



**Institute of Public Administration Australia
WA Division, University of Western Australia
UWA Business School**

Corporate Governance Seminar

***"Improving Corporate Governance in the Public
Sector: Where Judges Fear to Tread"***

Keynote Address by

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Introduction

The title to this address is intended to depict my basic theme, which is to the effect that the necessary and appropriate limitations upon the extent to which the courts can supervise corporate governance in the public sector has led to the creation of other mechanisms and agencies to perform that role. The spread and efficacy of those other agencies in Western Australia is such that the courts can and should restrict their role to the determination of the legality of administrative action, and resist the temptation to adopt any broader role.

Until about 40 years ago, the avenues available to a citizen who wished to complain about a decision or action of government were very limited. Essentially they comprised:

- (a) representations to government;
- (b) in a very limited class of cases, appeal on the merits to a review body;
- (c) a challenge to the legality of the decision in the courts.

The manifest deficiencies in these avenues of redress has led to a significant expansion of the structures and processes which are intended to improve the governance of public administration and the quality of decision-making both generally, and in the particular case. The aim of this paper is to briefly review those developments and assess the relative strengths and weaknesses of each of the structures and processes which have evolved, by comparison to the proper role of the courts. It is appropriate to set the scene for that analysis by charting the historical development of government itself, and the inability of the common law courts to provide comprehensive supervision of governmental action.

The Growth of Government

It is the tendency of each generation to assume that all significant developments are unique to our time. That tendency is apparent in the frequent references made to the exponential growth of government in recent years. To place those observations in perspective, it is worth noting that as long ago as 1888, English historian and jurist Frederick Maitland wrote:

"We are becoming a much governed nation, governed by all manners of councils and boards and officers, central and local, high and low, exercising the powers which have been committed to them by modern statutes."

The role of central government, as we now know it, emerged significantly during the 19th century in England. Prior to that time, government administration in England was very localised, and focused significantly upon the Justice of the Peace. The Justices were used as all purpose administrative authorities. Their activities were supervised by the Judges of the Assize, who, while on circuit, conveyed instructions from the Crown, dealt with any defaults and malpractices, and reported back to London on the circumstances in the relevant county. So, very early in the development of government administration, the primary mechanism of oversight or governance was the law in the form of the circuit Judges. Their powers included quashing the decisions of the Justices and compelling the Justices to perform their duties and to enforce the law.

During Tudor times, the early signs of centralisation were seen, through the exertion of the authority of the Privy Council, and the Provisional Councils which were created in the north of England and in Wales. The

authority of the Privy Council was exercised through the Star Chamber, which has received a lot of bad press over the years, as a result of its enthusiasm for the occasional use of physical coercion as an aid to the gathering of evidence. However, its less sensational jurisdiction included enforcement of the orders of the Justices of the Peace, and the supervision and removal of the Justices themselves.

In proof of the saying that "evil comes to he (or she) who evil does", the Star Chamber was abolished in 1642, and the Privy Council lost most of its executive power in the revolution of 1688. The vacuum in administrative supervision was filled by the common law courts, notably the court of King's Bench which developed the prerogative writs - mandamus, certiorari and prohibition, as the mechanisms by which the courts could exert supervisory authority over the administrative organs of government. The description of these writs as "prerogative" of course derives from the royal prerogative, and was no doubt adopted in order to emphasise the fact that the common law courts derive their authority from the Crown and that, to that extent were acting as the emanation of the Crown when exerting authority over the administration. This technique appears to have been effective in discouraging challenges to the authority of the courts.

By including the review of administrative decisions within the general jurisdiction of the common law courts, the English courts proceeded in a fundamentally different direction to that taken in many countries on mainland Europe (France, Germany, Italy) where entirely separate Administrative Courts were created to resolve complaints about administrative actions or procedures.

The 19th century saw the development of central government in a form which would be familiar to us now. By 1854, in England there were sixteen central government agencies. During the same century, the administrative functions of the Justices of the Peace were transferred to elected local authorities. The common law courts extended their supervisory jurisdiction, through the prerogative writs, to those authorities, which included county councils, boards of work, school boards, hospital trusts and so on.

