UNIVERSITY OF CANBERRA

CORPORATE GOVERNANCE ARC RESEARCH PROJECT

CORPORATE GOVERNANCE IN THE PUBLIC SECTOR

DINNER, HIGH COURT OF AUSTRALIA, CANBERRA, 9 MARCH 2006

PUBLIC FUNDS AND PUBLIC POWER BEGET PUBLIC ACCOUNTABILITY

The Hon Justice Michael Kirby AC CMG[*]

THE 'COMMERCIALISATION' OF THE PUBLIC SECTOR

Both the public sector and government service delivery in Australia have been fundamentally transformed over the past thirty years. In an effort to improve efficiency and effectiveness, governments at both the federal and State levels, have sought to apply private sector models and practices to public administration. The public sector has increasingly been subject to 'commercialisation', a term encompassing policies including (1) corporatisation, (2) privatisation, (3) outsourcing and (4)

---

[*] Justice of the High Court of Australia; Member of the Administrative Review Council 1976-1984. The author acknowledges the assistance of Mrs Lorraine Finlay, Legal Research Officer in the Library of the High Court of Australia, in the provision of materials used in the preparation of this lecture.

deregulation. According to the former Australian Auditor-General, Mr Pat Barrett[1]:

> "This has been brought about both by a reassessment of the role of government and emerging trends associated with globalisation and the information age, which have the potential to transform dramatically the way governments do business."

It is important to understand the significant scope of public sector "commercialisation" in order to appreciate fully the implications of such reforms, including the significance of recent decisions of the High Court of Australia in this area. At the federal level this can be illustrated by comparing the changing nature of public service structures in Australia since Federation. In 1901, there were eight Departments of State of the Commonwealth. There were no federal statutory authorities or companies. By 2004, there were 18 Departments of State and, additionally, 240 federal statutory authorities and 234 federal companies[2]. The number has not changed greatly since then.

A similar story exists at the State level in Australia. In New South Wales, for example, there are approximately 20 State-owned corporations, 25 government trading enterprises and over 600 government

---

1 P. Barrett, "Corporate Governance in the Public Sector Context" (2003) 107 *Canberra Bulletin of Public Administration* 7, at 7.

2 P. Nicoll, "What lies ahead for public sector governance" (2005) 57 *Keeping Good Companies* 19, at 19.

boards. The State owned corporations and government trading enterprises control assets totalling approximately $65 billion[3].

This represents not only a considerable expansion of government, but also a fundamental change in the nature of the bodies charged with delivering government outcomes. Public service delivery in the 21st century is characterised by increasingly complex inter-relationships between (1) government agencies, (2) different levels of government, and (3) the private sector. The traditional distinction between the public and private sectors is increasingly being blurred[4], with the concept of 'integrated government' being applied to government service delivery and the achievement of 'public' outcomes. Privatisation, corporatisation and outsourcing have greatly added to the changes witnessed in the past 30 years. The changes gather pace.

THE DEVELOPMENT OF ADMINISTRATIVE LAW

In administrative law it is clear that these reforms present unique challenges. The application of judicial review has traditionally been limited strictly to decisions made by the public sector. As such, judicial review has been focused on the legality, fairness and rationality of government

---

3 B. Sendt, "And if you thought good corporate governance was tough in the private sector, take a closer look at public sector issues" (2001) 53 *Keeping Good Companies* 516, at 516-517.

4 *Forbes v New South Wales Trotting Club* (1979) 143 CLR 242 at 275 per Murphy J; *R v Panel on Takeovers and Mergers; Ex parte Datafin* [1987] QB 815 at 847 per Lloyd J.

decisions. As the nature of both the public sector and government decisions change, it is necessary for administrative law to develop so that it is able to continue to operate effectively but in the new environment. The 'commercialisation' of the public sector means that isolating the activities and decisions of government from those of the private sector is becoming a more complicated, and sometimes, seemingly, an impossible exercise. The lines between the public and private sectors are becoming increasingly blurred. Such changes have highlighted significant tensions and gaps in administrative law, in Australia and elsewhere. They have raised important questions as to the development of the law in this area.

JUDICIAL REVIEW IN THE MODERN PUBLIC SECTOR ENVIRONMENT

The central question is the application of administrative law in the changing public sector environment. Can government avoid decisions of an administrative nature being subjected to judicial and constitutional review simply by passing responsibility for those decisions to a non-government body or persons? To what extent should administrative law be applied to private or hybrid bodies, when those bodies are exercising responsibilities of a public nature?

