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CANBERRA

JACK RICHARDSON MEMORIAL  
LECTURE 2012

The Hon. Michael Kirby AC CMG

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**12 SEPTEMBER 2012**

**JACK RICHARDSON MEMORIAL LECTURE 2012**

**JACK RICHARDSON, THE FIRST AND  
PERFECT COMMONWEALTH OMBUDSMAN**

THE HON MICHAEL KIRBY AC CMG\*

*JACK RICHARDSON: THE PREPARATION*

Jack Richardson was born on 24 September 1920 in Geelong, Victoria. He attended the Camperdown State School and Geelong College, from which he proceeded to the University of Melbourne.

The advent of the Second World War, and the peril then facing Australia, led him to interrupt his studies. He enlisted and served in the AIF. He returned after demobilisation to complete his under-graduate studies. Eventually, he was to

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\* Justice of the High Court of Australia (1996-2009); President, Court of Appeal of New South Wales (1984-96); Judge, Federal Court of Australia (1983-4); Member of the inaugural Administrative Review Council (1977-83); Chairman of the Australian Law Reform Commission (1975-83). The author acknowledges the assistance of Helen Madani on personal details concerning Professor Richardson's life.

graduate Master of Laws from both the University of Melbourne and McGill University in Canada. He was attracted to McGill because of its Institute of Air and Space Law. He was to be one of the first Australian lawyers to display an interest in this specialised field of study.

This interest, in turn, derived from the direction that his career had taken in the law. He left Melbourne and proceeded to Canberra where he was engaged, in 1949, in the Commonwealth public service. He there commenced duties as an officer in the Attorney-General's Department in Canberra. In 1952 he was seconded to work as a member of the legal committee of the International Civil Aviation Organisation (ICAO). He held this position until 1957. It was whilst so engaged that he married Grace Snook in March 1955. They were to raise three children, two daughters and a son.

Jack Richardson's experience as an officer of the Commonwealth continued. He was seconded to be the Legal Secretary of the Constitution Review Committee of the Federal Parliament, serving in that office from 1956 to 1959. The committee made a number of proposals for the modernisation of the Australian Constitution. One of these involved the repeal of section 127 of *the Constitution*. That provision provided for the exclusion of Aboriginals from the national census. Jack Richardson wrote the report of the committee favouring repeal. That report, in turn, became the basis of the proposal for a constitutional amendment<sup>1</sup>. That proposal was enacted on 27 May 1967 in accordance with section 128 of *the Constitution*. It was carried in every State and the national vote in favour was 89.34% of the valid votes, with only 9.08% against. To this extent, Jack Richardson was directly involved in one of only eight constitutional referendums that have succeeded in the history of the Australian Commonwealth<sup>2</sup>.

At this point in his career, it appeared that the young Mr Richardson had a lifetime of service in front of him as a legal advisor of, and participation in, federal institutions. His acquaintance with a successful referendum made him something of an expert in

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<sup>1</sup> *Constitutional Alteration (Aboriginals)* 1967; Number 55 of 1967. See A.R. Blackshield and G. Williams, *Australian Constitutional Law and Theory* (3<sup>rd</sup> Ed. Federation, 2002), 1306.

<sup>2</sup> The proposal achieved amendments to 51 (xxvi) of the *Constitution* as well as deleting s.127.

that comparatively untilled constitutional field<sup>3</sup>. However, this was not to be. In 1961, the new Faculty of Law in the Australian National University was looking for a Dean who could combine experience in the activities of government with sound academic credentials, to replace Professor Harold Ford. He had been the head of the Faculty for legal studies in the Australian Capital Territory, offered by him and Canberra colleagues by agreement with the University of Melbourne. Jack Richardson applied for this post and was appointed Professor and Dean of the Faculty of Law. Thus began his second career.

In 1960 his appointment was as Professor of Public Law, a post he held until 1962. That year he assumed a chair in law named after Sir Robert Garran, the first public servant of the Commonwealth on its foundation in 1901 and the first head of the Attorney-General's Department<sup>4</sup>. Jack Richardson's links with his old department formed an important bridge that strengthened the association of the new Faculty with the public service in what was still seen as a jurisdiction dominated by federal governmental interests and activities. He served as Dean from 1961 to 1966 and again from 1968 to 1970. During the later period, he was elected by his colleagues to be Chairman of the Committee on Australian Legal Education, formed by the Australasian University Law Schools' Association.

