ADMINISTRATIVE LAW AND INVESTIGATIVE AGENCIES

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In my address to you today, I will discuss the application of administrative law to investigative agencies. What review is possible of decisions made and actions taken in investigations? What principles apply to that review?

Statutory powers of investigation are a means to an end, not an end in themselves. These powers are given to agencies as a means of assisting them to enforce other laws - in the case of the ASC, the Corporations Law, in the case of the TPC, the Trade Practices Act, in the case of the NCA, the criminal law generally (albeit within the field of organised crime).

Powers of investigation are administrative in nature. It has long been clear that these powers are administrative and not judicial or legislative in nature.[1]

The role of royal commissions

Perhaps the most notable repositories of special investigative powers have been, and still are, royal commissions.

Commissions of inquiry are a very long established part of the system of government inherited from the United Kingdom. The history of royal commissions extends back to the Domesday Book of 1086, which was the result of an inquiry appointed by William the Conqueror to establish the ownership of land holdings in England for taxation purposes[2] Royal commissions have been a regular feature of the UK system of government over the centuries.

Royal commissions are part of the executive arm of government. Their function is not judicial in nature.[3] This is so even where their powers include the power to conduct hearings, to summons and examine a witness on oath and to make decisions on refusal to answer questions or produce documents.[4] The basic functions of royal commissions are to inquire and report.

The Commonwealth and all states of Australia have enacted legislation regulating commissions of inquiry in one form or another.[5] These commissions are armed with statutory powers to require the attendance of witnesses and the production of documents.

In the past ten years, we have seen a number of royal commissions and commissions of inquiry established to inquire into a vast range of issues: possible illegal activities and associated police misconduct in Queensland (the "Fitzgerald Inquiry"), the business dealings of the WA Government (the "WA Inc Royal Commission"), the collapse of Tricontinental, corruption in the NSW Police Service, aboriginal deaths in custody, the

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State Bank of South Australia, and the building industry in New South Wales, just to name a few.

Historically royal commissions have a limited life and usually inquire into a specific subject matter. Calls to establish royal commissions usually arise when there is public concern about the capacity of existing bodies to deal with a matter.

Because royal commissions are executive in character their decisions and actions are amenable to judicial review. In fact there has been considerable judicial review of royal commissions over many years. (The cases cited in the endnotes to this paper are sufficient support for this proposition.)

Permanent inquisitive bodies

In recent years we have seen considerable development of standing investigative bodies with royal commission powers. Examples of such bodies in Australia are the National Crime Authority (1984), NSW's Crime Commission (1985), NSW's Independent Commission Against Corruption (1988) and Queensland's Criminal Justice Commission (1989). These permanent bodies have the functions of inquiring and reporting and they derive their authority and compulsive powers from statute. They may have other functions as well, for example the NCA has a statutory function to disseminate intelligence and information to law enforcement agencies.

These permanent investigative bodies differ from regulatory agencies in that their primary function is to investigate, not to regulate.

I will concentrate primarily on the Commonwealth and New South Wales investigative agencies as they are probably more relevant to my audience today; however, the general principles of administrative review applying to the other agencies will be the same.

Regulatory agencies

A number of regulatory agencies also have investigative powers granted to them in support of their regulatory role: in the Commonwealth sphere, the Australian Securities Commission and the Trade Practices Commission are two of the best known and influential of these agencies. Similar regulatory agencies exist at the state level.

Administrative Law generally

The Commonwealth system of review of administrative decisions has evolved through the establishing of the Administrative Appeals Tribunal,[6] and the office of the Ombudsman,[7] and the introduction of a codified judicial review system[8] and provision for access to administrative records.[9]

The development of the systems in the states has not kept pace with the Commonwealth: while all states have Ombudsman's offices and freedom of information legislation, only Victoria has established an Administrative Appeals Tribunal,[10] and only Victoria and Queensland have enacted judicial review legislation.[11]

On the other hand some of the Commonwealth administrative law enactments have not kept pace with more recent developments in the states. It is noteworthy that the Australian Law Reform Commission is conducting a review of the *Freedom of Information Act* 1982.

Common law review

In reviewing a decision under the common law (in an application for a declaration, an

injunction, or one of the prerogative writs of *mandamus*, *certiorari* and prohibition), a court is generally not able to examine the merits of the decision being reviewed. The court is limited to reviewing whether the decision was, or will be, made fairly, within the statutory power, and made according to law.

The Administrative Decisions (Judicial Review) Act

Decisions of an administrative nature made or proposed or required to be made under an enactment may be reviewed under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth).[12] Other administrative acts which may be challenged are the making of reports and recommendations required by legislation and conduct engaged in for the purpose of making a reviewable decision.

Subsection 3(2) of the Act provides that a reference to making a decision includes:

(a) making, suspending, revoking or refusing to make an order, award or determination;

(b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;

(c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;

(d) imposing a condition or restriction;

(e) making a declaration, demand or requirement;

(f) retaining, or refusing to deliver up, an article; or

(g) doing or refusing to do any other act or thing.

A reference to a failure to make a decision is to be construed accordingly. Subsection 3(1) also provides that failure to make a decision includes a refusal to make the decision.

Decisions excluded from review

Decisions included in any classes of decisions set out in Schedule 1 of the AD(JR) Act are not reviewable under the Act. Some categories relevant to investigative agencies are decisions made under the *Telecommunications (Interception) Act* 1979 (Cth) and decisions regarding the assessment or calculation of tax.

Further, Schedule 2 sets out categories of decisions that, while still reviewable, are not ones for which the reasons for decision may be obtained under section 13 of the AD(JR) Act. These categories include (i) decisions relating to the administration of criminal justice, including decisions in connection with the investigation or prosecution of any person for any offences against a law of the Commonwealth or of a Territory, and (ii) decisions under a law of the Commonwealth or of a Territory requiring the production of documents, the giving of information or the summoning of persons as witnesses.

