DEVELOPMENTS IN ADMINISTRATIVE LAW

*Ron Fraser**

Government initiatives, inquiries, legislative and parliamentary developments

Report on ASIO legislation

The Senate Legal and Constitutional References Committee reported in December 2002 on the Australian Security Intelligence Organisation Legislation (Amendment) Bill 2002 and related matters. Unsurprisingly, most of the Committee's report deals with the preconditions for, and the conditions of, exercise of ASIO's proposed powers to detain and question persons believed to have information about terrorist offences. The report recommended changes to the Bill, but Government Senators expressed a number of reservations. In addition, chapter 9 of the report, on 'Protocols and safeguards', contains a short section on the question of judicial review of actions under the Bill. The Bill provided for a person being questioned to be told of his or her rights, including the right to seek a judicial review remedy. Other relevant accountability mechanisms referred to in the Bill included the role of the Inspector–General of Intelligence and Security and the Ombudsman.

The Committee noted that a judicial review application could be made to the Federal Court, under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act), or under s 39B of the *Judiciary Act 1903* (Cth), or to the High Court under the provisions of s 75(v) of the Constitution, and referred to differences of view concerning an action for, or in the nature of, habeas corpus. The Committee drew attention to several factors that could tend to limit the practical value of judicial review in this context. These arose from the nature of the discretion, considerations relating to national security sensitivities, and practical considerations relating to evidence, time and the role of the legal representatives and/or approved lawyers under the Bill. The Bill was not passed by the Senate after some of its amendments were rejected by the House of Representatives, but was reintroduced into the House on 20 March 2003. (***Report of the Senate Legal and Constitutional References Committee on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and related matters,*** December 2002***,*** available from:

http://www.aph.gov.au/senate/committee/legcon_ctte/index.htm)

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Senate Scrutiny of Bills Committee

The following aspects of proposed bills are among the matters the Senate Scrutiny of Bills Committee has drawn to the attention of Senators in its *Alert Digests* and *Reports* for 2003 up to 19 March:

- Agriculture, Fisheries and Forestry Legislation Amendment Bill (No. 2) 2002: The Committee was concerned with whether there was sufficient Parliamentary scrutiny of the progressive incorporation in delegated legislation of changes to the Australian and New Zealand Food Standards Code and the international Codex Alimentarius. It left the Senate to determine whether information on the changes contained in annual reports or a separate document would provide sufficient Parliamentary scrutiny. (***Alert Digest No. 1 of 2003***, 5 February 2003 and ***Second Report of 2003***, 5 March 2003))

- Migration Legislation Amendment (Protected Information) Bill 2002: The Bill was in part designed to prevent review by the courts of the exercise of the Minister's power under s 503A of the *Migration Act 1958* (Cth), to permit the disclosure of specific confidential information communicated by gazetted law enforcement and intelligence agencies. The Committee noted that the amendments were the same as other privative clauses in the Act, and that they made rights and liberties dependent on non-reviewable decisions; it left the Senate to determine whether they did so unduly. (***Alert Digest No. 1 of 2003***, 5 February 2003)

- Migration Legislation Amendment Bill (No. 1) 2002: The Committee left the Senate to determine whether the abrogation of the rules of natural justice was an undue breach of personal rights in relation to a declaration under s 33(9) of the Migration Act that it is undesirable for a person with a special purpose visa (such as crew members of ships and aircraft, military personnel, government guests, etc.) to travel to and enter, or remain in, Australia. The Committee accepted that there may be substantial reasons for abrogating the rules of natural justice in this matter, but noted that because of the effect on personal rights the exclusion of natural justice should occur only in exceptional circumstances. (***Second Report of 2003***, 5 March 2003)

- In the Committee's *First Report* for 2003, it made some interesting comments on the purposes of Explanatory Memoranda, noting that they should contain a full explanation of the background to the bill and its intended effect, including a substantial discussion of the issues relating to the Committee's terms of reference in addition to notes on clauses. The Committee intended to write to the Department of the Prime Minister and the Office of Parliamentary Counsel about these concerns and report back to the Senate. (***First Report for 2003***, 5 February 2003 at 20)