Between running the Faculty, attending to the challenges of establishing its priorities and teaching public law, Jack Richardson pursued his special interest of air law. Between 1966 and 1967, he was Visiting Professor at the Institute of Air and Space Law and McGill University in Montreal. He there acquired his Master of Laws Degree from McGill. He never lost his interest in that special area of legal activity. It was a discipline that was to grow rapidly with the huge increase in the carriage of passengers and goods by air.

During the 1970s, Professor Richardson naturally followed closely the successive reports that recommended significant reform in public law<sup>5</sup>. These reports took the

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<sup>3</sup> Cf. J.E. Richardson, "Reform of the Constitution: The Referendums and Constitutional Convention" in G.J. Evans (Ed.), *Labor and the Constitution 1972-5* (Heinemann, 1977, Melbourne), 76

<sup>4</sup> Robert Garran, *Prosper the Commonwealth*, Angus & Robertson, Sydney, 1958, 139 ff.

<sup>5</sup> Administrative Review Committee Report (J.R. Kerr, Chairman) Parliamentary Paper No. 144 of 1971; *Final report of the Committee on Administrative Discretions* (Sir Henry Bland, Chairman); Parliamentary Paper No.

names of the leading figures in law and public administration who had chaired the committees, Mr Justice [later Sir] John Kerr, Sir Henry Bland and Mr R.J. Ellicott QC, then Solicitor-General of the Commonwealth. Other names that were indelibly linked to the significant changes to federal administrative law were soon also to be revealed, including Lionel Murphy QC, Federal Attorney-General in the Whitlam Government who proposed enactment of the reforms and secured the passage of the *Administrative Appeals Tribunal Act 1975* (Cth); the Rt. Hon. Malcolm Fraser, Prime Minister of Australia from 1975-83, whose government oversaw the implementation of the remaining chief measures of law reform, and Mr Justice [later Sir] Gerard Brennan, first President of the Administrative Appeals Tribunal (AAT) and inaugural Chairman of the Administrative Review Council (ARC). The seventh name was to be added in 1977 when Jack Richardson resigned from his post of Robert Garran Professor of Law to take up, at the invitation of Malcolm Fraser, appointment as the first Commonwealth Ombudsman, pursuant to the *Ombudsman Act 1977* (Cth). At the time of this appointment, on 17 March 1977, Mr Fraser said that Professor Richardson was “a distinguished academic of high Australian and international standing who will bring to this office the qualities and experience which are necessary to perform this challenging role”.

Many leading personalities were to play a key role in the formulation and implementation, of the new federal administrative law in Australia. In a large pantheon of heroes at that time, Jack Richardson was to stand out. He returned to the world of public administration in the third phase of his career, strengthened not only by a decade of daily exposure but now by having had the opportunity, and obligation, in his academic years to reflect upon the integers necessary to achieve a successful and accountable public administration. Upon his appointment as Ombudsman, he completed the composition of the Administration Review Council (ARC). That body was provided for in the *Administrative Appeals Tribunal Act*<sup>6</sup>. Initially, the chairman of the ARC was to be the President of the AAT, *ex-officio*. Other permanent members, also *ex-officio*, were to be the Commonwealth Ombudsman and the Chairman (later President) of the Australian Law Reform

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317 of 1973. See also R.W. Cole “The Public Sector: The Conflict Between Accountability and Efficiency” (1988) 47 *Australian Journal of Public Administration* 223 at 224.

<sup>6</sup> Part V(ss47-58). The composition of the ARC is set out in s49 of the Act.

Commission. This was how my life came to intersect with that of Jack Richardson. Under the leadership of Mr Justice Brennan, we took part in the work of the ARC at the most critical phase of its operations. It was there that I saw Jack Richardson at close quarters. I quickly concluded that he was a perfect appointee as inaugural Commonwealth Ombudsman. He was smart, well informed, experienced, and appropriately intellectual but also practical. He could not abide obstruction or procrastination in delivering administrative justice to the people affected by the decisions of federal officials<sup>7</sup>.

Once again, Jack Richardson had to assist in setting a new body, starting from scratch<sup>8</sup>. The declared objective of office of Ombudsman, building on long experience in Scandinavia, and more recent models in the United Kingdom and elsewhere sought to provide a form of administrative justice that would be transparent, just, quick and cheap, where tribunals and courts were commonly slow, expensive, and sometimes formalistic, rather than concerned with the substantial merit of the matter.