Further, individual Commonwealth statutes may contain provisions which attempt to oust the jurisdiction of the Act. One such provision is section 42 of the *Financial Transactions Reports Act* 1988 (Cth).[13] The *National Crime Authority Act* 1984 (Cth) does not exclude the operation of the AD(JR) Act, however, section 57 of the NCA Act varies the operation of the AD(JR) Act, most importantly by providing that an application for review must be made within five days of the applicant becoming aware of the matter to be reviewed.

The Administrative Appeals Tribunal

The Administrative Appeals Tribunal can only review decisions where review by the AAT is specifically provided for in the enactment establishing the decision maker or governing its procedure.[14]

Specific review mechanisms in empowering enactment

In addition to the general methods of review outlined above, there are often specific review mechanisms provided for in the enactment providing the powers of investigation.

One such review mechanism is contained in section 32 of the *National Crime Authority Act* 1984 (Cth). This section provides a right to apply to the Federal Court to seek a review of the Authority's decisions in certain circumstances. This provision provides for a review to ascertain whether there has been an error of law in reaching the decision, however other enactments may provide for a full merit review. The provision of a specific avenue of review does not usually exclude the possibility of review by way of application under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) or under the common law.

Grounds for review

Taking Into account an irrelevant consideration

An order for review may be sought on the ground that "an irrelevant consideration was taken into account in the making of the decision". It is well established at common law that a decision may be invalid where an irrelevant consideration has been taken into account.[15] Decisions made under a Commonwealth statute may also be reviewed on this ground under section 5(2)(a) of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth).

Whether a matter is relevant or irrelevant is to be determined by construction of the legislation conferring the power.[16] A broad construction has been given to unconfined discretion, and therefore to the matters which may be taken into consideration in arriving at a decision.[17]

Failing to take into account a relevant consideration

This ground of review is available both under the AD(JR) Act[18] and the common law.[19] For a successful review on this ground, the applicant must show that the matter was relevant to the exercise of the power, and that the decision-maker was obliged to consider that matter before making a decision, that the decision-maker was, or ought to have been aware of the matter, and that the decision-maker failed to take the matter into account in making the decision

Bad faith and fraud

Bad faith and fraud are grounds for review under both the AD(JR) Act and the common law. Bad faith involves deliberate dishonesty, corruption or malice. A finding of bad faith or fraud completely vitiates the decision or ruling that it infected.[20]

Unauthorised purpose

An authority exercising a power conferred by a statute is bound to exercise the power for the purposes for which the power is conferred, and an exercise of the power for a different purpose is invalid.[21] The AD(JR) Act formulation of this principle is that an order for review may be sought in respect of "an exercise of a power for a purpose other than a purpose for which the power is conferred".

Unreasonableness

A decision may be reviewed under the AD(JR) Act and at common law for unreasonableness. To be reviewed on this ground, the exercise of power must be so unreasonable that no reasonable person could have so exercised the power.[22]

Error of law and want of jurisdiction

At common law, review is available for error of law on the face of the record, and for want of jurisdiction (whether the error in assuming jurisdiction was one of fact or law, or on the face of the record or not).

Under the AD(JR) Act, review is available for error of law, whether the error appears on the face of the record or not. Administrative action is reviewable under section 5(1)(c) of the AD(JR) Act for want of jurisdiction.

Breach of natural justice

Natural justice, also known as the duty of procedural fairness, arises where a body is exercising a power which may "destroy, defeat, or prejudice a person's rights, interests or legitimate expectations". The test is the nature of the power, not the character of the proceedings.[23]

Natural justice is a right to bring evidence before and to put submissions to the decision-maker on the decision to be made, and sometimes to cross examine other witnesses. There is no "absolute" content of natural justice, rather the content is dependent upon the type of decision being made and the circumstances of its making. In general, the more drastic the effect of the decision on a person's rights, the greater content of their right to natural justice.

Policy aspects of powers of investigation

There are a number of policy considerations underlying the grant and use of investigative powers, and views on how these considerations should be balanced often differ. The two major policy considerations are (i) the citizen's rights to privacy and confidentiality, and (ii) the legitimate needs of the government to ensure its laws are effectively enforced and to ensure that breaches of its laws are effectively investigated.

The report of the Commission of Inquiry Into Possible Illegal Activities and Associated Police Misconduct (better known as the "Fitzgerald Inquiry") described the tension between the two policy considerations:

> The problem is that law enforcement involves values and interests which often conflict.
>
> First, there is a desire to preserve and protect equality, privacy, reputation, freedom of thought, freedom of conscience, freedom of expression and religious and political freedom as well as the rights to personal security, liberty and fair trial which traditionally include the presumption of innocence, a right to remain silent and for serious offences, the right to trial by jury.
>
> Secondly, there is the right of the individual to protection by the State. There is a powerful public interest in opposing the spread of illegal drug trafficking, official corruption and other organised crime. The apparent conflict between these interests is accentuated by the manner in which the discussion on them is conducted. The debate over the

> formulation of policies and law relevant to crime tends to become emotional at the thought of crime on one hand and a loss of civil liberties on the other.[24]

The rights to privacy and confidentiality have received considerable attention over the past 20 years, and developments such as the appointment of a Commonwealth Privacy Commissioner attest to the importance that is placed on this area. The interests of privacy will tend towards having reasonable limits placed upon the use and scope of the powers of investigation.

However, privacy is not an absolute right, and other public policy elements tend towards giving investigative powers a wide scope and active role. Investigative powers are enacted in support of one or another area of law. The policy behind that other area of law also supports the grant and wide use of the investigative powers: for example, the powers of the Australian Taxation Office are supported by the requirement of the government to raise revenue.