The recent decisions of the High Court of Australia in *NEAT Domestic Trading Pty Ltd v AWB Pty Ltd*[5] ("*NEAT*") and *Griffith University v Tang*[6] ("*Tang*") have highlighted the complexities and challenges

5 *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277.

6 *Griffith University v Tang* (2005) 213 ALR 724.

surrounding this area, with significant differences emerging in the approaches adopted by different members of the High Court.

It is worth reflecting on why these questions are important in the first place. Does it matter whether or not administrative law remedies are available in these types of circumstances? The answer, in my opinion, is yes. It matters a great deal. It matters for the integrity of legal principle. More importantly, it matters because it presents important issues of governance - the accountability of the deployment of public power to those affected by it.

The exercise of public power is fundamentally different in character to the making of a decision in a purely private context. Decisions are then being made on behalf of the people, typically involving the use of money raised from, and power derived from, the people. Higher standards of accountability and responsibility are therefore attached to the decision-maker. Public power imports public accountability, including before the courts.

The availability of administrative and judicial review is an important aspect of our system of governmental checks and balances, designed to ensure that public powers are exercised only within the legal limits impliedly agreed to by the people. Removing administrative decisions from the ambit of administrative and judicial review can

sometimes, at least, be viewed as effectively negating the rule of law in areas where it has, until lately, expanded[7].

The issue also raises serious questions about accountability and the principles of responsible government. The 'commercialisation' of the public sector is designed to increase productivity and efficiencies. However, it may, at the same time, reduce executive accountability. This reduction in accountability is a result of removing control over day-to-day actions and decisions from the relevant Minister and government departments to private sector bodies whose ultimate legal responsibility is to their shareholders, rather than to the public interest more generally.

It is important, in my view, that standards of accountability should be maintained even whilst an increasingly integrated approach to government service delivery is being pursued. The High Court was faced with these issues in *NEAT* and *Tang*. There is time for me to deal only with one of these cases. Because it involved officials of the Australian Wheat Board and because that subject is topical in Australia just now, I will mention the case of *NEAT*.

---

[7] Sir Gerard Brennan, "The Mechanics of Responsibility in Government" (1999) 58 *Australian Journal of Public Administration* 3, at 9.

NEAT DOMESTIC TRADING PTY LTD v AWB LTD

The issue: The specific issue raised by the *NEAT* decision was whether a "decision" of AWB Ltd and its subsidiary, in refusing to give NEAT Domestic Trading Pty Ltd written approval for the bulk export of wheat, was a "decision of an administrative character" made under an enactment and, therefore, a reviewable decision within the provisions of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) ("the ADJR Act"). At a more general level the issue before the High Court had much wider implications, raising an important question of principle which I described thus[8]:

> "… whether, in the performance of a function, provided to it by federal legislation, a private corporation is accountable according to the norms and values of public law or is cut adrift from such mechanisms of accountability and is answerable only to its shareholders and to the requirements of corporations law or like rules."

The facts: The decision challenged in *NEAT* was made by Australian Wheat Board (International) Ltd ("AWBI"), a wholly-owned subsidiary of Australian Wheat Board Ltd ("AWB"). Both were grower-owned companies limited by shares and originally incorporated under the Victorian Corporations Law. Under the *Wheat Marketing Act 1989* (Cth) AWBI was the only body entitled to export wheat from Australia without obtaining the prior approval of the Wheat Export Authority ("the

---

8 *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277, per Kirby J at 300.

Authority")[9]. This was part of a so-called 'single-desk' approach to wheat exports that was seen as necessary to allow Australia to compete with the interventionist policies adopted by other grain producing competitors such as the United States of Australia and European Union[10]. The Authority was not entitled to grant approval for bulk wheat exports without prior written approval being given by AWBI. AWBI therefore effectively held a right of veto over the approval of bulk wheat exports from Australia. Immediately, that begins to look like the use of public power. Ordinarily, at least in Australia, a private corporation does not enjoy monopoly veto power over the export of the entirety of a nation's product. Economic power is not enough to secure that end. Public power is needed.