Jack Richardson commenced his duties as Ombudsman with a staff of five officers. This modest compliment was to grow to more than 100 as the effectiveness of his work became clear. It fell to him to create State offices for the Ombudsman and to process the increasing numbers of claims of bad administration that invoked the Ombudsman's jurisdiction. Drawing on his own skills as a teacher and communicator, Professor Richardson enjoyed much success in promoting knowledge of his office and awareness of the assistance he could provide. As the Special Minister of State, Hon. Gary Gray said after Professor Richardson's death,

“Towards the end of his time as Ombudsman, the total number of approaches to the office exceeded 20,000, demonstrating the strength of his public education efforts and the establishment of a reputation that exemplified independence and fairness”<sup>9</sup>.

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<sup>7</sup> His appointment and the earlier establishment of the ARC were noted in [1997] *Reform* 34.

<sup>8</sup> Typical of his insightful analysis was his examination of “defective administration” and of what conduct is “unreasonable or unjust”. See Commonwealth Ombudsman, 3<sup>rd</sup> *Annual Report 1979-80* (AGPS, Canberra 1980), 18-19.

<sup>9</sup> Hon. Gary Gray, remarks on the death of Professor Jack Richardson AO, first Commonwealth Ombudsman (June 2011).

In 1982, he famously arranged for a cartoon to be included on the packaging of milk cartons sold in Canberra. It read:

“Bamboozled by the bureaucracy?

The Ombudsman is ready to help you in a dispute with a Commonwealth Department...”

Naturally some of his critics in the Australian Public Service objected to this form of publicity. But the new Ombudsman was unconcerned by their criticism. He was supported, for the most part, by the relevant federal ministers, particularly Prime Minister Fraser.

In 1982 – 1985, Professor Richardson became a director of the International Ombudsman Institute in Canada. From 1983, he was appointed to serve as Defence Force Ombudsman, a post he held until 1985 when his substantive appointment as Commonwealth Ombudsman expired. After he laid down his duties as Australia’s first federal Ombudsman, Professor Richardson was visiting fellow at the ANU Law School (1986-90) and President of the Australian Institute of Administrative Law (1990). Such was his reputation as a fearless guardian of good administration and against mal-administration that the nation of Western Samoa appointed him as its Ombudsman (1990-92). With this post concluded, he entered a fourth phase of his life. This saw him as co-owner of a horse and cattle breeding property at Cobbitty. He was still engaged in these activities when he died at Camden in New South Wales on 13 June 2011 at the age of 90. He mixed his activities in animal husbandry with an active sporting life, which unaccountably, included a passion for fast motor vehicles.

In earlier times, Jack Richardson would have been knighted on demitting office. He received many honours to celebrate his achievements. The ANU appointed him Emeritus Professor in 1977. In 1984 he was appointed an Officer in the General Division of the Order of Australia. In 2002 the Ombudsman’s office helped to establish the Jack Richardson prize for the best student performance in administrative law at the ANU. This memorial lecture was intended to be a tribute

not only to Professor Richardson himself but to the values of good administration, transparency and law reform which his career exemplified. We honour ourselves and our institutions by remembering this outstanding servant of the people of the Commonwealth of Australia.

### *ARC EARLY DAYS*

The opportunity to work closely with Jack Richardson and other notable personalities in the ARC deserves memorialising, 35 years after that body was established. It was set up in the central business district of Canberra City in Knowles Place, not far from the Supreme Court of the ACT. The Secretariat of the ARC was established adjacent to the judicial chambers of Mr Justice Brennan. He had been initially appointed in 1976 as a judge of the Australian Industrial Court and then, in 1977 on the establishment of the Federal Court of Australia, as a judge of that court. The proximity of the Secretariat and the chambers of the President of the AAT reflected the then anticipated relationship between the AAT and the ARC. That relationship was modified in 1979, when Mr Justice Brennan resigned. The provisions of the AAT Act were amended, and Mr Ernest Tucker was appointed the second Chairman of the Administrative Review Council, a post he held until 1987. Mr Tucker was a Melbourne businessman. He had much experience in chairing public and private bodies.

