# DEVELOPMENTS IN ADMINISTRATIVE LAW

***Ron Fraser****

## Government initiatives, inquiries, legislative and parliamentary developments

### *Migration litigation legislation introduced*

The *Migration Litigation Reform Bill 2005* was introduced into the House of Representatives and debate on the second reading adjourned on 10 March 2005: its provisions were referred to the Senate Legal and Constitutional Legislation Committee on 16 March 2005 for report by 11 May 2005. Twenty-four submissions have been received by the committee. The Bill is designed to implement the Government's response to a review of migration litigation by Ms Hilary Penfold (see (2004) 43 *AIAL Forum* at 5 and 40 *AIAL Forum* at 5). The Government's stated purposes are to address the high volume of migration litigation, in particular 'unmeritorious litigation', and to reduce delays and facilitate quicker handling of cases. A central element in the Bill is the enhanced role of the Federal Magistrates Court (FMC), which has grown from 16 magistrates in 2000 to 31 after the appointment in 2005 of eight new magistrates; the Bill provides for the Chief Federal Magistrate to become responsible for administration of the FMC. Most applications for judicial review of migration decisions will be heard initially in the FMC as the result of limiting the migration jurisdiction of the Federal Court to more complex matters transferred to the court from the FMC and to review of 'character-related' decisions by the Administrative Appeals Tribunal and the Minister. In addition, the grounds of review in relation to migration cases in the FMC's original jurisdiction are to be the same as in the High Court under section 75(v) of the Constitution, and remission by the High Court to the FMC in migration matters may now occur on the papers without the need for a hearing. The Federal Court retains appellate jurisdiction from the FMC in migration matters, and the Bill mandates the current practice of single judges hearing most migration appeals, except where a hearing by the Full Court is considered appropriate by a judge. Uniform time limits apply to applications for judicial review in all three courts, and these are subject to extension if made within 84 days of notification of the relevant decision; the bill's provisions on time limits incorporate revised amendments from a previous bill (the lapsed Migration (Judicial Review) Bill 2004) to accommodate criticisms by the Senate Legal and Constitutional Legislation Committee. The Bill also broadens the grounds on which a court can summarily dispose of proceedings where it is satisfied that there are no reasonable prospects of success, and prohibits persons, including lawyers and migration agents, from encouraging the initiation or continuation of 'unmeritorious migration litigation', providing for costs orders against such persons in certain cases.

A submission by the Administrative Review Council (ARC) points out that the summary judgment provisions will apply to *all* applications before the FMC, the Federal Court and the High Court, not merely migration applications, although there is no indication of that in the short title of the Act. It considered that there was little risk of the courts interpreting the provisions 'rashly or without careful regard to countervailing access to justice principles', but noted that the Government's own research indicated that, apart from migration matters, special leave applications to the High Court and vexatious claims to the Family Court, 'there was no evidence of an increase in unmeritorious claims across the board'. Among other things, the ARC supported the provisions of the Bill to 'limit the jurisdiction of the Federal Court to certain kinds of cases in migration matters'. The ARC noted concerns by

stakeholders that the third party costs provisions could result in discouraging pro bono assistance in migration matters, and commented that the breadth of the provision would affect the likelihood of this consequence ensuring. Other submissions are critical of many elements of the Bill, such as that of the Law Council of Australia. (For submissions to the committee see:
www.aph.gov.au/senate/committee/legcon_ctte/mig_litigation/index.htm).

### *Government responses to immigration detention issues*

The Government has responded to criticisms of the immigration detention of an Australian citizen, Cornelia Rau, based on the mistaken belief that she was an unlawful non-citizen, by appointing the former Australian Federal Police Commissioner, Mr Mick Palmer, to conduct an internal inquiry. Mr Palmer had not reported at the time of writing. The Government also announced changes to procedures of the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) following the Rau case. (**Senator Amanda Vanstone, Media Releases,** 8 & 26 February 2005; **Peter Prince, *The detention of Cornelia Rau: legal issues***, **Parliamentary Library, Research Brief No 14, 2004–05,** 31 March 2005, which includes a general discussion of the legal basis of detention)

The Rau case may also have helped precipitate the announcement by the Government of the introduction of a new category of bridging visa (Removal Pending Bridging Visa) designed to allow community release with reporting obligations of unsuccessful asylum seekers (other than those detained on Nauru) whose removal from Australia is not possible at least in the short term. For a detainee to qualify for such a visa the Minister must believe the person has done everything possible to facilitate his or her removal from Australia, and the detainee must agree to abide by all prescribed conditions and to cooperate with arrangements for their removal if that becomes possible. Holders of the new visa will be entitled to the same social support as Temporary Protection Visa Holders, access to trauma and torture counselling and access to the English as a second language service for school age minors. The visa is not available to detainees with current visa applications, or who are challenging decisions in the RRT or the courts. While *The Age* has said there are up to 120 people who have been in immigration detention for more than three years, the Minister has said the visa will apply only to a small number of detainees, none of whom had been publicly identified at the time of writing, nor had the regulations been amended. (**Senator Amanda Vanstone, Media Release,** 23 March 2005; see also reference in **Prince** (above) at 5)

### *Reintroduction of lapsed bills*

Several bills which lapsed when the 40th Parliament was dissolved were reintroduced into the new Parliament which first met in November 2004. These included:

- Administrative Appeals Tribunal legislation. The *Administrative Appeals Tribunal Amendment Act 2005* was assented to on 1 April 2005. It finally passed all stages of the Parliamentary process on 17 March 2005, following a report by the Senate Legal and Constitutional Legislation Committee on 8 March 2005. A number of the committee's recommendations were accepted by the Government, including retaining the provision in the existing Act that the President of the AAT be a Federal Court judge. The committee's report is available from its website:
  www.aph.gov.au/senate/committee/legcon_ctte/index.htm
  (See also (2004) 43 *AIAL Forum* at 12 for a description of the original bill, and Parliamentary Library, *Bills Digest No 54, 2004–05: Administrative Appeals Tribunal Amendment Act 2004*, 26 November 2004.)

- National Security legislation. The *National Security Information (Criminal Proceedings) Act 2004* and the *National Security Information (Criminal Proceedings) (Consequential Amendments) Act 2004* were passed by Parliament on 8 December 2004 and assented to on 14 December 2004. The first of these Acts incorporated a number of amendments proposed by the Government and accepted by the Opposition that reflected some of the recommendations of the Senate Legal and Constitutional Legislation Committee for changes to the original lapsed bills in order to give the courts greater discretion in relation to exclusion of evidence, holding closed hearings and ensuring a fair trial. Among other things, the consequential amendments Act excludes from the reasons provisions of section 13 of the *Administrative Decisions (Judicial Review) Act 1977* decisions by the Attorney–General under the principal Act to give a certificate relating to disclosure of information, as well as limiting a court's jurisdiction to review an application for review of such a certificate decision. (See (2004) 43 *AIAL Forum* at 3 and 14 for summaries of the original principal bill and the ALRC report relating to these issues, and Parliamentary Library, *Bills Digests Nos 59 & 60, 2004–05*, 29 November 2004.) See also later amendments to the principal Act made by the *National Security Information (Criminal Proceedings) Amendment (Application) Act 2005*, assented to on 21 March 2005. The provisions of the *National Security Information Legislation Amendment Bill 2005*, which among other things extends the principal Act to include certain civil proceedings, was referred to the Senate Legal and Constitutional Legislation Committee on 16 March 2005 for report by 11 May 2005; a public hearing by the committee was held on 13 April 2005.

