disclosure scheme aims to minimise the disincentives for people to make disclosures. As a result, penalties and sanctions should not apply to those who do not follow the prescribed procedure or knowingly or recklessly make false allegations. Removal of protection in these circumstances is sufficient.

The committee also considered the merits of adopting a US-style reward system for whistleblowers, such as the ‘qui tam’ provisions in the False Claims Act. On balance, it concluded that such a reward system would not contribute to the objects and purposes of the legislation. In the committee’s view, it is appropriate to provide for compensation to restore a person to the position they would have been in were it not for adverse treatment arising from making a disclosure. The legislation should not remove any existing legal rights in relation to damages.

**Procedures**

Research shows that the vast majority of disclosures made are made internally. Legislation should encourage the making of disclosures within agencies because of the agencies’ proximity to the subject of the disclosure and ability to effect action. The Committee recommended, however, that the new legislation provide avenues for making disclosures to specified external agencies, such as the Commonwealth Ombudsman and the Public Service Commissioner, in cases where people consider on reasonable grounds that their disclosure would not be handled properly within their own agency.

The success of the new legislation depends on the extent to which people within the public sector have confidence in the system, and positive obligations on agencies are an important source of confidence. The legislation should include strong positive obligations on agencies receiving, acting on and reporting disclosures.

The Commonwealth Ombudsman has a reputation for and skills and experience in handling investigations into serious and sensitive public interest–type matters and, in the committee’s view, is therefore the most suitable agency to oversee the administration of the legislation. The committee recommended that the Ombudsman have new statutory responsibilities under the scheme, including monitoring the system, providing training and education, and reporting to parliament on the system’s operation. The committee also proposed that the Ombudsman be able to publish reports on matters in the public interest that are raised under this scheme.

**Third party disclosures**

Since the committee’s report was tabled in Parliament in February 2010 much of the public discussion about the proposed reforms has centred on the role disclosures to third parties should play in the framework and what protections should be extended to those making such disclosures.

When determining the appropriateness of protecting disclosures made to third parties — particularly the media — the primary consideration must be how such disclosures could serve the public interest. If a form of disclosure cannot promote accountability and integrity in public
administration or otherwise serve the public interest, the disclosure does not warrant protection. Affording protection for disclosures made to the media in specific circumstances could act as a safety valve when particularly serious matters take too long to resolve inside the system and in the case of matters that pose an immediate threat of serious harm to public health or safety.

The committee recommended that members of parliament be recognised as authorised recipients of public interest disclosures. This would complement the limited protections already afforded those who provide information to parliamentarians under the Parliamentary Privileges Act 1987. The Standing Orders of each House should be amended to ensure that members act responsibly in relation to the disclosures to which they become party.

Disclosures should also be protected when they are made during the course of seeking assistance from legal advisors, professional associations and unions.

People are much more likely to make disclosures within their own agency or through other prescribed channels. The proposed scheme recognises that people can sometimes have good reasons to turn to third parties for advice or to make a disclosure.

An important principle for the new public interest disclosure legislation the committee recommended is that government has a right to consider policy in confidence. The committee therefore recommended that protection not apply if it is established that a person has ‘leaked’ confidential information. Whistleblowing is distinct from leaking, whereby a person covertly provides information directly to the media with the intention of embarrassing government. Under the committee’s proposals unauthorised disclosures of this nature might not be eligible for protection.

Leaking breaches the trust between the Public Service and the executive. There could also be unintended consequences—among them unfairly implicating people in charges of misconduct, putting incomplete or erroneous information into the public arena, and incorrectly anticipating that government has determined it will follow a particular course of action.

The media lacks a structured and rigorous system for investigating and assessing the risks of publishing a disclosure. It is not in the public interest that internal investigations be undermined or that workplace confidentiality be breached. In recent times we have seen Australian media organisations do the following:

- publish the details of a forged email that the journalist in question had not seen and that had simply been read to him on the phone
- break a news embargo by announcing the Deputy Prime Minister’s visit to Iraq before she had arrived there—an action that could have had serious security ramifications
- report on a high-level security operation that involved the raiding of 19 houses and the arresting of several people on terrorism-related charges before the operation had been completed. Early release of this report could have endangered the lives of those involved in the operation.

The UK media seems to have even more trouble identifying the public interest, as exemplified by the controversy that erupted in July 2009 in relation to media organisations engaging in large-scale hacking into the mobile phones of celebrities, politicians and political advisers.

A free and independent media with access to information is a crucial part of a modern democracy. There are countless examples of wonderful work done by the media in exposing corruption and maladministration. But the media is not, and cannot be, a formal part of the official public integrity framework. We do need to find a role for the media in the public interest disclosure regime, but that role is likely to be a limited one.
Organisational culture

Missing from much of the discussion of whistleblower protection has been the need to build a pro-disclosure workplace culture. This was a strong theme in the evidence the committee received, but it has attracted almost no public comment since the tabling of the report.

Whistleblower protections are needed only when systems have failed to take public interest disclosures seriously, when systems have failed to deal with such disclosures, and when employees making disclosures have suffered repercussions as a result of making the disclosure.

It is obviously preferable for employees to have disclosures treated appropriately and sensitively at the time they make the disclosure, rather than having to take remedial action to return themselves to the position they were in before making the disclosure.

Many who participated in the inquiry noted that there is in the public sector a strong culture that militates against those who question work practices. Organisational culture is as important as legislation in producing the desired outcome of facilitating public interest disclosures and supporting those who make them.

The committee recognised that legislation alone is insufficient to bring about cultural change and promote accountability in public administration. There is also an important role for leadership and education in promoting a more supportive environment, one in which people feel at ease when expressing their doubts about workplace practices.

A crucial recommendation of the committee is that the Commonwealth Ombudsman be given responsibility for providing assistance to agencies implementing the public interest disclosure system. The committee felt this should occur by promoting awareness among employees through educational activities and through an anonymous and confidential advice line.

Conclusion

Legislation to protect whistleblowers in the Commonwealth public sector is long overdue. I look forward to legislation based on the report of the House of Representatives Legal and Constitutional Affairs Committee being introduced into the parliament soon.2

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The central elements of modern Australian administrative law—a statutory code for judicial review, an ombudsman, and a general jurisdiction merits review tribunal—are progressively celebrating their 30th birthdays. Other, newer, elements have also been noting anniversaries: the Freedom of Information Act 1982 (Cth) achieved a quarter of a century in 2007; the Australian Human Rights Commission has been in operation for more than 20 years; the Privacy Commissioner enjoyed its 20th anniversary in 2008; and the whistleblower laws—the ‘new kid on the block’—are approaching their first decade. These are important milestones, and they suggest that administrative law is well established in Australia. This paper reflects briefly on what has happened during the past 30 years and considers where these planks of the administrative law edifice are likely to be in the next two to three decades.

Retrospective

Although they have been slow to follow the Commonwealth model, the states and territories have adopted similar accountability packages. Each state and territory has freedom of information legislation; each has an ombudsman or parliamentary commissioner; all have anti-discrimination laws; and all except the Northern Territory have whistleblower protection laws. While the national privacy regime protects personal information at all levels of government, each state and territory except Western Australia has introduced privacy laws or guidelines. Only one other jurisdiction, Tasmania, has set up a body akin to the Administrative Review Council to monitor its administrative law system, although New South Wales, Queensland and Victoria have at various times foreshadowed such a development.

As can be expected in a federal system, there are local differences. For example, there is no pattern to state and territories privacy laws, and there are moves in some jurisdictions,
including the Commonwealth, to introduce dedicated human rights Acts. Amalgamation of
merit review tribunals has not occurred everywhere. South Australia and Tasmania have located
their administrative review jurisdiction in their court systems. New South Wales has in effect
two amalgamated mega-tribunals in the Consumer Trader and Tenancy Tribunal and the
Administrative Decisions Tribunal. The Northern Territory has not yet adopted a
multi-purpose tribunal, and Queensland only introduced its Queensland Civil and
Administrative Tribunal from the middle of 2009. The Australian Capital Territory’s
Administrative and Civil Tribunal began operating in early 2009. At the same time, these state
and territory bodies differ from the Commonwealth Administrative Appeals Tribunal in that
their jurisdiction often covers civil as well as administrative matters. Victoria, the ACT,
Queensland and Tasmania have introduced judicial review legislation, which simplifies the
procedure and codifies much of the law of judicial review. Other jurisdictions have streamlined
the remedies of judicial review.

These developments reflect a vibrant administrative law system and one that is valued. Indeed,
some jurisdictions have made administrative law an element of their political platform. In
Victoria, after concerns had been expressed about excessive government secrecy and
administrative ineptitude in the late 1990s, the newly elected Bracks Government
constitutionally entrenched the judicial review role of the Supreme Court and the independence
of the Auditor-General and the Ombudsman. In Tasmania, Premier David Bartlett, in a press
release issued on 22 August 2008, and in the face of a ‘succession of scandals [that] had
undermined public confidence in government’, announced a 10-point plan for ‘strengthening
trust in democracy’. The Government responded to the report of the Joint Select Committee of
the Tasmanian Parliament by announcing in November 2009 it intends to set up an Integrity
Commission for Tasmania with investigative powers. Other foreshadowed moves are a review
of the Freedom of Information Act and whistleblower legislation and increased funding for the
offices of the Auditor-General, the Ombudsman and the Director of Public Prosecutions.

In summary, therefore, there is in Australia nationally and in the states and territories a robust
system of administrative law. That system offers redress when citizens complain that their rights
and interests have been thwarted by government. But vindication of individual rights is not the
only interest being protected. Administrative justice requires that the courts, tribunals,

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8 The Human Rights Act 2004 (ACT) and the Human Rights and Responsibilities Act 2006 (Vic). Tasmania is
also proposing to introduce such a law. So, too, was Western Australia, but the change of government
might inhibit that move. The Commonwealth Government’s response to the report of the National
Human Rights Consultation Committee, submitted in September 2009, was responded to on
21 April 2010 through the launch of an Australian Human Rights Framework.


10 These are established respectively by the Consumer, Trader and Tenancy Tribunal Act 2001 (NSW) and the
Administrative Decisions Tribunal Act 1997 (NSW).

11 Qld: Queensland Civil and Administrative Tribunal Act 2009 (assented to on 26 June 2009).

12 Australian Capital Territory Civil and Administrative Tribunal Act 2008.

13 See, for example, the 12 March 2008 announcement of the Queensland Attorney-General,

14 These are, respectively, ACT: Administrative Decisions (Judicial Review) Act 1989; Qld: Judicial Review Act

15 For example, NSW: Supreme Court Act 1970 ss 65, 66, 69, 75; Vic: Supreme Court Act 1986 s 3(6); General

16 Constitution Act 1975 (Vic) s 85, Pt V, Div 3, Pt VA.

17 Matthew Denholm & Imre Salusinszky (quoting Sir Max Bingham 2008), ‘Kevin Rudd eyes MP ethics
watchdog’, The Weekend Australian (Western Australia), 24 May.

18 The Tasmanian Parliament enacted the Integrity Commission Act 2009 (Tas) and will constitute the
Integrity Commission in 2010.

19 The Tasmanian Premier presented a submission on these matters to a Joint Select Committee of the
Tasmanian Parliament that is inquiring into ethical conduct in public life. Details of the Premier’s
submission are available at http://premier.tas.gov.au/hot_topics/strengthening_trust_in_democracy,
investigative bodies and ombudsman offices, while administering the values of fairness, rationality, transparency, impartiality and accountability that underpin good administration, also allow for government to operate in an efficient and effective manner. How well the institutions balance these elements is a measure of the effectiveness of administrative justice in Australia.

**Prospects?**

The following are predictions about likely developments in Australian administrative law; they are based on emerging trends both in Australia and in other common law countries.

**Integration**

There will be increased convergence of the adjudicative arms of government. Just as tribunals are required to act in a manner summed up in the legislative formula ‘fair, just, economical, informal and quick’, so too are courts embracing this approach. The New South Wales Supreme Court, for example, is now required to operate in its civil (including administrative law) jurisdiction in a manner that is ‘just, quick and cheap’. As the Civil Procedure Act 2005 (NSW) states, ‘The overriding purpose of this Act and of rules of court, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings’. In its Civil Justice Review the Victorian Law Reform Commission was asked to consider ‘the promotion of principles of fairness, timeliness, proportionality, choice, transparency, quality, efficiency and accountability’; it recommended ‘changes which will reduce the cost, complexity and length of civil trials’. Similar reforms have occurred in the federal courts and are being considered in Western Australia and Queensland.

One impetus for these developments was Lord Woolf’s report in the United Kingdom in the second half of the 1990s, which recommended a speedier, more affordable, and more accessible justice system. Underpinning the reforms is the principle that justice should be tailored to the complexity and value of the matters involved — what was later dubbed ‘proportionate justice’. Adoption of this approach not only encourages courts to be more efficient and less costly but also favours mechanisms for review outside the mainstream court system.

The movements towards greater integration are not, however, all in one direction. The Commonwealth Administrative Appeals Tribunal has found that, although it is not a court and does not exercise judicial power, it does operate in a court-like fashion. As a consequence, applicants to the AAT are entitled to rely on client litigation privilege unless there is a clearly

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21 For example, Administrative Appeals Tribunal Act 1975 (Cth) s 2A; NSW: Administrative Decisions Tribunal Act 1997 s 73; Vic: Victorian Civil and Administrative Tribunal Act 1998 s 98.
23 Civil Procedure Act 2005 (NSW) s 56(1). The Access to Justice (Civil Litigation Reforms) Amendment Act 2009 (Cth) has a similar intention and uses the terminology of an ‘an overarching purpose’ to describe the procedural provisions that are designed to achieve these objectives.
expressed abrogation of the privilege in the relevant legislation.\textsuperscript{30} The application, in practice, of rules of evidence to tribunals\textsuperscript{31}, and the applicability of evidential principles such as estoppel to tribunals, are other manifestations of this alignment.

At the same time, the High Court has cautioned against transposing the doctrine of public interest immunity developed in the courts ‘to the wholly different inquisitorial decision-making by’ a tribunal.\textsuperscript{32} This warning signals that principles developed in the courts should not be ‘cut and pasted’ but instead should be adopted for tribunals only if there is good reason to do so.

Although there has been a discernible coalescence of court and tribunal practices, differences do remain. In litigation involving the Tasmanian Anti-Discrimination Tribunal\textsuperscript{33} the Federal Court confirmed that the tribunal is not a ‘court of a State’ in which the judicial power of the Commonwealth can be invested.\textsuperscript{34} The finding also confirmed that the Anti-Discrimination Act 1998 (Tas) invests the tribunal with state judicial power, but that power did not authorise the tribunal to hear a matter involving a Commonwealth agency since that would breach Chapter III of the Commonwealth Constitution. Similarly, in New South Wales, the divisions of the Administrative Decisions Tribunal have been prohibited from considering federal law in a matter since they were not a ‘court’ for Chapter III purposes.\textsuperscript{35} This distinction between state and federal judicial power is likely to have significance for tribunals at both the state and the Commonwealth levels because it will continue to define what functions may and may not be invested in tribunals.

At issue in these cases was the separation of powers concept, which prohibits a tribunal exercising the judicial power of the Commonwealth. But, although separation of powers defines judicial and executive power and delineates different territory for each branch of government, that does not mean that courts and tribunals are locked in a contest or that each develops in isolation from the other. Rather, as Gleeson CJ suggested, the development of a strong system of tribunals has complemented the judicial review roles of the courts because it:

\begin{quote}
… relieves the judicial branch of pressure to expand judicial review beyond its proper constitutional and legal limits. Federal courts can mark out and respect the boundaries of judicial review more easily where there is a satisfactory system of merits review. This has beneficial consequences for the relations between the three branches of government, and relations between the judicial branch and the public.\textsuperscript{36}
\end{quote}

Reframing the question in these terms confirms that the earlier concern that tribunals might detract from the work of the courts has overstated the position.

**Reduced emphasis on adjudication by courts**

Despite moves to reduce the cost, length and complexity of hearings in the civil as well as the administrative arenas, there will probably be a diminished emphasis on settlement of disputes by adjudication.\textsuperscript{37} The inevitable costs, the forensic hazards of litigation, and the personal toll on
complainants inhibit recourse to courts and, to a lesser extent, tribunals. Indeed, even at present it is estimated that some 90 per cent of matters before courts do not go to hearing.38 Similarly, four out of five matters before the Administrative Appeals Tribunal do not go ahead following the preliminary conferencing or alternative dispute resolution processes.39

Tribunals are, however, more likely to be relied on for review than courts. Tribunals’ flexible procedures and their ability to tailor proceedings to the needs of applicants, as well as their emphasis on substantive outcomes rather than technical evidentiary matters, are more attractive to applicants than the more formal judicial processes. Equally attractive is the fact that tribunals are able to provide a cheaper, less formal way of resolving disputes.

At the same time, there will probably be developments aimed at further streamlining and improving the tribunal process. It can be predicted that tribunals will take a more inquisitorial approach to their task. Established to operate in a non-adversarial manner, tribunals have struggled to fulfil this role. This has been in part because they have not been adequately resourced to carry out inquiries, but also in part because the oversight by courts steeped in the adversarial method has depressed tribunal aspirations to be more proactive.40 The High Court has sent mixed signals on this. In some cases it has countenanced a passive role on the part of a tribunal, with the effect that the tribunal was not obliged to investigate matters that clearly seemed to warrant inquiry; in other cases, however, it has accepted that tribunals should take an investigative approach.42 The many decisions of lower courts that support an investigative role illustrate the range of circumstances that warrant tribunals adopting a more active part in evidence collection and the exploration of available legal options.45

The reduced emphasis on adjudication has led to an increased focus on getting decisions right the first time. This in turn has led to the publication of a range of materials designed to equip primary decision makers to better perform their tasks. There are now best-practice guides that aim to improve public administration44, curriculum guidelines for administrative law training45, lessons for good administration46, definitions of administrative deficiency47, and aids to handling difficult complainants.48 These are reinforced by tools such as performance and compliance auditing, which test the quality of the initial decision, and the development of standards such as certificates of assurance and compliance and performance indicators for measuring the quantity and quality of outputs. All this signals an anticipatory, rather than a reactive, approach to.