The Committee's *Alert Digests* and *Reports* may be accessed via the Committee's website:

http://www.aph.gov.au/senate/committee/scrutiny/index.htm

From the Annual Reports

Among the annual reports of government agencies for 2001–02 tabled in Parliament in the last half of 2002, the following reports relating to administrative law agencies or mechanisms may be of interest to readers. Some of their highlights are mentioned below. Copies of reports may be obtained from the agency websites set out below or often from the agency itself in hard copy.

- Administrative Appeals Tribunal (AAT): Initiatives taken by the new President, Justice Garry Downes, AM included establishment of a Tribunal Constitution Committee to examine the effectiveness of multi-member tribunals and propose principles for the constitution of one, two and three member tribunals. The President noted that he had been appointed for one year from April 2002, during which the Government was expected to finalise proposals for change that would not necessarily take the same form as the proposals included in the Administrative Review Tribunal Bill (and see below under heading 'Administrative review and tribunals'). The report includes a chapter on decisions of interest.

  http://www.aat.gov.au/about.htm

- Administrative Review Council (ARC) (26th Annual Report): The report includes a Tribute to its late President, Ms Bettie McNee, and notes the appointment of new President Mr Wayne Martin QC. It notes the launch in October 2001 of the ARC's publication *A Guide to Standards of Conduct for Tribunal Members*. The report as usual includes copies of letters of advice to government concerning aspects of administrative review, administrative law and public administration, although the number of these has diminished in recent years. The Council is pursuing ways in which consultation with it by agencies early in the legislative process may be encouraged. (Other ARC matters are dealt with below.)

  http://www.ag.gov.au/www/arcHome.nsf

- Commonwealth Ombudsman and ACT Ombudsman: The Commonwealth Ombudsman's report identifies a decline in complaints to the Ombudsman's office (19,263), due partly to a decline in complaints concerning the GST and the new tax arrangements, and partly to better public knowledge of agency complaint handling units. 5,143 complaints were investigated, in 29% of which the Ombudsman identified an agency defect (down from 35% in 2000–01). There was an increase in the number of more complex matters and complaints raising systemic issues. The Ombudsman conducted 12 major investigations of which ten were under his own motion powers. The report noted that complaints continued to rise in the immigration area particularly in relation to the policy of mandatory detention. The Commonwealth Ombudsman acts as the ACT Ombudsman under arrangements agreed between the two governments; there was a very slight decrease in complaints received. The website of each Ombudsman is:

  www.ombudsman.gov.au and http://act.ombudsman.gov.au

- Federal Court of Australia: The court's report noted that there had been a significant reduction in the number of matters commenced in the court due

largely to conferral of jurisdiction in a number of areas on the Federal Magistrates Court. The addition of a migration jurisdiction to that court's jurisdiction had resulted in a small decrease in first instance applications to the Federal Court, but there was a 78.5% increase in migration appeals to the Federal Court. In view of the large growth in appeals to the court, it might be necessary in the future for the court to seek legislative changes to assist in managing this workload, 'such as broadening the leave to appeal requirements'. Appendix 8 contains summaries of decisions of interest, including several with administrative law significance. The court's website is at:

http://www.fedcourt.gov.au

- Federal Magistrates Service: The Federal Magistrates Service is known as the Federal Magistrates Court when it exercises judicial functions. It is a lower level court with the objective of providing enhanced accessibility and simplicity of procedure. In addition to its family law, bankruptcy and other jurisdictions, the court's jurisdiction at its establishment in 1999 included many administrative law matters, including applications under the ADJR Act and appeals from the AAT transferred by the Federal Court, but excluding visa-related decisions of tribunals under the Migration Act. The latter jurisdiction was conferred on the court in October 2001, and is concurrent with the jurisdiction of the Federal Court. There has accordingly been a significant increase in the court's migration work.