- The *Australian Communications and Media Authority Bill 2004* and its companion transitional and consequential amendments bill completed the Parliamentary process on 17 March 2005 and were assented to on 1 April 2005. (See (2004) 43 *AIAL Forum* at 3 for a short summary.)

- The *Postal Industry Ombudsman Bill 2005* had not yet been passed by the Parliament at the time of writing (see (2004) 43 *AIAL Forum* at 13 for the nature of the scheme).

- Indigenous affairs legislation. The *Aboriginal and Torres Strait Islander Commission Amendment Act 2005* was assented to on 22 March 2005. It abolishes ATSIC with effect from the proclamation date of 23 March 2005 and makes consequential amendments. It also abolishes Regional Councils with effect from 1 July 2005. The assets and liabilities of ATSIC will largely transfer to Indigenous Business Australia and the Indigenous Land Corporation. The Government has appointed a National Indigenous Council to advise it on Indigenous issues and has created an Office of Indigenous Policy Coordination and Indigenous coordination centres across the country. The legislation is largely contrary to the majority recommendations of the Senate Select Committee on the Administration of Indigenous Affairs. (**Senator Amanda Vanstone, Media Release on Indigenous Affairs,** 24 March 2005**; Senate Select Committee on the Administration of Indigenous Affairs, *After ATSIC – Life in the Mainstream?*,** 8 March 2005; see also: **Angela Pratt & Scott Bennett, *The end of ATSIC and the future administration of Indigenous affairs*, Parliamentary Library, Current Issues Brief No 4*,* 2004–05*,* 9 August 2004**)

## *Government legislative program Autumn 2005*

The following are among the new bills proposed by the Government for the Autumn Sittings 2005. The comments on the bills are drawn from the Government release at: www.pmc.gov.au/parliamentary/index.cfm, or from Parliamentary Bills lists where the Bill has already been introduced.

- The *Archives Amendment Bill* will 'update the *Archives Act 1983* in accordance with current practice and assist the National Archives of Australia to promote good record-keeping across the Commonwealth'.
- *Australian Citizenship Legislation Amendment Bill*: To 'amend the *Australian Citizenship Act 1948* to improve the integrity and equity of the citizenship process; to substitute simplified provisions; to restructure and tidy up the Act; and to ensure that the Act is an exhaustive statement of Australian citizenship'.

- *Migration Amendment (Migration Zone) Bill*: To amend the Migration Act to 'provide greater certainty in the definition of "migration zone"', and to 'clarify detention powers to remove persons to a place outside Australia'.

- Other proposed migration legislation includes the *Migration Legislation Amendment (Border Protection and Visa Integrity) Bill* and the *Migration Legislation Amendment (Information Management) Bill*.

- *Australian Human Rights Commission Legislation Bill*: To 'restructure, refocus and rename the Human Rights and Equal Opportunity Commission'. This will presumably be in similar terms to the Bills that have previously been unsuccessful in the Parliament (see (2003) 38 *AIAL Forum* at 2).

- *Defence Legislation Amendment Bill (No 1)*: Among other things, the Bill will establish the position of the Inspector General of the Australian Defence Force on a statutory basis and create the statutory appointments of Director of Military Prosecutions and Registrar of Military Justice.

- The *Legislative Instruments (Technical Amendment) Bill 2004* was introduced into the Parliament on 16 November 2004 and debate adjourned. It amends the *Acts Interpretation Act 1901* to clarify the effect of the expression 'by legislative instrument'. The legislation program also referred to other proposed technical amendments which have not yet been introduced.

- For the *Migration Litigation Amendment Act 2005* see separate item above.

### *Introduction of website for Commonwealth law incorporating the Federal Register of Legislative Instruments*

The Attorney–General's Department has developed a new legislative repository known as ComLaw which contains Commonwealth primary legislation and ancillary documents in electronic form and the new Federal Register of Legislative Instruments established on 1 January 2005 under the *Legislative Instruments Act 2003* as the authoritative source for legislative instruments and compilations of legislative instruments. Material from SCALEplus is up to date as at 1 January 2005 but no new material has been added since then. The new website is: www.comlaw.gov.au

### *ACT Human Rights Commission and the activities of the Human Rights and Discrimination Commissioner*

Following the report of an external review, and the enactment of the *Human Rights Act 2004* (ACT) (see (2004) 41 *AIAL Forum* at 1–2), the ACT Government has introduced legislation to establish a Human Rights Commission which will comprise a President, a Disability and Community Services Commissioner, a Health Services Commissioner and a Human Rights and Discrimination Commissioner, supported by specialist staff including conciliators, investigators and legal advisers. In addition to its human rights activities, the Commission is

intended to provide a single, easily accessible office to receive complaints and concerns about health and disability services, services for older people, and discrimination across a range of service and employment areas, and to improve service provision and public education. (**ACT Chief Minister, Media Release**, 7 April 2005)

The ACT Human Rights and Discrimination Commissioner, Dr Helen Watchirs, presented an ANU–Toyota Public Lecture on 22 February 2005 in which she discussed experience of the operation of the ACT Human Rights Act since 1 July 2004, referring to a number of court and tribunal cases in which the application of the Human Rights Act was raised. The Commissioner outlined her office's work in promoting public and agency knowledge of human rights. She noted that the Victorian Government has committed itself to introducing a Charter of Rights and Responsibilities, and that the UK Government intends to introduce a Human Rights Commission in 2006 with functions similar to those of the ACT Commissioner. After the first year of operation the government will review whether the rights covered by the Human Rights Act should extend to economic, social and cultural rights. (**Dr Helen Watchirs, 'The ACT Human Rights Act 2004: its impact and potential', ANU-Toyota Public Lecture**, 22 February 2005, available from the ANU website: www.anu.edu.au/disabilities/ANU-Toyota_lecture_Watchirs.htm. See also **Hon JJ Spigelman, 'Blackstone, Burke, Bentham & the Human Rights Act 2004 (ACT)', Keynote address 9th International Criminal Law Congress, Canberra**, 28 October 2004, available from: www.lawlink.nsw.gov.au/sc/sc.nsf/pages/spigelman)

### *Brief items*

- The Parliamentary Joint Committee on ASIO, ASIS and DSD is conducting a review of ASIO's questioning and detention powers under Division 3 of Part III of the *Australian Security Intelligence Act 1979*, inserted by the *Australian Security Intelligence Organisation Amendment (Terrorism) Act 2003* and later amendments. The review is to be completed by 22 January 2006. Forty-seven submissions were received, and public hearings will be held in the future. For materials relating to the committee's review see: www.aph.gov.au/house/committee/pjcaad/index.htm

- On 31 August 2004 the Senate Legal and Constitutional References Committee tabled its report *The road to a republic: Inquiry into an Australian Republic*. On 8 June 2004 it tabled a report on its *Inquiry into Legal Aid and Access to Justice*, including recommendations that the Commonwealth Government adopt a new model for funding legal aid.

  For these reports see:
  www.aph.gov.au/senate/committee/legcon_ctte/index.htm

## The courts

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

### *Aliens power extends to children born in Australia of parents who are not Australian citizens or permanent residents*

In *Singh* the High Court decided by a majority of 5:2 (McHugh and Callinan JJ dissenting) that the aliens power in section 51(xix) of the Australian Constitution extends to a child born in Australia of parents who are not Australian citizens or permanent residents. Section 10(2) of the *Australian Citizenship Act 1948* (Cth) excludes such a child from the provision in section 10(1) that a person born in Australia is an Australian citizen. Ms Singh was born in

Mildura of Indian parents who had originally arrived on valid visas but later sought and were refused refugee status, a matter which was still under appeal at the date of the High Court's decision. As a result of that decision, Ms Singh could become liable to the removal provisions of the *Migration Act 1958* (Cth) if her parents' appeal is unsuccessful.