Judicial attitudes to investigations

In a large number of cases, judges have acknowledged the reality of investigations: that they are, of their very nature, wide ranging; that they are investigations, not judicial determinations of disputed facts; that they must chase a number of leads, many of which will be fruitless; that they must investigate allegations that have not yet been proved and that may never be proved, or may be proved false.

One such acknowledgment was made in *Melbourne Home of Ford*:

> In the case of a matter that may constitute a contravention, the chairman may not know the constitutive facts of a contravention (if there has been one) and he may ultimately ascertain that there has been no contravention in the conduct or transaction which he is investigating. Because his attention has been drawn to a particular act or transaction which warrants investigation and because he has reason to believe that the person to whom the notice is given is capable of furnishing information relating to the matter under investigation he is engaged in a function of investigation, not in a task of proving an allegation. The power conferred by section 155(1) is in aid of that function and is a power which authorizes inquiries both wide in scope and indefinite in subject matter. It is an investigative power which is under consideration here and it is not possible to define a priori the limits of an investigation which might properly be made. The power should not be narrowly confined.[25]

And further:

> The investigative power may properly be exercised by inquiring into the existence of facts which do not themselves constitute a contravention or deny the possibility of a contravention. The power may properly be exercised to ascertain facts which may merely indicate a further line of enquiry, or which may tend to prove circumstances from which an inference can be drawn as to the existence of facts which have a more immediate and proximate relationship to the matter under investigation.[26]

As to the subject of the investigation being able to review every step of the investigation, it has been said:

> It is of the very nature of an investigation that the investigator proceeds to gather relevant information from as wide a range of sources as possible without the suspect looking over his shoulder all the time to see how the inquiry is going. For an investigator to disclose his hand prematurely will not only alert the suspect to the progress of the investigation but may well close off other sources of inquiry.[27]

In *Ross v Costigan*, Ellicot J stated[28]

> In determining what is relevant to a Royal Commission inquiry, regard must be had to its investigatory character. Where broad terms of reference are given to it, as in this case, the Commission is not determining issues between parties but conducting a thorough investigation into the subject matter. It may have to follow leads. It is not bound by rules of evidence. There is no set order in which evidence must be adduced before it. The links in a chain of evidence will usually be dealt with separately. Expecting to prove all the links in a suspected chain of events, the Commission or counsel assisting, may nevertheless fail to do so. But if the Commission bona fide seeks to establish a relevant connection between certain facts and the subject matter of the inquiry, it should not be regarded as outside its terms of reference in doing so.
>
> This flows from the very nature of the inquiry being undertaken.

Courts are however concerned with abuse of power. In *Clinch v Inland Revenue Commissioners* it was stated:

> One of the vital functions of the courts is to protect the individual from any abuse of power by the executive, a function which nowadays grows more and more important as governmental interference increases.[29]

However, even taking into account the need to control excesses of power:

> The court's jurisdiction is not to set the course of an investigation but to call a halt if it is shown that the investigation exceeds the powers conferred. Short of that point, the protection of the corporate citizen from harassment rests in the good sense of the repository of the power.[30]

The decision to investigate

The subject of an investigation does not have a right to present a case that he or she should not be subject to such an investigation by the investigating body *R v Coppell; Ex parte Viney Industries Pty Ltd* (1965) VR 630.

There is no right under the common law for a person under investigation to request disclosure of the reasons for the commencement of an investigation, the evidence to support those reasons or the name of the person making the accusation.[31]

Courts will, however, carefully scrutinise the source of the authority to investigate. In *Marriah v State Drug Crime Commission*[32]

it was held that the written notice that was the source of the power of the Commission to investigate a relevant drug activity did not by its own terms identify that activity by reference to the relevant allegations or circumstances or otherwise. The written notice upon which the Commission relied to found its power to conduct the investigation was not a notice authorised by section 25(1)(a) of the *State Drug Crime Commission Act* 1985 (NSW) and no relevant drug activity was referred to it for investigation by that document.[33] Thus the whole investigation was flawed for want of jurisdiction.

In *Ganin v New South Wales Crime Commission*[34] it was argued that the granting of the reference of the matter in question to the Commission was beyond power, tainting the whole investigation. It was held that the reference was not in fact beyond power. However, in arriving at that decision, the Court looked at the decision to grant the reference.

Kirby P observed:[35]

> The final attack on the jurisdiction of the Commission was that the Court on review, would conclude that the Management Committee had erred in being satisfied that "ordinary police methods of investigation into the matter are unlikely to be effective": See section 25(2).
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> The question is not whether this Court is of such a view. By the statute, the decision is committed to the Commission. On review, the Supreme Court would only be authorised to intervene if the decision of the Commission in this regard was so unreasonable that no reasonable decision-maker could arrive at it, or involved the use of the power conferred on the Commission disproportional to the purposes of the power: cf *A-G (NSW) v Quin* (1990) 170 CLR 1 at 35; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41; cf *In the Application of Bryant* (unreported, Supreme Court, Qld, 6 January 1992), per Ryan J, at pp 20f, 42.

The use of compulsory process

In *Ross v Costigan*[36] the court held that the summonsing of witnesses to appear before a royal commission was a "decision" under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) and was reviewable under the Act. In *Lloyd v Costigan*[37] it was further held that Lloyd had not established grounds for review of a summons to appear. To succeed, Lloyd would have to show that there was no possible question the royal commissioner could ask Lloyd which was relevant to his terms of reference or which bore upon a line of enquiry being pursued by him in good faith.

The recipient of a notice requiring the production of books has a genuine interest in seeking to avoid the obligations placed on him or her by the notice and is a person aggrieved by the decision to issue the notice.[38] Where a person is subject to an investigation, either as a target or as a person capable of assisting in an investigation, it is probable that the person would be aggrieved by a relevant decision.[39]

In *Melbourne Home of Ford Pty Ltd v Trade Practices Commission (No 3)*[40] the Full Federal Court considered in detail the power of the TPC to issue a summons and the validity of such a summons.