However, the exponential growth of government agencies, and regulation in general, during the last half of the 19th century, and the early parts of the 20th century, was matched by a corresponding disinclination on the part of the courts to exert authority over the many and varied forms of administrative agencies which were emerging.

Commentators (eg Wade and Forsyth - Administrative Law, 9th Ed (2004)) suggest that in the early part of the 20th century, the courts showed a loss of confidence in the performance of their constitutional role in ensuring that administrative agencies complied with the law. In 1929, the Chief Justice of England, Hewart CJ, published a book entitled "The New Despotism" in which he referred to the untrammelled power of the bureaucracy.

During the first half of the 20th century, the parliaments of the UK and Australia showed enthusiasm for:

- (a) increasing use of delegated legislation, in which the authority of the parliament was devolved upon an administrative official; and
- (b) the conferral of broad and powerful discretions upon administrative officials.

Each of these techniques substantially expanded the powers of the administration, at the expense of the authority of the parliament. The critical question was whether the courts, as the third branch of government, would step up and assume the responsibility of supervising the proper exercise of the expansive powers conferred upon the bureaucracy.

In the United Kingdom, initially the courts showed no inclination to assume this responsibility. This tendency was abundantly evident during World War II, and is perhaps best demonstrated by the famous case of *Liversidge v Anderson* [1942] AC 206. In that case, the legislation empowered the Home Secretary to intern people if he had "reasonable cause" to believe that they had "hostile associations". The House of Lords held that it was not for the courts to determine whether there was, in an objective sense, reasonable cause for the formation of that view, but that, it was sufficient if the Minister believed, in a subjective sense, that he had reasonable cause to order internment.

In a powerful dissenting judgment, that great jurist, Lord Atkin, protested that the majority had placed "a strained construction on words with the effect of giving an uncontrolled power of imprisonment to the Minister". He went on to say:

"I know of only one authority which might justify the suggested method of construction: -

'When I use a word, humpty dumpty said in a rather scornful tone, it means just what I choose it to mean, neither more nor less. The question is, said Alice, whether you can make words mean so many different things. The question is said

Humpty Dumpty, which is to be master - that's all.'

(Through the Looking Glass)

After all this long discussion, the question is whether the words 'if a man has' can mean 'if a man thinks he has'. I am of the opinion that they cannot, and that the case should be decided accordingly."

(at 245)

In Australia during World War II, the Commonwealth legislature developed the same enthusiasm for delegated legislation - justified politically by the need to confer broad and sweeping powers upon the administration in order to effectively counter the perils of war. Despite the obvious power of the public interest in the successful defence of the nation, the High Court of Australia repeatedly exercised its constitutional authority to ensure that the legislation complied with the constraints imposed by a written constitution, the existence of which significantly distinguished Australia from the United Kingdom, until more recent times, when the courts of the United Kingdom have been given jurisdiction to supervise administrative action through the various treaties and conventions, and perhaps most significantly, the Charter of Human Rights, to which it is a party by virtue of its membership of the European Union. The import and effect of those laws is such that, over the last 20 years, the tables have turned dramatically, from a circumstance in which the Australian courts had a greater capacity to intervene in the supervision of administration than their UK counterparts by reason of the Australian Constitution, to a circumstance in which the international instruments which have become part of the domestic law of the United Kingdom provide the courts of that country with significantly broader grounds of intervention than exist in Australia.

Of course, the desirability of greater judicial supervision of executive action depends very much upon one's perspective - that is, whether one is a governor or one of the governed. Doing the best I can to be objective, it seems to me that the recent growth of alternative mechanisms for the supervision, review and constraint of executive action provides significantly less justification for an expansive view of the scope of judicial supervision. Put another way, as there are now a variety of agencies which provide:

- review of decisions on their merits
- the investigation of complaints of maladministration
- the promulgation of public sector standards and the capacity to investigate complaints of departure from those standards
- the scrutiny of administrative efficiency
- a well-resourced agency for the investigation of allegations of misconduct on the part of public officers
- a general right to information in the possession of government

there is much to be said for the proposition that the courts should stay within the bounds of assessing the lawfulness of administrative action, and resist any temptation to intervene on the merits.