All members of the court enunciated views about how the Constitution should be interpreted in such a case. Chief Justice Gleeson, in the majority, and McHugh and Callinan JJ, in dissent, considered it crucial to ascertain the meaning of the word 'alien' in the historical context of the drafting and adoption of the Constitution around 1900, but differed on what that meaning was. The Chief Justice agreed with the joint judgment of Gummow, Hayne and Heydon JJ that in 1900 there was no established legal requirement that an Indian citizen, born of Indian citizens, be excluded from the class of aliens, and noted that the issue of race was of great concern to the framers of the Constitution. Parliament was therefore empowered by section 51(xix) of the Constitution to decide whether such a person should be treated as an alien. Both McHugh and Callinan JJ, however, considered that it was central to the common law notions of allegiance and alienage, and remained so in 1900 despite statutory modifications, that those born within the dominions of the Crown became natural-born subjects of the Crown. In the view of McHugh J, because of her birth in Australia, Ms Singh was a person who owed permanent allegiance to the Queen of Australia and could not be treated as an alien: Parliament itself could not define who is an alien. The authors of the joint judgment started from the premise that, while it was essential to ascertain the meaning of words used in the Constitution at the time of federation, the Constitution must be construed bearing in mind that it is an instrument of government intended to endure. Justice Kirby also rejected 'the notion that the meaning of a word or phrase is fixed forever by reference to understandings that existed in 1901', noting that international law left it to nation states to determine their own nationality laws and principles. (***Singh v Commonwealth of Australia* (2004) 209 ALR 355**, 9 September 2004)

### *Whether mandatory detention invalid in relation to children – limits on power to detain aliens*

The High Court unanimously refused an application founded on a claim that the mandatory detention regime in the *Migration Act 1958* (Cth) was invalid in its application to infant children. The applicants, through their father as next friend, were the children of asylum seekers from Afghanistan whose appeals against refusal of refugee status were still in process, although the applicant children had been granted temporary protection visas in July 2004 and were no longer in detention. In essence, the applicants claimed that the mandatory detention provisions of the Migration Act either did not apply to children, or were invalid because they were punitive in character in relation to children and that mandatory detention of children under those provisions (ss 189 and 196) therefore involved an exercise of judicial power by the executive in breach of the separation of powers mandated by Chapter III of the Constitution. Detention was for an indefinite time, and even if adult detainees could seek removal from Australia (s 198), children lacked the legal capacity to do so.

All members of the court held that the current administrative detention regime was not punitive, either generally or in relation to children, so as to bring the provisions of Chapter III into play. The court could see no relevant distinction between the mandatory detention provisions upheld in *Chu Keng Lim v Minister for Immigration* (1992) 176 CLR 1 and those in the current ss 189 and 198. However, there were significant differences between the justices in their assessment of *Lim*'s continuing effect particularly in the light of the recent decision in *Al-Kateb v MIMIA* (2004) 208 ALR 124 (see (2004) 43 *AIAL Forum* at 9–10). As he did in *Al-Kateb*, Justice McHugh called in question a number of statements in the joint judgment in *Lim*, while both Kirby and Gummow JJ supported the interpretation of the Constitution in *Lim*, and saw no reason to revisit it in the present case. In particular, McHugh J considered

that since *Al-Kateb* the test stated by the majority in *Lim*, that to be valid detention must be 'reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered', was no longer good law. All that was necessary to satisfy the requirements of Chapter III was that the purpose be non-punitive: one should not start with the assumption that detention laws are punitive. Both Gleeson CJ and Callinan J used the terminology employed in *Lim*, which may indicate an overall majority in the present court for that approach. Finally, Kirby and Gummow JJ maintained their dissenting view in *Al-Kateb* that detention was not unlimited in circumstances where a detainee requested removal from Australia and 'where such removal is unlikely as a matter of reasonable practicability'. (***Re Woolley; Ex parte Applicants M276/2003 by their next friend GS* (2004) 210 ALR 369**, 7 October 2004; see also: **Peter Prince, 'The High Court and indefinite detention: towards a national bill of rights?', *Research Brief No 1,* 2004–05**, 16 November 2004)

### *Time limit for appeal to Federal Court from RRT or MRT commences only on notification of both decision and reasons of the tribunal*

By a majority of 4:1 (Gleeson CJ, McHugh, Gummow and Heydon JJ; Kirby J dissenting), the High Court in *WACB* allowed an appeal from the Full Court of the Federal Court. The High Court held that the legislative history of s 478 of the Migration Act, which requires that an application to the Federal Court must be lodged within 28 days of the applicant being notified of a decision of the RRT, supported the construction that an applicant must also be notified of the reasons for the decision in the manner provided by ss 430 and 430D(2) of that Act. (Similar provisions apply to appeals from the Migration Review Tribunal.) The applicant, an asylum seeker claiming to be from Afghanistan who was unable to read, had been told by staff of the Curtin detention centre of the unsuccessful outcome of his appeal to the RRT, but was at that time neither informed of his rights to apply to the Federal Court nor provided with the reasons for the decision. Three weeks later at his request he was provided by an employee of the detention centre with the RRT's reasons expressed in English. His appeal was lodged three weeks after expiry of the time limit assuming it commenced the day he heard of the RRT's decision. The majority held he had not been 'notified of the decision' under s 478 until he received the statement of the RRT's reasons in English, and his appeal was therefore within time. Justice Kirby, though expressing considerable sympathy for the applicant, considered that the legislative history established that the Parliament had deliberately repealed an earlier provision that notification of a decision of the relevant tribunal at the time had to be accompanied by a statement of the tribunal's reasons for a decision: 'those provisions were intended by the Parliament to impose extremely severe limitations which are very short and rendered expressly unyielding even to special circumstances'. (***WACB v MIMIA* (2004) 210 ALR 190**, 7 October 2004)

### *Failure to complete hearing a breach of procedural fairness*

In *NAFF* the High Court unanimously overturned a majority decision of the Full Federal Court refusing relief against a decision of the RRT to uphold refusal of refugee status to a Tamil Muslim from India, requiring the RRT to determine the matter according to law. The court's decision was made in light of statements by the RRT member to the applicant at the end of the hearing of his matter that there were inconsistencies in evidence in relation to alleged periods of detention, that she would write to him about these in the next few days and that he would have 21 days 'in which to respond to my questions and to put any more information that you wish to the Tribunal'. She did not do so, and proceeded to hand down a decision adverse to the applicant without explaining why no further information had been sought.