> Ordinarily, when a question arises as to the validity of a s. 155 notice issued under the first limb, three

> questions fall for consideration: (1) whether there is a "matter that constitutes, or may constitute a contravention"; (2) whether the Commission, the chairman or the deputy chairman (as the case may be) has reason to believe that the person to whom the notice is given "is capable of furnishing information, producing documents or giving evidence relating to" that matter; and (3) whether the information required to be produced or the evidence required to be given (as the case may be) relates to that matter.
>
> The first two of these questions are material to the existence of the power to issue a notice, the last to the manner of its exercise.[41]
>
> ...
>
> Provided the necessary relationship exists between the matter and the information or documents required, the notice is not open to objection on the grounds that it is burdensome to furnish the information or produce the documents.[42]
>
> ...
>
> Notices are to be reasonably, not preciously, construed and the terms used in notices will ordinarily take their meaning from the commercial circumstances in which the notices are given.[43]

The onus of showing that a notice (and any other use of powers) complies with the empowering enactment lies on the investigating agency.[44]

It should also be noted that the exercise of the powers depends upon the statute granting the power. It is to this statute that one should first turn when seeking to attack or justify a use of the power. Each statute is couched in different terms - for example the *National Crime Authority Act* 1984 (Cth) subsection 28(7) restricts the powers granted by the section to being exercised only for the "purposes of a special investigation". This brings into play a different test to that associated with section 155 of the *Trade Practices Act* 1977 (Cth), which requires reason to believe that a person is able to furnish information or produce documents relating to a matter that constitutes or may constitute a contravention of the Act.

Natural justice

A party is entitled to natural justice in the conduct of a hearing and what is required by natural justice depends *inter alia* on the nature of the inquiry, the subject matter and the rules under which the authority in question is acting.[45]

A witness before an investigative body is not entitled to be informed in advance of the questions to be asked, or of the use to which his or her answers or documents may be put, or of the relevance of his or her answers or documents.[46] Further, there is no requirement that the investigator supply all information to a person in possible jeopardy of an adverse finding before he or she is asked to contribute to the investigation.[47]

It has been held that there is no common law right for proceedings which might adversely affect a person's reputation to be held in private and there was no miscarriage of the discretion to hold the hearing in public. In arriving at this decision, NSW Chief Justice Gleeson stated:

> There is a fallacy in passing from the premise that the danger of harm to reputation requires the observance of procedural fairness to the conclusion that fairness requires that proceedings be conducted in all respects in such a way as to minimise damage to reputation ... our ideas of fairness in judicial procedure do not encompass a requirement to protect people from adverse publicity.[48]

Natural justice does not require that the suspected person or persons be allowed to be present throughout the whole of the hearing process in order to cross-examine witnesses, give evidence in reply or make submissions before any findings are made.[49]

Good faith

Investigative powers must be used in good faith and for the purpose of the investigation of the matter referred to the body, which cannot go off on a frolic of its own.[50]

Challenging relevance of questions or documents required to be produced

If the documents sought are not relevant to the investigation, it is not sufficient for the investigating agency to be acting *bona fide*. However, the criterion of relevance is to be applied in accordance with the (very wide) concept of investigation explained in *Melbourne Home of Ford v Trade Practices Commission*[51] and *Lloyd v Costigan*.[52]

The relevance of documents sought by way of notice is to be determined by an objective examination and not by the person served with the notice.[53]

An investigative agency does not take part in the accusatory process and does not determine the rights of parties in the way that a court does. Relevance of questions put to a witness or documents sought to be produced in relation to the investigation cannot be tested against defined pleadings and relevance may not strictly be an appropriate term.[54]

Severance of invalid portion of notice to produce

Where a document or other thing required to be produced by written notice is not relevant to an investigation, the requirement to produce that document or thing is invalid. However, provided that requirement is severable, the remainder of the notice remains valid. Where the requirements contained in the notice are divided into numbered paragraphs each dealing with different matters, there is no reason why an invalid paragraph should invalidate the other paragraphs.[55]

Review of listening devices and telephone intercepts

Two of the most intrusive powers available to certain law enforcement agencies are the power to listen into the private conversations of persons through the use of listening devices and the interception of telecommunications. The intrusiveness of these powers requires that they are only used in circumstances where the infringement of civil liberties is justified. Further, the nature of the powers requires that they be subject to close scrutiny, before and after the grant of the warrants authorising the listening device or the interception of telecommunications.

In New South Wales, the use of listening devices is governed by the *Listening Devices Act* 1984 (NSW). Section 5 of this Act prohibits the use of listening devices to listen to or record private conversations.[56]

This prohibition is lifted where a person has obtained a warrant from the Supreme Court to use a listening device. To obtain a warrant, the applicant must first believe or suspect that an indictable offence has been, is about to be, or is likely to be committed, and that the use of a listening device is necessary for the investigation of the offence or for the gathering of evidence. Before granting the warrant, *the Court* is to consider the following:

- the nature of the offence
- the effect of the use of the listening device on the privacy of any person
- the alternative means of obtaining evidence and the effectiveness of those means
- the evidentiary value of the expected product of the listening device
- any previous warrants sought or granted.[57]

The Attorney-General of New South Wales or a prescribed officer (in effect, this function is performed by the Solicitor-General) must be served with details of any warrant being sought, and the Court is not to grant the warrant unless it is satisfied that the Attorney-General has been so served, and that the Attorney-General has had an opportunity to be heard in relation to the granting of the warrant.[58] This provision has the effect of allowing the Attorney-General to review all warrants before they are granted and to represent the public interest in the hearing of the application for the warrant.