The appellant in the case, NEAT Domestic Trading Pty Ltd, had made six applications between November 1999 and January 2000, seeking approval for the export of bulk quantities of durum wheat. NEAT had willing lawyers. AWBI refused to consent to such approvals being granted. In doing so, it claimed that the issuance of export permits would be at odds with the single-desk policy and would ultimately disadvantage those growers who had sold their wheat into the national pool.

High Court decision: NEAT Domestic Trading Pty Ltd commenced legal proceedings in the Federal Court of Australia. Those

---

9 Section 57(1A) of the *Wheat Marketing Act 1989* (Cth).

10 Australian Government Solicitor, "Public Law Remedies and Private Bodies" (2003) 10 *Litigation Notes* 6, at 6.

proceedings failed at first instance[11]. An appeal to the Full Court was dismissed[12]. Before the High Court, NEAT Domestic Trading Pty Ltd sought an order that the decision of AWBI to refuse export approval be quashed and a declaration made that the decision contravened section 5 of the *Judicial Review Act*. The case therefore depended on whether the decision of AWBI could be characterised as a decision of an 'administrative character' that was 'made under an enactment'. If it could, it was susceptible to judicial review and that would mean scrutiny by the standards of public power.

The decision of the High Court of Australia was delivered on 19 June 2003. By a 4-1 majority the appeal by NEAT Domestic Trading Pty Ltd was dismissed.

Majority reasons: The joint reasons of the majority (Justice McHugh, Justice Hayne and Justice Callinan) identified three central factors as leading to their conclusion that the decisions of AWBI were not subject to judicial review under the ADJR Act and, therefore, to the appeal being dismissed. These three factors were (1) the statutory context in which the decision was made, (2) the suggested private character of AWBI, and (3) the impossibility of AWBI accommodating public law obligations within the pursuit of its private interests.

---

11 *NEAT Domestic Trading Pty Ltd v Wheat Export Authority* (2000) 64 ALD 29 (Mathews J).

12 *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2001) 114 FCR 1 (Heerey, Mansfield and Gyles JJ).

In contrast to the statutory Authority, the majority found that AWBI did not, as a matter of law, rely upon, or have to rely on, the *Wheat Marketing Act* to confer upon it the power to grant an approval in writing. The majority judges held that[13]:

> "Unlike the Authority, AWBI needed no statutory power to give it capacity to provide an approval in writing. As a company, AWBI had power to create such a document. No doubt the production of such a document was given statutory significance by s57(3B) but that subsection did not, by implication, confer statutory authority on AWBI to make the decision to give its approval or to express that decision in writing. Power, both to make the decision, and to express it in writing, derived from AWBI's incorporation and the applicable companies legislation. Unlike a statutory corporation, or an office holder such as a Minister, it was neither necessary nor appropriate to read s 57(3B) as impliedly conferring those powers on AWBI."

Chief Justice Gleeson agreed with the majority that the appeal should be dismissed. However, he expressed a 'preference' for the view that the decision *was* of an administrative nature[14]. He agreed with the majority that the decisions challenged were not made "under an enactment".

---

13 *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277, per McHugh, Hayne and Callinan JJ at 298.

14 *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277, per Gleeson CJ at 290-291.

A dissenting opinion: My dissenting reasons would have allowed the appeal and rendered the decision of AWBI accountable to legal standards of lawfulness, reasonableness and rationality. It was my view that the claimed ground of judicial review had been established by NEAT. By adopting a blanket policy against the approval of the export of durum wheat in bulk without paying regard to the merits of individual applications, the decisions of AWBI were an 'improper exercise of power' on the grounds of unlawful inflexibility. Public power must be deployed lawfully and flexibly. To be lawful it must conform to the proper decision-making imputed to all holders of public power. I said[15]:

> "Repositories of statutory functions and powers must keep their minds open for the exceptional case. They must not disable themselves from exercising their discretion by adopting a rule "not to hear any application of a particular character by whomsoever made". At least they must not do so without clear authority of law permitting that course. There was no such clear authority in the present case."

I cannot forbear to mention that, events since the High Court's decision was handed down, and the present inquiry by the Hon Terrence Cole AO into the governance of the Australian Wheat Board, lend weight to the suggestion that accountability of AWB and AWBI to the standards of lawfulness, reasonableness and interest in public administrative law might not have been such a bad thing. Arguably, more rather than less judicial supervision in this area was needed. But that is another thing.