The authors of the joint judgment (McHugh, Gummow, Callinan and Heydon JJ) decided the matter on the basis that the RRT had not met its statutory requirements to conduct a review

and to allow the applicant to give evidence and to present arguments. While the RRT was under no obligation to give the applicant an opportunity to provide further material, it had indicated 'that the review could not be completed until further steps had been directed and performed' and could not then conclude the review by peremptorily making a decision without taking those steps. Justice Kirby decided the matter in terms of the requirements of the general law of procedural fairness that had not at the time of the RRT's decision been abolished or diminished by statute (s 422B of the Migration Act inserted in 2002: see below under heading 'Effects of legislation removing ground of procedural fairness'). Failure to follow up as foreshadowed at the end of the proceedings represented a procedural unfairness because the 'inconsistencies' remained relevant. Justice Kirby commented that, while this was not a case in which to explore the notion of 'legitimate expectations' in relation to procedural fairness, there was nothing in *Lam's* case (see (2003) 36 *AIAL Forum* at 8) requiring abandonment of that fiction as a tool of judicial reasoning, although its utility was somewhat limited in view of the expanded notion of procedural fairness in Australia. (***Applicant NAFF of 2002 v MIMIA* (2004) 211 ALR 660**, 8 December 2004)

### *Exclusion of student from PhD course not a decision made under an enactment*

*Tang* was concerned with whether a decision by Griffith University to exclude a student from a PhD program on the ground of academic misconduct was subject to review under the Queensland *Judicial Review Act 1992*, which is similar in material respects to the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act). The High Court allowed an appeal from the decision of the Queensland Court and ordered that Ms Tang's application for judicial review be dismissed without consideration of the evidence for her claims that there had been breaches of the bias and hearing principles of procedural fairness, together with other grounds for relief set out in the Judicial Review Act.

By a majority of 4:1 (Kirby J dissenting) the High Court held that Ms Tang's exclusion from the PhD program was not a decision of an administrative character 'made under an enactment', in this case the *Griffith University Act 1998* (Qld), and therefore was not subject to review under the Judicial Review Act. The High Court's consideration of this matter occurred in the context of differing lines of interpretation in the Federal Court of the phrase 'made under an enactment'. In their joint judgment, Gummow, Callinan and Heydon JJ held that in order to qualify as a decision 'made under an enactment', it was necessary not only that a decision be expressly or impliedly required or authorised by the relevant enactment, but it had also to affect legal rights and obligations and in that sense derive from the enactment. On the basis of Ms Tang's application it appeared that no legal rights or obligations under private law subsisted between her and the university that could be affected by the decision to exclude her. Chief Justice Gleeson held similarly that, although the exclusion was within the university's general statutory powers, as it related only to the termination of a voluntary relationship the statute itself did not give the exclusion decision 'legal force or effect'.

As with the majority judges, Kirby J rejected a number of other formulations of the bases on which a decision should be characterised as having been 'made under an enactment'. In contrast to the majority judgments, however, he held that the correct test of whether a decision was 'made under an enactment' is to determine first whether the lawful power to make the decision lies in the enactment, and secondly whether an individual would apart from that source have power to make it. There was no justification for the joint judgment's addition of a 'gloss' that the decision must also affect 'legal rights or obligations'; this was particularly so in light of the general remedial nature of the legislation and the fact that the legislation is concerned with effects on the complaining party's 'interests' not his or her 'legal rights or obligations'. Ms Tang's 'interests' would be profoundly affected by the finding of

misconduct and her exclusion from obtaining a PhD degree, decisions directly traceable to the University Act and of a kind that 'only a university operating under the [Qld] Higher Education Act could lawfully perform'. It was 'not unreasonable that such bodies should be answerable for their conformity to the law', including the law of procedural fairness. (***Griffith University v Tang*** **[2004] HCA 7**, 3 March 2005; **Michael Will, 'High Court decision may add to government power'**, ***Canberra Times***, 30 March 2005)

### *Entitlement to protection visas of refugees able to obtain 'effective protection' in another country*

The High Court has handed down an important decision on the question whether acknowledged refugees from one country who are able to claim 'effective protection' in a 'safe' third country are entitled to a protection visa in Australia. The issue was decided on the basis of the provisions of s 36(2) of the *Migration Act 1958* as they were when the applicants applied for protection visas, before the amendment of s 36 in 1999. The applicants were Russian Jews each of whom met the definition of a refugee in the Refugees Convention, but who were entitled to immigrate to Israel and obtain nationality status under its *Law of Return*. They had never been to Israel and did not speak Hebrew, and had no desire to immigrate to Israel for those and other reasons. The High Court in effect rejected the view of the Full Court of the Federal Court in *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (1997) 80 FCR 543 that Australia had no protection obligations in those circumstances because Article 33 of the Convention (concerning 'non-refoulement') did not prevent their removal to the third country. *Thiyagarajah* had been followed by subsequent benches of the Full Court, reluctantly in the present case (see (2004) 41 *AIAL Forum* at 6). Six judges delivered a joint judgment in which they refused to imply the limitation sought by the Minister in relation to a Convention refugee's right to a protection visa. Justice Kirby expressed the belief that it would be absurd to hold by implication that the Convention or the Migration Act removed Australia's protection obligations because of the generosity of other States' refugee laws, an interpretation that if universalised could potentially 'send refugees shuttling between multiple countries'. (***NAGV & NAMW v MIMIA*** **[2005] HCA 6**, 2 March 2005)

### *Effects of legislation removing ground of procedural fairness*

The provisions introduced into the Migration Act by the *Migration Legislation Amendment (Procedural Fairness) Act 2002* (Cth) (the Procedural Fairness Act) have begun to affect applications for review made after 4 July 2002 (see (2002) 35 *AIAL Forum* 2–3). In *WAID*, for example, French J was of the opinion that, when read with the new provisions, s 424A (concerning provision of information by the RRT) was to be treated as 'exhaustive of the requirements of procedural fairness relating to the applicant's right to comment on adverse material which is known to and is to be relied on by the (RRT)'. The legislation purports to make a number of Divisions or Sub-Divisions of the Migration Act an 'exhaustive statement of the natural justice hearing rule *in relation to the matters [the Division etc] deals with*'. However, the words emphasised have created problems of interpretation, and it is unclear how far the provisions go to exclude the application of procedural fairness.

The state of authority is sparse and indeterminate. The view taken by French J in another decision (*WAJR*), was that the 'matters' dealt with in the Division within which s 424A occurs are 'to be identified by reference to its particular provisions and not by reference to its general subject matter, ie the conduct of reviews by the RRT' (see also *WAID*). In *WAJR* the result was that the requirements in s 424A concerning provision by the RRT of information to an applicant had become 'an exhaustive statement of the requirements of procedural fairness relating to adverse material' known to the RRT which it intends to rely on. However, that left open the question whether there might be other aspects of procedural fairness which could be relevant to decisions under the appropriate Divisions (cf *obiter dicta* of Lindgren J in

*NAQF*). On the basis of his comments in *Wu*, Hely J would clearly not have held there was any residual procedural fairness obligation to provide the adverse material. By contrast, in a recent decision that examines the authorities (*Moradian*), Gray J found that, despite the evident intention of the Minister in introducing the Procedural Fairness Act to overcome the High Court's decision in *Re MIMIA; Ex parte Miah* (2001) 206 CLR 57, the relevant provision was too ambiguous to operate as 'plain words of necessary intendment' capable of excluding the principles of procedural fairness. The issue of principle would seem to require further consideration at the level of the Full Court. (***Moradian v MIMIA* [2004] 1590**, 6 December 2004, Gray J; ***WAJR v MIMIA* [2004] FCA 106**, 18 February 2004, French J; ***NAQF v MIMIA* (2003) 130 FCR 456**, Lindgren J; ***Wu v MIMIA* [2003] FCA 1249**, 13 November 2003, Hely J; ***WAID v MIMIA* [2003] FCA 220**, French J, 19 March 2003; on other issues relating to s 424A note forthcoming High Court decision in *SAAP v MIMIA*)