38 J Wade 2001, ‘Don’t waste my time on negotiation and mediation. This dispute needs a judge’, Conflict Resolution Quarterly, no. 18, 259–69.
39 Administrative Appeals Tribunal annual reports.
41 See, for example, Re Minister for Immigration and Multicultural Affairs; Ex parte Applicants S134 (2003) 211 CLR 441; Minister for Immigration and Multicultural and Indigenous Affairs v SGLB (2004) 78 AJLR 992.
42 Applicant NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 224 CLR 1, 10; Applicant VEAL of 2002 v Minister for Immigration (2005) 87 ALD 512. The matter was directly explored by the Court in Minister for Immigration and Citizenship v SZIAI (2009) 83 ALJR 1123.
improving decision making in public administration, and the initiatives are likely to become more widely adopted.

**Proportionate dispute resolution**

There will be increasing emphasis on proportionate dispute resolution. This means that the most appropriate and cost-effective solution – be it internal or tribunal review, investigation by the ombudsman or other investigation agency, or a negotiated outcome – will be encouraged instead of resort to adjudicative bodies such as courts. As the UK White Paper *Transforming Public Services: complaints, redress and tribunals* put it, what people want to achieve ‘will vary considerably from case to case and person to person’. Some ‘are looking … for a legal remedy, like an award of a disability benefit’, while others ‘might really be seeking something else, like an apology or a clear explanation’.

Adherence to proportionate dispute resolution would require courts to decline to hear a matter when another more suitable option is available. This will leave adjudication by courts as the ‘last resort’. Section 10(2)(b)(ii) of the Administrative Decisions (Judicial Review) Act already provides for the Federal Court or the Federal Magistrates Court to decline to hear a matter if a more suitable alternative is available, but the provision has not been much used. If, as the figures suggest, only some 5 to 8 per cent of cases are of precedential value, the adjudicative system is unlikely to suffer from this diversion of disputes to other settlement mechanisms.

Proportionate dispute resolution is a central feature of the *Access to Justice (Civil Litigation Reforms) Act 2009* (Cth), which came into effect in January 2010. This Act introduced amendments to make it clear that the ‘overarching purpose’ of the civil practice and procedure provisions of the *Federal Court of Australia Act 1976* (Cth) is to achieve a just resolution of disputes according to law, as quickly, inexpensively and efficiently as possible. Although these provisions might be seen as a response to so-called mega-litigation, they are obviously intended to provide an indication to the parties of all cases that the costs of any dispute should be proportionate to the matter in dispute.

**Alternative dispute resolution**

The focus on proportionate dispute resolution will see alternative dispute resolution increase in popularity. Model litigant principles in the major Australian jurisdictions reinforce this by requiring that alternative methods of solving disputes about government decisions be adopted where possible. These developments are part of a ‘resolution culture’ that seeks to solve matters at the earliest possible stage. The Administrative Appeals Tribunal now offers not only conferencing but also mediation, neutral evaluation, case appraisal and conciliation.


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50 Ibid. [2.6].

51 The estimate of precedent cases is based on a pre-hearing settlement rate of between 80 per cent for the AAT, for example, and 90 per cent for courts.

52 The *Access to Justice (Civil Litigation Reforms) Act 2009* (Cth) inserted these objectives in the form of s 37M(2) of the *Federal Court of Australia Act 1976* (Cth).


Although it has strong government endorsement, especially at the national level\(^{57}\), alternative dispute resolution is not without its detractors. In an empirical survey of government agencies in 2002 some 40 per cent of participants expressed concern about the drawbacks of alternative dispute resolution. Respondents stated variously that it ‘can hide bad compromises or good compromises about originally bad decisions’, that it detracts from the normative role of courts and tribunals, and that it could deny the opportunity for exposure of error by government agencies, allowing officials to continue to make decisions that might be unlawful.\(^{58}\) It will be interesting to see how these conflicting views are reconciled in future.

**Soft law**

There will continue to be growth in ‘soft law’ — that is, those instruments (codes, guidelines, manuals, circulars, and so on) that have no legally binding force but are designed to influence official behaviour.\(^{59}\) Soft law has become the most prevalent form of regulation: in 1997 there were over 30 000 codes, which are but one variety of soft law, in Australia\(^{60}\); the number today would be considerably greater. To illustrate the impetus for this form of regulation, in the area of privacy the federal Privacy Commissioner deliberately adopted a policy of providing codes or guidelines rather than relying on adjudication to ‘flesh out’ the Privacy Principles. Another reason, as the Australian Law Reform Commission noted in its privacy inquiry report, is that:

> Establishing broad outcomes for the handling of personal information, rather than setting out detailed rules for each particular technology, is also consistent with the ‘light-touch’ approach to privacy regulation that has characterised the Australian system.\(^{61}\)

This trend reflects the call by government for standards of professionalism and ethicality exceeding the base-level standards of administrative law and for regulation that is more responsive and flexible in relation to the needs of consumers and users of services.\(^{62}\) The growing support for soft law suggests that business and government are prepared to trade off the certainty and authoritative effect of legal rules for less formal regulation, a development that marks a retreat from legislation in favour of informal rules.\(^{63}\) The challenges for administrative law are threefold: how to develop standards for drafting of soft law instruments; how to make decisions that rely on soft law rules reviewable; and how to achieve a greater level of consultation with those affected, so that the rules better represent the interests and encourage the cooperation of those they are designed to influence.

**Access to justice**

A priority of government is improved access to justice. In the administrative law context this is likely to take a number of forms. In the first instance, governments will take steps to ensure, in the words of the federal Attorney-General, that ‘our justice system is practical, cost efficient and

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57 The topic has been the focus of the Commonwealth Attorney-General, the Hon. Robert McClelland: launch of the National Alternative Dispute Resolution Advisory Council, Report on alternative dispute resolution in the civil justice system, Parliament House, Canberra, 4 November 2009; keynote address to the 11th Annual Australian Institute of Judicial Administration Tribunals Conference, Surfers Paradise, 6 June 2008; keynote address to the National Forum of the Australian Institute of Administrative Law, Melbourne, 7 August 2008; and address to the 9th National Mediation Conference, Perth, 10 September 2008.


60 ibid. xi.


facilitates the timely resolution of disputes’. A manifestation of that practical approach will be the development of a single government portal that grants entry to the range of administrative law bodies. This one-stop-shop approach will ensure there is an official who can identify the problem and direct the claimant to the most suitable administrative law agency or body to handle the matter.

Improving access to justice is a central aim of the Access to Justice (Civil Litigation Reforms) Act 2009 (Cth). The Act places federal courts’ case-management powers on a more secure statutory foundation and confers on federal courts a wide range of powers to enable them to identify and resolve matters in dispute at the earliest possible stage. Additionally, the Act makes it clear that lawyers have a responsibility to help their clients achieve these objectives. The obligation to assist has also been imposed on the Commonwealth Administrative Appeals Tribunal.

**Information access**

**Reasons**

It has long been recognised that an essential prerequisite for an effective administrative complaints regime is having access to the reasons for an adverse decision. The significance of this right is illustrated by the right’s inclusion in clause 33 of the South African Constitution as a primary element of ‘just administrative action’. Clause 33 states, ‘Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons’. That right is not so well protected in Australia. Those who are entitled to bring actions under the Administrative Decisions (Judicial Review) Act or the Administrative Appeals Tribunal Act do have a right to obtain reasons, and a growing number of individual Acts provide that reasons must be given. There is, however, no common law right to reasons, the High Court having declined to take that step in *Public Service Board of NSW v Osmond* in 1986, preferring to leave it to the legislature to define the circumstances in which reasons are required.

That was more than 20 years ago. In the intervening years the reluctance to impose a reasons requirement has been eroded on several fronts. There has been a consistent pattern of individual statutes providing such a right. The courts, too, have taken a benign view of reasons statements by tribunals and primary decision makers, deferring to their expertise and refusing to be overly critical unless a matter omitted was material to or dispositive of the decision. There are also signs of increasing inroads into the ‘no common law right to reasons’ principle. In *Campbelltown City Council v Vegan*, the New South Wales Court of Appeal found that, in the absence of a statutory obligation to provide reasons, when there is a right of appeal and the appeal body is exercising a judicial, as opposed to an administrative, function a right to reasons will be implied at common law. The degree to which this will prove to be the ‘Trojan horse’ for circumventing the Osmond ruling remains to be seen. While the reasoning adopted in the Campbelltown case might provide an avenue for obtaining reasons where a right of appeal exists, the desire for reasons will probably be greater in cases where there is no right of appeal. In such instances the only solution might be a direct (and long overdue) reconsideration of the Osmond case.

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64 The Hon. R McClelland MP 2008, Commonwealth Attorney-General, Keynote address, 11th Annual Australian Institute of Judicial Administration Tribunals Conference, Queensland, 6 June, 2.
65 The Access to Justice (Civil Litigation Reforms) Act 2009 (Cth) inserted these objectives in the form of s 37M(2) of the Federal Court of Australia Act 1976 (Cth).
66 Administrative Appeals Tribunal Act 1975 (Cth) s 33(1AA).
159 CLR 656.
72 That is, determining legal rights or obligations.
Just as the right to reasons is essential to an effective ability to challenge administrative decisions, so, too, is the broader right to have access to information held by government. To that end, governments are currently focused on streamlining privacy laws, simplifying freedom of information laws, and redefining whistleblowing laws. In this context we have seen the Commonwealth Government abolish conclusive certificates in federal legislation — a move also proposed for Queensland, Western Australia and Victoria — and a Bill to simplify the exemptions to rights of access. The Commonwealth Government has also introduced a Bill that will create an FOI Commissioner, who will provide specialist oversight of freedom of information. New South Wales has recently taken this step. The creation of a specialist form of supervision for freedom of information recognises that this part of the administrative law framework continues to be of particular concern to both governments and the public.

There will also be separate but related reforms aimed at developing more robust whistleblower laws following the release of reports of the Whistling While They Work project and the inquiry of the House of Representatives Standing Committee on Legal and Constitutional Affairs. In its For Your Information report the Australian Law Reform Commission has posited that in future privacy laws must provide a ‘simple, workable system that provides effective solutions and protections’. Harmonisation — bring into accord or agreement — of laws is being pursued. Intergovernmental cooperative schemes with centralised review bodies have been developed, and administrative law institutions and avenues for review have been aligned between countries to avoid unnecessary complexity and confusion. The Standing Committee of Attorneys-General (which includes New Zealand) has agreed ‘to actively participate in consultation on the draft

73 Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act 2009 (Cth).
74 These proposals have met with varying success. The Victorian Freedom of Information Amendment Bill 2007, which sought to remove conclusive certificates, was defeated in the Legislative Council. The Western Australian Freedom of Information Bill, which sought to remove conclusive certificates and make other reforms to FOI, lapsed when a state election was called in mid-2008. Queensland’s Right to Information Act 2009 s 49 Sch 4 essentially shifts the balance more in favour of disclosure of information (unless disclosure is found to be against the public interest) and extends FOI to certain government-owned corporations. The Information Privacy Act 2009 introduces a regime for managing the collection and handling of information by government agencies. It also provides for individuals a right to gain access to and seek the amendment of personal information held by the government and its agencies if that information affects the individual seeking access.
75 Freedom of Information Amendment (Reform) Bill 2009 (Cth).
76 Information Commissioner Bill 2009 (Cth).
78 This is a research project involving many government agencies and academics; details are available at www.griffith.edu.au/centre/slrc/whistleblowing/. The first report of the project is AJ Brown (ed.) 2008, Whistle Blowing in the Australian Public Sector. The report was released by the Hon. J Faulkner, Special Minister of State, who reiterated the Government’s commitment to strengthening whistleblowing legislation.
79 The committee reported in February 2009, and the government response was tabled in parliament on 17 March 2010.
81 Standing Committee of Attorneys-General, Communique, 28 March 2008, 2.6, and 4 November 2009.
82 For example, the Commonwealth Administrative Appeals Tribunal is the review body for a number of Commonwealth–state cooperative schemes.
83 For example, New Zealand and Australia have a cooperative arrangement in relation to mutual recognition of professional qualifications, complaints about which are heard in the AAT or the Trans-Tasman Occupations Tribunal in New Zealand.
treaty on trans-Tasman legal cooperation’ and the need for harmonisation of anti-discrimination laws. Similarly, the Australian Law Reform Commission’s privacy report pointed out that, as a result of the patchwork of laws applying in Australia, the compliance burden imposed on businesses and individuals by privacy regulation underlined ‘the pressing need for simplification and harmonisation of law and practice’.

Other steps

Reforms are needed in a number of other areas. Federally, the differing jurisdictional hurdles for judicial review applications in the Administrative Decisions (Judicial Review) Act and the Judiciary Act often act as a barrier to litigation; the inefficiency of servicing the multiple tribunals that exist at both the Commonwealth and the state and territory levels runs counter to the need for more efficient and effective government; there continues to be a lack of transparency about the appointments processes for many tribunals, leading to a loss of confidence in the tribunals’ output; and there has still not been a legislative attempt to develop a more uniform framework of procedures for tribunals, although the Council of Australasian Tribunals has developed a Practice Manual for Tribunals, the second edition of which was published in 2009.

Conclusion

Administrative justice continues to develop in Australia. This country pioneered many of the bodies and remedies through which administrative justice is effected in common law countries. It is clear, however, that other countries are now leading the way in areas such as tailoring responses to complaints—the proportionate dispute resolution approach—and single-door entry for approaches to government to vindicate grievances. This is a dynamic area of government. Just as practices and philosophies in government change, so must the administrative law framework through which citizens approach government for vindication of the rights or interests they seek. The next 30 years will certainly be interesting for the well and truly ‘alive and kicking’ administrative law area of Australian jurisprudence.

84 Standing Committee of Attorneys-General, Communique, 28 March 2008, 10. In July 2008 Australia and New Zealand signed the Trans-Tasman Treaty on Court Proceedings and Regulatory Enforcement. Legislation to implement the treaty in Australia was passed by the Australian Parliament on 18 March 2010.

85 Standing Committee of Attorneys-General, Summary of decisions, July 2008, 1.

Administrative law evolution: independent complaint and review agencies

John McMillan and Ian Carnell

The framework for Australian government accountability has developed and changed markedly in the past 30 years. Two changes stand out. One is the creation by statute of a large number of independent agencies (in addition to tribunals) that review and scrutinise executive government processes, including by complaint handling. These review agencies — watchdogs, as the media often describe them — have their roots in administrative law culture and its values of legality, rationality, fairness and transparency.

The second development is to do with the role of the oldest independent accountability agency at the Commonwealth level, the Auditor-General, which was established in 1901 under the fourth Act passed by the new Commonwealth Parliament. Since the 1970s, through the broader mandate of performance auditing, the Auditor-General has analysed in detail selected administrative decision making in a manner that complements administrative law processes.

These two developments tell us a great deal about how government has changed over the period, both in structure and in its relationship with the public. The review agencies continue to flourish and to deal with new challenges in government accountability.

The emergence of independent review agencies since the 1970s

The first of the new independent review agencies to be created at the Commonwealth level was the office of the Commonwealth Ombudsman, established in 1976 following a lead set by Western Australia in 1971 and quickly followed in other Australian states. The primary function of the Ombudsman, then as now, is to investigate complaints received from members of the public about the administrative decisions and actions of government agencies, including departments. The number of approaches and complaints handled by the Commonwealth Ombudsman has steadily increased over the years, from 2656 complaints in 1977–78 to 45,719 approaches and complaints in 2008–09.

From an accountability perspective, a special feature of ombudsman offices is their statutory independence from parliament and the executive. The office is created by statute. The Commonwealth Ombudsman is appointed for a fixed term of up to seven years and can only be removed from office by both Houses of parliament. An investigation is to be conducted ‘as the Ombudsman thinks fit’. There is a broad discretion to begin or cease an investigation — including the authority to initiate an own-motion investigation. Extensive investigative powers, matching those of a royal commission, are conferred on the Ombudsman, among them the power to require documents, to take evidence on oath or affirmation, and to enter premises. A complainant to the Ombudsman is protected against civil proceedings (for example, defamation) and Ombudsman officers are not compellable to provide evidence in other legal proceedings.

* Prof. John McMillan AO has taken leave as the Commonwealth Ombudsman while he is the Information Commissioner Designate; Ian Carnell has recently retired from his position as the Inspector-General of Intelligence and Security. Both have been members of the Administrative Review Council.

1 Audit Act 1901 (Cth).
2 The Western Australian office was called the Parliamentary Commissioner for Administrative Investigations. Ombudsman offices were established in South Australia in 1972, Victoria in 1973, Queensland in 1974, New South Wales in 1975 and Tasmania in 1978.
3 Ombudsman Act 1976 (Cth).
4 Ibid. s 8(2).
The Ombudsman can make a special report to parliament and has discretion to publish information in the public interest.

It has become commonplace for independent review agencies to be established along similar lines. Even so, the familiarity of this model of independent review should not detract from the profound nature of this change in government. It involved a marked departure from traditional means of accountability, which focused on the role of parliament. Before, accountability for government administrative action was primarily to the parliament in three ways—through the answerability of ministers for the administrative actions of government agencies, through the oversight role of parliamentary committees, and through the constituency grievance role of individual members of parliament.

The creation of ombudsman offices was a new and radically different way of requiring government agencies to justify their actions and expose their processes to independent external scrutiny. This change in the mechanisms of accountability was a response to significant growth in the functions and activities of government.

Government had accepted greater responsibility for providing social welfare support, community grants and commercial incentive payments. As a consequence, more people, were affected by government decision making. Government regulation had also expanded, prompted by a host of new policy imperatives to combat injustice, safeguard the vulnerable, control development, regulate business, stimulate commerce, expand taxation, protect the environment, suppress criminal activity and respond to security threats. Other social changes—for example, in tertiary education and in entrepreneurial business activity and the rise in international travel—meant that people were more likely to require government permission or approval for social or business activities. The cumulative effect of all these changes was greater interaction between the community and government and government exercising more discretionary authority to control human affairs and business activity.

This greater interaction between the community and government was accompanied by other changes. People expected more of government agencies and officials: they expected them not only to act lawfully and in the public interest but also to be responsive, transparent and answerable. Allied to this change was the notion that people have a ‘right to complain’ against a failure by an agency or its staff to comply with the standards of good administration. This expectation is now well entrenched in community attitudes.