From the start, the ARC comprised extremely talented members, with diverse experience in federal administration, the law and the needs of people affected by governmental decisions<sup>10</sup> The Council's duty was to keep the federal administrative system under review; to monitor developments; and to make recommendations on improvements that might be made to the system. Various functions were assigned to the Council, including a duty to enquire into the law and practice governing administrative decisions, judicial review by the courts, the constitution of tribunals and the promotion of knowledge about the federal administrative law system<sup>11</sup>.

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<sup>10</sup> *Administrative Appeals Tribunal Act 1975* (Cth), s50.

<sup>11</sup> *Ibid*, s.51



Amongst the inaugural members of the ARC, in addition to Mr Justice Brennan (as President of the AAT), Professor Richardson (as Ombudsman) and myself (as Chairman of the ALRC), the other members were Mr Laurie Daniels OBE (an experienced permanent departmental head, then Director General of the Department of Social Security, a mass jurisdiction agency); Mr [later Sir] Frederick Deer CMG; Mr [later Justice] Roger Gyles QC; Mr [later Sir] Clarrie Harders OBE, permanent head of the Attorney-General's Department; Mr Geoff Kolts, second Parliamentary counsel, Mr Des Linehan (another permanent head, then a Commissioner of the Public Service Board and soon to be Director of the Industrial Relations Bureau) and Professor Harry Whitmore (Jack Richardson's successor as Dean of Law at the ANU and later to be Dean at the University of New South Wales, a notable scholar and author on administrative law<sup>12</sup>).

In addition to the members of the ARC, must be mentioned an officer of the Attorney-General's Department who became the driving force behind the efforts of Attorneys General Murphy and Ellicott, to translate the proposals for administrative law reform into legislation and then implementation. I refer to Mr Lindsay Curtis. At the time, he was first Assistant Secretary of the Attorney-General's Department. He was a brilliant, energetic, somewhat tense and passionate official who effectively took the place of Sir Clarrie Harders at many of the meeting of the ARC. Lindsay Curtis was available to the members to brief them and strengthen their hands in pushing forward the programme of legislative change and education within the federal public service.

In the manner of those times, it was usual for Australian lawyers and officials, in exploring any area of the law (or law reform) to begin by acquainting themselves with the state of the law in England. In retrospect, this can sometimes seem surprising to contemporary Australian lawyers and officials. However, it was the natural by-product of a legal system, and judicial hierarchy that assigned most of the ultimate say on important principles of the law (particularly common law) to the members of the Privy Council, and other judges sitting in London. This was, effectively, the last decade before the abolition of Privy Council appeals, when the Australian legal system was tied by a kind of umbilical cord to the institutions and personalities of the

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<sup>12</sup> M.D. Kirby, "The Reason for Reasons – *Osmond* Revisited", (Whitmore Lecture 2012), Council of Australasian Tribunals (2012), unpublished.

laws of England. Thus, Lindsay Curtis was intimately acquainted with every decision of the higher courts of England concerning the prerogative writs of the Crown. This meant that he was familiar not only with ancient law on the myriad of pre-conditions and procedures for the grant of such writs but, also with the most up to date decisions. He was also familiar with the contemporaneous steps that were being taken in the United Kingdom to modernise and refurbish the system of tribunals and the remedies available to individuals who wished to challenge administrative decisions affecting them. His awareness of authority was breathtaking and daunting. His synthesis of judicial holdings was astonishing. Essentially, he encapsulated, in brief form, the grounds then available in England for judicial review of administrative action. He cut away the dead wood of diverse procedures and irrelevant distinctions. He simplified the essential procedures. And he added key provisions to the proposed legislation, designed to make it work more effectively. In particular, he insisted on the centrality of the provision obliging the person making a relevant federal administrative decision, upon request, to give reasons for the decision; and to identify findings on material questions of fact upon which the decision was based<sup>13</sup>.

Much of the time in the early months of the ARC was taken up on analysis of the proposed terms of the *Administrative Decisions (Judicial Review) Act 1977* (Cth). Substantially, this was Lindsay Curtis' responsibility. No similar legislation had ever been enacted to that time in Australia or in Britain. Indeed, there was nothing quite like it elsewhere in the Commonwealth of Nations. It was truly stunning in its scope and ambition. Naturally, it attracted much opposition. Officials complained that it would over-judicialise federal administration; that it would add grossly to public costs; that it would oblige the revelation of the 'secrets of the Crown'; and that it would undermine efficiency and be inconsistent with our traditions, including the Westminster system of ministerial accountability and cabinet solidarity.