## *Full court quashes land acquisition by Commonwealth as not authorised by legislation*

In a judicial review action brought by the South Australian State Government under both the ADJR Act and s 39B of the *Judiciary Act 1903* (Cth), the Full Court of the Federal Court has quashed actions of the Parliamentary Secretary to the Commonwealth Minister for Finance and Administration purporting to acquire two parcels of land in South Australia for the purpose of constructing a repository for near-surface radioactive waste. The Commonwealth had made it known that it wished to acquire certain land in South Australia for that purpose, and the State Government indicated that it would introduce legislation in the near future designed to declare the land a public park which, under s 42 of the *Lands Acquisition Act 1989* (Cth) (the LAA), would have prevented the acquisition occurring without the State Government's consent. Shortly afterwards, the Parliamentary Secretary, acting for the Minister, signed certificates under s 24(1) of the LAA stating his satisfaction that there was an urgent necessity for the acquisition of the interests in the land and that it would be 'contrary to the public interest for the acquisition to be delayed by the need for the making, and possible reconsideration and review, of a pre-acquisition declaration'. He immediately afterwards signed declarations under s 41(1) of the LAA that all the interests in the land were compulsorily acquired by the Commonwealth for the public purpose of disposal of short-lived intermediate level radioactive waste. In a statement of reasons under s 13 of the ADJR Act, the Parliamentary Secretary stated that the reason for urgency was the proposed introduction of the public park bill in the South Australian Parliament.

The court unanimously allowed an appeal against the decision of the primary judge upholding the acquisition. Justice Branson, with whom Finn and Finkelstein JJ agreed, held that the power to give a certificate of urgency under s 24(1) of the LAA did not extend to exercise of it for the purpose of preventing the application of section 42 to the acquisition, nor could it be contrary to the public interest for the acquisition to be delayed for that reason. Alternatively, it could be said that the Parliamentary Secretary had exercised his power under s 24(1) for an improper purpose. Justice Finn, with whom Branson and Finkelstein JJ agreed, held also that a reading of the LAA in the light of the ALRC report which preceded its enactment did not reveal any basis for excluding the application of procedural fairness principles to the exercise of power under s 24, and that in the present circumstances where both the State and others had important interests at stake there was no reason for the content of those requirements to be reduced to 'nothingness'. (See also the Court's useful summary of the usual principles of procedural fairness.) (***South Australia v The Hon Peter Slipper, MP* [2004] FCAFC 164**, 24 June 2004)

# Administrative review and tribunals

## *ARC report on automated assistance in administrative decision making*

Following consultations on the basis of its earlier Issues Paper (see (2004) 40 *AIAL Forum* at 7), the Administrative Review Council (ARC) has released its final report on automated assistance in administrative decision-making. Starting from the administrative law values of lawfulness, fairness, rationality, openness (or transparency) and efficiency, the report propounds a series of principles directed to those involved in the construction and maintenance of expert (automated) systems used in administrative decision-making (noting their applicability in many cases also to agency decision-making manuals). The report concludes that using an expert system to actually make a decision, as distinct from providing assistance to a decision-maker to make it, 'would generally be suitable for decisions involving non-discretionary criteria'. However, there were at least four approaches brought to the ARC's attention where expert systems could appropriately be used as an administrative tool to help a decision maker in the exercise of their discretion. The report also noted that the design of expert systems needs to reflect government policy while not fettering or narrowing a decision-maker in the exercise of the discretion. The remaining principles are set out in chapter 4 of the report, and fall broadly under three headings: primary administrative law considerations; system development and operational considerations; and new service delivery considerations. The first category deals with issues such as compatibility with legislation; when it is appropriate to override a decision made with the assistance of an expert system; and the need to comply with administrative law standards and privacy obligations. (***Automated Assistance in Administrative Decision Making*, Report No 46, Administrative Review Council**, November 2004; available from: www.law.gov.au/arc )

## *UK reforms in the area of administrative justice*

The UK Government published a White Paper in July 2004 setting out the broad measures proposed in the areas of improving the processes of 'administrative justice', in response to the Review of Tribunals headed by Sir Andrew Leggatt, presented in March 2001 (see (2002) 35 *AIAL Forum* at 7–8 for a brief summary of the Leggatt Report). The White Paper accepts the fundamental view of the Leggatt report that the tribunals system is 'incoherent and inefficient'. In addition to the bringing of tribunals under one administrative umbrella, the paper proposes also to find ways to improve: the standard of decision-making, explanations of decisions (reasons statements), provision of advice to those dissatisfied with decisions, and the utilisation of means of resolving disputes other than proceeding to full hearings by a tribunal. The paper proposes a timetable for progressive integration of tribunals under the new Tribunals Service as an Executive Agency within the Department of Constitutional Affairs (DCA), beginning with the ten largest tribunals, and extending to the remaining central government tribunals by early 2009. The aims include to provide efficiencies between tribunals including accommodation; to improve their standard of operation; to strengthen the reality and appearance of the independence of tribunals from decision-making agencies; to bring procedures in different tribunals more into line where possible; to improve training and performance appraisal of members of tribunals; and generally to provide users of the system with more and better targeted support. A Senior President with the knowledge, experience and standing equivalent to a Lord Justice of Appeal is to be appointed with responsibility in relation to all tribunals. There will also be an appellate tier (called the Administrative Appeals Tribunal!) to hear appeals from individual tribunals by leave, as well as more complex primary cases. Administrative actions to implement the proposals have commenced, legislation concerning tribunal members is proposed to be introduced in June 2005 (Courts and Tribunals Bill), and the formal launch of the service is proposed for April 2006.

A significant element of the new proposals is the recasting of the present Council on Tribunals – which Sir Andrew Leggatt found 'had given insufficient emphasis to strategic thinking about administrative justice generally or about tribunals in particular' – to become an Administrative Justice Council with a greater role in the development and support of the new system. Unfortunately, unlike the Administrative Review Council in Australia, it will not have a research function. In the meantime, the present Council on Tribunals will have a greater consultative role on legislation affecting tribunals. (**Secretary of State for Constitutional Affairs and Lord Chancellor, Lord Falconer of Thoroton, *Transforming Public Services: Complaints, Redress and Tribunals***, Cmd 6243, July 2004, available from: www.dca.gov.uk/legalsys/tribunals.htm )

### *WA State Administrative Tribunal in operation*

The Western Australian State Administrative Tribunal (SAT) commenced formal operation on 1 January 2005 (for the Barker Report leading to its establishment see (2002) 35 *AIAL Forum* at 1–2). The new tribunal brings together the work of a large number of existing tribunals and other bodies in reviewing or making original decisions (over 600 in all) under 137 enactments. Applications to the tribunal are divided into four streams: Human Rights, Development and Resources, Commercial and Civil, and Vocational Regulation. The tribunal became fully operational on 24 January 2005 with the addition of the power to make decisions under the WA *Guardianship and Administration Act 1990* in place of the Guardianship and Administration Board. The SAT intends to emphasise mediation rather than formal hearings to resolve disputes wherever possible. Justice Michael Barker QC is President of the SAT, assisted by two Deputy Presidents, with 12 other fulltime members and 100 sessional members. The tribunal's website includes a decisions database: www.sat.justice.wa.gov.au.