The creation of ombudsman offices was a response to this change in the role and functions of government and in government’s relationship with the public. There quickly followed the creation by statute of a number of other independent review agencies with a similar role of upholding the rule of law in government administration, protecting the public against wrongful agency action, and fostering good governance. Among these agencies were the following:

- The Australian Human Rights Commission, established in 1986 as the Human Rights and Equal Opportunity Commission, administers functions under laws relating to human rights, age discrimination, disability discrimination, sex discrimination, racial discrimination and equal employment opportunity. The functions of the commission are discharged by its

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5 An example of an oversight agency not included in this list is the Inspector General of the Australian Defence Force, which investigates complaints from defence personnel about military justice matters and conducts audits and performance monitoring of military justice arrangements. The inspector general is a statutory office (see the Defence Act 1903 (Cth) Part VIIIIB) that is independent of the normal chain of command but is located within the Department of Defence. Another example is the National Security Legislation Monitor, to be established in 2010 to review the operation of Australia’s counter-terrorism and national security legislation, although it will not have a complaint function—see the National Security Legislation Monitor Act 2010.

president, the Aboriginal and Torres Strait Islander Social Justice Commissioner, the Disability Discrimination Commissioner, the Human Rights Commissioner, the Sex Discrimination Commissioner and the Race Discrimination Commissioner. These functions include investigating and conciliating complaints alleging discrimination and breaches of human rights, conducting public inquiries and consultations, raising public awareness about human rights, and intervening in legal proceedings to provide advice on human rights principles.

- The Inspector-General of Intelligence and Security, created in 1987, provides independent review of the six intelligence agencies—the Australian Security Intelligence Organisation, the Australian Secret Intelligence Service, the Defence Signals Directorate, the Defence Imagery and Geospatial Organisation, the Defence Intelligence Organisation and the Office of National Assessments. The inspector-general can conduct investigations in response to a complaint from the public or a reference from a minister or on its own motion. Other activities include inspections (effectively compliance audits) of the legality and propriety of agency operations.

- Among other things, the Privacy Commissioner, created in 1988, monitors compliance by Australian government agencies with 11 Privacy Principles that control how personal information may be collected, stored, used and disclosed. The commissioner exercises diverse functions, among them investigating complaints, conducting own-motion investigations, auditing agency practices, providing advice and guidance on privacy matters, and raising awareness in government and the community about privacy rights and responsibilities.

- The Inspector-General of Taxation, established in 2003, reviews the systems established to administer Australian taxation laws and makes recommendations for improvement. The inspector-general does not investigate individual taxation complaints but does conduct public inquiries to examine the need for systemic improvements in taxation administration with a view to reducing the administrative burden for taxpayers in meeting their taxation obligations.

- The Integrity Commissioner, supported by the Australian Commission for Law Enforcement Integrity, was established in 2006 to detect, investigate and prevent corruption in the Australian Crime Commission and the Australian Federal Police. A corruption investigation can begin as a result of a complaint to the Integrity Commissioner on the initiative of the commissioner or in response to a referral from the head of a law enforcement agency, the Minister for Justice or another agency such as the Commonwealth Ombudsman.

- The Aged Care Commissioner, established in 2007, reviews decisions made by the Complaint Investigation Scheme (located in the Department of Health and Ageing) concerning aged care services that are subsidised by the Australian Government and the conduct of the Aged Care Standards and Accreditation Agency. In addition to receiving complaints, the commissioner can initiate an own-motion investigation into the scheme’s processes for investigating aged care complaints or the conduct of the agency.

- Legislation was introduced into parliament in late 2009 to establish the Office of the Information Commissioner, to be constituted by three commissioners—the Information

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8 Privacy Act 1988 (Cth).
9 Inspector-General of Taxation Act 2003 (Cth).
10 Law Enforcement Integrity Commissioner Act 2006 (Cth).
11 Aged Care Act 1997’s 95A.1.
Commissioner, the Freedom of Information Commissioner and the Privacy Commissioner. The functions of the new office will include monitoring agencies’ compliance with the Freedom of Information Act 1982 and the Privacy Act 1988, promoting the objects of both Acts, issuing guidelines on administration of the Acts, providing training to agency staff, investigating complaints received from the public, conducting own-motion investigations, advising government on information policy, and reviewing agency FOI decisions and making determinations that can substitute for those decisions.

Four features are common to these review bodies:

- They are established by statute as independent bodies that are not subject to government direction on how reviews should be conducted or other functions exercised.
- They can investigate the administrative actions of government agencies, including on receipt of complaints from members of the public.
- Investigation reports are often published, either by the review body or through the minister or parliament.
- They have extensive statutory powers to conduct investigations, and there are associated protections for the investigation process, investigation staff, witnesses and complainants.

Many of the review bodies have functions additional to their investigative role. As noted, some have a record-inspection program or conduct audits in selected areas of government administration in order to gauge whether decisions are being lawfully and correctly made. That is the dominant activity of the Inspector-General of Intelligence and Security, who works in an area, national security, that is largely hidden from public view. Another example of a specialist function is the Ombudsman’s role in preparing a report, tabled in parliament, on every person held in immigration detention for more than two years.

Sometimes monitoring can be in ‘real time’. The Inspector-General of Intelligence and Security can attend questioning conducted under warrant by ASIO; if the inspector-general expresses concern, the questioning is suspended until the concern is redressed.

Some of the review bodies have additional powers that reflect their specialist functions. The Integrity Commissioner, for example, can investigate police corruption; this can be done by means of telephone interception, electronic surveillance, undercover and controlled operations, and passport confiscation.

Jurisdiction can be another area of difference. Three of the review bodies—the Ombudsman, the Privacy Commissioner and the Australian Human Rights Commission—have a jurisdiction that extends both to government agencies and, at least to some degree, to the private sector. The National Privacy Principles, administered by the Privacy Commissioner, apply to many private businesses, including health service providers, Commonwealth contractors, and businesses with an annual turnover exceeding $3 million. The disability, race and sex discrimination standards administered by the Human Rights Commission similarly extend to most private businesses that provide goods and services to the public. The Ombudsman’s jurisdiction extends to private businesses that provide government services under contract to the public and to some private postal operators that join the Postal Industry Ombudsman Scheme.

Another distinguishing feature is that some review bodies place strong emphasis on educational activities to promote better decision making and respect for human rights values and privacy principles, in and outside government.

12 Information Commissioner Bill 2009.
13 The Inspector-General of Taxation does not have a complaint investigation function.
14 Migration Act 1958 (Cth) s 486O.
15 Australian Security Intelligence Organisation Act 1979 (Cth) s 34Q.
Also notable is the fact that the Australian Commission for Law Enforcement Integrity reports to a parliamentary committee that is required by statute to monitor the commission’s work. Additionally, the Inspector-General of Intelligence and Security must report to the Parliamentary Joint Committee on Intelligence and Security on certain matters.16

Widening of the Auditor-General’s mandate

Before the mid-1970s the main task of the Auditor-General, supported by the Australian National Audit Office, was financial auditing to verify the information contained in the financial statements of Australian government agencies. A profound change in the 1970s was the widening of the Auditor-General’s mandate to include performance auditing, which involves scrutinising the efficiency and effectiveness of program management by government agencies.17 A performance audit will typically examine both how an agency is performing its functions and whether it is achieving the objectives of the program in question.

There is overlap between performance auditing and administrative law, in terms of both the topics covered and the objectives. In the case of the topics, performance auditing and administrative law review cover all of government. Often the focus is on the areas of government that interact directly with the public, either through providing services to the public or through regulating individual and business conduct. In recent years, for example, the Auditor-General has carried out performance audits of payments made to individuals, such as age pension payments, Medicare claims and Youth Allowance18; government grants to regional and community projects19; registration of business activity for taxation and business purposes20; administrative penalties21; and immigration and visa processing.22

The Auditor-General has also carried out performance audits of components of the administrative law system. Among the topics examined have been the management of appeals by the Migration and Refugee Review Tribunals, Centrelink’s review and appeals system, veterans’ appeals against disability compensation decisions, the administration of freedom of information requests, confidentiality in government contracts, complaint handling, and customer service charters.23

In the case of the objectives, performance auditing and administrative law are both concerned with ensuring that public administration is accountable and transparent. Both are also concerned

16 Respectively, the Intelligence Services Act 2001 (Cth) s 28 and the Law Enforcement Integrity Commissioner Act 2006 (Cth) s 213.
18 Administration of Complex Age Pension Assessments, ANAO report no. 26 of 2006/07; Accuracy of Medicare Claims Processing, ANAO report no. 20 of 2007/08; Administration of Youth Allowance, ANAO report no. 12 of 2009/10.
19 Performance Audit of the Regional Partnerships Programme, ANAO report no. 14 of 2007/08; Distribution of Funding for Community Grants Programmes, ANAO report no. 39 of 2006/07; Administration of Grants by the National Health and Medical Research Council, ANAO report no. 7 of 2009/10.
20 Administration of Australian Business Number Registrations Follow-up Audit, ANAO report no. 15 of 2007/08; Export Certification Australian Quarantine and Inspection Service, ANAO report no. 2 of 2006/07.
22 Visa Management: working holiday makers, ANAO report no. 7 of 2006/07; Management of the Processing of Asylum Seekers, ANAO report no. 56 of 2003/04; Processing of Incoming International Air Passengers, ANAO report no. 10 of 2009/10.
with ensuring, at a more practical level, that administrative decision making and service delivery are lawfully and properly conducted. Tribunals and courts pursue that objective principally by the review of individual decisions that are the subject of an application for review by a tribunal or court. Review bodies such as the Ombudsman pursue not only individual cases but also systemic matters. Performance auditing achieves the same objective by examining a random selection of individual decisions to see if errors are occurring but also considers systemic or governance matters.

Both techniques can be effective in identifying flaws in decision making and service delivery. This can have a beneficial influence on public administration beyond the individual decisions that are reviewed or audited. The reports of the Auditor-General, along with the published decisions and findings of review agencies, tribunals and courts, provide a body of principle and case law that can guide officials when discharging their functions.

This message is the more influential because it comes from an external agency. The reality and potential of external review is that it provides a stimulus for officials to work more assiduously to improve the integrity and defensibility of decision making and service delivery. The underlying lesson is that it is more efficient and effective to get a decision right in the first instance than to have a flaw exposed publicly by an external agency at a later time. Public confidence in government programs and agencies can also be undermined if serious or frequent errors are detected by an external agency.

One other point of cross-over is that audit activity is increasingly being used by some review agencies as a means of promoting legality and propriety in government administration. From its inception the office of the Inspector-General of Intelligence and Security has devoted the larger part of its resources to regular examinations of intelligence agencies’ use of their special powers and capabilities, such as entry and search or telecommunications interception warrants. Inspecting the records of law enforcement agencies to ensure compliance with laws controlling telecommunications interception, electronic surveillance, controlled operations and access to stored communications is now a routine function of the Ombudsman. Similarly, the Privacy Commissioner audits agency practices in order to gauge compliance with the Information Privacy Principles.

Taking stock: review bodies’ contribution to the work of government

Individually and collectively, independent review agencies play an important, active and developing role in government. Government agencies take the work of the review agencies seriously, in responding to their investigations and reports and in implementing their recommendations. Routinely, in legislative and policy development, government agencies refer to the recommendations of review agencies as a catalyst for change. Most government agencies now have either a dedicated unit or specific procedures for liaising with the Auditor-General, the Ombudsman, the Privacy Commissioner and other review bodies.

Another dimension of review work is that individuals who are aggrieved by government administrative decisions and actions are given a genuine opportunity to express their concern and have it redressed. Again, it is routinely accepted in the community and in government that individuals have a right to complain, every complaint must be examined, a reasoned response

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25 Telecommunications (Interception and Access) Act 1979 (Cth) s 152; Surveillance Devices Act 2004 (Cth) s 55; Crimes Act 1914 (Cth) s 15UA.
must be given, and a remedy (including financial compensation) should be provided if there was defective administrative action.

One way government agencies have acknowledged this point is by establishing their own complaints units, which for the most part are well resourced and deal with a much higher number of direct inquiries and complaints than the external review agencies. Examples are ATO Complaints, the Centrelink Customer Service Centre, the Child Support Agency Complaints Service, the Department of Defence Fairness and Resolution Branch and the Department of Immigration Global Feedback Unit. This mechanism is supplemented by customer service charters adopted by government agencies; the charters outline the service standards the agency will meet and the complaint avenues available to a client who feels the agency has broken its commitments.

Government as a whole has also taken up this approach. A strong theme in the government reform agenda is the need for agencies to be ‘customer focused’ or ‘citizen centered’. In an address in 2009 Prime Minister Rudd identified one of the five tasks facing the Australian Public Service as the need to ‘deliver high-quality programs and services that put the citizen first’. This point was echoed in the government discussion paper Reform of Australian Government Administration, published in October 2009. The paper outlined the Government’s commitment to a ‘citizen centred philosophy’:

Being truly citizen centered means placing the citizen at the centre of the entire public service endeavour. This requires a meaningful commitment to actively engaging and empowering people at all points along the service delivery chain—from high-level program and policy formulation all the way to the point of service delivery, and capturing feedback from the users of services. The public service also needs to be capable of effectively interacting with citizens with unique or special needs or whose circumstances do not fit what might be considered the norm.

The work of the review bodies also contributes to sustaining fundamental principles of Australian government and civil service. Foremost is accountability—a principle that is strengthened through the work of review bodies in handling tens of thousands of complaints each year against government agencies, investigating selected government activities and programs, auditing and monitoring government administration and publishing reports that are critical of government agencies, and through public appearances before and presentations to parliamentary committees, conferences and in the media. All this work also ensures a greater measure of transparency in the workings of executive government.

Another fundamental principle the review agencies safeguard is that government administration must be free of corruption, bias and conflict of interest. The work of the Auditor-General is significant in this regard, in its close scrutiny of government financial transactions followed by regular reporting to the parliament. Important, too, is the recent creation of the Australian Government

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27 Prime Minister Kevin Rudd, John Paterson Oration, Australia New Zealand School of Government Annual Conference, Canberra, 3 September 2009. Note also that the title of the Commonwealth Association for Public Administration and Management Conference held in Australia in October 2009 was ‘Government—it’s all about citizens’.

Commission for Law Enforcement Integrity to combat corruption in law enforcement agencies. The work of the Ombudsman and some other complaint and investigation agencies also provides a means of deterring unacceptable conduct, in particular because these agencies are prepared to accept anonymous and whistleblower complaints and promise protection to those who allege misconduct.

The extensive jurisdiction and powers of standing independent review agencies have been an important element in Australia’s consistently high ranking in the annual Transparency International Corruption Perception Index (Australia was ranked eighth in 2009).

**Looking ahead: future challenges**

Independent review agencies are now a permanent element of the government accountability framework. Their role in government is likely to grow, both in activity and in importance. One sign of this is the government decision in 2009 to establish three new officers—the National Security Legislation Monitor, the Information Commissioner and the Freedom of Information Commissioner.

Another sign is the increased functions of some of the existing review agencies. One point of note is a general movement beyond individual complaint handling: the agencies are now more active in conducting own-motion investigations, publishing reports, setting standards for good administration, and monitoring and auditing government administrative activity.

Complaint and own-motion investigations by standing review agencies have a number of advantages over ad hoc reviews. There is no delay and establishment cost in launching an inquiry, staff with expertise are readily available, there is capacity to monitor responses to the report, and the review agency itself remains accountable for its work. The review agencies also have strong powers and protections available to them and are often flexible and inquisitorial in approach. These sorts of advantages led the Australian Law Reform Commission to conclude in 2010 that some public inquiries are best conducted by existing bodies such as the Ombudsman, the Inspector-General of Intelligence and Security and the Australian Commission for Law Enforcement Integrity.

The independence and expert knowledge of a review agency have a range of potential uses. An example is that the Inspector-General of Intelligence and Security—following on from the abolition of conclusive certificates as a means of denying access to documents under the freedom of information and archives legislation—has been given a role in the Administrative Appeals Tribunal as an expert witness on whether disclosure of documents would or could cause damage to Australia’s security, defence or international relations. The Australian Law Reform Commission has built on that example by recommending that the inspector-general be allowed to provide expert advice or assistance to relevant royal commissions.

Looking ahead, another way of evaluating the future role of independent review agencies—the opportunities as well as the difficulties they face—is to examine their relationship to the parliament, to the executive branch of government, and to each other.

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29 In May 2009 the Parliamentary Joint Standing Committee on the Australian Commission for Law Enforcement Integrity began an inquiry into whether ACLEI’s jurisdiction to investigate corruption should be extended to other Australian government agencies—see Inquiry into the Operation of the Law Enforcement Integrity Commissioner Act 2006.

30 See notes 5 and 12.


32 Freedom of Information Act 1982 s 60A; Archives Act 1983 s 50A.

Independent review agencies and the Parliament

The Auditor-General has long been designated by statute ‘an independent officer of the Parliament’ and reports to the Joint Parliamentary Committee of Public Accounts and Audit. That Committee monitors the Auditor-General’s work and can play a role in approving or rejecting a recommendation for the appointment of the Auditor-General. As noted, the Inspector-General of Intelligence and Security and the Integrity Commissioner are also required by statute to report to specialist joint parliamentary committees, at least on some matters. Many of the review bodies can also make special reports to parliament.

A continuing debate concerns whether the role of ombudsman and similar offices should be tied specifically to parliament. Two of the early ombudsman offices, in Western Australian and Queensland, were named the ‘Parliamentary Commissioner for Administrative Investigations’, and specialist parliamentary committees exist in some states. Internationally, the prevalent model for creating an ombudsman is to make it an officer of parliament.

It is not likely that there will be broad, sweeping change along these lines at the national level. Existing arrangements are settled, they rest on a mixture of formal and informal relationships between individual review bodies and parliamentary committees and parliamentarians, there is a high degree of cooperation and mutual respect, and the arrangements are generally effective. There is nevertheless scope within those arrangements for accentuating the relationship between review agencies and parliamentary committees.

The terms of reference of current committees could be sharpened to make more explicit their relationship with the review agencies in their area of activity. If a committee were to hold a hearing on the annual report of a review agency, this would also afford the review agency an important forum for discussing its work: at present many of the review agencies line up periodically for the parliamentary estimates hearings, sandwiched between central government departments and agencies, and are often not called because of political stoushes that can dominate the hearings.