After the warrant has been executed, the person to whom the warrant was issued must report in writing to both the Court and the Attorney-General.[59] If, after receiving that report, the Court is satisfied that the use of the listening device was not justified and was an unnecessary interference with the privacy of any person, the Court may direct the person authorised to use the listening device to supply to the subject of a recording such information regarding the warrant and the use of the listening device as the Court specifies.[60]

The interception of telecommunications is governed by the *Telecommunications (Interception) Act* 1979 (Cth). This Act prohibits the interception of a communication passing over a telecommunications system, and then provides an exception for (amongst other things) interception pursuant to a warrant.[61]

The application for a telephone interception warrant must be accompanied by an affidavit setting out the facts and grounds the application is based on, and details of previous applications and warrants in relation to the person and service and the result of those applications and warrants.[62]

Telephone interception warrants can be obtained for class one offences which are defined as:

- murder, or an equivalent offence
- kidnapping, or an equivalent offence
- a narcotics offence
- an ancillary offence in relation to murder, kidnapping or narcotics
- an offence into which the NCA is conducting a special investigation.

Warrants can also be obtained for class two offences which are defined as:

- offences punishable by life imprisonment or imprisonment for a maximum of at least 7 years, and involving:
  - loss of life or serious risk thereof;
  - serious personal injury or serious risk thereof;
  - serious damage to property in circumstances endangering the safety of a person;
  - trafficking in prescribed substances;
  - serious fraud; or
  - serious loss to the revenue of the Commonwealth or of a state or the ACT
- offences against Part VIA of the *Crimes Act* 1914 (computer crimes)
- an ancillary offence in respect of the above.

Before granting a warrant in relation to a class one offence, the judge must be satisfied that there are reasonable grounds for suspecting that a particular person is using or is likely to use the service, that the material to be intercepted would be likely to assist in connection with the investigation of a class one offence in which the person is involved, and that some or all of the information could not be appropriately obtained by using other methods of investigation.[63]

Before granting a warrant in relation to a class two offence, the judge must be satisfied that there are reasonable grounds for suspecting that a particular person is using or is likely to use the service and that the material to be intercepted would be likely to assist in connection with the investigation of a class two offence in which the person is involved, and further, must consider the following factors:

- the potential invasion of the privacy of any person
- the gravity of the conduct being investigated
- the value to the investigation of the material likely to result from the intercept
- the alternative investigative methods available, and their previous use in the investigation
- how much the use of alternative investigative methods is likely to assist the investigation
- how much the use of alternative investigative methods is likely to prejudice the investigation.[64]

Review of records by Ombudsman

Each agency is to keep a register of all telecommunications interception warrants granted to its officers. The Ombudsman is required to inspect the records of the Commonwealth agencies, at least twice a year, to ensure that the agency has complied with the record keeping and destruction requirements of the Act. The Ombudsman must report on this inspection to the Attorney-General. The Ombudsman may also report to the Attorney-General any other contraventions of the Act that he or she discovers.

Reports to Commonwealth Attorney-General

A Commonwealth agency obtaining an interception warrant must give a copy of the warrant (and a copy of any revocation of a warrant) to the Commonwealth Attorney-General. In addition, within three months of the ceasing of the warrant, the agency must report to the Attorney-General on the use made of the information obtained from the interception, and of the communication of that information to any person outside the agency.

Both state and Commonwealth agencies must make an annual report to the Commonwealth Attorney-General on all interceptions.

The decision to prosecute

The Federal Court is reluctant to interfere in the criminal process by exercising review pursuant to the *Administrative Decisions (Judicial Review) Act* 1977 (Cth), reflecting the common law concept of justiciability.

In *Smiles v Commissioner of Taxation (Cth)*[65] Davies J held that the court will not interfere by way of judicial review in the ordinary process of a prosecution unless exceptional cause for doing so is shown. Section 5 of the AD(JR) Act is not an appropriate vehicle for the control of abuse of process in the court of a state as that is a matter for the courts of the state.

This decision was applied in *Jarrett v Seymour*, the court also stating:[66]

> Moreover, this case is concerned with a particular area of the criminal process, that is, the discretion to institute criminal proceedings, where collateral intervention, as was sought here, should be allowed only in very special situations. There are cogent, and obvious, policy considerations underlying the reluctance of civil courts to interfere collaterally with the initiation of a criminal prosecution: see for example, *Barton v The Queen* [(1980) 147 CLR 75].

It is always open to the applicants to challenge, after the institution of criminal proceedings against them, the validity and propriety of those proceedings in the courts exercising criminal jurisdiction once charges have been formulated and filed and the issues in those proceedings have been defined.

> Courts exercising criminal jurisdiction have for many years had power to examine whether the processes of the criminal law have been commenced or exercised in bad faith or as an abuse of process.[67]

There is no doubt that there can indeed be injustice or unfairness to an accused in being charged and put on trial without reasonable grounds and that an action for damages for malicious prosecution does not necessarily remove the injustice or unfairness.[68]

Nevertheless intervention is relatively rare. As the Federal Court has stated:

> Time and again judges of the High Court and this Court have made it clear that the Court will not interrupt or interfere with criminal proceedings except in special circumstances.[69]

In *Yates v Wilson*[70] Mason C.J. delivering the judgment of the High Court said:

> It would require an exceptional case to warrant the grant of special leave to appeal in relation to a review by the Federal Court of a magistrate's decision to commit a person for trial. The undesirability of fragmenting the criminal process is so powerful a consideration that it requires no elaboration by us. It is a factor which should inhibit the Federal Court from exercising jurisdiction under the Administrative Decisions (Judicial Review) Act 1977 (Cth) and as well inhibit this Court from granting special leave to appeal.