### *Application of legal professional privilege and public interest immunity in the AAT*

In proceedings in the Administrative Appeals Tribunal (AAT) concerning objections to amendments to tax assessments, the Commissioner of Taxation claimed exemption from disclosure of certain documents on the grounds of legal professional privilege and public interest immunity. Deputy President Forgie held that, while under s 37(3) of the *Administrative Appeals Tribunal Act 1975* (Cth) legal professional privilege cannot prevent provision by a government agency of the 'T' documents both to the AAT *and to the other party*, or the provision to the AAT of documents requested by it under s 37(2) of that Act, the AAT's power under s 33 to give the other party copies of documents it has obtained is subject to the application of legal professional privilege. Similarly, there is no implied or express provision to do away with any privilege in relation to documents produced to the AAT under summons (s 40). The documents in question were properly subject to legal professional privilege and could not be ordered to be produced under the AAT's general powers in s 33, the only avenue for their production.

The AAT also held that claims for public interest immunity in relation to information in documents were not limited to the case where the Attorney–General of the Commonwealth, or a State or Territory, issued a certificate under ss 36 or 36B of the AAT Act to the effect that disclosure would be contrary to the public interest. Where a certificate is issued, the AAT is governed by the provisions of s 36D(6) which exclude 'the operation of any rules of law that relate to the public interest' that would otherwise apply to disclosure of information or matter in documents. The better interpretation of s 36D(6) was that, where no public interest certificate had been issued, it was 'not intended to exclude the general operation of considerations of public interest immunity in proceedings in the Tribunal'. In the present case the balance of public interest favoured non-disclosure of information given in confidence to a

government agency that would have revealed the identity of informers, but the relevance to the proceedings of other non-confidential information outweighed any public interest in its non-disclosure. (***Re Hobart Central Child Care and Commissioner of Taxation*** **(2004) 57 ATR 1368**, 19 November 2004)

## Ombudsman

### *Activities of the Commonwealth Ombudsman in 2003 to 2004*

The Ombudsman's annual report for 2003–04 contains a wealth of material on the activities of his office. The report is significant for a greater attention than in the past to the systemic effects of the work of the Ombudsman's office, including chapters on problem areas in government decision-making, ways in which the Ombudsman helped people as a result of complaints, and some of the Ombudsman's contributions to promoting good administration, including his own motion investigations (see next item). During the year there was a decrease of 12% in the number of complaints received (17,496), but a steady increase in the number of more complex matters raised. The Ombudsman investigated 30% of all complaint issues finalised (5,910); agency error or deficiency was identified in 20% of cases investigated, compared to 29% last year, and no error or defect was found in 43%. New functions for the Ombudsman include assuming responsibility as the Postal Industry Ombudsman during 2004–05 (see (2004) 43 *AIAL Forum* at 13), conducting an annual review of the information-gathering powers of the Building Industry Taskforce, and possible assumption of the role of Ombudsman in relation to Norfolk Island. The Government has provided additional funding of $7.061 million over four years to establish the office's new roles, as well as to expand delivery of Ombudsman services in regional and remote areas, to improve oversight of surveillance devices, and for partial funding of Comcover premiums. The Ombudsman intends to appoint an Outreach Manager in 2004–05.

The Ombudsman's office is considering whether, as with some of its State counterparts, it should be excluded from the FOI Act for documents relating to its investigation activities, arising in part out of a review by Professor Ian Freckleton concerning unusually persistent complainants. Again, in view of the absence of comprehensive review of the work of the Ombudsman since the establishment of that position in 1976, the Ombudsman's office, with the Prime Minister's approval, is also conducting a review of the legislative framework for the Ombudsman's work. As part of this exercise the Ombudsman is considering the best way of conferring jurisdiction on the Ombudsman to cover the actions of Commonwealth contractors. (***Commonwealth Ombudsman: Annual Report 2003–2004***, 5 October 2004, available from the Ombudsman's website at: www.comb.gov.au/publications )

### *Reports of own motion and other investigations by the Commonwealth Ombudsman*

Investigations initiated by the Commonwealth Ombudsman (known as 'own motion' investigations), often relating to systemic problems identified as a result of a series of complaints, continue to form a significant aspect of the Commonwealth Ombudsman's work. In 2003–04 the Ombudsman released four own motion reports, relating to: complaint handling by the Australian Taxation Office (ATO) and by Job Network; changes to assessment decisions by the Child Support Agency (CSA); and the operational and corporate implications for the Australian Crime Commission (ACC) arising from alleged corrupt activity by two former secondees.

At the beginning of the 2004–05 financial year, there were four own motion investigations under way, into: the treatment of underaged people in the military; the administration by the AFP of traffic infringement notices; the use of coercive powers by the ATO; and the quality of

FOI processing by government agencies, building on the Ombudsman's and the Auditor–General's previous reports on these matters. The Ombudsman published a report after an audit of the use of coercive access powers in one area of the ATO (August 2004), and proposes to continue the own motion investigation by auditing the use of access powers in a different sphere of ATO operations. In November 2004, the Ombudsman published a report on his own motion investigation into the implementation by the Australian Crime Commission (ACC) of the Ombudsman's recommendations relating to allegations of corrupt behaviour by two officers seconded from State services and of the findings of a review commissioned by the ACC, concluding that the actions taken by the ACC had been appropriate and proportional responses to the recommendations and the review.

In line with an earlier decision of the Ombudsman, reports of investigations that culminate in a formal finding of agency deficiency will be published in full – or in an abridged version where privacy, confidentiality or secrecy provisions require it – on the ombudsman's website (above).

## Freedom of information, privacy and other information issues

### *Amendment of Public Service Regulation 2 in relation to disclosure of official information*

As a result of the finding by the Federal Court in *Bennett v President, HREOC and CEO, ACS* (2003) 204 ALR 119, that the previous equivalent of then regulation 2.1 was invalid because it breached the constitutional freedom of communication on political and governmental matters, the Government has amended regulation 2 of the *Public Service Regulations 1999*, made under s 13(13) of the *Public Service Act 1999*, with effect from 23 December 2004. As amended, regulation 2.3 prohibits the disclosure of information obtained or generated by an APS employee in connection with his or her employment 'if it is reasonably foreseeable that the disclosure could be prejudicial to the effective working of government, including the formulation or implementation of policy or programs'. In addition, regulation 2.4 prohibits the disclosure of such information which was, or is to be, communicated in confidence within the government, or was received in confidence by the government from a person or persons outside the government (not confined to circumstances where disclosure would found an action for breach of confidence). Disclosure is not prohibited in the course of an employee's duties or in accordance with an authorisation of an Agency Head, or if it is 'otherwise authorised by law'. The new provisions respond to the court's concerns that the former legislation was a 'catch-all' provision, and to the Australian Law Reform Commission's (ALRC) recommendation that the legislation should only apply to information that genuinely requires protection. They do not pick up the additional recommendation of the ALRC that the duty of secrecy should apply only where unauthorised disclosure is likely to harm the public interest. (***Public Service Amendment Regulations 2004 (No 2)*****,** gazetted 23 December 2004; see also (2004) 41 *AIAL Forum* at 10)

### *FOI: public interest in government confidentiality upheld*

Two recent decisions of the President of the AAT (Downes J) under the *Freedom of Information Act 1982* (Cth) (FOI Act) have attracted considerable public comment. They concerned FOI requests made by the FOI Editor of the *Australian*, Mr Michael McKinnon, to the Department of the Treasury for documents relating to 'bracket creep' in taxation collection, and to the First Home Buyers Scheme, including fraudulent applications under the scheme, and another request to the Department of Foreign Affairs and Trade for documents relating to the Australian Government's response to the situation of Mr David Hicks, including advice on the legality of his detention in Guantanamo Bay.