From time to time there will also be scope for creating a new parliamentary committee to which review agencies can report. A welcome development in this regard was the Government’s announcement in December 2008 that it would establish a Parliamentary Joint Committee on Law Enforcement to extend parliamentary oversight to include the Australian Federal Police.

The dual advantage of these and similar reforms would be to strengthen the independent role of review agencies and enable them to provide more targeted assistance to the parliament in its compatible role of ensuring executive accountability.

Independent review agencies and the executive branch

Review agencies’ relationship to the executive branch is also well settled, yet could be refined. There are three main areas of contact.

First, review bodies can be more effective if government agencies cooperate in their investigations, readily provide information and assistance, and acknowledge and respect the

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35 Auditor-General Act 1997 s 8.
36 Public Accounts and Audit Committee Act 1951 ss 8, 8A.
37 See note 16.
38 For example, the Ombudsman Act 1976 s 17.
39 See the Parliamentary Commissioner Act 1971 (WA). The Queensland Parliamentary Commissioner was renamed the Ombudsman in 2001. The Victorian Ombudsman has since been declared in the Constitution to be ‘an independent officer of the Parliament’ — Constitution Act 1975 (Vic) s 94E(1).
40 For further discussion see R Creyke & J McMillan 2009, Control of Government Action: text, cases and commentary, 2nd edn, LexisNexis, Sydney, 268–73.
bodies’ independence. For the most part this occurs. There are occasional instances of resistance, which can usually be overcome by use of the review body’s coercive investigative powers. The threat of adverse publicity is another valuable tool.

Second, a crucial performance measure for a review body is whether its recommendations and reports are accepted by government agencies. It is difficult to measure this precisely, since recommendations often require adaptation or implementation over time by an agency—for example, a recommendation that an agency provide more assistance or a better explanation to a member of the public, expedite the resolution of a person’s application, revise its administrative procedures, or provide better training to agency decision makers. Nevertheless, the rate of acceptance is high. For example, for the last three years the Ombudsman has reported that between 80 and 92 per cent of the recommendations made in formal reports were accepted in whole or in part, with some others depending on further agency work.\(^{42}\)

This question of implementation and follow-up warrants consideration. The Auditor-General’s practice is to monitor the implementation of audit recommendations and conduct follow-up audits when necessary. Similarly, the Inspector-General of Intelligence and Security monitors implementation closely and can initiate own-motion inquiries or report to ministers and ultimately the parliament if not satisfied. In 2009 the Ombudsman instituted a new system of asking each agency six months after publication of a report to explain the steps taken to implement the report’s recommendations.

Government agencies are required to provide in annual reports information on the most important developments in external scrutiny of the agency, including judicial and tribunal decisions and reports of the Auditor-General and the Ombudsman.\(^{43}\) The degree to which this is done seems variable, particularly in relation to implementation of changes within the agency that flow from such decisions and reports.

More generally, there is no formal institutional means in the administrative law system for ensuring that review outcomes are ‘fed back’ into the administrative system in order to achieve systemic change.\(^{44}\) Review agencies and tribunals are given all the powers necessary to conduct investigations and hearings, but less thought has been given to designing mechanisms for ensuring that the findings of those investigations and proceedings are heeded. This point was taken up in the Access to Justice report launched in 2009 by the Attorney-General.\(^{45}\) The report recommended that all government agencies develop mechanisms for reporting to tribunals and the Ombudsman on the action taken in response to individual case decisions and recommendations, to help resolve systemic shortcomings and to communicate external review findings to staff of the agency. A similar recommendation was made in 2010 by the Henry review into the Australian system, that the Joint Committee of Public Accounts and Audit should monitor implementation by the Australian Taxation Office of recommendations of the Commonwealth Ombudsman and the Inspector-General of Taxation.\(^{46}\)

The third area of contact between review agencies and the executive branch is in relation to their budget. Put bluntly, the executive branch can undermine a review agency by starving it of finance. From time to time complaints are made that this occurs, but it has been less of a problem in recent years. For example, the staffing numbers of the Auditor-General, the Ombudsman and

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\(^{43}\) Department of the Prime Minister and Cabinet 2009, *Requirements for Annual Reports*, PM&C, Canberra. These guidelines are approved by the Joint Committee of Public Accounts and Audit under ss 63(2) and 70(2) of the *Public Service Act 1999* (Cth).


the Privacy Commissioner rose during the five years from 2004 to 2009 from 296 to 352 (Auditor-General), 89 to 152 (Ombudsman) and 36 to 64 (Privacy). The experience of the present authors is that, on the whole, the executive branch will give sincere consideration to any submission about financial constraints or funding needed for a new or extended function.

The area of budgetary difficulty for review agencies is the efficiency dividend, introduced in 1987, whereby most government agencies receive a reduced budgetary allocation each year of 1.25 per cent, plus an additional one-off 2 per cent in 2008–09. Larger government agencies can usually absorb that reduction by phasing down an existing program or developing a new policy proposal that attracts new funding. It is not as easy for small agencies, including all the review bodies, to take the same action. As the Joint Committee of Public Accounts and Audit noted in a report in 2008:

> The system favours larger agencies and agencies with a stronger policy focus over small agencies. This latter type of agency usually has a technical, precisely defined function that gives them reduced discretion over how they manage their operations. They have poorer economies of scale. Further, they have fewer opportunities to top up their funding through new policy proposals because they are rarely involved in new policy.\(^\text{48}\)

Among the difficulties some review agencies reported were recruitment and retention of quality staff in a competitive labour market, reduced training opportunities for staff, and difficulty with funding innovation.

The committee recommended a formula for exempting small agencies from the efficiency dividend and sufficient funding for the Australian National Audit Office to enable it to conduct each year the number of performance audits determined necessary by the Auditor-General and endorsed by the committee. The committee’s set of recommendations has not apparently been accepted by the Government.\(^\text{49}\)

### The relationship of independent review agencies to each other

The statutory independence of each review agency means that they are necessarily independent of each other. Indeed, many of them have jurisdiction to investigate complaints about the other. For example, the Ombudsman, the Human Rights Commissioner and the Privacy Commissioner can each investigate the administrative actions of the other. And, necessarily, the Auditor-General can scrutinise the accounts of all agencies.

Cooperation between the agencies occurs in numerous ways along the informality–formality spectrum. There is some statutory regulation; for example, the Inspector-General of Taxation is required to consult the Ombudsman and the Auditor-General at least annually\(^\text{50}\), the Ombudsman is required to transfer particular complaints to the Privacy Commissioner or the Integrity Commissioner\(^\text{51}\), and the Australian Human Rights Commission must refer complaints against the intelligence agencies to the Inspector-General of Intelligence and Security.\(^\text{52}\) Some review agencies have also signed memorandums of understanding with each other, to deal with cooperation, referral of complaints, and investigation of complaints about the other agency. In addition, there is a considerable amount of informal contact between the office holders and staff of the various agencies; for example the

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\(^{47}\) These figures are taken from the annual reports of the agencies. Each uses a different counting method, but the trend picture is accurate.


\(^{49}\) The 2009 Budget did allocate additional four-year funding of $20.1 million to the ANAO and $3.3 million to the Ombudsman to continue oversight of the Northern Territory Emergency Response – see *Budget Measures: promoting integrity and accountability*, Media release 16/2009 by Senator Faulkner, Cabinet Secretary and Special Minister of State.

\(^{50}\) *Inspector-General of Taxation Act 2003* s 9.

\(^{51}\) *Ombudsman Act 1976* ss 6(4A), 6(17).

\(^{52}\) *Australian Human Rights Commission Act 1986* (Cth) s 11(3).
Auditor-General circulates (to all government agencies) a draft program of audits for the following year, and there can be cooperation with other review agencies in conducting those audits.

Another link between the review agencies is that many are now located within the portfolio of the Department of the Prime Minister and Cabinet—specifically, the Australian National Audit Office, the Commonwealth Ombudsman, the Inspector-General of Intelligence and Security, the Privacy Commissioner and, when established, the Information and Freedom of Information Commissioners. Together with the Australian Public Service Commissioner and the National Archives of Australia, these agencies are at times described as the ‘integrity group’ within government, and they occasionally meet under that rubric.

This grouping coincides with a broader emerging suggestion that the review agencies be viewed as a separate and fourth branch of government—the accountability or integrity branch. It has been conventional to describe them as being located in the executive branch ‘because they fit in here better than anywhere else’. Obviously, the review agencies are not part of the other two acknowledged and traditional branches of government—the legislative and judicial branches.

The suggestion is that we should update our constitutional thinking and recognise that independent review agencies have become a distinct group within government. In particular, they have statutory independence from the executive branch, their role is to ensure the integrity and accountability of the executive branch, and they do not implement government policies and programs in the traditional manner of the executive branch. Rather, review agencies are a new and effective means of enforcing the rule of law in government, checking the propriety of administrative decision making and controlling government action.

53 The Attorney-General’s portfolio includes the Administrative Appeals Tribunal, the Australian Commission for Law Enforcement Integrity and the Australian Human Rights Commission.
Administrative law evolution: an administrator’s point of view

Andrew Metcalfe*

Immigration policy has always been at the forefront of administrative justice. In one way or another the immigration portfolio has helped to shape some of the most important innovations in administrative law in Australia. My brief is to discuss the question of whether administrative justice remains ‘alive and kicking’ from an administrator’s point of view. This year, being the 65th anniversary of the establishment of the Department of Immigration and Citizenship, is a fitting time to reflect on these issues. While discussing this largely from an immigration perspective, I also refer to the experiences of the Australian Taxation Office and Centrelink, which, with the Department of Immigration and Citizenship, account for a high proportion of administrative decision making and review in the Commonwealth sector.

The migration program plays a vital role in Australia’s prosperity and in our country’s compliance with international obligations. The Department of Immigration and Citizenship makes decisions that affect human rights and the very foundations of many people’s lives. For this reason DIAC has a legal, moral and economic obligation to be fair and just in all its dealings.

It is often said that Australia is a country of immigrants. Over 44 per cent of the population was born overseas or has at least one parent born overseas. In 2008–09 DIAC did the following:

- processed more than 26 million movements¹
- administered a humanitarian program² covering 13,507 individuals
- made over 86,000 grants of Australian citizenship at ceremonies
- approved over 118,000 people as Australian citizens by descent, conferral and resumption.

In decision making of this importance and scale, administrative justice in immigration is obviously crucial to the bigger picture of an orderly migration program.

In this paper I briefly examine the history of administrative justice in Australia, attempt to define this somewhat amorphous concept, and consider some of the wider benefits gained in the 40 years since the establishment of the Kerr Committee.³ I also outline the roles of the Australian Human Rights Commission, international law and the Commonwealth Ombudsman for the purpose of discussing their impact on DIAC’s operations. I conclude with a discussion of the importance of organisational culture in achieving administrative justice.

History

In 1968 a single officer constituted the entirety of the Department of Immigration’s legal clearing-house. On secondment from the Attorney-General’s Department, Mr Ernst Willheim was ordered to certify the legality of deportation orders before they were sent to the minister’s office.

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¹ 'Movements' refers to the number of arrivals and departures of Australian residents or overseas visitors, including the crews of vessels, through Australian sea ports and airports.

² The humanitarian program provides for migration to Australia of refugees and others in humanitarian need from all parts of the world.

³ The Kerr Committee comprised the Hon. Mr Justice Kerr, the Hon. Mr Justice Murphy, Mr RJ Ellicot, and Professor Whitmore.
He found that all the documents in his in-tray were unlawful in one way or another and, not unnaturally, he refused to certify them. Mr Willheim remembers the deportation unit’s protest: ‘You don’t seem to understand that it’s your job to initial these. If you don’t … the Minister won’t sign them …’

Administrative justice in the 1960s was uncoordinated, full of anomalies, fragmented and confused. Tribunals and review processes were idiosyncratic, and each operated within its own limited mandate. Public servants were sometimes unaware of the legal basis for their decisions, occasionally subordinating the law to internal manuals and government policy.

Also in 1968 Attorney-General Nigel Bowen established an inquiry into Australian administrative law that paved the way for today’s system of administrative justice. The inquiry committee’s chairman, Sir John Kerr, handed down the committee’s report in 1971. The main findings in the report were that ‘access to review was blocked by cost, official secrecy and privative clauses’ and that ‘the basic fault of the entire structure’ was that merits review was unavailable. The report recommended many reforms, including a general merits review tribunal, an obligation to disclose relevant documents, and an administrative review council to monitor and recommend improvements to the administrative law system.

Administrators’ responses to the report were not entirely positive. As Sir Anthony Mason recalled, ‘The mandarins were irrevocably opposed to external review because it diminished their power’.

Since the report of the Kerr Committee, bureaucrats’ thinking on administrative justice has evolved. The system that has emerged is, in the words of Justice Deirdre O’Connor, ‘in many ways, an example of world’s best practice’. The Administrative Appeals Tribunal, the Commonwealth Ombudsman, the Administrative Review Council, the Administrative Decisions (Judicial Review) Act 1977, freedom of information legislation and legislatively mandated provision of reasons have irrevocably changed the environment in which administrative decisions are made throughout the Commonwealth.

Definition

The nature of administrative law changed in the early 1990s, expanding from its focus on judicially defined principles in the limited classes of cases that came before the courts and tribunals to encapsulate agency-level decision making and internal review processes. According to Associate Professor Pamela O’Connor:

> It was recognised that the decisions which are changed on external review by a court, tribunal or Ombudsman are only the tip of the iceberg. For the administrative law system

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7 ibid.
to become an *administrative justice* system, it needed to demonstrate its contribution to the quality of the vastly greater volume of decisions made at agency level.\(^{11}\)

The Commissioner of Taxation, Michael D’Ascenzo, makes a similar point. Referring to changes in public sector thinking from the late 1990s to the present day, he stated:

> While a focus remains on lawfulness, effectiveness and efficiency, talk is now also of the ethical obligations on the public and private sector as well. The rhetoric is now ‘effectiveness, efficiency and ethicality’. At a structural level, compliance is to be managed through a fourth, integrity branch of government.\(^{12}\)

In relation to managing compliance, the Commissioner recognises a reliance by departments and agencies on ‘soft law’\(^{13}\) — a term I am pleased to adopt.

‘Soft law’ means non-legislative materials such as codes and guidelines, which are increasingly being used by government regulatory agencies. Soft law is not binding by force of statute but can be influential in other ways. Its aim is to have some practical effect or impact on the behaviour of administrative decision makers.\(^{14}\) The Administrative Review Council has previously noted that soft law can, in practice, have a more substantial effect on administrative decision making than the legislation itself.\(^{15}\) This is particularly the case for the migration portfolio given the number of decisions made and the speed with which they are made.

### Benefits of review and accountability bodies

External oversight offers to an organisation many benefits beyond reaching the correct or preferable decision in individual cases. DIAC has benefited from the openness and accountability provided by its merits review system and the extensive external oversight to which the department is subjected. The Migration Review Tribunal and the Refugee Review Tribunal oblige DIAC decision makers to uphold high standards and provide a crucial safety valve for errors or oversights.

External inquiry can inspire or necessitate effective communication in large organisations. Some years ago in two areas of DIAC each believed the other had reasons for continuing a policy that was, on its face, unjust. It was not until an oversight body’s inquiries about the policy prompted communication between the two areas that the policy was revised.

Feedback from merits review and accountability bodies helps by critiquing and improving the quality of agencies’ decisions. Having decisions overturned is not easy for officials, though, especially when an external body is criticising them publicly. The relationship with individual decision makers must be carefully managed to avoid resentment of the review process.

Undoubtedly, however, review decisions in the migration sector, from both the tribunals and the courts, are of high quality and make a positive contribution to departmental decision-making practices. DIAC has a multi-layered process for establishing which tribunal and court decisions are significant. Decisions are assigned to one of several policy or legal areas for a process (including a risk assessment) referred to as ‘triage’. The resulting advice is then handed to a policy unit further up in the organisation to assess whether the department is required to alter its practices in response.


\(^{13}\) ibid. 8.


\(^{15}\) ibid.
In the past DIAC has at times adopted too defensive a stance and maintained an overly antagonistic relationship with review bodies. Remembering that the idiosyncrasies of the migration portfolio can lead to review decisions that have sometimes frustrated DIAC officials — indeed, ministers — I believe DIAC has now made considerable progress in opening itself up to review. This is in the context that, rightly, the department is highly accountable for its actions.

**The Australian Human Rights Commission and international law**

The Australian Human Rights Commission has a central role in delivering administrative justice for detainees and has contributed to major improvements in the management of detention centres. For example, the commission’s recommendations have played an important part in improving mental health monitoring and care.

Australia is also a party to optional protocols to several human rights treaties that allow for the hearing of individual complaints by international committees. Although Australia does not always agree with the legal interpretations or findings of these committees, DIAC has always fully cooperated with the examination of the complaints.

International law further influences administration by providing minimum standards to be met (and exceeded) and a process whereby which world’s best practice can be established and emulated. Australia takes its international obligations seriously. Monitoring developments in human rights law is an essential part of DIAC’s work: it forms a basis for many of the department’s decisions and policies.

**The Ombudsman**

The Commonwealth Ombudsman originally advertised in 1977 that the office was created to help those “trampled underfoot by officialdom”, “strangled by bureaucratic red tape”, or having their problems “swept under the carpet”.16

The Ombudsman has provided invaluable feedback and advice to DIAC, especially since 2005, when the office was given the additional title of Immigration Ombudsman. The Immigration Ombudsman’s investigations of individual cases and systemic matters provide detailed and focused insights into administrative problems in DIAC.

In 2005 and 2006 the Government asked the Ombudsman to investigate the cases of 247 people detained by DIAC ‘and later released [because] they were not, or were no longer, unlawful non-citizens’.17 The recommendations arising from the Ombudsman’s reports continue to have a practical and positive influence on DIAC’s practices. Drawn together in a summarising report18 that DIAC has nicknamed ‘Ten Lessons’, the recommendations included measures for good governance, case management and quality control.

Since 2005 the Ombudsman has investigated all the cases of people held in immigration detention for two or more years. DIAC hopes that with this increased vigilance past mistakes will not be repeated and that it can concentrate on continuing to build better and more robust internal practices.

**The courts**

At time of application to the courts around 73 per cent of applicants for judicial review of migration decisions are self-represented. DIAC has been successful in 94 per cent of defended matters. This very high success rate shows that the system is delivering administrative justice.

17 ibid. 3.
Efficiency is increasing, too; there has been a reduction of over 3000 in the number of active cases on the courts’ books at any one time.