Whereas the *Administrative Appeals Tribunal Act 1975* (Cth) operated on a statutory principle that required the "opting in" on jurisdiction for the AAT, the principle adopted in the *AD(JR) Act* was opposite. That Act, being concerned to uphold the rule of law and written against the background of the constitutional writs in s75 (v) of the

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<sup>13</sup> *Administrative Decisions (Judicial Review) Act 1977* (Cth), s.13(1). Hereafter "AD(JR) Act."

Australian *Constitution* worked on a principle of universal jurisdiction, unless specified agencies and decision had been excluded or exempted. The consequence of this distinctive approach in the Act was an enormous battle by powerful leaders of the Commonwealth public service to secure exemptions from the operation of the *AD(JR) Act*. In the first instance, the Fraser Government delegated advice on the terms and final provisions of the *AD(JR) Act* to the ARC. It also accepted that the ARC would, within its statutory mandate, have the opportunity to provide advice, both of a generic and specific kind, concerning applications for exemption.

In consequence of this approach on the part of the government, a large part of the early work of the ARC, and of its secretariat, was devoted to considering criticism of the key legislative measures designed to implement the new administrative law and to recommend for exemptions or non-inclusions of specified agencies and decisions. It was here that the ARC, wisely led by Mr Justice Brennan and greatly assisted by Lindsay Curtis, called upon its own resources to afford well considered and cogently argued recommendation for the final decisions by the Cabinet. In performing its functions, the ARC had two great strengths to rely on.

The first strength lay in the ARC secretariat itself. Although small in number, the secretariat worked at a cracking pace, during a time of great legislative creativity. It was led successively by fine young lawyers who had immediate access to Mr Justice Brennan as Chairman of the ARC. The lawyers to whom I refer were Graham Taylor, a New Zealand lawyer, with a knowledge of administrative law, as it was developing in England and Australia, that almost rivalled that of Lindsay Curtis. He was to lead the ARC Secretariat during those first heady days. His devotion to duty was legendary. He was greatly admired by members of the ARC.

His work was supported, and he was succeeded, by two other fine lawyers, each of whom has gone on to high judicial appointment in Australia. I refer to Chief Justice Wayne Martin of the Supreme Court of Western Australia, whose first three years of practice as a lawyer was spent in Canberra with the ARC, and later involved his working in the Immigration Department on deportation appeals. As to those years, Chief Justice Martin has honoured the fine personalities who worked with him and directed his labours. In addition to Mr Justice Brennan there was Sir John

Nimmo, Sir Reginald Smithers, Mr Justice Douglas McGregor, Mr Justice Robert Fischer and Mr Justice Daryl Davies, the last of whom was later to succeed Mr Justice Brennan as President of the AAT<sup>14</sup>.

The post of Director of Research passed to Mr John Griffith. In due course he became an experienced barrister and senior counsel. He now serves as a Judge of the Federal Court of Australia. All of the secretariat staff and leaders were dedicated to improving public administration for the people of Australia. All of them saw their role as upholding the actuality of the three fundamental concepts of modern administrative law: lawfulness, fairness and rationality in decision-making and associated procedures.

The second strength of the ARC lay in its own members: in their backgrounds, experience and complementary personalities. A range of talents which were deployed to good effect. Mr Justice Brennan, at the Bar, had enjoyed considerable experience in the conduct of criminal trials. He had often seen the product of the police technique of interrogation known as the 'old soft and hard'. He explained this to me and to the other members of the ARC. It involved the utilisation of a harsh policeman to begin an interrogation and to soften up the subject. He was followed by a kind and gentle policeman, whose sweet disposition was such a contrast that the accused was inevitably tempted to open up to him and 'spill the beans'.

In the ARC this technique of soft and hard was used to good advantage upon the often hostile subject who attended to demand exemption for their agencies or particular decisions from the application of the *AD(JR) Act* and any other new fangled proposals for administrative transparency and accountability. Amongst the most powerful and voluble of the critics of the ARC were Mr John Stone (Secretary to the Treasury), later a Senator of the Commonwealth, and Sir William Cole (Chairman of the Public Service Board).