The Current Scope of Judicial Review

There are many texts, written mainly for lawyers and law students, on the current scope of judicial review within Australia. It would be possible to go on at great length about the doctrinal basis for the judicial review jurisdiction of the various Australian courts, but that would be more appropriate for a primarily legal audience, not such as this. It is sufficient for present purposes to deal with some of the practical limitations upon the scope of judicial review.

First, generally speaking, the jurisdiction of the courts is limited to ascertaining whether or not an administrator has exceeded the jurisdiction conferred upon him or her by the legislature. Put another way, the essential question which is posed to a court is not whether the administrator was right or wrong, but rather whether he or she exceeded their powers. As the jurisdiction of the Australian courts is conferred by legislation, and the powers of administrators are also generally conferred by legislation, it might be thought that the legislatures have the capacity to effectively exclude judicial review if they wish. However, at least at Commonwealth level, that view would be erroneous because, firstly, the Constitution enshrines the jurisdiction of the High Court to review administrative decisions (Constitution, section 75) and, secondly, the High Court has held that unless the legislature is prepared to expressly empower administrators to act capriciously, or unreasonably, or by reference to utterly irrelevant considerations, the court can exercise the authority conferred by the Constitution to ascertain whether one or more of those factors is present, with the result that the administrator has gone beyond jurisdiction (*Plaintiff S157/2002 v Commonwealth* (2003) 211 CCR 476).

The courts of the States do not enjoy the same constitutional protection, but, nevertheless, no significant attempt has been made to erode their supervisory jurisdiction. The greatest constraints upon the exercise of judicial review by State courts derive from the procedural limitations of the prerogative writs still in use in some States (such as Western Australia), and the lack of an entitlement to a statement of reasons, which is often fundamental to the exercise of meaningful judicial review. The Commonwealth removed these procedural inhibitions more than 30 years

ago with the enactment of the *Administrative Decisions (Judicial Review) Act*, which modernised and simplified the procedures relating to judicial review of administrative action, and provided a comprehensive entitlement to a statement of reasons for any decision made under Commonwealth legislation. The latter entitlement was colourfully described by Sir Gerard Brennan as "having lowered a bridge over the moat of executive silence". The practical effect which these changes had upon the capacity of the courts to supervise Commonwealth administration is evident in the explosion of judicial review litigation since the implementation of that legislation. Over that time, administrative law has become a significant component of the day to day work of the Federal and High Courts, whereas, in previous years, administrative law litigation was a relative rarity.

In Western Australia, in 2002, the Law Reform Commission recommended that the government of this State enact legislation very similar to that which has applied at Commonwealth level, including a general right to a statement of reasons. The State government announced its acceptance of those recommendations as soon as the report was published. However, the legislation to give effect to those recommendations is still awaited. Its enactment is unlikely, in my view, to give rise to an explosion in judicial review litigation of the kind that was seen at Commonwealth level for a number of reasons. The first is that much of the Commonwealth litigation was driven by immigration issues, which are, of course, exclusively federal. The second is that the availability in this State of other mechanisms for governmental supervision, review and accountability will, I think, reduce the need for judicial intervention. It is to those alternative mechanisms that I will now turn.

Review on the Merits

The essence of judicial review is that it is limited to an inquiry into the lawfulness of the action under consideration, not its merits (although there have been times, in the history of judicial review, when that distinction has not been readily apparent). The first half of the 20th century saw the creation of many boards, tribunals and panels for the purpose of reviewing administrative decisions in particular subject areas. Their growth was such that, by the latter part of the 20th century, it was very difficult to comprehensively list them all, or to define their jurisdiction. In 1971, the Kerr Committee recommended the creation of an umbrella merits review tribunal for the Commonwealth, bringing all the diverse boards and tribunals which had been created for the review of decisions on their merits under one roof. The *Administrative Appeals Tribunal Act* was passed in 1975, and the Tribunal commenced work in 1977. The same approach has been taken in Victoria (with VCAT), in Western Australia (with SAT), to a lesser extent, in New South Wales (with the ADT), and is proposed in Queensland.