For two decades the executive and judicial branches of government have maintained a sometimes tense and conservative relationship. Occasionally, judgments are made that seem out of step with policy makers’ views and have major impacts on management of the migration program. Conversely, governments have sought to restrict judicial review—for example, by trying to codify natural justice and creating a restrictive and separate judicial review scheme for most visa-related decisions.

At times legislative measures such as the privative clause have been quickly read down and their impact softened by the constitutionally entrenched jurisdiction of the High Court. Other measures—most notably the Migration Act’s code of procedure—have been a continuing source of novel interpretation.

Although the administrative justice system provides an important check on administrative action, it also extends our clients’ stay in Australia by up to two years. This incentive can lead some of our clients to remain in the review system even when they do not believe the handling of their case was flawed. Currently 1 per cent (although previously up to 5 per cent) of all new visa-related applications in the Federal Magistrates Court seek review of a decision already reviewed and upheld by the courts. There is no denying the importance of review in providing fair outcomes, but the reality is that delaying tactics are a factor in the migration portfolio.

A corollary to this is that agencies fear the delays caused by the review process. Unfortunately, this fear can contribute to inertia in administrative reform and can hinder the development of new initiatives. The courts have recognised this problem and have worked hard to resolve it by ensuring efficiency in the review of immigration matters. Some members of the judiciary have sought to resolve the problem by dispensing with full hearings in cases where there is no apparent merit to the litigant’s review application; others have declined to do so.

Some of our clients seem to feel they must take every available step in the review process in order to achieve administrative justice. Because the judicial review process is concerned with the lawfulness of decisions rather than their merits, however, this course of action might not actually resolve the matter at the forefront of applicants’ minds. Educating individuals about the review process might help to remedy this.

It is possible that a review process prescribed in legislation for decision makers to follow can in some cases increase the potential for the system to generate delay rather than administrative justice. In overturning some tribunal decisions, courts have called the outcome ‘rather absurd’ and noted that ‘in fact, no unfairness or prejudice was visited upon any of the appellants’. Although this was overturned on appeal, such decisions can be frustrating for administrators, it does serve as a reminder of the need to adhere to the requirements of procedural fairness.

On the other hand, the courts have rejected some extremely quibbling arguments—for example, that substituting ’2000’ for ’2010’ in the postcode of a letter that reached its destination breached the code of procedure. The court noted ‘the clear absence in this case of any practical injustice or even inconvenience to the appellant …’ In another case Justice Madgwick declined ‘to allow the triumph of mere technicality over substance …’

**An agency case study: Centrelink**

As a comparatively young agency, Centrelink has emerged into a well-developed administrative justice system, with some known parameters. On its creation Centrelink inherited an administrative justice approach somewhat different from that applying in DIAC; the Centrelink

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approach interposes a detailed internal review stage between the original decision and the Social Security Appeals Tribunal (internal review was abolished in immigration in 1999). The incentive to appeal, which is such a factor in the migration sector, is also at play in the social security context, although to a lesser extent.

Centrelink allows for both own-motion and customer-initiated review. The own-motion power is enlivened when the Secretary is satisfied there is sufficient reason to review a decision. When a customer applies for review the case must be reviewed by the Secretary. In practice this means an authorised review officer, who is a ‘senior and experienced [person] in Centrelink who will have had no involvement in [the] case’. A review can affirm, vary or set aside and substitute a new decision. No time limit is imposed, but payments can be backdated only 13 weeks.

Centrelink also expressly affords its clients the option of review by the original decision maker—known as an ‘ODM reconsideration’—which allows ‘… a chance to correct misunderstandings, present new information or evidence, and get an incorrect decision changed quickly’. Following an ODM reconsideration, a customer can still proceed to seek review by an authorised review officer.

In the context of Centrelink’s business, the internal review by an authorised review officer might have reduced the need to go on to other forms of review. In 2007–08 authorised review officers dealt with 55,761 internal reviews; only 11,060 (under 20 per cent) went to the Social Security Appeals Tribunal and 1937 (3.5 per cent) to the Administrative Appeals Tribunal. This is despite 65 per cent of original decisions being upheld at the internal review stage. It appears, therefore, that not only is the scheme correcting 35 per cent of decisions efficiently, but that it could also be reducing the number of unmeritorious claims progressing through the system. Reform, however, continues. Like the rest of the Australian Government, Centrelink strives to balance administrative justice, speedy decision making and efficient use of the public purse.

**An agency case study: the Australian Tax Office**

The Australian Taxation Office has differing review options available, depending on the subject matter to be reviewed and which review options have already been exercised.

As with Centrelink, the ATO has a layer of internal review that provides for review of a decision by a tax officer who did not make the original decision. External review is conducted by the Administrative Appeals Tribunal or the Federal Court.

The Small Taxation Claims Tribunal is part of the Administrative Appeals Tribunal and provides an inexpensive, quick and independent review if the amount of tax in dispute is less than $5000. Judicial review is also available. Clients are helped to meet the costs of litigation in test...
cases. Additionally, clients can also complain to the Taxation Ombudsman, who can investigate the fairness and reasonableness of ATO actions, decisions and procedures.\footnote{Commonwealth Ombudsman website: www.ombudsman.gov.au/commonwealth/publish.nsf/AttachmentsByTitle/special_tax/$FILE/tax.pdf, viewed 28 July 2008.}

The ATO’s highly developed complaints system could be contributing to the decrease in complaints to the Ombudsman about the ATO in this decade.\footnote{Commonwealth Ombudsman 2008, Taxation Ombudsman Activities 2007, Commonwealth Ombudsman, Canberra, 20.}

The ATO’s efforts to achieve administrative justice are further enhanced by the formalisation of its integrity framework. The Commissioner of Taxation has stated, ‘This framework, complemented by our governance and planning processes, makes our integrity visible and measurable, and assists us to deliver on our commitment of being an open and accountable organisation’.\footnote{Michael D’Ascenzo 2006, Integrity Framework – how we ensure we are an integrity-based organisation, Foreword, Australian Taxation Office, Canberra, January, 1.}

As with other agencies, various external review bodies scrutinise the ATO’s performance.\footnote{ibid. 16.}

**Organisational culture**

Relying primarily on review mechanisms to achieve administrative justice does not make for effective decision making. Outcomes based on law and policy are really just the minimum standard for competent decision making. The values of fairness and ethical behaviour are more difficult to instil and promote. They are, however, just as important if an organisation is to make the high-quality, fair and appropriate decisions that we should strive for.

We should not underestimate the role of organisational culture in administrative justice. Developing an internal culture of accountability and openness to review is a crucial aspect of managing a decision-making process and litigation caseload. No benefit ensues if officers see review as an obstacle to be overcome, rather than an essential part of providing administrative justice.

It is well known that the Palmer and Comrie reports in 2005 have led DIAC to work towards a higher standard of internal governance. We have made much progress in promoting a new culture through extensive training programs and by changing our focus, which is more clearly directed at people – the foundation of our business. In the past few years in particular this focus has greatly improved administrative justice for our clients. It is, however, vital to constantly reinforce and revisit good governance.

In 2005 I established a Values and Standards Committee to help ensure that the people with whom DIAC deals are treated fairly, reasonably and lawfully. The committee also helps to ensure that DIAC staff are well supported in their work and that they are aware of their ethical obligations and the departmental and Australian Public Service values. The committee consists of a number of senior departmental staff as well as some external members. The Deputy Ombudsman, the Deputy Public Service Commissioner and two independent members play a major role in ensuring that we are outwardly focused and aiming for very high standards in our values and ethics.

Decision makers and policy formulators need to be aware of good governance principles and turn them into good governance practices. Management must ensure that staff are well informed about their duties under the Public Service Act 1999 and departmental policy, rules of conduct, standards of professionalism, and ethical obligations.
Conclusion

Is administrative justice being pursued within Australian public administration? I submit that it is, not only in comparison with Ernst Willheim’s 1960s but also by modern standards of government accountability. The Australian system has proved effective in ensuring that administrative justice is ultimately achieved, or is achievable, in virtually all cases.

I do not pretend, however, that the system is without problems, either in DIAC or in a wider context. The Comrie and Palmer reports, the Commonwealth Ombudsman and the Australian Human Rights Commission have shown that administrative injustice can still occur, albeit as the exception rather than the rule. DIAC’s ability to confront the difficult questions raised by the shocking treatment of Cornelia Rau and Vivian Alvarez, and the enormous improvement in the department’s practices that resulted, are testimony to the vitality and robustness of modern administrative justice as part of our democracy. In fact, even when considering obviously poor decisions – such as the highly publicised ones made some years ago by the Department of Immigration – it is evident that the administrative justice system is working. Has there ever before been this level of scrutiny of administrative decisions in Australia?

Of course, administrative justice cannot give everyone the decision they want. This does not, however, mean the system has failed, provided that decision making is not only lawful but also fair, just and humane.

Today we have a migration law system that is very different from the system in which a single officer worked and sought reform. Today’s system is more transparent, strong guidance is available for decision makers, and there are many more mechanisms for identifying and remediing problems. Coupling modern migration law with an open approach to decision making, accountability and the rule of law has given us a system that is more administratively just than ever before.
Administrative law evolution: thoughts from a business perspective

Peter Anderson

Businesses are significant consumers of the system of administrative law. The core administrative values that individuals expect in government decision making are also the values expected by the business community.

For business, regulatory decisions can have far-reaching consequences, affecting interests well beyond those under immediate consideration. In many instances decisions, particularly those of tribunals, can result in the development or redrafting of company practices or policies. Poor decision making can add unnecessary costs, which are unwelcome in a business environment subject to continuing competitive pressures.

Increasing regulation

As the Taskforce on Reducing Regulatory Burdens on Business recently noted:

Like many other developed countries, Australia has undergone a relatively rapid rise in regulation over the past couple of decades, in response to a succession of social, environmental and economic needs and pressures. In our view, business is justified in protesting at the compliance and other burdens that this regulatory inflation has entailed.¹

A consequence of this, and of the increased level of administrative decision making that has ensued, is that the million or so businesses in Australia are increasingly consumers and users of administrative law.

The diverse nature of commercial activity, coupled with the extended reach of regulatory decision making, means that the interaction between administrative decision makers and business has extended beyond agencies such as the Australian Securities and Investments Commission, the Australian Competition and Consumer Commission and the Australian Taxation Office. In the area of industrial regulation, for example, there are multiple decision makers, including ministers of the Crown (individually or collectively in ministerial councils), the Australian Human Rights Commission, Fair Work Australia, the Office of the Fair Work Ombudsman and, in some cases, government departments. Certain treaty obligations also give authority to or create lines of accountability for decisions of international bodies such as the International Labour Organization.

The increased focus on environmental matters has also meant that many business activities give rise to questions of environmental sustainability, either directly, through environmental legislation, or indirectly, through planning regulations.

In the face of this increasing level of regulation, it is heartening that the Commonwealth Attorney-General has said:

One of my key objectives is to help underpin Australia’s economic prosperity by ensuring that our domestic legal system is robust, that we reduce unnecessary costs, and remove impediments for those who need access to justice. And I know it is an objective shared by my State and Territory counterparts.²

This statement resonates well with the aspirations of business in relation to Australia’s system of administrative law. For business, the notion of justice is as tied up with accessible administrative decision making as it is with efficient judicial processes.

**Important considerations for business users**

The following are among the important considerations we identified for business users of administrative law.

**Guidelines and other policy materials**

Elsewhere in this edition of *Admin Review* reference is made to the growth of ‘soft law’ codes, guidelines, circulars, and so on. As a result of this development business users are required to comply not only with ‘black letter’ law but also with the additional obligations that can be imposed on them by means of soft law materials.

Business believes that consideration should be given to ensuring an appropriate level of accountability for the guidelines and other policy documents that are being turned to increasingly by regulators and non-government entities involved in co- and self-regulation as part of their regulatory functions. The principles for the development and review of such materials, as set out in the Council’s report *Administrative Accountability in Business Areas subject to Complex and Specific Regulation*³ are highly pertinent in this regard.

To increase transparency, business believes government and non-government regulators would be usefully encouraged to place on their websites (in a readily accessible place) all internal policy documents that affect decision-making processes.

**Access to review**

Administrative review of one sort or another is generally available in established areas of business interaction. Consideration could, however, be given to the establishment of more avenues for internal review of decisions.

Where merits review is available business favours the availability of full de novo merits review. In the absence of such review a number of counterproductive consequences can ensue, including the impetus to provide a ‘greater than needed’ volume of material at the primary decision-making stage in anticipation of possible review of the decision.

**Tribunals**

Business users widely accept the role of administrative tribunals in reviewing decisions that affect business. As a general rule, tribunal members exhibit a level of expertise in business areas sufficient to secure the support and confidence of business users.

The accelerating changes in the nature of doing business in a global economy mean that continuing professional development among tribunal members is essential in order that they

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² Attorney-General, Hon. Robert McClelland MP, Address to the Sydney Institute, 30 July 2008.
stay up to date. This is seen as especially important in the case of tribunals where long-term appointments are made or tenure is provided.

Tribunal members’ ability to act independently of past business interests or associations is also central to the establishment of business confidence in the work of tribunals.

**Reasons for decisions**

In all cases, reasons for decisions should be cogent and relevant to both current law and objectively established facts, including facts drawn from the manner in which business is conducted in an industry context. Consistency in decision making is also important to business users, providing invaluable guidance on required standards and practices.

Decisions that are too technical diminish the precedent value of a decision by reducing the business’s capacity to understand and to apply the decision more broadly. Elsewhere in this edition of *Admin Review* reference is made to the ‘problematic practice’ of having draft statements of reasons settled by legal advisers. The experience of business users is that this practice can make decisions (and reasons) more complicated, overly legalistic and technical, thereby reducing the precedent value of decisions and limiting the capacity of business users to apply decisions more broadly.

**Grounds of review**

Although business considers that the availability of judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) is an important right, the Act’s grounds of review are generally seen to be too narrow. The ground of ‘unreasonableness’ is particularly difficult to establish. Consideration of overseas trends, such as those in the United Kingdom, would be useful.

**The administrative system’s demands on business**

There is among business users of the system of administrative law an expectation that administrative decision makers will act efficiently, professionally and sensitively in relation to commercial information and business circumstances.

Decision makers also need to adjust their methodologies in response to the different commercial entities with which they deal. In the case of larger businesses, various chains of command might be in operation for approving particular courses of action. This needs to be taken into account when seeking information and materials relevant to an administrative decision-making process. Account also needs to be taken of the fact that many small and medium-sized businesses might not have sufficient internal resources to respond to administrative authorities ‘at the drop of a hat’ when requests are made for information or attendance at conferences or interviews.

**Information management**

Regulators often have multiple educative, advisory, investigative and prosecutorial roles. In these instances, effective information management strategies are crucial.

Information provided at one time by a business to a regulator seeking information or advice should not generally be transmitted throughout the authority to investigators or prosecutors at a later time for different purposes—certainly not without that possibility having been made clear to business users at the outset.

These situations arise more frequently when regulatory agencies have a ‘one-stop-shop’ function. Particular attention to the application of administrative law values needs to be paid in circumstances where such an approach to administrative structures and decision making is adopted.
Potential conflicts of interest that compromise accountability can also arise when administrative authorities tender out legal services.

**Other factors**

Traditionally, the Commonwealth Ombudsman has not represented a significant avenue of redress for businesses aggrieved by poor administrative decision making. The reasons for this are uncertain. A review could usefully be carried out to determine whether greater recourse by business to the Commonwealth Ombudsman would be beneficial.

Consideration could also be given to amending the freedom of information legislation to allow a limited release of information to a claimant or party, instead of the world at large, when a clear case for release has been established and other interests are not prejudiced by selective release.

The federal Compensation for Detriment Caused by Defective Administration Scheme is not widely known among business users. Its relevance (or potential relevance) to business users should be explored.

**Conclusion**

Access to the Commonwealth system of administrative law remains paramount for business users. Importantly, however, to ensure that this continues to be the case, periodic review of the qualitative aspects of that system from a business perspective is strongly recommended. Continuing vigilance is required, to ensure that administrative law values are maintained in the face of new and expanded areas of business regulation.
Current topics

This section examines four topics—statements of reasons by administrative decision makers, the nature of merits review, the role of administrative decision makers in judicial review proceedings (the Hardiman principle), and standing. The topics are discussed briefly in four separate and thought-provoking pieces from members of the practising profession and from a leading academic in the area of administrative law.¹

Statements of the decision maker’s actual reasons

Stephen Lloyd SC and Donald Mitchell²

The essential requirement of a statement of reasons is truth—to convey the actual reasons of the decision maker. When referring to an obligation to give reasons in the Migration Act 1958 (Cth), McHugh, Gummow and Hayne JJ said:

> It requires no more than that the Tribunal set out the findings which it did make. Neither expressly nor impliedly does this section require the Tribunal to make, and then set out, some findings additional to those which it actually made … A requirement to set out findings and reasons focuses upon the subjective thought processes of the decision-maker. All that [the provision] obliges the Tribunal to do is set out its findings on those questions of fact which it considered to be material to the decision which it made and to the reasons it had for reaching that decision.³

It sounds simple enough. And yet there are a number of circumstances in which, for the reasons explained shortly, hazards or difficulties arise in achieving this objective.

A requirement to provide a statement of reasons advances a number of different objectives, among them that the statement:

- provides a measure of governmental transparency
- is capable of creating a certain rigour in decision making to promote critical thinking and improved decision making (through exposure to criticism and review)⁴
- empowers people aggrieved by decisions to find out why the decisions were made and, if still aggrieved, can assist in making any decisions whether to seek to exercise rights of review in either merits review tribunals or courts⁵
- where review rights are exercised, informs the body carrying out the review of the reasons, which can be important for merits review bodies as well as courts performing judicial review. A statement of reasons greatly improves the effectiveness of judicial review and thereby ensures that government decision making is more likely to proceed in accordance with the law.

In SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs the Court said, in relation to the reasons of the tribunal, ‘The detailed exposure by the Tribunal of its reasoning

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¹ The pieces were compiled and reviewed in December 2008 by Melissa Perry QC, a member of the Administrative Review Council.
² Both members of Sixth Floor, Selborne/Wentworth Chambers, Sydney
⁴ Department of Foreign Affairs and Trade v Boswell (1992) 36 FCR 367, 377.
⁵ Burns v Australian National University (1982) 40 ALR 707, 715.
processes was not criticised and represented in itself a praiseworthy method of fulfilling the duty to give reasons’. As it turned out, the reasons clearly revealed error to the High Court.