A number of the exemption claims in the Treasury matter related to deliberative process material which was covered by a conclusive certificate given under s 36(3) of the FOI Act. His Honour found that reasonable grounds existed for those claims, in effect endorsing grounds advanced by Treasury of two main kinds. Broadly speaking, these were either (a) the need for confidentiality of communications within government, in particular between Ministers and advisers on controversial matters of ongoing sensitivity, and for confidentiality of written communications relating to decision-making and policy formulation processes where disclosure might lead to future reluctance by officers to make written records, or (b) the alleged misleading or confusing effect of disclosing various kinds of provisional or superseded analysis, recommendations or options, or material that would be difficult to understand. The applicant has appealed to the Federal Court against that decision. In the Foreign Affairs matter, after balancing other aspects of the public interest, the AAT upheld exemption claims under s 36 similar to those in the Treasury matters even in the absence of a conclusive certificate; claims under ss 33 (international relations) and 34 (Cabinet documents) were also upheld on the evidence. (***Re McKinnon v Secretary, Department of the Treasury*** **[2004] AATA 1364**, ***Re McKinnon v Secretary, Department of Foreign Affairs and Trade*** **[2004] AATA 1365**, both 21 December 2004; **Denis O'Brien, 'FOI law is well and truly in need of an overhaul',** ***The Public Sector Informant*** (a *Canberra Times* publication), 2 March 2005; **'FOI rulings squeeze access' (editorial**), ***Canberra Times***, 23 December 2004)

## *Commencement of access provisions of the UK FOI Act*

On 1 January 2005 the access provisions of the *Freedom of Information Act 2000* (UK) came into force (a separate Act applying in Scotland also came into force on that day). The Act joins the *Data Protection Act 1998* (UK) and the *Environmental Information Regulations 2004* (UK) as the principal means for the disclosure of publicly-held information in the UK. Opinions differ on how wide and productive the right of access will turn out to be, with much depending on the way in which public authorities, the Information Commissioner and the courts interpret the public interest override that applies to a number of exemptions. (For a useful description and analysis of the UK FOI Act, see: **Philip Coppel, 'Freedom of information in the United Kingdom: the public interest, prejudice and practice' (2005) 12** ***Aust Jo of Admin Law*****,** forthcoming; for comment and criticisms see: **Robert Hazell, 'Fear of information stalks corridors of Whitehall',** ***Independent***, 23 December 2004, and articles and leader in ***Independent***, 2 February 2005)

## *AAT privacy decision*

In the first substantive decision on such a matter, the AAT (Justice Downes, President, Senior Member Constance and Member Miller) recently held that the Federal Privacy Commissioner, acting as Privacy Commissioner in relation to the ACT, had been in error in not awarding compensation to an applicant, whose privacy the Commissioner had found had been breached by the ACT Department of Justice and Community Safety (DJACS). The CEO of DJACS had unlawfully provided personal information about the applicant's employment and private affairs to the Ombudsman who was investigating a public interest disclosure by the applicant (see *Public Disclosure Act 1994* (ACT)). The Privacy Commissioner declared that DJACS should apologise to the applicant (which it did in formal terms), but in view of the fact that disclosures did not go beyond the Ombudsman's investigating team and were not known more widely in the community, he made no declaration as to compensation.

The *Privacy Act 1988* (Cth) provides for compensation for any loss or damage suffered by reason of an act or practice complained about; and loss or damage includes 'injury to the complainant's feelings or humiliation suffered by the complainant'. In the absence of

authority concerning compensation decisions in relation to breaches of privacy, the AAT accepted the applicability of principles endorsed by the Full Court of the Federal Court in relation to compensation for breaches of the *Sex Discrimination Act 1984* (Cth), awarding compensation of $8,000 on the basis of ordinary principles of tort law for injury to the applicant's feelings and humiliation suffered. Playing the man and not the ball was as unfair in public administration as in sport, the AAT commented. (***Re Rummery and Federal Privacy Commissioner* (2004) 39 AAR 166**, 22 November 2004, relying on the reasoning of the Full Federal Court in *Hall v A&E Sheiban Pty Ltd* (1989) 20 FCR 217)

## Public administration

### *Establishment of Commonwealth anti-corruption body foreshadowed*

The Commonwealth Government announced in June 2004 that it would establish a new independent body to address corruption amongst law enforcement officers at a national level. It will have the powers of a Royal Commission, including telephone intercept powers. The move arose out of the allegations of corruption by state service officers seconded to the Australian Crime Commission (see above in relation to Ombudsman own motions). (**Commonwealth Attorney–General and Minister for Justice, Media Releases**, 16 June 2004)

### *Report on corruption and democracy*

A report by Professor Barry Hindess of the Australian National University examines the question of corruption and democracy, in particular issues relating to institutional corruption. Among the report's recommendations are Commonwealth legislative whistleblower protections, country-wide anti-defamation legislation to provide more protection for bona fide public interest discourse, statutory codes of conduct for ministerial staff, parliamentarians and ministers, and an independent ethics commissioner. (**Barry Hindess, *Corruption and Democracy in Australia*, Democratic Audit of Australia, Report No 3, ANU**, 2004, available from the following website:
http://democratic.audit.anu.edu.au/ )

### *New collaborative public administration body formed*

An interesting recent development in the field of public administration is the establishment of the Australia and New Zealand School of Government Ltd (ANZSOG), a not for profit public company limited by guarantee. The new body has a vision of creating a world-class institution which focuses on the needs of the government and community sectors and seeks 'to enhance the breadth and depth of policy and management skills and invest in the further education and development of those who are destined to be leaders in the public sector'. It organises a public lecture series and a number of public seminars, as well as offering an Executive Master of Public Administration program. ANZSOG has sponsored a Chair of Public Management located at Monash University with the aim of providing leadership to ANZSOG in relation to research, teaching, professional activities, and academic administrative matters. The body functions through a number of core academic staff, fellows and adjunct professors, as well as drawing on other teaching staff in Australia and New Zealand. ANZSOG is an initiative of five governments (Commonwealth of Australia, New Zealand, New South Wales, Queensland and Victoria) and ten higher education institutions. Its program and publications are available through its website. A recent ANZSOG public lecture was given by Professor Rob Rhodes on changes in government practice in the UK (and Australia). (See **Rob Rhodes, 'End of an era: is Westminster dead in Westminster?', *The Public Informant*** (a *Canberra Times* publication), 2 March 2005, and the full lecture at: htttp://anzsog-research.anu.edu.au/events.html )

### *Provision for long-term planning processes in Australia*

Dr Ian Marsh and Emeritus Professor David Yencken have recently provided a stimulating discussion of the deficit in long-term planning processes in Australia and some possible ways of rectifying the situation. They argue that social and political changes in the last 30 years or so have reduced the effectiveness of the two-party political system 'to provide the setting for sustained review and analysis of long-term trends', and that new structures are required to enable long-term issues to be identified and considered in a non-partisan way and then brought into the political arena for consideration and decision. In their view, the present political arrangements lack a 'transparent "contemplative" phase in the consideration of longer-term issues'. They suggest that improvement will involve, first, strengthening capabilities for identifying and analysing such issues, and, secondly, providing for the engagement of interest-group and public opinion. Among suggestions on the former are building independent research capacity by government-supported bodies, including advisory committees and consultative forums, and promoting the growth of independent think tanks and community organisations concerned with policy issues. More fundamentally, they propose restructuring the Council of Australian Governments (COAG) to fit it better for bringing about key nationwide reforms, and a major reconfiguration of the national Parliamentary committee system to involve interest groups and the public generally in policy-making and to give careful consideration to significant issues before the major political parties take a stand on policy. One model would involve parliamentary committees or bodies that either included both parliamentarians and outside experts, or that worked with groups of such experts. While recognising the difficulties in bringing such changes about, they point to the popular support they would have and the existence of similar processes in other countries. (**Ian Marsh & David Yencken, *Into the Future: The Neglect of the Long Term in Australian Politics*, Australian Collaboration & Black Inc, Public Interest Series**, **Melbourne**, 2004; **Ian Marsh, 'Australia's Representation Gap: A Role for Parliamentary Committees?', Senate Occasional Lecture**, 26 November 2004)