None of these tribunals have a plenary jurisdiction to review all decisions made within their polity on their merits. Rather, they depend upon the conferral of specific jurisdiction to review particular classes of decisions. However, the creation of umbrella tribunals of this kind has significantly increased the willingness of the legislature to provide a mechanism for review of decisions on their merits, because the hurdle of creating a specific and separate tribunal, with its attendant cost, is not present. The jurisdictions of the AAT, VCAT and SAT are now extremely broad and constantly expanding. Within those areas of jurisdiction, review on the merits provides a generally more satisfactory means of review for those

aggrieved by administrative action or decisions, than that provided by the courts. That is because each of those tribunals can inquire into both the lawfulness of the decision or action under review, and its merits, whereas the court can only determine lawfulness. Of the various forms of review, review on the merits provides the most effective remedy to an aggrieved citizen.

The Ombudsman

The office of Ombudsman, and the word derived from Sweden in 1809. New Zealand became the first English-speaking country to create the office in 1962, and the UK Ombudsman was established in 1967. Western Australia was the first Australian jurisdiction to create the office in 1971, followed by Victoria in 1972, Queensland and New South Wales in 1974, and the Commonwealth in 1976/77. The office now exists in varying forms (and with varying degrees of independence) in 120 countries.

In Western Australia, one of my more illustrious predecessors, Sir Francis Burt, advised, prior to the creation of the office of Ombudsman, that:

"The problem of legal control of the exercise of executive power could not be solved within the existing law. New institutions and attitudes would have to be created."

This was a perceptive and prescient observation upon the limited utility of judicial review. In the course of the Parliamentary Debates relating to the passage of the Western Australian legislation, one member referred to the qualities required of an Ombudsman in the following terms:

"Who will this man be? In looking at the schedule (to the Act), I think he will be God, Jesus, Christ, Allah, Mahomet and Solomon, all in one."

Another member said of the Ombudsman:

"The heavens will open and he will descend in a golden chariot."

The essential function of the Ombudsman is to investigate complaints of maladministration. He or she is primarily responsible to the Parliament, and lacks power to set aside the decision under review, or to substitute his own decision. His or her power is, ultimately, limited to the power of report.

However, the significance of that power should not be underestimated. Its use, or perhaps more significantly, the prospect of its use, has led to the substantive change of decisions in many thousands of cases. Perhaps the most topical recent example of the effective use of the powers of the Ombudsman relates to the investigations by the Commonwealth Ombudsman into the continuing detention of persons under the *Migration Act*. Those investigations have been instrumental in the release of many persons from custody.

Freedom of Information Legislation

Lack of information, or secrecy, has been used as a cloak to shroud administrative action from any form of review for many years. In 1972, Jim Spiegelman (as he then was - now Chief Justice of New South Wales) published a book entitled, "Secrecy - Political Censorship in Australia" recounting his experiences, as a member of the staff of the Leader of the Opposition, in attempting to obtain information from the Public Service. Later, as a senior executive in the Whitlam government, he was instrumental in a review of the principles relating to public access to government information, but the Whitlam government lost office before any significant action was taken in that regard. However, in 1982,

the *Freedom of Information Act* was enacted by the Commonwealth Parliament, and various States, including Western Australia, have followed suit.

The significance of conferring a right of access to information as a constraint upon executive action is not to be underestimated. The fact that documents might have to be made available acts as a general and overriding constraint upon maladministration irrespective of whether or not any request is ever made for those documents. Further, the availability of information significantly enhances the utility of other mechanisms for review, including judicial review and merits review.

Contentious issues have arisen in Western Australia recently in relation to the precise structure of the mechanisms for the provision of access to information, and for the review of decisions to refuse access. It would not be appropriate for a serving Judge to comment upon those issues, which are in the political arena. However, it is not inappropriate to refer to statements made by me on the public record prior to my appointment. These include, in my capacity as Chair of the Administrative Review Council, the endorsement of a joint report by that Council and the Australian Law Reform Commission, which supported the creation of an office of Commissioner for Information, but at the same time recommended that review of decisions for refusal should be undertaken by an independent tribunal - at Commonwealth level the AAT. It is also a matter of public record that while I was Chair of the WA Law Reform Commission, that Commission recommended that jurisdiction to review decisions to refuse access for documents be removed from the Information Commissioner and conferred upon the State Administrative Tribunal (although the Committee appointed to make detailed

recommendations prior to the creation of the SAT recommended otherwise).