**The source of the obligation to give reasons**

It is well settled that, as a matter of judicial duty, a judge in the first instance has an obligation to provide reasons for a judgment. Yet there is no common law obligation on an administrative decision maker to provide reasons.

Statute has to an extent sought to redress this shortcoming. There are, for example, limited rights to reasons provided by s 28 of the *Administrative Appeals Tribunal Act 1977* (Cth) (and see s 37(1) of that Act). In most cases, however, in the Commonwealth context the right to a statement of reasons and the obligation to provide one are created by s 13 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth). This note focuses on s 13 of the ADJR Act.

With some exceptions, s 13 permits any person who is aggrieved by a decision that is reviewable by the Federal Court or the Federal Magistrates Court under the ADJR Act to ask the decision maker to furnish in writing within 28 days a statement setting out their findings on material questions of fact and giving reasons for their decision. A corresponding obligation is placed on decision makers to provide the statement (again with exceptions).

There are of course a great many other statutes that oblige decision makers to provide a statement of reasons in respect of particular powers; the content of such statements is largely determined by s 25D of the *Acts Interpretation Act 1901* (Cth).

The Administrative Review Council has prepared a number of guidelines on the preparation of statements of reasons. Among the Council’s publications are *Practical Guidelines for Preparing Statements of Reasons* (revised in November 2002) and the accompanying commentary and, more recently, the booklet *Decision Making: reasons* in the best-practice guide series (August 2007). These publications set out clearly and concisely what is expected of decision makers by s 13 of the ADJR Act.

**Areas of concern**

Notwithstanding these considerable and important steps taken in relation to the provision of statements of reasons, there remain some aspects that might be improved by further consideration and possible reform.

**Ex post facto provision of reasons**

The general position relating to decisions to which s 13 of the ADJR Act applies is that there is no obligation to provide reasons until a request is made. A request can generally be made within 28 days of receipt of the decision, and a further 28 days is generally allowed for the provision of the statement of reasons. It follows, then, that there can be a material lack of contemporaneity between the date of the decision and the time when the statement of reasons is prepared. The Administrative Review Council’s *Practical Guidelines for Preparing Statements of Reasons* observes that it is ‘best practice’ (and by inference not mandatory) to prepare statements of reasons at the time of the decision.

Putting aside circumstances in which detailed notes have been made and kept when the decision was actually made, there is a real risk—even with conscientious efforts to be accurate—that the statement of reasons will not record the decision maker’s actual reasons.

These difficulties associated with reflecting the actual reasons can be exacerbated in circumstances where the fact that a request has been made puts the decision maker on notice that

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6 (2006) 228 CLR 152, 159.
8 *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656, 662.
the decision might be subject to some form of review. It is only human for a decision maker to want to provide the ‘best possible’ reasons for the decision in fact made. But, unfortunately, the best possible reasons might not have been the actual reasons. This is perhaps less crucial if the review to be carried out is merits review and the statement of reasons plays more the role of a submission to the next tier of decision making. If, however, the review being mooted is judicial review, the provision of a statement of reasons that does not reflect the actual reasons presents a threat to the rule of law.

This problem can be aggravated if the decision maker seeks help from colleagues in positing a statement of reasons. Unless those colleagues were involved in the actual decision making, it is not clear how they would be able to help with the preparation of a statement of reasons. It might be appropriate for the Administrative Review Council to consider whether rules or guidance should be given in relation to seeking such assistance.

Perhaps a more problematic practice—although the extent to which it occurs is unclear—arises when decision makers seek to have ‘draft’ statements of reasons ‘settled’ by legal advisers. It is difficult to see how this practice is designed to reveal the actual reasons of the decision maker. The imposition of legal professional privilege further serves to prevent transparency. It might be appropriate for the Council to consider the extent to which this practice should be allowed and whether legal professional privilege in such cases should be maintained. The Council might also want to consider whether recommendations should be made to professional bodies about whether it is appropriate for barristers or solicitors to provide advice on whether ‘draft’ statements of reasons should be amended to remove apparent legal errors.

A different question arising from the ex post facto nature of the s 13 obligation emerges when the original decision maker is no longer available to provide the statement of reasons. This could occur, for example, because the decision maker has left or been removed from office, has died, has become unfit for duty or has retired. It would be a real detriment to the aggrieved person if a statement of reasons could not be provided at all. Putting aside again circumstances in which detailed notes have been made and kept when the decision was actually made, however, it is not clear how such a statement can provide the actual reasons for the decision made. The Council might want to consider whether in such a case the person responsible for the area when the request is received could give their reasons for the decision made or, if that person is of the view that a different decision should have been made, be empowered to make the different decision and provide reasons for it. In this way any review will proceed on the basis of a set of actual reasons for what is the current decision.

Another difficulty arising from the ex post facto drafting of statements of reasons emerges when decisions are made by senior decision makers such as ministers. When decisions are made following consideration of submissions to the minister that are written in neutral terms so as to allow a range of findings, it will often not be possible to determine from the decision made what the findings and reasons were. The Council might want to consider whether any administrative reforms would improve the recording of ministerial (and similar) reasons at the time of decision making to ensure that accurate statements of reasons can be provided if they are sought. The kinds of difficulties that can arise were exemplified in Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme.9

Of course, in considering what, if any, reforms should take place, regard will need to be had to the very different kinds of decisions covered by s 13. It could be that a ‘one-size’ solution will not fit all in respect of some of these more specific concerns. Section 13 covers decisions:

- that will be of interest to an individual only—for example, entitlement to a subsidy or payment—and that are liable to be challenged only if the application is refused

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that affect the public interest and might be liable to challenge regardless of whether the application is granted or refused—for example, decisions on whether or not to grant approval to a proposed action under the Environmental Protection and Biodiversity Conservation Act 1999 (Cth) that affects a matter of national environmental significance.

that are made in circumstances where the agency involved is producing hundreds of thousands of decisions a year.

that are made in circumstances where the agency or decision maker makes a handful of decisions a year.

that are made where there is a right to full merits review.

that are made where judicial review only is available.

**Decisions made by committees**

A further area where difficulties can arise is when committees are the decision makers preparing statements of reasons. Although there is probably a requirement that a committee provide reasons under s 13 (where applicable), the form the reasons should take is not clear. How, for example, should a committee go about ensuring that the reasons are the reasons of all the members of the committee? Must all committee members approve and settle the statement of reasons? And what happens when there is dissent among committee members about what the reasons were? Section 13 leaves these questions unanswered.

The difficulties are, of course, exacerbated when the reasons need to be provided some time after the decision was made. It is quite likely that membership of the committee will have changed, thus making the provision of actual reasons more difficult.

**Admissibility**

There is also a question about how a decision maker goes about proving that a statement of reasons represents their real reasons for a decision. There is doubt, for example, about the evidentiary status of statements of reasons under s 13 of the Act in circumstances where the statement has been prepared after the decision was made. In Minister for Immigration and Ethnic Affairs v Tavelli the Full Federal Court was considering an appeal from a decision of Wilcox J to reject the tender by the minister of a statement of reasons prepared more than a month after the relevant decision was made. All three judges dismissed the appeal on the basis that admission of the statement of reasons would not have affected the outcome of the proceedings, but only French J held that the statement should have been admitted. Davies and Hill JJ, on the other hand, held that Wilcox J was correct in rejecting the tender, largely for the reason that a self-serving statement made after the event is not normally admissible at the hands of the person who made it.

These concerns would, it is submitted, be heightened in circumstances where, in preparing the reasons the decision maker has been assisted by another person, particularly a lawyer. It could be that, if more rigorous requirements were imposed to ensure that reasons were the actual reasons of the decision maker, it would be appropriate to make special provision for the reasons’ admissibility. There are, of course, countervailing considerations that suggest that an affidavit would be a preferable form of evidence if the reasons are not contemporaneous or are disputed.

**Conclusion**

Section 13 of the Administrative Decisions (Judicial Review) Act aims to promote the integrity of the administrative decision-making and judicial review processes. Its ability to meet that objective, however—in terms of both the decisions to which it does and does not apply and the

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10 (1990) 23 FCR 162.
manner in which it is being implemented—requires reconsideration. This paper touches on only some of the difficulties presented.

Merits review at the federal level

Mark Robinson

In the Administrative Appeals Tribunal Australia is fortunate to have had the benefit of a long-established independent external merits review tribunal of no small stature in the federal scheme of things. It was established by the Administrative Appeals Tribunal Act 1975 (Cth) and was part of what is styled the administrative law ‘package’ designed and proposed in a number of Commonwealth reports in the early 1970s.12

Few administrative law lawyers would have imagined that, about 30 years after the AAT’s establishment, the High Court of Australia would be deliberating on fundamental aspects of the AAT’s nature and the scope of its jurisdiction. The nature of merits review in the AAT was discussed at length by the court in Shi v Migration Agents Registration Authority.13 At [140]-[141], Kiefel J stated (with Crennan J agreeing (at [117])):

The term ‘merits review’ does not appear in the AAT Act, although it is often used to explain that the function of the Tribunal extends beyond a review for legal error, to a consideration of the facts and circumstances relevant to the decision. The object of the review undertaken by the Tribunal has been said to be to determine what is the ‘correct or preferable decision’. ‘Preferable’ is apt to refer to a decision which involves discretionary considerations. A ‘correct’ decision, in the context of review, might be taken to be one rightly made, in the proper sense. It is, inevitably, a decision by the original decision-maker with which the Tribunal agrees. Smithers J, in Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd ((1979) 24 ALR 307 at 335), said that it is for the Tribunal to determine whether the decision is acceptable, when tested against the requirements of good government. This is because the Tribunal, in essence, is an instrument of government administration …

The reasons of the members of the Full Court of the Federal Court in Drake v Minister for Immigration and Ethnic Affairs ((1979) 24 ALR 577) confirm what is apparent from s 43(1), that the Tribunal reaches its conclusion, as to what is the correct decision, by conducting its own, independent, assessment and determination of the matters necessary to be addressed ((1979) 24 ALR 577 at 591 per Bowen CJ and Deane J, 599 per Smithers J; and see Nevistic v Minister for Immigration and Ethnic Affairs (1981) 34 ALR 639 at 648 per Deane J).

In the Shi case Hayne and Heydon JJ described the nature of the AAT’s ‘task’ in some detail (at [96] to [100]). Further, Kirby P discussed at length the nature of the AAT (at [30] to [32]), its function (at [33] to [38]) and the purpose of the AAT Act (at [39] to [42]). Although the case arose in the context of the disciplinary provisions for the control of registered migration agents under the Migration Act 1958 (Cth), these fundamental matters assumed primary significance.

The court held that, when the AAT was reviewing the finding of the migration agent’s regulatory authority that the migration agent was not a fit and proper person to be registered and was not a person of integrity, this did not involve a temporal element, as the Federal Court had held it did by majority in Shi v Migration Agents Registration Authority.14 The court held that the tribunal, in reviewing this decision, was not restricted to a consideration of the events occurring until the time the authority made its decision but could consider later events. It held

11 Member, Third Floor, Wentworth Chambers, Sydney.
12 See the Kerr, Bland and Ellicott Committee reports, as reproduced in The Making of Commonwealth Administrative Law—R Creyke & J McMillan (comps) 1996, Centre for International and Public Law, Law Faculty, Australian National University, Canberra.
that the tribunal could have regard to the state of affairs at the time of making its decision unless in the legislation empowering the decision maker to make the original decision under review there is a statutory qualification that the making of the decision should be restricted to the material before the original decision maker. It held that there was no such statutory qualification in the Migration Act and therefore the tribunal’s review was relevantly unrestricted (as to temporal considerations).

The court also considered the AAT’s power to fix ‘conditions’ in the determination of the review. The tribunal had determined that the migration agent should be cautioned but that the caution should be lifted at a specified time if specific conditions were satisfied – namely, that he be supervised as a migration agent for three years and that he not provide immigration assistance in relation to applicants for a protection visa during that period. The registration authority possessed statutory power to ‘set one or more conditions for the lifting of a caution’ (s 304A of the Migration Act). The High Court determined (by majority) that this power to impose conditions was wide enough to enable the AAT to fashion, or ‘mould’, conditions to the particular circumstances of the case. The court did not comment on the appropriateness of the conditions in the case, only on their legality – with the exception of Kirby J, who stated (at [70]) that the tribunal had made an ‘available and arguable sensible disciplinary decision’.

The court also took the opportunity to endorse aspects of ‘long established’ determinations as to the nature and scope of the tribunal’s task in external merits review in cases such as Drake v Minister for Immigration and Ethnic Affairs, Re Brian Lawlor Automotive Pty Ltd and Collector of Customs (New South Wales) and Minister for Immigration and Ethnic Affairs v Pochi. It is interesting to observe in the Shi case that the High Court accepted the AAT’s significant review role and its evident important place in the federal executive scheme of independent merits review and construed its powers widely in that broader context.

The Shi case has itself raised a number of questions left unanswered by the High Court and that would benefit from investigation or review by the Administrative Review Council. For example, the nature or function of the AAT as an ‘investigative’ body or as an ‘adversarial’ body is not explored. Nor is the manner by which the agency or executive decision maker is to defend the decision in the tribunal or to assist the tribunal is settled. That is so particularly having regard to the recently inserted s 33(1AA) in the AAT Act, which obliges the person who made the decision to use their best endeavours to help the tribunal make its decision. What does this mean in practical terms? Do the model litigant rules apply?

More fundamentally, given the High Court’s firm confirmation of the ‘standing in the shoes’ merits review dogma, what role or significance remains for the primary decision or the decision under review (a question raised but not wholly answered by Kirby J in Shi at [34] and [37]? Is the primary decision merely relegated to the status of a jurisdictional fact? Is it simply part of the material now before the tribunal (as Kirby J holds it is in Shi at [37])? Does it have significance in fixing or narrowing the matters before the tribunal (as the delegate’s decision limited the Refugee Review Tribunal in SZBEL v Minister for Immigration)? What scope is there in the tribunal for raising fresh matters or for ‘ambush’ between the parties at tribunal hearings?

What does it mean for the tribunal to ‘review’ the original decision, as the enabling Act requires and as is provided for in section 25(4) of the AAT Act? In Shi at [43] Kirby J suggests that it merely ‘makes it necessary in each case to identify the precise nature and incidents of the decision that is the subject of the review’.

15 (1979) 24 ALR 577 (Bowen CJ, Deane and Smithers JJ); (1978) 1 ALD 167; (1980) 31 ALR 666.
16 (2006) 228 CLR 152.
17 See the discussion of some of these questions in Aerolink Air Services Pty Ltd v Civil Aviation Safety Authority [2003] AATA 1357 at [4]-[7] (Senior Member MD Allen).
These questions are all the more apposite when the decision maker or the responsible agency, or both, possesses considerable specialist expertise, corporate history, and experience and knowledge. Who is best equipped to deal with such difficult and complex questions and in what manner? These questions lead to further difficult questions about, for example, the best way to provide to the AAT proper resources and expertise in these cases.

Should all matters continue to be dealt with in the same fashion by the tribunal? Should matters concerning safety, such as the regulation of the air transport industry, be dealt with separately or differently? The Administrative Review Council’s investigation, and perhaps resolution, of some of these matters would be better than waiting for the High Court to focus on them in another 30 years’ time.

The Hardiman principle

Simon Daley and Nick Gouliaditis

The Hardiman principle concerns the degree to which certain administrative decision makers can act as contradictors in proceedings challenging their decisions. In Hardiman itself the High Court had unanimously taken issue with the role played by the Australian Broadcasting Tribunal in proceedings in which prerogative writs were being sought against the tribunal. The court said:

In cases of this kind the usual course is for a tribunal to submit to such order as the court may make. The course which was adopted by the Tribunal in this court is not one which we wish to encourage. If a tribunal becomes a protagonist in this court there is the risk that by so doing it endangers the impartiality which it is expected to maintain in subsequent proceedings which take place if and when relief is granted. The presentation of a case in this court by a tribunal should be regarded as exceptional and, where it occurs, should in general, be limited to submissions going to the powers and procedures of the tribunal.

There are, however, a number of uncertainties attaching to the scope and application of Hardiman, and it might be worthwhile for the Administrative Review Council to consider them.

First, although Hardiman concerned the operation of a ‘tribunal’ exercising adjudicatory functions inter partes—that is, tribunals in the nature of court substitutes—it has been observed that the basis of the principle (a concern to maintain the appearance of impartiality) extends to other administrators to whom a matter might be remitted following judicial review. There are cases that suggest Hardiman should be applied in all cases in which the following apply:

- The decision maker is required to accord procedural fairness.
- The application for relief raises the prospect of remitter to the decision maker.
- Either there is present a contradictor prepared to advance arguments in opposition to the applicant’s claim for relief or, when there is no contradictor, there is a public interest that would justify the intervention of the Attorney-General (or other law officer or public

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18 See Kirby J in Shi at [37], describing the matter by reference to Re Control Investment Pty Ltd and Australian Broadcasting Tribunal (No 2) (1981) 3 ALD 88 at 92–3 (Davies J).
20 Senior Lawyer, Australian Government Solicitor, Sydney. The discussion that follows is derived (with the authors’ permission) from a paper presented by Nick Gouliaditis at the Australian Institute of Administrative Law’s Administrative Law Forum, held in Melbourne on 7 August 2008.
21 R v Australian Broadcasting Tribunal; Ex parte Hardiman (1980) 144 CLR 13 at 35–6 (Gibbs, Stephen, Mason, Aickin and Wilson JJ).
official). Only if there is no natural contradictor, and there is no intervention, is an active role justified, and even then it should be limited to what is necessary to assist the court.

Second, there is now conflicting intermediate appellate authority about whether Hardiman should be applied in merits review proceedings. The Full Court of the Federal Court has held that Hardiman applies to proceedings before the Administrative Appeals Tribunal. The Victorian Court of Appeal has, however, encouraged decision makers to take an active role in helping the Victorian Civil and Administrative Tribunal come to the ‘correct or preferable’ decision by defending the decision under review. The Court of Appeal noted that the original decision maker, as repository of the powers and responsibilities conferred on it by the legislative scheme under which it made the relevant decision, has the experience and knowledge to make a unique contribution and that the presence of other contradictors was ‘no guarantee that all relevant matters will be canvassed’. Given that the Victorian Civil and Administrative Tribunal rarely remitted matters, it was unlikely that the impartiality of the original decision maker would be jeopardised by active participation, so long as it did not ‘engage in curial tactics’.