The first strategy in the ARC was to let loose the 'attack dogs' of the Council. These comprised Mr R.V. Gyles QC, who was a doubtful, tough barrister, greatly skilled in

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<sup>14</sup> W. Martin, "Administrative Appeals Tribunal 30<sup>th</sup> Anniversary" in AAT, *30<sup>th</sup> Anniversary Speeches* (Canberra, 2006), 19.

cross examination. The other was Professor Jack Richardson. Somewhat like Lindsay Curtis, he often displayed a querulous and highly sceptical exterior in the face of every suggestion that exemption was merited or that the new administrative law had nothing to teach such experienced and worldly public servants. John Stone and Bill Cole were unused to such blunt speaking. At the end of a somewhat savage treatment by the Gyles and Richardson 'bad cop' team, the two gentlest, and kindest, members of the ARC were sent into action. I refer, of course, to Sir Clarrie Harders and myself. Sir Clarrie was always searching for a median path. I was ever understanding and respectful (sometimes almost deferential) to such experienced officers of the Commonwealth as Stone and Cole. But the end of our questioning (as the 'good cops'), if Stone and Cole were not actually begging the ARC to bring their agencies under the new administrative law, they were at least reconciled to the likelihood that this was the fate that awaited them at the end of this distasteful journey.

The result was that the general applications for exception were overwhelmingly rejected. The *AD(JR) Act* was brought into force. The revolution in accountability was implemented, by the obligation to state reasons and to make relevant findings of fact. And an important step was taken in the direction of greater accountability of federal administrative decision-making, to the law, to the persons affected and to the general community of citizens.

These were extremely exciting and significant years for federal administrative law reform in Australia. It is little wonder that, subsequently, Malcolm Fraser was to claim that the achievement of so many reforms: the AAT, the ARC, the Ombudsman, the *Freedom of Information Act* 1982, the *Privacy Act* 1988 and much else, represented one of the greatest achievements of his term in government. His assessment was accurate. Australia was once an innovative and creative country in law reform. We were amongst the first jurisdictions in the world to introduce votes for women; testators' family maintenance; industrial arbitration; workers' compensation and aged pensions. The federal administrative law reforms of the 1970s represented another golden age for significant and innovative law reform in Australia. Sadly, it is not an age that has endured into the present time.

Take, for example, the reform of laws to provide full equality to sexual minorities, a matter for which I have some familiarity. This has been an area where the reforms have been achieved slowly, reluctantly and often after great delay. For this and other causes, we can look back on the reforms of administrative law in the 1970s and take inspiration from them. A significant contributor to those reforms between 1977 and 1985 was Professor Jack Richardson. As Chief Justice Martin has observed, he provided “significant colour amongst an already impressive group of great Commonwealth lawyers”. And he was not averse to taking the battle right up to his opponents and critics. From time to time, as Ombudsman, he would represent himself in the case before the AAT, bringing to bear his sharp mind, with a tongue to match<sup>15</sup>. His eyes often sparkled with wit and humour. But behind this agreeable exterior was a man of steely resolve with impatience for change.

### *THE PRINCIPLE OF TRANSPARENCY*

A common theme running through Jack Richardson’s contributions to the ARC was his devotion to the principle of transparency. Like his academic colleague, Professor Harry Whitmore, he believed in the right of the individual to have reasons for administrative decisions that affected him or her. Only if such reasons, and supporting material, were provided would it often be possible for the individual to challenge successfully the decision of the administrator. In the face of a simple refusal to provide reasons, a challenge to the official decision would often be difficult, even futile. The individual would not know where to start. The grounds of relief could not be proved. An impression could not be turned into an established claim. This was why Jack Richardson was attracted to the challenge of establishing the office of the Commonwealth Ombudsman. Often, his interventions helped the individual to secure information essential to relief. Or it provided sufficient information to satisfy the individual as to the justice of the course taken. The very amenability of decision-makers to the obligation to provide reasons would frequently ensure that such existed in advance of the decision. The existence of reasons would be an encouragement to the tripartite requirements of lawfulness, fairness and rationality in decision-making.

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<sup>15</sup> Martin, *ibid*, 20.

The administrative law that Jack Richardson helped to design and implement in the federal sphere was an important advance on the law that pre-existed it. However, soon after completing my service as Chairman of the ALRC and as a member of the ARC, I saw the other side of the coin. This was the difficulty of procuring change in the principles of the common law to uphold the same values of transparency and accountability that were so vital to the thought and action of Professor Richardson.