The Corruption and Crime Commission

The Corruption and Crime Commission was established on 1 January 2004. It has three basic functions being:

- (a) the investigation of possible misconduct by public officers;
- (b) the function of preventing and educating public officers with a view to minimising misconduct; and
- (c) the function of investigating organised crime.

The third function, the investigation of organised crime, is of little interest to this gathering, and has, in any event, been of limited impact to date, because the exercise of the function depends upon references from the Commissioner of Police, which, as far as one can tell, have not been significant since the inception of the Commission.

"Misconduct" is defined very broadly by the Act, as is "public officer". It has been estimated that more than 115,000 Western Australians come within the definition of "public officer", within more than 550 agencies.

I believe that any review of the work of the Commission to date would conclude that it has been effective in raising public awareness of the need for integrity in public administration. It has engendered controversy, but that is probably some measure of its success in raising public awareness. Most recently, those controversies have included differences of opinion between the Commission and the Parliamentary Inspector as to the scope of the Commission's jurisdiction (in respect of the expression of opinions on conduct which does not come within the definition of "misconduct")

and as to the scope of the Parliamentary Inspector's jurisdiction (as to whether his audit function includes review of the opinions expressed by the Commission). It is not appropriate for me to express a view on those issues. Because they go to the extent of jurisdiction, they are issues which could be presented to the Supreme Court for determination, although it seems to me that a parliamentary resolution would be preferable. I will, however, venture a few observations on another issue which has enjoyed some topicality, which is the question of the extent to which the Commission should conduct its hearings in public.

I approach that issue from the perspective of a judicial system which has recognised the virtue of transparency of operation for hundreds of years. Long experience suggests that the conduct of proceedings under the full scrutiny of the public significantly enhances public respect for the relevant institution. In my view, the fact that the Anti-Corruption Commission (the predecessor of the CCC) never conducted any of its hearings in public, was a significant factor in the public disquiet which ultimately led to the abolition of that body. The inhibitions upon the reporting of proceedings in the Family Court and the Children's Court has also occasionally led, in my view, to public misunderstanding, and disquiet in relation to the operations of those courts. So, I start from the perspective that conducting proceedings in public enhances public confidence in the integrity of those proceedings. There is also an obvious and very direct benefit to the Commission's preventive and educative function from conducting hearings in public. And the public benefit from being able to see and hear for themselves the evidence given in relation to those officers in whom the public should be entitled to repose trust and confidence. The public work of the CCC has also enhanced the

democratic process by providing the electorate with information pertaining to the conduct of the elected representatives of the public.

Obviously these considerations must be balanced against the possibility of irremediable harm to the reputations of innocent people. The fact that the Commission is an investigative agency, which forms and expresses opinions, and not a court, which makes binding determinations, is also relevant to this issue. That is because the process of investigation will often involve the ventilation of assertions and contentions which lack the factual basis of assertions made in a court, after investigations are complete.

Where the balance is to be struck between those competing considerations is a matter for judgment in individual cases. It is inevitable that those who have been investigated in public will feel that they have been unfairly prejudiced as compared to those who have been investigated in private. The public ventilation of those grievances is, I think, an inevitable consequence of providing the Commission with the discretion to determine those cases in which hearings should be held in public, and those in which hearings should be held in private. Although the legislation is structured in a way which would suggest that the default position is a private hearing, it will be apparent from the views I have expressed, that, in my view, in many cases, there will be a strong public interest in a public hearing, against which the risk of unfairness to particular individuals must be balanced.