The use of coercive powers once proceedings have commenced

Early decisions of the High Court held that the use of compulsory powers while a matter was within the cognisance of a court was *ultra vires* the grant of the powers and constituted a contempt of court.[71] These decisions were made on the basis that once the matter was before the courts, the act of fact finding was an exercise of judicial power, and was no longer an administrative function. In *Melbourne Steamship Co Ltd* Griffith CJ went so far as to say:

> In my opinion, when the Attorney-General has formally instituted a prosecution in this Court in respect of an alleged offence, the power as well as the purpose of sec. 15B is exhausted so far as regards the persons whom the Attorney-General alleges to have committed the offence for which he prosecutes, whether they are made parties to the suit or not.[72]

This position held sway until recently,[73] to the extent that in *Pioneer Concrete*,[74] at first instance it was held that the service of a notice to produce on a respondent in proceedings brought under the *Trade Practices Act* 1977 (Cth) by a private litigant was beyond the power vested in the Trade Practices Commission and was a contempt of court.

When *Pioneer Concrete*[75] reached the High Court, that Court held that there was no evidence that the notices were issued as an aid to or for the purposes of the proceedings, or that there was any intention to interfere with the course of justice, or that there was any real risk the notices would do so.

The Court held that the use of notices was not an exercise of judicial power and was within the power granted by section 155 of the *Trade Practices Act* 1977. Gibbs CJ and Brennan J held that an inquiry into facts which are the subject of pending proceedings is not necessarily an exercise of judicial power, and that under section 155 the Commission cannot determine the facts, or apply law to them, in any way that is binding. Mason J stated: "And I do not accept the suggestion made by Barton J in *Melbourne Steamship* (at p 346) that once the subject matter has passed into the hands of the courts it is immune from legislative and executive action".[76]

The High Court examined the issue again in *Environmental Protection Authority v Caltex Refining Co Pty Ltd*,[77] where the Court was divided over the validity of the issue to defendants in current proceedings of notices to produce documents for the purpose of those proceedings.

Mason CJ and Toohey, Brennan and McHugh JJ held that the notices were valid. Deane, Dawson and Gaudron JJ held them invalid on the ground that the relevant section did not "empower an authorised officer to require the production of documents for the purpose of furnishing

evidence in existing proceedings" as that is governed by the procedures of the court in which the prosecution is commenced.[78]

In arriving at the decision that the notices were valid, Mason CJ and Toohey J stated: "As the court's own process can be used to compel production, resort to the statutory power for the same purpose cannot amount to an abuse of process".[79] Later they said:

> It would be artificial to say that it is permissible to issue a notice requiring production of documentary material with a view to ascertaining whether a breach of the statute or a condition of a licence has taken place but it is impermissible to issue a notice with a view to providing evidence of such a breach. And, if it be permissible to issue such a notice for that purpose before the commencement of proceedings, as we think it is, it must be permissible to do so after proceedings have commenced.[80]

Brennan J observed:

> There is no abuse of a court's process in a party taking advantage of a legitimate means of obtaining evidence to be used in a pending litigation. If the documents to be produced pursuant to the notice had been seized under a search warrant, it could not be suggested that the use of the search warrant was an abuse of process. Nor can the service of the notice under s29(2)(a) be so described.[81]

Similarly, McHugh J noted:

> Obtaining evidence under a statutory power for the purpose of assisting a party in pending litigation does not necessarily constitute an interference with the procedure of the courts. The evidence gathering procedures of a party are not limited to the use of court procedures. No interference with the processes of the courts or the course of justice occurs merely because a party avails itself of a statutory power to obtain evidence during the course of pending litigation. the mere use of such a power during the pendency of litigation is not a contempt of court even where the sole purpose of the exercise of the power is to assist a party to obtain evidence for use in that litigation. To constitute a contempt, the party must exercise the power in such a way that it interferes with the course of justice. Thus, there might be contempt if the exercise of the statutory power 'would give such a party advantages which the rules of procedure would otherwise deny him'.

The other justices in the majority similarly expressed the sentiment that the exercise of a power may constitute a contempt of court if that exercise interfered with the course of justice. From this, we can see that not every use of an investigative power after proceedings have commenced will be invalid, but rather one must examine how the use of the power relates to the proceedings and whether they interfere with those proceedings. For example, using a statutory power to require a party to disclose its defence would almost certainly constitute an interference with the course of justice and be beyond power.

These principles leave a large degree of uncertainty and investigative agencies

should act carefully in using compulsory powers where matters are before the xourt.

Reportings of findings and dissemination of information

Until recently the law was that, in an investigation, a body is not bound, before it makes a report or charges a person, to give the person an opportunity of answering or explaining matters which if unanswered or unexplained might give rise to adverse findings.[82]

However, in *Annetts and Anor v McCann and Ors*,[83] the High Court virtually overruled *Testro Brothers v Tait*, saying:[84] "It is beyond argument that the view of the majority in that case would not prevail today".

Natural justice only requires that submissions may be made in respect of any potential adverse finding against the person making the submission and not in the whole of the subject matter of the investigation.[85]

A report affecting the commercial or business reputation of a person (being legal rights or interests of the person) gives rise to the obligation to accord the person procedural fairness by appraising him or her of the allegations and providing the opportunity to rebut them.[86]

Where a person has given evidence in private before an investigative body, the transcript of that evidence should not be given to a third party without the witness being given an opportunity to be heard, if the release would be contrary to that person's interests. That opportunity need not be provided, however, where the purpose of providing the transcript (for example to a law enforcement agency for the potential laying of charges) would be frustrated by the witness being aware of the transcript being provided.[87]

Regulatory and investigative agencies (eg NCA) are given significant powers to investigate activity within their purview. Due to the nature of investigations, the agencies must be free to exercise them in a wide range of circumstances. However, the checks and balances of administrative review of these powers, and close scrutiny by the courts of their exercise endeavours to ensure that they are not abused.