  http://www.fms.gov.au/

- Freedom of Information Act 1982: There was a rise in requests of 4.88% over the previous year to 37, 169, of which 90% were for documents containing personal information; 86% of requests were made to the Departments of Veterans' Affairs and Immigration and Multicultural and Indigenous Affairs, and to Centrelink. There was a 21% increase in requests for amendments of personal records (617 across seven agencies) of which around 70% resulted in alteration and/or notation of records. The report noted that *FOI Memorandum No. 98* on exemptions had been updated as at 31 December 2001. The website is at:

  www.ag.gov.au/foi

- High Court of Australia: The report noted the announced retirement of Justice Mary Gaudron from 10 February 2003. There was an increase of 34% in the number of matters filed over the previous year; in the court's original jurisdiction there was an increase from 81 to 300 applications, 96% of them in the immigration jurisdiction. Section 476(4) of the *Migration Act 1958* had the result of restricting the capacity of the court to remit immigration matters to the Federal Court. The court was also concerned with the number of self-represented litigants with extremely little chance of success; while adverse implications for access to justice needed to be avoided, this growing problem could not be left unchecked. The court's website is at:

  http://www.hcourt.gov.au

Government announcement on reform of AAT

The federal Government has announced that it will not seek to reintroduce the Administrative Review Tribunal legislation in the current Parliament. It remains convinced that amalgamation of tribunals would provide real benefits and will investigate amalgamation options in the future. In the interim, it will investigate reform of existing tribunals on an individual basis, starting with the AAT. Areas of amendment could include procedures of the AAT, constitutional requirements and greater use of ordinary members, directed to delivering 'informal, fast and fair merits review, unfettered by costly and legalistic procedures'. The Government has not indicated what consultative processes it will employ in formulating its reforms. (***Commonwealth Attorney–General's News Release*****,** 6 February 2003)

Report of review of discrimination cases

A review by the Human Rights and Equal Opportunity Commission (HREOC) has shown that legislative changes have improved the way anti-discrimination cases are handled. The review focused on court decisions over the two years following legislative changes made in response to the decision in *Brandy v HREOC* (1995) 183 CLR 245 to the effect that HREOC could not make binding decisions. The changes enable those wanting binding decisions to go directly to the Federal Court or the Federal Magistrates Court following unsuccessful conciliation. The report analyses developing case law and concludes that the approach of the courts is not more conservative or legalistic than under the previous system. (**HREOC**, ***Change and Continuity: Review of the Federal Unlawful Discrimination Jurisdiction September 2000 – September 2002*****; Commonwealth Attorney–General's News Release,** 14 March 2003) The review will be available from HREOC's website at:

www.humanrights.gov.au

Administrative Review Council's (ARC) report on the Council of Australasian Tribunals

The last 'Developments' section ((2002) 35 *AIAL Forum* 1) referred to the establishment in June 2002 of the Council of Australasian Tribunals (COAT). The present report contains the ARC's report on COAT's establishment and other useful documents concerning its organisation and activities. (**ARC, *Report on the Council of Australasian Tribunals*****,** October 2002, copies of which may be obtained from the ARC, Robert Garran Offices, National Circuit, Barton, ACT 2600; the ARC's website is:

http://www.ag.gov.au/www/arcHome.nsf)

Judicial review

(All decisions mentioned may be accessed on the Australian Legal Information Institute website http://www.austlii.edu.au)

ARC Discussion Paper on the Scope of Judicial Review

With consummate timing, in view of the decision of the High Court in *S157/2002 v Commonwealth* concerning the effect of traditional privative clauses (see next item), the ARC has released its discussion paper on the scope of judicial review. Its aim is to explore the desirable balance between the rights of individuals to test the legality of administrative actions by judicial review, and ensuring that the work of government is not unreasonably frustrated. The paper examines the nature and scope of judicial review under both the ADJR Act and the constitutional writs, together with legislative and other ways in which historically its application has been limited, and raises a series of discussion points. It includes a substantial section concerning proposed considerations in developing a guide to the scope of judicial review (Part V). The outcome of the project is expected to be the publication of a set of guidelines to assist stakeholders to identify the circumstances in which, bearing in mind the constitutional constraints, the exclusion of judicial review is appropriate. Comments and submissions are sought by 4 July 2002. For copies of the paper and address for submissions see the preceding item. (**ARC, *The Scope of Judicial Review: Discussion Paper***, March 2003)