Third, in an apparent further extension of Hardiman, the rule was recently applied to the Australian Securities and Investments Commission in judicial review proceedings in which it sought to defend not its own decision but a decision made by the Administrative Appeals Tribunal (on review from the Australian Securities and Investments Commission). The Full Court of the Federal Court noted that, had the appeal been successful, there would be the possibility of the matter being referred back to the AAT. Further, they reasoned that, pursuant to s 43(1) of the Administrative Appeals Tribunal Act 1975 (Cth):

… it is open to the [AAT], in reviewing a decision, to remit the matter to the original decision-maker for further consideration. Thus it was at least theoretically possible that the [AAT] would remit this matter to [ASIC] for further consideration … We consider that the view of the High Court as expressed in Hardiman should have informed [ASIC] in deciding upon the role which it would play in these proceedings, both in the [AAT] and on appeal to this Court.

Practitioners of administrative law would recognise that there is currently a major disconnect between these significant extensions of the Hardiman principle and the actual role decision makers play in many areas of administrative law litigation. The field of migration law is an example. If the cases just discussed are accepted as the proper scope of the rule, there is a real question about the role taken by the Minister for Immigration and Citizenship in defending decisions of the Migration Review Tribunal and the Refugee Review Tribunal. There is also a real question about the minister’s role in defending his own decisions.

A more fundamental question is whether the Hardiman principle is appropriate in any case. Arguably, decision makers are often best placed to make submissions on their jurisdiction and procedure. It might also be incongruous that in cases raising questions of public law the only

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24 See, for example, Bankstown City Radio Co-operative Ltd v Australian Communications and Media Authority [2008] FCA 89.
parties that should be allowed to take an active role are those more concerned with their narrow commercial interests than the broader public interest.29

Even if there is a role for such a principle there is a question as to whether applying Hardiman in the broad manner suggested by some cases fails to differentiate sufficiently between court-like tribunals, which must maintain an impartial and dignified stance, and ‘administrative tribunals charged with the development and implementation of policies under a very broad statutory framework’.30

No doubt that is why in cases where the private parties will not adequately ‘expose all aspects of the case’ the authorities say it is desirable for the Attorney-General to intervene as an adversary.31 Whether it would be a satisfactory solution to identify a surrogate contradictor such as the Attorney-General or the Commonwealth to intervene in every case in which a primary decision maker is constrained might also be worthy of further consideration.

## Standing and related matters

**Dr Matthew Groves**

### Standing in judicial review

Although the last 30 years have witnessed an explosion of administrative review, Australia has not developed a culture of public interest litigation. One reason for this is that the rules of standing in judicial review retain some restrictive elements that make it difficult for representative groups to challenge government decisions. The requirement that, to have standing, a complainant must be able to show a special interest or be aggrieved by a decision does not equate with even the strong views or commitments of a group.33 As a consequence, the special interest test has yielded uneven results in environmental cases—particularly for representative bodies that seek to challenge decisions concerning their local area. Sometimes the courts accept that such groups have standing34; sometimes they do not.35 These disparate results led one state court to suggest that some lower courts have ‘run ahead of both High Court authority, and of principle’.36 Justice Kirby has said the High Court should review the environmental cases in order to determine the correct approach to standing.37

Although the High Court has not to date taken up that suggestion, it does appear that any reform to standing will have to come from the courts. The Australian Law Reform Commission’s repeated recommendations to relax standing tests and to introduce more uniformity in the various statutory tests have not been accepted by government.38 As a result, people seeking to

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31 *Re City of Dartmouth* (1976) 17 NSR (2d) 425 at 440 (MacKeigan CJ).
32 Associate Professor, Law Faculty, Monash University.
33 These are liable to be branded as merely emotional or intellectual concerns, which are clearly insufficient to establish standing: *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493, 530–1.
34 *North Coast Environmental Council Inc v Minister for Resources* (1994) 127 ALR 617.
36 *Re MacTiernan; Ex parte Coogee Coastal Action Coalition Inc* (2005) 141 LGERA 106, 112 (Wheeler JA).
vindicate their interests might have to navigate their way through the various ‘interested’ or ‘affected’ or ‘aggrieved’ standards, depending on the statute under which a matter is raised. This is unsatisfactory and undermines moves to simplify access to government.

**A duty of consultation**

The difficulties representative groups continue to face in the law of standing are reproduced in the requirements for natural justice. The rules of natural justice do not apply to decisions that affect the public at large, as opposed to individuals or particular groups.\(^{39}\) In the absence of any duty to provide natural justice—in the form of notice of a proposed decision and an opportunity to comment—it is difficult for representative groups and public interest bodies to participate in many decisions of broad public importance. There is, in effect, no duty of consultation on governments and their agencies. One consequence of this is that administrative rights often do not extend to decisions of general public importance.

The United Kingdom has adopted a novel solution in order to manage the increasing expectations of many people and groups in relation to participating in government decision making. The Government has adopted general guidelines for consultation that apply when no other procedures for consultation apply.\(^{40}\) Almost every government department in the nation and many agencies now follow these guidelines.\(^{41}\) The effect of the guidelines is that many decisions that might have a widespread effect, and that in Australia would be categorised as ‘policy’ or ‘political’ in character, are open to public comment as a matter of course. No Australian government has taken this approach, although some individual agencies have done so.

**Fair outcomes in judicial review**

The High Court has declared that s 75(v) of the Constitution does not enable the judicial branch of government to impose notions of good administration and other normative ideas on the executive branch of government.\(^{42}\) Under this approach the courts may enforce legal but not other values in their judicial review jurisdiction. Tribunals are not subject to the same constitutional limitations, so their focus on reaching the correct or preferable decision allows them to take account of principles of good administration such as consistency and fair outcomes. This is territory Australian courts cannot enter.

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\(^{39}\) The authorities are usefully summarised in *Geelong Community for Good Life Inc v EPA* [2008] VSC 185 at [21]–[29] (Cavanough J).


\(^{41}\) The list of departments and agencies that observe the guidelines is available at www.berr.gov.uk/whatwedo/bre/consultation guidance/page44420.html/consultation guidance/page44420.html, viewed 29 October 2008.

\(^{42}\) *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 213 CLR 1, 12 (Gleeson CJ).
Over and out: some concluding thoughts

Margaret Harrison-Smith

In December 2008 I concluded more than six years as Executive Director of the Administrative Review Council Secretariat. I can claim the record for the longest serving secretariat head since the Council’s inception some 30 years ago. Not all records are worth claiming, but this is one, I think, that is. My experience with the Council over the years was both stimulating and productive.

The work of the Council

I accepted the position of Executive Director in mid-July 2002, and since then the Council has produced a steady stream of reports and guideline publications. Among the most innovative of these publications, not only in this country but also elsewhere, has been the Council’s 2004 report entitled *Automated Assistance in Administrative Decision Making*. The report helped the Department of Immigration and Citizenship respond to recommendations for review and analysis of the department’s information technology systems, as put forward in 2005 in the Palmer report.

*Automated Assistance* was also the catalyst for further work by an across-agency working group headed by the Australian Government Information Management Office, in the Department of Finance and Deregulation, and comprising representatives of 14 Commonwealth departments and agencies. I represented the Council on the working group. What impressed me most about the composition of this group was the involvement—notwithstanding some initial uncertainty on their part—of information technology experts and others involved in the management of agency computer systems. The practical, ‘hands-on’ experience of these people is apparent in the better practice guide resulting from the work of the group.

The Council’s most recent report, *Administrative Accountability in Business Areas subject to Complex and Specific Business Regulation*, also moves into new territory, exploring the degree to which administrative law mechanisms and principles should extend to private business regulation by non-government industry bodies and others. The report is a companion, therefore, to two earlier reports, the first relating to government business enterprises and the second to the contracting out of government services. Like the most recent report, these earlier reports responded to important evolutionary changes in government administration, both of them exploring difficult and evolving areas not previously the subject of in-depth consideration. Work in such areas can be, and in my experience undoubtedly is, testing, but it is nonetheless worthwhile.

My period as Executive Director also saw the Council continuing to wholeheartedly embrace the educational role described for it by the Senate Legal and Constitutional Legislation Committee’s

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1 Before 2000 the head of the Council Secretariat held the title of Director of Research.
The success of this focus can be gauged by the response to the five best-practice guides for government decision makers released by the Council in August 2007. Representing a natural progression from the Council’s 2004 curriculum guideline publication Legal Training for Primary Decision Makers and covering the areas of lawfulness, natural justice, evidence, facts and findings, reasons and accountability, the guides have been hugely successful. The feedback on them I have received has been unswervingly positive. The Department of Immigration and Citizenship strongly supported the development of the guides, annotating them with materials of particular relevance to it. The department has since employed the guides as an integral part of its post-Palmer reform strategy.

It is, I think, worth noting that one of the most avid customers to date for the guides has been the Australian Public Service Commission. Through the commission’s use and promotion of the guides, the Council has influenced large numbers of people working in the Australian Public Service. As they move between agencies, these people will take with them the skills they have acquired through the guides.

This is all very satisfying to me and, undoubtedly, to all those involved in the guides’ production.

One should not, however, draw the conclusion from this that the Council has shied away from its more traditional areas of interest. In my time the Council produced two publications on judicial review – one a discussion paper and the other a report. The report is a companion to the Council’s earlier, and still integral, guideline publication What Decisions Should Be subject to Merits Review? Like the earlier guideline publication, the report offers valuable assistance for government policy makers and legislative drafters when they are determining rights to seek review of the actions of government decision makers.

The best-practice guides and the Council’s work on merits and judicial review also reflected a growing tendency on the part of the Council not to make direct recommendations to government. In recent times the tendency has instead been to suggest ways in which areas of administrative law might be improved, through, for instance, the application of best-practice principles.

Invariably, these principles have been carefully crafted by the Council with regard to the administrative law values of lawfulness, transparency, rationality, fairness and efficiency. Through this less ‘sharp-edged’ approach, the Council has had considerable success in inculcating in areas of government administration its views and approaches.

The Council’s 2008 report The Coercive Information-gathering Powers of Government Agencies is illustrative. The report contains a set of 20 best-practice principles covering matters such as the drafting of notices, record keeping, authorisation and delegation, training, conflict of interest, notices, examinations and hearings, and privilege. The Commonwealth Ombudsman has noted

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8 ibid. recommendation 7.
that this report is being widely turned to by government agencies in the exercise of their information-gathering powers. The report also provides for the Ombudsman a ready-made set of guideline principles to turn to and to recommend to agencies for application in the appropriate use of their powers.

Importantly, the Council does not pluck guidelines out of the air. With the assistance of its Secretariat, it consulted extensively on each piece of work it has produced, seeking to involve all with an interest in the area in question from an early stage. I found this aspect of the Council’s work very satisfying: it allowed me to be an ambassador for good decision making, as well as allowing me to gain an appreciation of the extent of agencies’ knowledge of administrative law and of administrative law principles. Overall, I was impressed by the extent of this knowledge and by the high regard in which many agencies hold the work of the Council.

**An advisory role**

Another important aspect of the Council’s work is the provision of advice to government. During my period with the Council I drafted numerous letters of advice on a diverse range of administrative law subjects. This is an area in which I would like to see the Council take a greater role. Of course, in the case of proposed legislation there are often time constraints and tight government schedules that militate against the harvesting of comments from a widely dispersed and invariably busy member group. Nonetheless, it can be done.

Time pressures also sometimes discourage departments and agencies from seeking the benefits of the Council’s views and expertise. But the Council can, and does, respond quickly when required. The Council could further refine and promote this capacity throughout government. Obviously, the sooner the Council’s views are sought, the better. Once policy approaches and implementation strategies are established, it is difficult to amend them or to turn them back.

**The changing landscape**

What changes to the administrative law landscape did I see during my term as Executive Director? One of the most interesting developments for me — one I have already touched on in my reference to the Council’s work on government business enterprises, contracting out and complex and specific business regulation — was the increasingly innovative response of administrative law and related administrative accountability mechanisms to the growing complexity of government administration.

One manifestation of this has been the extension of the Commonwealth Ombudsman’s jurisdiction under the *Ombudsman Act 1976* in response to the increasing extent to which government services are provided to the public by non-government entities. As a result of the amendments, a complaint about one of these entities is to be treated as a complaint about the government agency on whose behalf the service is being provided.

Another consequence of this growing complexity has been recognition of the need to supplement the traditional focus of administrative law on the review of individual decisions with strategies directed at achieving a broader level of continued agency accountability and sound administrative practice. The Council’s educative publications are, of course, responsive to this need. Others — notably the Commonwealth Ombudsman — have also responded to the challenge, with an increase in the number of own-motion investigations and the emergence of new, and important, auditing and inspection roles.

Integrity bodies such as the Inspector-General of Taxation have also been established to oversee specialist areas, and the role of the Auditor-General’s office now encompasses an important performance auditing function. The number of industry ombudsmen has also expanded in recent times.
The yardstick of time

One measure of my time with the Council is that, of the members who were there when I formally assumed the Executive Director’s role, only two—Professor Robin Creyke and Robert Cornall AO—remained at the end of my term. Reassuringly, ex officio members Justice Garry Downes AM and Professor David Weisbrot AM were also still there. Among others who came and went during my time are immediate past President Wayne Martin QC, now Chief Justice of Western Australia, and Stephen Gageler SC, now the Commonwealth Solicitor-General.

The quality of the Council’s membership made my experience worthwhile. This is not to say, of course, that things were always ‘smooth sailing’. With such a highly charged group in all its manifestations over the years, it is inevitable that tact and tenacity had to be essential elements, albeit unstated, of the duty statement for the Executive Director. An ability to draw together and to synthesise often disparate and unconnected views was also a vital, and again unstated, element of the position.

Another aspect of the Executive Director position that will continue to be a source of fond memories for me was the staff of the Secretariat. I have concluded that a special bond develops between Secretariat members, perhaps because of our somewhat amorphous position as the bridge between the Council and the Attorney-General’s Department, of which we were a part; perhaps, too, because of the singular nature of the ‘crises’ that we encountered.

As with all small work units, often the odds can seem stacked against you—the meeting papers that need to be circulated in the face of major mechanical failures in the photocopy room; the Council report that comes back from the printer with pages missing, or worse; the Council member stranded at an airport surrounded by swirling mists … Perhaps not so unique, but in a small team having a more acute impact on all. The same goes, though, for the good times: these are savoured by each team member.

It was with some sadness that I left the Council. But I felt that a changing of the guard was due and that it was time for me to try new things. I wish the Council well, and I offer my encouragement and support to those who will take it forward.
Admin law watch

This section provides information about recent developments in the area of administrative law.

Law reform

Current law reform initiatives are furthering policies of open, accountable and transparent government through improved access to government information and greater participation in government by citizens. Improving access to justice and social inclusion are both policies that also have strong support across governments and are being reflected in a range of new laws and administrative processes.

Freedom of information

Commonwealth

The Australian Government is reforming the Freedom of Information Act 1982 with the principal objective of promoting a culture of disclosure throughout government. The reforms are being implemented in two stages. In the first stage the Government introduced legislation to repeal the power to issue conclusive certificates under the FOI Act and the Archives Act 1983. The Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act 2009 came into force on 7 October 2009. In his second reading speech on the Bill, the Cabinet Secretary advised the Parliament:

> The measures in this Bill deliver on the Government’s election commitment to abolish conclusive certificates. They also establish a fair balance between ensuring appropriate safeguards are in place in the review process with respect to sensitive information, while at the same time ensuring full independent merits review of agencies’ decisions on FOI.

The second stage of the reforms is made up of a broader package of changes. The Government introduced the Information Commissioner Bill 2009 and the Freedom of Information Amendment (Reform) Bill 2009 into the parliament on 26 November 2009, following public consultation on exposure drafts of these Bills earlier in the year. The Information Commissioner Bill will establish the office of the Information Commissioner, which will bring together the independent oversight functions for privacy protection (principally regulated by the Privacy Act 1988) and for access to government information (as regulated by the FOI Act). For this purpose, the Bill creates two new independent statutory positions — Information Commissioner and Freedom of Information Commissioner. It also makes provision for the appointment of the Privacy Commissioner in this legislation instead of under the Privacy Act. On 26 February 2010 the Government announced the appointment of Prof. John McMillan AO as the Information Commissioner Designate.

Proposals in the Freedom of Information Amendment (Reform) Bill are drawn in part from the findings of the 1995 joint Australian Law Reform Commission and Administrative Review Council Open Government report. The report’s main findings have been updated and supplemented by other measures aimed at delivering better access to government information.

In addition to the structural reforms, among the significant changes envisaged for the FOI Act are the proposed agency information publication scheme and a change to the period for which the FOI Act will govern access to government information. The proposed information publication scheme establishes a legislative framework for agencies to be proactive in the publication of government information. It is intended that the scheme will change the focus of the FOI Act from one that is now largely reactive to requests being made for access to documents. The Bill will amend the Archives Act to bring forward the open access period for all records (other than Cabinet note books and census information) from 30 years to 20 years. This
means the FOI Act will govern access for 20 years instead of 30 years. The open access period for Cabinet note books is to be brought forward from 50 years to 30 years.

The Information Commissioner will be able to carry out full merits reviews of FOI decisions made by agencies and ministers, most applications probably being determined on the papers. The commissioner will also take over the bulk of the role of the Ombudsman in relation to investigating complaints about handling of FOI requests. The Ombudsman will still have the capacity to investigate FOI complaints where it would be more appropriate or effective for the Ombudsman to do so— for example, if an FOI complaint forms part of a wider grievance relating to agency action or if the complaint concerns actions by the office of the Information Commissioner.

The Bill also allows for a stronger distinction between the remedy of a merits review function (if a person is concerned about the correctness of an FOI decision) and a complaints investigation function (if a person is concerned about procedural matters such as delay or a failure to receive assistance). At present, if a person makes a complaint to the Ombudsman about an FOI application they cannot make an application to the Administrative Appeals Tribunal for review of the decision. That limitation will be removed by the Bill, with the intention that a person’s grievance is handled under the appropriate function.