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Endnotes

1 *Shell Co of Australia Ltd v FCT* (1931) 44 CLR 530, *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, *Melbourne Home of Ford Pty Ltd v TPC* (1979) ATPR 40-107.

2 L E Hallet *Royal Commissions and Boards of Inquiry* (1982), p 17.

3 *Lockwood v Commonwealth* (1954) 90 CLR 177 at p 181.

4 *Mannah v State Drug Crime Commission* (1987) 13 NSWLR 28, at p 38.

5 *Royal Commissions Act* 1902 (Cth); *Evidence Act* 1910 (Tas); *Royal Commissions Act* 1917 (SA); *Royal Commissions Act* 1923 (NSW); *Commissions of Inquiry Act* 1950 (Qld); *Evidence Act* 1958 (Vic); and the *Royal Commissions Act* 1968 (WA).

6 *Administrative Appeals Tribunal Act* 1975 (Cth).

7 *Ombudsman Act* 1976 (Cth).

8 *Administrative Decisions (Judicial Review) Act* 1977 (Cth).

9 *Freedom of Information Act* 1982 (Cth).

10 *Administrative Appeals Tribunal Act* 1984 (Vic).

11 *Administrative Law Act* 1978 (Vic); *Judicial Review Act* 1991 (Qld).

12 Section 3(1).

13 This section reads:

> 42 The *Administrative Decisions (Judicial Review) Act 1977* does not apply to decisions under this Act, other than a decision by the Director under subsection 19(2) or (3).

14 *Administrative Appeals Tribunal Act* 1975 (Cth) section 25(1).

15 *R v Trebilco: Ex p FS Falkiner & Sons Ltd* (1936) 56 CLR 20, Latham CJ at 27, Dixon J at 32, Evatt and McTiernan JJ at 33; *R v War Pensions Entitlement Appeal Tribunal: Ex p Bott* (1933) 50 CLR 228, Rich, Dixon and McTiernan JJ at 242-243; *Parramatta City Council v Pestell* (1972) 128 CLR 305, Menzies J at 323, Gibbs J at 327, Stephen J at 332.

16 *R v Trebilco: Ex p FS Falkiner & Sons Ltd* (1936) 56 CLR 20, Latham CJ at 27, Dixon J at 32, Evatt and McTiernan JJ at 33; *R v War Pensions Entitlement Appeal Tribunal: Ex p Bott* (1933) 50 CLR 228, Rich, Dixon and McTiernan JJ at 242-243; *Parramatta City Council v Pestell* (1972) 128 CLR 305, Menzies J at 323, Gibbs J at 327, Stephen J at 332.

17 See for example, *Murphyores Incorporated Pty Ltd v Commonwealth* (1976) 136 CLR 1; *R v Australian Broadcasting Tribunal: Ex p 2HD Pty Ltd* (1979) 144 CLR 45.

18 *Administrative Decisions (Judicial Review) Act* 1977 (Cth) section 5(2)(b).

19 *R v Australian Broadcasting Tribunal: Ex p Hardiman* (1980) 144 CLR 13; 54 ALJR 314; 29 ALR 289; *Mutton v Kuring-gai Municipal Council* [1973] 1 NSWLR 233 (CA) per Jacobs P at p 241.

20 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, [1969] 1 All ER 208.

21 *Brownells Ltd v Ironmonger's Wages Board* (1950) 81 CLR 108, *Arthur Yates & Co Pty Ltd v Vegetable Seeds Committee* (1945) 72 CLR 37.

22 See *Administrative Decisions (Judicial Review) Act* 1977 (Cth) s5(2)(g) and *Parramatta City Council v Pestell* (1972) 128 CLR 305.

23 *Ainsworth v Criminal Justice Commission* (1992) 106 ALR 11.

24 Fitzgerald Report 1989, p 172.

25 *Melbourne Home of Ford Pty Ltd v Trade Practices Commission (No 3)* (1980) 47 FLR 163 per Brennan, Keely and Fisher JJ at p 173; see also *MF1, MF2 & MES v National Crime Authority* (1991) 105 ALR 1; 33 FCR 449.

26 *Melbourne Home of Ford Pty Ltd v Trade Practices Commission* (1980) 47 FLR 163 at p 174; see also *MF1, MF2 & MES v National Crime Authority* (1991) 105 ALR 1; 33 FCR 449.

27 *National Companies and Securities Commission v News Corp Ltd* (1984) 156 CLR 296 per Mason, Wilson and Dawson JJ, at pp 323-324.

28 (1982) 41 ALR 319 at p 334.

29 *Clinch v Inland Revenue Commissioners* [1974] 1 QB 76 per Ackner J at p 92.

30 *Melbourne Home of Ford Pty Ltd v Trade Practices Commission (No 3)* (1980) 47 FLR 163 per Brennan, Keely and Fisher JJ at p 174.

31 *Maxwell v The Department of Trade and Industry* (1974) 1 QB 523 at 534 per Lord Denning MR; *Parry-Jones v Law Society* (1969) 1 Ch 1 at 8 per Lord Denning MR; *Wiseman v Borneman* (1971) AC 297; *Re: Standhill Development and Finance Limited* (1965) VR 415 at 415 per Starke J.

32 (1987) 13 NSWLR 43.

33 Hope JA at 49.

34 (1993) 70 A Crim R 417.

35 At p 437.

36 (1982) 49 FLR 184.

37 (1983) 48 ALR 241.

38 *Salter v National Companies and Securities Commission* (1989) WAR 296.

39 *Ricegrowers Co-operative Mills Ltd v Bannerman* (1981) 56 FLR 443 at pp 447-448.

40 (1980) 47 FLR 163.