High Court limits scope of privative clause in s 474 of the Migration Act

In two companion decisions with wide-ranging implications (see next item), the High Court unanimously rejected the Government's sweeping arguments concerning the application of the privative clause in s 474 of the *Migration Act 1958*, while not accepting arguments that s 474 was completely constitutionally invalid. (For the arguments before the court concerning s 474, see 'Developments in Administrative Law' in (2003) 35 *AIAL Forum* 1 at 5.)

The provisions of s 75(v) of the Constitution – which 'secures a basic element of the rule of law' (Gleeson CJ) and 'introduces into the Constitution of the Commonwealth an entrenched minimum provision of judicial review' (joint judgment of Gaudron, McHugh, Gummow, Kirby and Hayne JJ) – had the result that it was not open to the Parliament to prevent an applicant seeking a writ referred to in that provision in cases where it was alleged there had been jurisdictional error. Similarly, the time limit for applications to the courts in s 486A of the Migration Act was valid but did not apply where it was alleged there had been jurisdictional error. Privative clauses are to be interpreted strictly and conformably with the Constitution, and s 474 did not apply to purported but invalid decisions. A privative clause does not protect all decisions that conform to the 'three *Hickman* provisos', as argued by the Government; rather, its protections only apply where those provisos are satisfied (see joint judgment).

As a result, the applicant in the first matter (*S157/2002*) was free to initiate proceedings on the basis of an alleged breach of procedural fairness which, if established, would constitute jurisdictional error. In the second matter (*S134/2002*), the court by a majority of 5:2 found no jurisdictional error in the failure of the Refugee Review Tribunal (RRT) in considering claims for refugee status to take into account information before it concerning the presence in Australia on a protection visa of the applicants' husband and father, which would have entitled the applicants to protection visas as members of his family. On that view there was no obligation on

the RRT to consider other categories of protection visa. The minority (Gaudron and Kirby JJ) took the view that the RRT was required by the Migration Act to consider *all* the criteria for obtaining a protection visa, and not just those for the specific class of protection visa sought. (***Plaintiff S157/2002 v Commonwealth of Australia* (2003) 195 ALR 24; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* (2003) 195 ALR 1**)

Appeals following High Court decision on privative clause in s 474 of Migration Act

Before the High Court's decision in *S157/2002* (above), numerous Federal Court decisions had applied the narrow view expressed in *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 193 ALR 449 that, following the enactment of s 474 of the Migration Act, ordinarily only decisions which offended against the three *Hickman* provisos could be reviewed by the courts (see 'Developments in Administrative Law', (2003) 35 *AIAL Forum* 1 at 4).

Appeals against such decisions are beginning to come through. In one case, for example, the Full Court of the Federal Court (Moore, Tamberlin and Hely JJ) noted that many decisions, including *NAAV*, were wrong in light of the High Court's decision. In view of the primary judge's criticisms of the RRT's reasoning, the Full Court considered that the appellant had raised issues of substance concerning apprehended bias and an unreasonable finding of jurisdictional fact, and remitted the matter to the primary judge for further hearing and determination. (***NADH & ors v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 19**, 19 February 2003)

Allegations of 'bad faith'

General principles applicable to a determination of whether a decision constitutes a bona fide attempt to exercise a power of review by the RRT were stated by Mansfield J in *SBAU v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 70 ALD 72 (2002) and endorsed by the Full Court in *SBBS v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 194 ALR 749. These included the propositions that an allegation of bad faith is a serious matter involving personal fault on the part of the decision maker, that the allegation is not to be lightly made and must be clearly alleged and proved, and that the circumstances in which the Court will find an administrative decision maker has not acted in good faith are rare and extreme. Nonetheless, such findings have been made in some cases, including *SBAU*. (See also the qualification expressed by a differently constituted bench in *Minister for Immigration and Multicultural and Indigenous Affairs v SBAN* [2002] FCAFC 431, 18 December 2002.) Presumably appeals based on alleged bad faith will be rarer following *S157/2002* (above).