The Senate Standing Committee on Finance and Public Administration reported on the Bills on 16 March 2010. On 17 March 2010 the Government circulated amendments it intended to move to the Information Commissioner Bill and the Freedom of Information Amendment (Reform) Bill. Both Bills passed through the Parliament on 13 May 2010.

Further information about the FOI reforms is available from the Department of the Prime Minister and Cabinet’s website— www.dpmc.gov.au/consultation/foi_reform/index.cfm.

New South Wales

In February 2009 the New South Wales Ombudsman released a special report on the state’s FOI regime. Opening up Government made 88 recommendations, the first of which was that ‘the government should continue to actively encourage and require greater proactive disclosure of information by agencies’. An integral part of the Government’s response to the Ombudsman’s report is the overhaul of the state’s FOI regime. The New South Wales Parliament has passed three new Acts, which were assented to on 26 June 2009:

- the Government Information (Public Access) Act 2009
- the Government Information (Information Commissioner) Act 2009

It is expected that the new regime will become fully operational in 2010. Until it does, the current New South Wales Freedom of Information Act 1989 applies.

Acting Information Commissioner Maureen Tangney has begun setting up the new office of the Information Commissioner. The Government intends to have a permanent office holder appointed by the time the new legislation comes into force. The Joint Parliamentary Committee on the Office of the Ombudsman and the Police Integrity Commission has accepted the Attorney-General’s recommendation for the appointment of Deirdre O’Donnell as New South Wales’ inaugural Information Commissioner.

Alternative dispute resolution

Commonwealth

On 13 June 2008 the Attorney-General issued to the National Alternative Dispute Resolution Advisory Council a reference asking that it inquire into and identify strategies for removing barriers to and providing incentives for the use of alternative dispute resolution instead of civil proceedings and during court and tribunal processes. The Attorney-General has also asked for advice on initiatives government might take to support the recommended strategies, including legislative action.

On 26 March 2009 the Advisory Council released its issues paper, *ADR in the Civil Justice System*. It subsequently received over 60 submissions and held extensive consultations with a variety of interested parties in Sydney, Melbourne and Canberra.

On 4 November 2009 the Attorney-General launched the Advisory Council’s report on alternative dispute resolution in the civil justice system, *The Resolve to Resolve – embracing ADR to improve access to justice in the federal jurisdiction*.

The report contains 39 recommendations aimed at encouraging greater use of ADR in civil proceedings, including the following:

- a legislative obligation on prospective litigants to take genuine steps to resolve disputes before they go to court
- developing and widely promulgating a National Alternative Dispute Resolution Protocol to promote the consistent application of ADR principles and processes
- requiring lawyers and the courts to provide appropriate information or advice in relation to ADR processes
- developing a standards framework for advisory ADR processes — similar to the framework that was developed for mediators (the National Mediator Accreditation System, or NMAS)
- developing judicial case management courses focusing on ways in which judges can identify matters suitable for referral to ADR and suitable ADR techniques and mechanisms
- supporting the development of accessible and effective community-based and private ADR services
- providing a model dispute resolution clause as a template that can be voluntarily adopted in contractual documents
- requiring Commonwealth agencies to include dispute resolution clauses in contracts
- improving data collection, evaluation and research in the federal civil justice system to ensure that future ADR policy is built on a strong evidence base.

The Commonwealth Government has already adopted a number of the recommendations put forward by National Alternative Dispute Resolution Advisory Council. In December 2009 the Attorney-General asked NADRAC to undertake three new references. These are to develop a statement of national ADR principles and a supporting guide, to provide advice on legislative changes required to protect the integrity of various ADR processes, and to develop a model dispute management plan for Commonwealth agencies.

New South Wales

In May 2009 the New South Wales Government released the discussion paper *ADR Blueprint*. From this blueprint the Government has released two of several proposed ADR blueprint draft

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recommendations reports. The first proposes that people be required to take all reasonable steps to resolve their disputes without going to court. The second deals with ADR in government and states that there are three main strategies for developing a less litigious culture in New South Wales:

- encouraging people to use other suitable dispute resolution strategies
- changing the culture of the legal profession, so that it becomes less focused on running cases and more focused on solving problems
- structuring the civil justice system so that, when litigation is contemplated or begun, the way the system works increases the likelihood that the dispute will be settled quickly.

In August 2009 the Government released ADR Blueprint Draft Recommendations 1: pre-action protocols. The report contains four recommendations: that the Civil Procedure Act be extended to pre-action conduct; that a guide for people in civil disputes be developed; that pre-action protocols for introduction in family provision disputes be developed and other types of disputes amenable to pre-action protocols be identified; and that courts and tribunals review their rules and practice notes to ensure that ADR is considered as early as possible.

In September 2009 the Government released ADR Blueprint Draft Recommendations Report 2: ADR in government. Among the report’s draft recommendations are that the Model Litigant Policy be strengthened to give greater emphasis to the role of ADR in resolving civil claims and litigation, that the Government prepare an annual public report on its use of ADR, and that ADR clauses be included in all appropriate government contracts.


**Victoria**

On 6 May 2009 the Victorian Parliament’s Law Reform Committee released a report proposing future directions for alternative dispute resolution and restorative justice in Victoria. The report contains 44 recommendations designed to realise the potential of ADR services in Victoria, ensure high-quality services, and make ADR accessible to all members of the community. Among the committee’s recommendations are the following:

- that barriers to access for members of the community be reduced — including by establishing more dispute settlement centres throughout the state, providing more assistance for people from non-English speaking backgrounds and developing culturally appropriate services
- that Victorians’ capacity to resolve civil disputes themselves be augmented through education in conflict resolution and communication skills
- that the supply of ADR services be expanded — particularly by exploring the scope for additional industry ombudsman schemes and by conducting research into the potential for using online ADR.

The committee’s report contains 34 recommendations aimed at improving current restorative justice programs and making restorative justice more widely available in Victoria. Among other things, the recommendations concern the following:

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• improving the experiences of victims participating in the Youth Justice Group Conferencing Program, a restorative justice program operating in the Children's Court of Victoria, through increased provision of information and support to victims and more follow-up with victims after a group conference

• increasing the quality and consistency of restorative justice services through the training and accreditation of service providers

• expanding restorative justice programs, including a staged roll-out of such programs to suitable adult offenders, a pilot program using restorative justice for some more serious offences (but not for family violence and sexual offences) and a trial restorative justice program for suitable offenders after they have been sentenced by a court.

Further information can be obtained from www.parliament.vic.gov.au/LAWREFORM/inquiries/ADR/.

On 28 May 2008 the Victorian Law Reform Commission released a report on its inquiry into the civil justice system.\(^3\) The terms of reference required the commission to undertake a number of tasks, including identification of the goals of the civil justice system and the principles that should guide the rules of civil procedure. The commission was also asked to identify the key factors that influence the operation of the civil justice system, including matters affecting the timeliness, cost and complexity of litigation.

The report made 177 recommendations with a view to making civil litigation in Victoria cheaper, simpler and fairer. It recommended increasing ADR resolution through greater use of an increased array of options for ADR, more effective use of industry dispute resolution schemes and additional provisions for mandatory referral to ADR.


**Access to justice**


In October 2009 the Attorney-General’s Department held national consultations on the taskforce’s report. This included a number of public seminars, a call for submissions and online feedback.

The Strategic Framework is the central recommendation of the taskforce’s report. It comprises principles for access to justice policy making and a methodology for translating the principles into practice. The framework has at its base five principles:

• accessibility

• appropriateness

• equity

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• efficiency
• effectiveness.

In November 2009 the Standing Committee of Attorneys-General adopted the access to justice principles to guide future decisions affecting civil justice.

The Strategic Framework supports a justice system that does the following:
• promotes access to mechanisms for the early resolution of problems and disputes
• establishes a ‘triage’ function, enabling matters to be directed to the most suitable destination for resolution, regardless of how people come into contact with the system
• provides capacity for resources to be directed in such a way as to reflect where and how people come into contact with the justice system
• promotes social inclusion by targeting the resolution and identification of broader concerns that might be the cause of particular legal problems
• promotes fair outcomes
• empowers individuals to resolve disputes between themselves when appropriate, without recourse to the institutions of the justice system
• allocates resources more efficiently, including through ongoing evaluation
• gives every individual improved access to effective resolution opportunities, regardless of how they come into contact with the justice system.

Policy makers should apply the Strategic Framework to all decisions affecting access to justice in the federal civil justice system.

Chapter 10 of the taskforce’s report makes recommendations specific to administrative law, including improving the quality of primary decision making and developing options for more pro-active case management in the Administrative Appeals Tribunal.

The Government is currently considering a range of measures for implementation that support the improvement of the justice system as a whole, consistent with the Strategic Framework, including measure relating to administrative law matters.

The Human Rights Consultation

On 21 April 2010 the Attorney-General, the Hon. Robert McClelland MP, launched the Australian Government’s new Human Rights Framework, which outlines action the Government will take to promote and protect human rights. The framework is available online at www.ag.gov.au/humanrightsframework.

The Framework reaffirms the Government’s commitment to human rights and community engagement. It draws on the valuable work undertaken by the National Human Rights Consultation in canvassing the views of the Australian community. Guided by the report of the National Human Rights Consultation, the Government has set education about human rights and responsibilities as the highest priority within the framework. The framework also includes measures to enhance parliamentary scrutiny, including a new Parliamentary Joint Committee on Human Rights and a requirement that statements assessing compatibility of new laws with our international human rights obligations accompany new legislation. In addition, the Attorney-General announced the inclusion of the President of the Australian Human Rights Commission as an ex officio member of the Administrative Review Council. The addition of the
President of the AHRC will promote the significance of human rights in the administrative law system.

**Norfolk Island: administrative law reform**

On 17 March 2010 the Australian Government introduced into parliament the Territories Law Reform Bill. If passed, the Bill will introduce important reforms to Norfolk Island’s governance arrangements. It also proposes amendments to Commonwealth administrative laws to strengthen the accountability and transparency of the Norfolk Island Government and Administration. In part, the Bill implements recommendations of the 2003 report of the Joint Standing Committee on the National Capital and External Territories, entitled *Quis custodiet ipsos custodes?: inquiry into governance on Norfolk Island*. In particular, the report recommended extension to Norfolk Island of the benefits of a comprehensive system of administrative law, commensurate with that available to other Australians.

The proposed amendments will extend to Norfolk Island the application of the *Administrative Appeals Tribunal Act 1975*, the *Freedom of Information Act 1982* and the *Privacy Act 1988*. In addition, through amendments to the *Ombudsman Act 1976* and the *Norfolk Island Act 1979* the Commonwealth Ombudsman will become the Ombudsman for Norfolk Island. The *Administrative Appeals Tribunal Act 1995* will not apply to all decisions made under Norfolk Island enactments: Part 4 of the Bill proposes amendments to the Act that will confer on the tribunal merits review jurisdiction for specified decisions under Norfolk Island legislation. The amendments in the reform Bill will be supplemented by regulations that will specify which decisions made under the authority of Norfolk Island law may be subject to Administrative Appeals Tribunal merits review. Use of regulations will allow for staged implementation of the reforms, to be carried out in consultation with the Administrative Appeals Tribunal and the Norfolk Island Government and Administration.

**Reviews**

**The Legislative Instruments Act**

In March 2008 the Attorney-General appointed a committee to review the *Legislative Instruments Act 2003*. The Act came into force on 1 January 2005, establishing a comprehensive regime for the making, registration, publication, parliamentary scrutiny and sunsetting of Commonwealth legislative instruments. The committee comprised Mr Anthony Blunn, Commonwealth Ombudsman Prof. John McMillan AO and Mr Ian Govey, Deputy Secretary of the Commonwealth Attorney-General’s Department.

Overall, the committee found that the Act is performing well by providing public access to accurate and authoritative information about the law. The committee’s report makes 46 recommendations dealing, among other things, with the following:

- fine-tuning the practical operation of the Act’s regime
- supporting the operation of the Federal Register of Legislative Instruments
- encouraging better consultation practices
- promoting high drafting standards
- ensuring that legislative instruments are regularly reviewed in order to determine whether they are still needed.

The Environment Protection and Biodiversity Conservation Act

On 31 October 2008 the Hon. Peter Garrett, then Minister for the Environment, Heritage and the Arts, commissioned an independent review of the Environment Protection and Biodiversity Conservation Act 1999. The review is a statutory requirement provided for by s 522A of the Act. The review was carried out by Dr Allan Hawke, who released an interim report on 3 August 2009. The report nominated a number of areas for additional consideration but made no conclusions or recommendations. Among the main areas for further consideration are the following:

- the purpose of the Act
- the division and harmonisation of responsibilities for the environment between the Commonwealth and the states and territories
- the appropriateness of the current matters of national environmental significance as triggers under the Act and proposals for the inclusion of additional triggers
- alternative approaches to biodiversity conservation
- improved arrangements for performance auditing and compliance — including for regional forest agreements and other bilateral agreements
- the scope for review of decisions made under the Act
- opportunities for streamlining environmental regulation.

On 30 October 2009 Dr Hawke presented his final report — The Australian Environment Act: report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999 — to the Minister for the Environment, Heritage and the Arts, who tabled it in parliament, as required by s 522A of the Act, on 21 December. The report recommends an integrated package of reforms, including the following:

- establishing an independent Environment Commission to advise government on project approvals, strategic assessments, bioregional plans and other statutory decisions
- streamlining approvals processes through earlier engagement in planning and providing for more effective use of and greater reliance on strategic assessments, bioregional planning and approvals, and bilateral agreements
- creating a new matter of national environmental significance for ‘ecosystems of national significance’ and introducing an interim greenhouse trigger
- improving transparency in decision making and providing greater access to the courts for public interest litigation.


The Australian Law Reform Commission

Privacy

The Australian Law Reform Commission’s final report on privacy law and practice, For Your Information: Australian privacy law and practice (report no. 108), was delivered to the Commonwealth Attorney-General on 30 May 2008 and was launched by the then Cabinet Secretary, Senator John Faulkner, and the Attorney-General, the Hon. Robert McClelland MP, on 11 August 2008. The report recommends 295 changes designed to improve Australia’s privacy framework. Central to these changes are a unified set of Privacy Principles for the public and
private sectors, national consistency in privacy law at all levels of government, and keeping the
Privacy Act technologically neutral to ensure its continued relevance.

The Government said it intended to respond to the report in two stages. On 14 October 2009 it released the first stage of its response, which outlined its position in relation to 197 recommendations relating to the following:

- developing a single set of Privacy Principles
- redrafting and updating the structure of the Privacy Act
- responding to the impact of new technologies on privacy
- strengthening and clarifying the Privacy Commissioner’s powers and functions
- introducing comprehensive credit reporting and better protections for credit reporting information
- improving and clarifying the protections associated with the sharing of health information and the ability to use personal information to facilitate research in the public interest.

The Government has announced that it plans to release an exposure draft implementing the first-stage response in early 2010.


The Royal Commissions Act
On 6 April 2009 the Australian Law Reform Commission released Review of the Royal Commissions Act (issues paper no. 35). The commission had been asked by the Attorney-General to review the operation of the Royal Commissions Act 1902 (Cth), including whether royal commissions have sufficient powers to operate effectively, whether there are suitable protections for the rights of people who participate in a royal commission, and whether there is a need to establish other forms of inquiry that are less formal and more cost-effective.

On 18 August 2009 the commission released discussion paper no. 75, Royal Commissions and Official Inquiries, which contained 75 proposals. The final report, Making Inquiries: a new statutory framework (report no. 111), was tabled in parliament on 4 February 2010. The report contains 82 recommendations, including that the Royal Commissions Act be amended and renamed the Inquiries Act in order to provide for the establishment of two tiers of public inquiry (royal commissions and official inquiries), that royal commissions be the highest form of inquiry established by the Governor-General to look into matters of substantial public importance, and that official inquiries be established by a minister to look into matters of public importance. Further details are available at www.alrc.gov.au.

Secrecy and confidentiality
On 5 August 2008 the Attorney-General issued to the Australian Law Reform Commission terms of reference for reviewing secrecy and confidentiality provisions in federal legislation. The commission was to ensure that whatever options it developed were ‘balanced against the need to maintain an open and accountable government through providing appropriate access to information’. An issues paper, Review of Secrecy Law, was released in February 2009 and a discussion paper in June 2009.

The final report, Secrecy Laws and Open Government in Australia (report no. 112), was tabled in parliament on 11 March 2010. The principles underpinning the ALRC’s recommendations are as follows:
• Administrative and disciplinary frameworks play the central role in ensuring that
government information is handled appropriately and that every person in the information
chain understands their responsibilities in respect of that information.

• Criminal sanctions should be imposed only where they are warranted — when the disclosure
of government information is likely to cause harm to essential public interests — and where
this is not the case the unauthorised disclosure of information is more appropriately dealt
with by the imposition of administrative penalties or the pursuit of contractual remedies.

• There is a continuing role for properly framed secrecy offences — both general and specific —
in protecting Commonwealth information, provided that they are clear and consistent and
directed at protecting essential public interests.


**The Commonwealth Ombudsman**

In April 2009 the Commonwealth Ombudsman published the *Better Practice Guide to Complaint
Handling*. The first guide had been published by the office in 1997; the new guide takes account
of the substantial development in complaint handling practice in government in the past
10 years.

On 3 August 2009 the Commonwealth Ombudsman published a report entitled *Putting Things
Right: compensating for defective administration*, which examines the operation of the Compensation
for Detriment Caused by Defective Administration Scheme. Among other things, the
Ombudsman’s recommendations cover the following:

• providing greater visibility for the scheme, so that the public knows they can ask to be
  compensated for government error

• establishing an interdepartmental advisory or review panel to deal with disputed or
  exceptional claims under the scheme and to have a
  ‘best-practice’ leadership role

• using the potential offered by information technology to improve case monitoring, provide
  support for decision making and capture feedback

• dealing with ‘administrative drift’ (needless delays) in finalising cases.


In November 2009 the Commonwealth Ombudsman published an issues paper, *Mistakes and
Unintended Consequences — a safety net approach*, which examines the problems that can arise, and
options for resolving them, when legislation has unforeseen consequences that affect individuals
harshly and are at odds with the intent of the regime. The paper also looks at circumstances
where an agency acknowledges it has erred when making a decision but has no explicit power to
reconsider and remake the decision.

The report is available at
cces.pdf.