41 *Melbourne Home of Ford Pty Ltd v Trade Practices Commission (No 3)* (1980) 47 FLR 163 per Brennan, Keely and Fisher JJ at p 172.

42 *Melbourne Home of Ford Pty Ltd v Trade Practices Commission (No 3)* (1980) 47 FLR 163 per Brennan, Keely and Fisher JJ at p 173.

43 *Melbourne Home of Ford Pty Ltd v Trade Practices Commission (No 3)* (1980) 47 FLR 163 per Brennan, Keely and Fisher JJ at pp 175-176.

44 *Re ABM Pastoral Company Pty Ltd* (1978) 3 ACLR 239.

45 *BHP Co Ltd v NCSC (No 3), Elders IXL Ltd v NCSC (No 2)* 10 ACLR 597.

46 *Mannah v State Drug Crime Commission* (1987) 13 NSWLR 28.

47 *Independent Commission Against Corruption v Aristodemou* (unreported) Supreme Court of NSW, 14 December 1989.

48 *ICAC v Chaffey* (1993) 30 NSWLR 21 at 28 and 29.

49 *NCSC v News Corporation Ltd* (1984) 156 CLR 296, see also *Connell v NCSC* (1989) 7 ACLC 748, *Connell v NCSC* (No 2) (1989) ACLC 755, *Sim v NCSC* (1988) VR 961; 6 ACLC 516.

50 *Riley McKay Pty Ltd v Bannerman* (1977) 31 FLR 129 at p 134; *Mannah v State Drug Crime Commission* at pp 39, 42; *Ross v Costigan (No 1)* (1982) 41 ALR 319 at pp 334-335; *Ross v Costigan (No 2)* (1982) 41 ALR 337 at p 351; *MF1, MF2 & MES v National Crime Authority* (1991) 105 ALR 1.

51 (1980) 47 FLR 163. See also *MF1, MF2 & MES v National Crime Authority* (1991) 105 ALR 1.

52 (1983) 48 ALR 241.

53 *MF1, MF2 & MES v National Crime Authority* (1991) 105 ALR 1 per Ryan J.

54 *McGuiness v Attorney-General (Vic)* (1940) 63 CLR 73 at p 86; *Mannah v State Drug Crime Commission* (1987) 13 NSWLR 28 at pp 37-41; *Ross v Costigan (No 1)* (1982) 41 ALR 319 at pp 334-335; *Ross v Costigan (No 2)* (1982) 41 ALR 337; *Lloyd v Costigan* (1983) 48 ALR 241 at p 244; *Melbourne Home of Ford v Trade Practices Commission* (1980) 47 FLR 163.

55 *Smorgon v ANZ Banking Group Limited* (1976) 134 CLR 475; *Re: Lindsay Toole and Co. (Wool) Pty Ltd* (1966) 84 WN (Part 1) (NSW) 318 per Street J at pp 320-321; *Re ABM Pastoral Company Pty Ltd* (1978) 3 ACLR 239.

56 The *Australian Federal Police Act* 1979 and the *Customs Act* 1901 allow AFP and NCA officers to apply to a judge to obtain listening device warrants for Commonwealth offences. There are similar safeguards and reporting requirements as in the NSW Act.

57 *Listening Devices Act* 1984 (NSW) section 16.

58 *Listening Devices Act* 1984 (NSW) section 17.

59 *Listening Devices Act* 1984 (NSW) section 19.

60 *Listening Devices Act* 1984 (NSW) section 20.

61 *Telecommunications (Interception) Act* 1979 (Cth) section 7.

62 *Telecommunications (Interception) Act* 1979 (Cth) section 42.

63 *Telecommunications (Interception) Act* 1979 (Cth) section 45.

64 *Telecommunications (Interception) Act* 1979 (Cth) section 46.

65 (1992) 35 FCR 405 at p 410.

66 (1993) 46 FLR 557 at 568.

67 *Jarrett v Seymour* (1993) 46 FLR 557 per Lockhart and Beaumont JJ at p 564.

68 *Barton v The Queen* (1980) 147 CLR 75 per Gibbs ACJ and Mason J at 96-97.

69 *Jarrett v Seymour* (1993) 46 FLR 557 per Sheppard J at p 573.

70 (1989) 168 CLR 338 at p 339.

71 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330; *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333.

72 At p 341.

73 See *Brambles Holdings Ltd v Trade Practices Commission* (1980) 44 FLR 182 and *Pioneer Concrete (Vic) Pty Ltd v Trade Practices Commission* (1980) 44 FLR 197.

74 (1980) 44 FLR 197.

75 *Pioneer Concrete (Vic) Pty Ltd v Trade Practices Commission* (1982) 152 CLR 460; 43 ALR 449; 57 ALJR 1.

76 57 ALJR 1 at p 7.

77 (1993) 68 ALJR 127.

78 At p 156.

79 At p 139.

80 At p 140.

81 At p 145.

82 *Testro Brothers v Tait* (1963) 109 CLR 353 at 364 per McTiernan, Taylor and Owen JJ; at 370-371 per Kitto J (by implication); and at 373-374 per Menzies J; *Footscray Football Club Ltd v Commissioner of Payroll Tax* (1983) 1 VR 505 at 511 per Lush J; *Re: Standhill Development and Finance Limited* (1965) VR 415 at 416 per Starke J; *Re: Pergamon Press Ltd* (1971) Ch 388 at 399 per Lord Denning MR.

83 (1991) 170 CLR 596, 97 ALR 177.

84 (1991) 170 CLR 596 at p 600.

85 See for example *Annetts and Anor v McCann and Ors* (1991) 170 CLR 596.

86 *Ainsworth V Criminal Justice Commission* (1992) 106 ALR 11.

87 *Johns v ASC* 116 ALR 567, particularly per Brennan J at 580.