Procedural fairness and apprehension of bias

The High Court, by a majority of 6:1, has held that a ministerial decision to issue a mining exploration licence in Western Australia was not invalid as involving a breach of procedural fairness on the ground of reasonable apprehension of bias. The Minister had made his decision after consideration, among other matters, of a

departmental submission in the preparation of which two officers had been involved who, or whose son, had shareholdings in one of the corporate applicants for the licence. The majority held that on the facts of the case the Minister did not know of the interests of either officer, and was not himself biased or influenced by the officers in making his decision. In the view of Justice McHugh it was not enough that 'a person with an interest in the decision played a part in advising the decision-maker'.

Justice Kirby delivered a powerful dissent, in which he drew attention to the developing legal and social context of accountability and the expectations of the public integrity of Ministers and departmental officials. The relevant test was whether 'a reasonable member of the public *might* conclude that there is a *possibility* that the decision could have been affected by the earlier participation in it of officers' who had undisclosed interests that would be advanced if the Minister accepted the departmental recommendation. The question of apprehension of bias should be capable of determination in advance, and should not depend on 'whether or not the administrator(s) involved *in fact* exercised their capacity to influence the decision'. (***Hot Holdings Pty Ltd v Creasy* (2002) 193 ALR 90**, 14 November 2002)

Procedural fairness and legitimate expectations in decision making process

A five-member bench of the High Court has rejected an application for relief on the ground of the failure of the Immigration Department to contact, as it said it would, carers of the applicant's children concerning the relationship of the applicant to his children. The statement was made in the course of advising the Minister on the exercise of his power to cancel a visa on character grounds (Migration Act, s 501). The applicant was serving a sentence for a serious offence. All judges were of the view that the applicant would suffer no unfairness in practice as the Minister in fact had all the information that could have been put to him concerning the relationship between the applicant and his children.

The court rejected the argument that the applicant had a legitimate expectation that the Department would either contact the carers or inform him that it had changed its mind about making contact. All judges discussed the concept of legitimate expectations, and distinguished between the developing law in England on this issue based on the notion of 'abuse of power' and the Australian position: a legitimate expectation could not create a substantive right in Australia. In some cases 'a legitimate expectation may enliven an obligation to extend procedural fairness', or where such an obligation already exists may 'bear upon the practical content of that obligation' (Gleeson CJ). The notion of legitimate expectations had played a part in developing the modern law concerning natural justice/procedural fairness but was now of limited utility (McHugh and Gummow JJ), or was apt to mislead (Callinan J). The reasoning in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 was criticised in some judgments. (***Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 195 ALR 502**)

Decisions of the Federal Court on detention under the Migration Act

At the time of writing, the Full Court of the Federal Court had reserved its decision in relation to the Minister's appeal against the decision of Merckel J in the *Al Masri* case, discussed in the last 'Developments' section in (2002) 35 *AIAL Forum* 1 at 6.

In the meantime, a variety of views has been expressed by single judges of the court in matters raising the same basic issues. Some judges have felt bound to apply his Honour's decision on the ground that they were not convinced that he was 'plainly wrong'. Others have doubted its correctness, while still others have declined to follow it, for example, on the ground that the reasoning of Merckel J was in error because it was based on analogies from previous cases and not on the plain words of s 189 of the Migration Act (***SHFB v Minister for Immigration and Multicultural and Indigenous Affairs*** **[2003] FCA 29**, per Selway J, 30 January 2003).