The Auditor General

The office of the Auditor General has a number of functions. Most pertinent to today's address are what might be described as the traditional

role of auditing financial statements and accounts, and the more recent role of performance or efficiency auditing. The former provides an opportunity to investigate maladministration or improper accounting. The latter role provides a much broader power to review, assess and report upon the efficiency, and efficacy of public administration. Recent years have seen successive Auditors General deploy significant resources into the function of auditing performance and efficiency. The reports which have followed those investigations have often resulted in substantial administrative changes, which have improved administration, not only from the perspective of efficiency, but also from the perspective of fairness and justice. Perhaps the most recent example is the performance audit recently undertaken in relation to the juvenile justice system, which identified a number of issues which should and hopefully will be addressed in relation to the administration of that important component of the justice system.

The Commissioner for Public Sector Standards

The Commissioner for Public Sector Standards has a number of functions including:

- The establishment of codes of ethics for the public sector and human resource management standards
- Assisting public sector agencies to comply with those standards
- Monitoring and reporting to Parliament upon compliance with those standards
- The investigation of claims of breach of those standards
- The provision of advice to Ministers in relation to appointments to Chief Executive Officer positions

- Assisting and monitoring compliance with the *Public Interest Disclosure Act 2003*

These are obviously vitally important functions which have the capacity to affect public administration generally. A public sector code of ethics was promulgated with effect from 1 February 2008, replacing all previous codes of ethics. The greater the adherence to that code, the less likely it is that other mechanisms for review and supervision of public administration will be necessary.

The Integrity Co-ordinating Group

It might be thought that the various mechanisms and agencies to which I have referred are operating in an unco-ordinated way in individual silos. That view would be quite wrong. In 2005 in Western Australia, the Integrity Co-ordinating Group (ICG) was established to provide greater policy coherence and operational co-ordination amongst key government integrity bodies, charged with improving integrity within the public sector. Membership of the cross-agency venture includes the Ombudsman, the Commissioner for Public Sector Standards, the Corruption and Crime Commission, and the Auditor General. The ICG meets regularly, and undertakes various projects aimed at encouraging co-operation and co-ordination of the activities of the various integrity agencies of government.

Conclusion

In this paper I have endeavoured to provide a brief overview of the development of the various mechanisms by which public administration can be reviewed and supervised, and administrators held accountable. I have endeavoured to show that, 50 years ago, those mechanisms were

essentially limited to judicial review in the courts (of a limited kind constrained by procedural complexity and lack of an entitlement to reasons) and some merits review tribunals in specific areas. The last 40 years have seen the exponential growth of alternative mechanisms for the review and supervision of public administration, enhancing the accountability of public administrators. Those mechanisms include the much greater availability of merits review, the creation of the office of Ombudsman, the provision of a right to governmental information, and the creation of integrity agencies such as the Corruption and Crime Commission, the Commissioner of Public Sector Standards, and the Auditor General. At the same time, judicial review has been simplified and enhanced by the provision of a right to a statement of reasons (in most jurisdictions - hopefully in Western Australia soon). The provision of these various alternative mechanisms for review and supervision of administrative decisions means that there is no justification for the courts to exceed the legitimate bounds of their jurisdiction to determine whether or not administrative action is lawful. Current indications are that the interrelationship between the various integrity mechanisms and agencies is working well, with the result that the courts can be expected to confine their inquiries into the lawfulness of administrative action, while those aggrieved by administrative decisions have available to them a variety of avenues of redress, including review on the merits, investigation by the Ombudsman, and investigation by the other integrity agencies identified in this paper.

A Postscript - Accountability of the Judiciary

Those of you who are public administrators might feel that it is all very well for a Judge to talk to you about your accountability, when Judges are not accountable to anybody. There is an element of truth in this criticism.

Traditionally, judicial independence has been provided as the justification for the lack of judicial accountability for performance. It is a weak excuse, because there is a significant distinction between the independence of the judiciary in relation to the adjudication of cases which is, of course, sacrosanct, and the accountability of the judiciary for the performance of their work in general, and the accountability of individual members of the judiciary for their performance in respect of matters other than the adjudicative decision. That is why the Judges and Magistrates of Western Australia recommended to the government that a Judicial Commission be created for the purpose of providing an independent mechanism for the investigation of complaints against the judiciary. The government has accepted that proposal. When that Commission is created, it will constitute yet another agency in the team of integrity agencies available for the investigation of complaints against government, including the judicial branch of government.