## Other developments

### *Law Council President warns on erosion of fundamental rights*

In a wide-ranging address to the LawAsia conference in Brisbane on 24 March 2005, the President of the Law Council, John North, expressed deep concern at the direction of 'law making in a climate of fear'. His concern related both to federal measures, such as anti-terrorism legislation and the treatment of asylum seekers, and to state measures such as those increasing police powers, limiting the availability of bail and amending the law concerning personal injuries compensation. He raised the issues of a better parliamentary process for closely scrutinising legislation before enactment, and the need for codified and entrenched basic human rights and fundamental freedoms, perhaps through an Australian bill of rights. The Law Council has established a new Human Rights Observer Panel to monitor citizens' rights around the world. It includes a large number of distinguished practitioners and judges; Nicholas Cowdery QC was appointed last year to co-chair the panel. (**Law Council of Australia, Media Releases**, 23 March & 6 April 2005; **John North, 'Restoring rights and liberties and restraining executive power in a climate of fear'**, available from the Law Council's website:
www.lawcouncil.asn.au/ )

### *Law Lords declare indefinite detention of non-UK nationals incompatible with human rights*

A recent decision of the House of Lords throws considerable light on the interpretation and application in the UK courts of the European Convention for the Protection of Human Rights

and Fundamental Freedoms (the Convention), largely adopted into UK law by the UK *Human Rights Act 1998*. Nine detainees held for over three years in Belmarsh prison challenged legislation enacted following the terrorist attacks of 11 September 2001 on the United States. The legislation provided in effect for the detention of non-UK nationals in relation to whom the Home Secretary certified that their presence was a risk to national security and that they were reasonably suspected of being terrorists who could not for the moment be deported because of fears for their safety or other practical considerations. Some 17 persons in all have been detained under the legislation. Before enactment of the legislation the British Government made an Order of derogation from Article 5 of the Convention (concerning the right to liberty). The Special Immigration Appeals Commission (SIAC) quashed the Order and declared the legislative provisions incompatible with Articles 5 and 14 (concerning unwarranted discrimination) of the Convention, a decision reversed by the Court of Appeal. The House of Lords allowed the appeal (Lord Walker of Gestingthorpe dissenting), quashed the order and made a declaration in similar terms to that of SIAC. (Under the Human Rights Act the courts cannot strike down legislation that is incompatible with the Convention. Parliament and the executive must decide what to do following a declaration of incompatibility.) The majority held that the derogation provisions had not been met, all but Lord Hoffman holding that, although there were adequate grounds for claiming there was 'a public emergency threatening the life of the nation', a law of such severity that applied only to non-national terrorist suspects and not UK nationals suspected of similar terrorist connections was disproportionate to the need presented by the public emergency, and was unwarrantably discriminatory. Lord Hoffman based his decision that the derogation was invalid on the ground that the current terrorist threat to lives and property did not threaten 'the life of the nation' in terms of its survival as an organised nation. In his Lordship's view, 'the real threat to the life of the nation … comes not from terrorism but from laws such as these', and it was now up to Parliament and the executive to decide 'whether to give the terrorists such a victory'. As a result of the Law Lords' decision, the UK Parliament has passed a highly contentious Bill providing for a range of surveillance and control measures, including house arrest, curfews, electronic tags and internet bans, that would apply both to foreign nationals and British citizens; the Act as modified in the House of Lords is to be reviewed in 12 months time. (***A & ors v Secretary of State for the Home Department* [2005] 2 WLR 87; [2004] UKHL 56**, 16 December 2004; ***Prevention of Terrorism Act 2005* (UK)**; see eg ***Independent***, 8, 9, 11 & 14 March 2005)

## *Ongoing US Federal Court decisions on Guantanamo Bay detainees*

Following the US Supreme Court decision in *Rasul v Bush* (28 June 2004) that US courts had jurisdiction to consider challenges to the legality of the detention and trial of foreign nationals captured abroad and incarcerated in Guantanamo Bay (see (2004) 43 *AIAL Forum* at 17–18), litigation by detainees has continued in the Federal courts. In one case involving a number of detainees, Judge Joyce Hens Green of the District of Columbia (DC) District Court held on 31 January 2005 that, following the Supreme Court's decision in *Rasul*, 'Guantanamo Bay must be considered the equivalent of a US territory in which fundamental constitutional rights apply', in particular due process rights under the Fifth Amendment. The procedures set up following *Rasul* to determine whether detainees were 'enemy combatants' did not satisfy due process requirements concerning access and challenge to evidence, which in some cases could have been coerced. While the Geneva Conventions on treatment of prisoners of war did not apply to those detained as members of terrorist organisations, they did apply to those detained as Taliban fighters or because of association with both the Taliban and al Qaeda. In direct contrast, in actions brought by seven other detainees in the same jurisdiction, Judge Richard J Leon ruled on 21 January 2005 that their habeas corpus petitions should be dismissed on the ground that there was no basis on which they could succeed against the government. These differences will have to be resolved on appeal.

In the meantime, litigation concerning the situation of the Australian David Hicks is being held in abeyance until resolution of all appeals in *Hamdan v Rumsfeld* in which Judge James Robertson of the DC District Court ordered on 8 November 2004 that, until such time as a competent tribunal determined that Mr Hamdan (captured during hostilities in Afghanistan in late 2001) was not entitled to prisoner of war status under the Geneva Conventions, he could not be tried for charged offences by a Military Commission but only by a court-martial under the Uniform Code of Military Justice. The court held that so long as the rules governing the Military Commission permitted his exclusion from commission sessions and withholding of evidence from him, trial before such a commission would be unlawful. Mr Hicks's trial by military commission, due to start on 15 March 2005, appears to have been deferred, and the Australian Government has sought assurances that Mr Hicks can be successfully prosecuted. The other Australian Guantanamo detainee, Mr Mamdouh Habib, was returned to Australia by the US Government without trial. (***In re Guantanamo Bay Cases*, US District Court (DC)**, 31 January 2005; ***Khalid et al v Bush*, US District Court (DC)**, 21 January 2005; ***Hamdan v Rumsfeld*, District Court (DC)**, 8 November 2004; **Angus Martyn, *Progress of the United States Military Commission trial of David Hicks*, Parliamentary Library, Research Note No 33, 2004–05**, 14 February 2005); **Lex Lasry QC, *United States v David Matthew Hicks: First Report of the Independent Legal Observer for the Law Council of Australia – September 2004***, see link on Law Council's Media Release of 15 September 2004, available from: www.lawcouncil.asn.au)

**Information Access Consultant, Canberra; former Principal Legal Officer, Information Access, Commonwealth Attorney-General's Department.*