In another significant decision, the Full Court of the Federal Court upheld the constitutional validity of s 196 of the Migration Act, dealing with the period of detention, on the principal ground that it does not prevent courts from ordering release of a person who is not lawfully detained (***NAMU & ors v Minister for Immigration and Multicultural and Indigenous Affairs*** **[2002] FCAFC 401**, 9 December 2002).

Another decision of the Full Court with the same composition as in *NAMU* also raised issues concerning detention. The court upheld its power under s 23 of the *Federal Court of Australia Act 1976*, despite ss 189 and 196 of the Migration Act, to make interlocutory orders for release of an asylum seeker held in detention, pending trial of the arguable claim that a delegate of the Minister had earlier made a decision granting a protection visa although the alleged decision had not been dated or notified to the applicant. The Migration Act did not unambiguously provide authority for continued detention of a lawful non-citizen, or repeal the court's power to make an interlocutory order for the respondent's release in the present circumstances. (***Minister for Immigration and Multicultural and Indigenous Affairs v VFAD*** **[2002] FCAFC 390**, 9 December 2002. The primary decision was discussed in the previous 'Developments' section in (2002) 35 *AIAL Forum* 1 at 6 under the erroneous name of *VAFD*, now reported at (2002) 194 ALR 304. The heading was also erroneous in referring to habeas corpus.)

Requirement to provide reasons for decision to cancel visa

By a majority of 2:1, the Full Court of the Federal Court exercised its discretion to find that the Immigration Minister should provide his reasons (as required by s 501G(1)(e) of the *Migration Act*) for deciding to cancel the appellant's visa on the ground that he did not meet the character test in s 501. The appellant, who had a criminal record, was a non-citizen who had come to Australia when only 6 months old and technically had remained an alien despite growing up in Australia (see *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Te* (2002) 193 ALR 37, decided on 7 November 2002 during the appeal proceedings in this matter). New counsel for the appellant abandoned all existing grounds of appeal but sought an order that the Minister provide reasons for his decision.

The majority (Allsop and Jacobson JJ) held that the briefing paper presented to and signed by the Minister did not explain why he exercised his discretion as he did, what he took into account and what weight he gave matters; moreover, there was a real connection of the order sought with the final disposition of the appeal. In exercising their discretion, the failure to make clear how the decision conformed to 'a careful and humane balancing of the effects of the decision with other relevant matters'

outweighed changes in the applicant's legal strategy, and the lapse of time since the decision was made. Justice Sackville in dissent held that, in the absence of any ground of appeal, such an order would not relate to a matter in which the court had jurisdiction, and in any case he would have refused to exercise his discretion to grant it. (***Ayan v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 196 ALR 332**)

Ministerial guidelines not authorised by law

In a matter that has aroused controversy between conservationists and farmers, Kiefel J in the Federal Court made a declaration that administrative guidelines in effect provided an exemption to growers from a statutory obligation to refer to the Minister certain actions concerning grey-headed, and spectacled, flying-foxes, an exemption not authorised by the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act). The guidelines were made following consultations between the relevant Commonwealth and State Ministers and reflected the view that taking a certain proportion of these species would not endanger them.

There was no decision under the EPBC Act or conduct to which the ADJR Act could apply. There was also no duty of the Minister for performance of which a writ of mandamus would lie under s 39B of the *Judiciary Act 1903* (Cth). However, while the statement in the guidelines about not making referrals did not itself cut across the Minister's statutory duty to consider each case, it would have the effect of deterring such referrals. In the court's view the statement amounted to the granting of an exemption which was not authorised by the Act. (***Humane Society International Inc v Minister for the Environment and Heritage* [2003] FCA 64**, 12 February 2003)

Administrative review and tribunals

See also above on government announcement of reform of the AAT.