---

15 *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277 at 324.

DIFFERENT APPROACHES TO ADMINISTRATIVE LAW

Significant differences existed between the majority and dissenting opinions in *NEAT* case. However, these divergent approaches raise important questions about the future development of administrative law in Australia. At the beginning of my dissenting reasons in *NEAT* I said that[16]:

> "Given the changes in the delivery of governmental services in recent times, performed earlier and elsewhere by ministries and public agencies, this question could scarcely be more important for the future of administrative law. It is a question upon which this court should not take a wrong turning."

I do not recount this case to reargue, before this audience, opinions that I lost, by majority in my Court. However, I call the case, and the associated case of *Tang*, to notice so that this expert audience will understand that the issues of accountability and privatisation of what were formerly undoubted governmental functions are important questions that have been the subject of lively debates in the Australia courts, legal profession, academic profession and public administration.

In my view, administrative law needs to ensure that government accountability and public scrutiny are not diminished because these are characteristics essential to a healthy democratic system. The basic challenge that faces us, in terms of administrative law, was explained

---

16 *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277, at 300.

by Jonathon Sprott in an article entitled "Privatisation, Corporatisation and Outsourcing: Critical Analysis from the Consumer Perspective"[17]:

> "... accountability ought not be compromised simply in the name of increased efficiency and productivity. There is a need for administrative law to remain contemporary in nature and to develop along with the new shape of community services, so as to guarantee equitable access to all consumers. Such as evolution can only occur if the focus of administrative review moves from an unreal distinction between public and private, to a more reasoned consideration of the character of the services being offered, and the interests that are affected."

I tried to reflect similar ideas to this in my reasons in the *NEAT* case. In my reasons I said[18]:

> "The character of the decisions of bodies assigned important public functions is not determined conclusively by the structure of such bodies (for instance as private or statutory corporations), still less by arguments about the merits or demerits, advantages or disadvantages of privatisation or private sector management. In so far as such decisions derive their necessity or effectiveness, and the bodies making them derive their existence or particular functions, from federal legislation, they may involve the exercise of public power. In so far as they do this, under the Constitution, a minister must be accountable to the parliament in respect of such exercise. In turn, through the parliament, the minister, and the government of which he or she is part, are responsible to the electors."

---

17 J. Sprott, "Privatisation, Corporatisation and Outsourcing: Critical Analysis from the Consumer Perspective" (1998) 5 *Australian Journal of Administrative Law* 223, at 238-239.

18 *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277, at 308.

The issues of public accountability, ultimately to the people of each polity, of publicly related corporations (whether the Wheat Board or its offshoots, corporations involved in defence supply, city tunnel builders or anyone else) are lively contemporary issues in the law and in society. One of the stated causes of the American Revolution was the demand for no taxation without representation. That was a demand for accountability to the public for decisions that, directly or indirectly, used public finds. Australians were the beneficiaries of such notions. The principle, at least, has generally been accepted since colonial times. We underwent no revolution to secure them. They are reflected in the structure and design of the federal Constitution. So this is a very important cause. We must keep basic principles of public, legal and political accountability shining and relevant to the contemporary conditions of government-related and privatised activities in our generation. To the extent that these activities use, directly or indirectly, public funds or invoke public powers, constitutional principle suggests that they should be accountable in the courts for the lawfulness, reasonableness and rationality of such decisions. Accordingly, this is an issue that should have the attention of this conference on the changing nature of the public sector. It is one of the key questions amongst the pressing modern questions about governance. It is as important in other countries as it is in Australia. It is no good Australia preaching good governance of other lands if it neglects the issue at home. I commend a reflection upon these aspects of governance to all participants in this conference concerned with the basic parameters of accountability in the deployment of public power. Public power and the use of public funds beget the need for public accountability. We should never forget or neglect this basic rule.

UNIVERSITY OF CANBERRA

CORPORATE GOVERNANCE ARC RESEARCH PROJECT

CORPORATE GOVERNANCE IN THE PUBLIC SECTOR

DINNER, HIGH COURT OF AUSTRALIA, CANBERRA, 9 MARCH 2006

PUBLIC FUNDS AND PUBLIC POWER BEGET PUBLIC ACCOUNTABILITY

The Hon Justice Michael Kirby AC CMG