Within days of my assuming office as President of the New South Wales Court of Appeal, I participated in an appeal designed to challenge the absence of reasons in a decision made by the New South Wales Public Service Board: *Osmond v Public Service Board*<sup>16</sup>. The case concerned the rejection of a well qualified applicant who had sought appointment to a local land board. The question was whether, in default of State legislation (akin to that provided in the *AAT Act* and the *AD(JR) Act* of the Commonwealth), the same values that had produced these statutory reforms could assist in a re-expression of the common law principles governing the right to administrative reasons. By majority, the Court of Appeal of New South Wales<sup>17</sup> upheld the contention that reasons had to be provided. On appeal to the High Court of Australia, that decision was unanimously reversed<sup>18</sup>. The High Court Justices, led by Chief Justice Gibbs, rejected all of the considerations that had informed the views of the majority in the court below. They held that the common law on the subject was clear and settled, despite the fact that within a decade or so, it had moved so as to require judicial officers to provide reasons for their decisions<sup>19</sup>. If so for judicial officers, why not for other significant decision-makers in the public sector, including the State Public Service Board? Far from considering that concurrent legislative reforms indicated a change in values, obliging reasoned justice as an inference in the legislation of a modern parliament, the High Court of Australia considered that they simply showed that the proper way to secure such change was by new legislation; not judicial innovation. References to foreign decisions which had taken the steps proposed were dismissed as immaterial to Australian decision-making. Yet

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<sup>16</sup> *Osmond v Public Service Board of New South Wales* [1984] 3NSWLR 447.

<sup>17</sup> Kirby P. and Priestley JA; Glass JA dissenting.

<sup>18</sup> *Public Service Board of NSW v Osmond* (1989) 159 CLR 656. See M. Taggart, “*Osmond Judicial Review of Administrative Action in the 1980s – Problems and Prospects*”, OUP, Auckland, 1986, 53.

<sup>19</sup> *Pettitt v Dunkley* [1971] 1 NSWLR 376.

in the succeeding years, the courts in England<sup>20</sup> and in Canada<sup>21</sup> and elsewhere have substantially taken the step that recommended itself to the majority in the Court of Appeal.

Delivering this tribute to Professor Jack Richardson in the public building adjoining the High Court of Australia, my thoughts naturally turn to the 13 years I spent in that place. During all of those years I waited patiently, expectantly, for an alert member of the legal profession to bring a challenge to the *Osmond* decision, so that it could be reconsidered in the High Court. But challenge came there none. In the Australian legal profession there was lacking the same spirit of determination and rejection of unaccountability that so motivated Jack Richardson in his lifetime. And now, Justice Gummow, who suggested an equal reservation about the *Osmond Case*, demits his office without the principle in that case having been corrected.

The chief point in administrative law and practice for which Jack Richardson stood, was that donees of statutory power are not unaccountable. They serve the people. They must act transparently and fairly. They must be rendered accountable by the law. No one in our Commonwealth is beyond the reach of the deep legal principle of accountability and responsiveness to the people that lies at the heart of Australia's constitutional, legal and political arrangements.

In the spirit of this fine man, who began his life as a public servant, embraced a new life as a scholar and teacher; accepted an innovative public post to serve the people in their relations government; and helped implement the new administrative law, I feel we should do better.

We need the same bold spirit of innovation to which Jack Richardson contributed so notably. We need the same leaders in public administration and the law as those who provided such a significant reconfiguration of the power of authority in relation to the individual in the 1970s. I invoke the outstanding Australians who played a part in these changes: Mason. Kerr. Bland. Ellicott. Whitlam. Murphy. Brennan.

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<sup>20</sup> See e.g. *R. v Secretary of State for the Home Department; ex-parte Doody* [1994] 1 AC 531 (HL).

<sup>21</sup> See e.g. *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817 (SCC); *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3. See also *Oriental Daily Publisher v Commissioner for Television and Entertainment Licensing Authority*, HKCFA, 25 November 1998



Curtis. Whitmore. Richardson. It was a privilege to be an observer at the Creation. To help found a new law school of great repute is a singular achievement. To help implement the ombudsman idea in potentially hostile and alien soil is a large accomplishment. But to play a part in enhancing the rights of the people to enjoy greater administrative justice, that is the noblest legacy that Jack Richardson left for us.