Power of Federal Court to give directions as to constitution of Refugee Review Tribunal

A majority of a five-member bench of the High Court has held, on differing grounds, that the Federal Court had power under the now repealed s 481 of the Migration Act to direct that the Refugee Review Tribunal (RRT), on remittal of a matter to it by that court, be constituted by the same person who made the original tribunal decision found by the Federal Court to be based on an error of law. Gummow and Hayne JJ did not consider it necessary to reach a final decision on the question of power. The Minister did not deny that the Federal Court had power to direct that the RRT be differently constituted. All members of the bench except Kirby J held that the Full Federal Court erred in exercising its discretion to direct that the RRT be constituted in the same way on the basis that the visa applicant should have the benefit of the initial findings of fact. In their view, the remitted decision must be based on all the information before the RRT at the rehearing, and there could be no preservation of the findings of fact made in the first hearing.

Justice Kirby dissented on the basis that the 'very purpose of such a power was to allow the Tribunal, in appropriate circumstances, to pick up its consideration of the

matter, at the point at which the earlier decision was reached'. The decision maker was 'obliged to give "further consideration" to the earlier decision, freed from the error of law identified by the Federal Court', and was not fettered in its inquisitorial role. The court 'should hesitate long before intervening' in relation to the exercise of such a broad and flexible power. (***Minister for Immigration and Multicultural Affairs v Wang*** **[2003] HCA 11**, 12 March 2003)

Reinstatement of a dismissed application not confined to administrative error

The Full Court of the Federal Court (Wilcox, Carr and Downes JJ) has declined to follow the obiter view of an earlier Full Court in *Brehoi v Minister for Immigration and Multicultural Affairs* (1999) 58 ALD 385 that s 42A(10) of the *Administrative Appeals Tribunal Act 1975* (AAT Act), which deals with reinstatement of an application that 'has been dismissed in error', was limited to situations where there had been an 'administrative error', i.e. the provision amounted to a 'slip rule'. The present court held that, whatever the idea behind the provision evidenced in the explanatory memorandum, its clear wording did not confine it to errors of an administrative kind. In refusing the appeal, however, Wilcox and Downes JJ (Carr J dissenting) said there was no evidence that the original proceeding had been dismissed in error, and the AAT could not have properly reinstated the application. Justice Carr considered there were grounds for concluding the dismissal was in error. (***Goldie v Minister for Immigration and Multicultural Affairs*** **(2002) 36 AAR 238**)

Ombudsman

Appointment of Professor John McMillan as new Ombudsman

The Prime Minister has announced the appointment of Professor John McMillan as the new Commonwealth Ombudsman to replace Mr Ron McLeod, AM. Professor McMillan commenced his five-year appointment on 17 March 2003. He held the Alumni Chair in Administrative Law at the Australian National University and was a founding member of the AIAL, serving as its President before his appointment. He has written extensively on many issues in administrative law, most recently undertaking (together with Professor Robin Creyke of the ANU) a major empirical study of the impact of administrative law on government administration (see eg (2002) 9 *AJ Admin L* 163). An expanded version of his inaugural professorial lecture on open government was published recently. Before commencing university teaching in 1983, Professor McMillan played a large part in the campaign for Freedom of Information legislation in the 1970s and 1980s, and has been active in other community groups. *AIAL Forum* congratulates Professor McMillan on his appointment. (***Prime Minister of Australia, Media Releases*****,** 7 March 2003; **John McMillan, *Twenty Years of Open Government: What have we learnt?*, CIPL Law and Public Policy Paper 21,** 2002)

Ombudsman's report on family assistance scheme

The Commowealth Ombudsman has released a report concerning his investigation of the family assistance scheme, including the Family Tax Benefit (FTB). He raised concerns with the scheme's operation, particularly the large number of debts, their size and the impact on low income families. Among the report's 18 recommendations

for improving the system were the waiving of debts in some circumstances, including where they resulted entirely from errors by the Family Assistance Office; measures to avoid overpayments where children earned more than anticipated; and allowing families to receive their full entitlement to family assistance when lodging late tax returns. The Ombudsman noted that sole parents faced particular obstacles that increase the likelihood of FTB overpayments. He suggested the Government consider broader policy change to improve the system against its overall policy objectives for government assistance. (**Commonwealth Ombudsman, *Report on Own Motion Investigation into Family assistance administration and impacts on Family Assistance Office customers*,** February 2003; **Commonwealth Ombudsman, *Media Release***, 2 February 2003**)**

Freedom of information & privacy

Passage of Northern Territory Information Act

The Northern Territory has enacted an Information Act that combines provisions for access to government information, access to and correction of personal information held by public sector organisations, the protection of privacy, and appropriate records and archives management in the public sector. The legislation provides for oversight of the freedom of information and privacy provisions of the Act by an Information Commissioner. (***Information Act 2002* (NT),** assented to 8 November 2002; second reading 14 August 2002**)**

Web symposium on 'National Security and Open Government: Striking the Right Balance'

The February 2003 issue of *FoI Review* (No 103) contains information about a symposium on the above topic consisting of a series of contributions published on the Internet over the next two months. The first contribution is by Toby Mendel, with the title 'National Security vs Openness: An Overview and Status Report on the Johannesburg Principles', and is now available on the following website.:

http://www.freedominfo.org

That website is sponsored by an online network of freedom of information advocates, and features current items from around the world. Interested readers can subscribe to an update digest by going to the website.

The symposium is a joint venture of Open Society Justice Initiative and the Campbell Public Affairs Institute of the Maxwell School at Syracuse University, and one of the organisers is Professor Alasdair Roberts, the Institute's Director, who has himself written widely on the topic of freedom of information and national security; see his website at:

http://www.faculty.maxwell.syr.edu/asroberts/

Other developments

Reports on breaching and penalty practices in the social security system, and on proposals for a new social security system

During 2002 there were several independent and official reports on issues relating to breaches and penalties in the social security system, as well as government responses to some of their recommendations. There is an assessment of government responses to that point, as well as references to the reports of other bodies such as the Ombudsman, in the November 2002 progress report of the Independent Review established by a number of organisations involved in provision of services in the social security area. The principal reports and their locations are as follows:

- Independent Review of Breaches and Penalties in the Social Security System, *Making it Work*, Sydney, March 2002, and *Progress Report on Implementation*, Sydney, November 2002, both available from the website of the Australian Council of Social Service (ACOSS):

  http://www.acoss.org.au/papers

- Productivity Commission, *Independent Review of the Job Network: Inquiry Report*, Canberra, September 2002, available at:

  http://www.pc.gov.au/inquiry/jobnetwork/finalreport/index.html

- Senate Community Affairs References Committee, Report on Participation Requirements and Penalties in the Social Security System, Canberra, 25 September 2002, available at:

  http://www.aph.gov.au/senate/committee/clac_ctte

- Commonwealth Ombudsman, *Social Security Breach Penalties – Issues of Administration*, Canberra, 4 October 2002, available at:

  http://www.ombudsman.gov.au

In addition, on 12 December 2002 the Ministers for Family and Community Services and for Employment and Workplace Relations issued a paper entitled *Building a simpler system to help jobless families and individuals*. It proposes a fundamental restructuring of the social security system through introducing a common payment with add-ons in particular circumstances ACOSS has welcomed the initiative. The Ministers seek written submissions on the issues raised in the paper by 20 June 2003 (send electronically to welfare.reform@facs.gov.au, or to the address given in the paper). On the basis of submissions and consultations, the Government proposes to develop more specific options for reform. The paper and a brochure may be obtained from the following website:

www.facs.gov.au/welfare_reform

Revised version of ARC guidelines on statements of reasons

In light of the decision of the High Court in *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 180 ALR 1, the ARC has revised and reissued its two valuable publications giving guidelines to decision makers on preparing statements of reasons. (**ARC, *Practical guidelines for preparing statements of reasons* and *Commentary on the practical guidelines for preparing statements of reasons*,** October 2002, available from the ARC's website referred to above in 'From the reports'**)**