

‘WHO NEEDS FOI WHEN MARKET MECHANISMS WILL DELIVER ACCOUNTABILITY ON DEMAND? A CRITICAL EVALUATION OF THE RELATIONSHIP BETWEEN FREEDOM OF INFORMATION AND GOVERNMENT BUSINESS ENTERPRISES’

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The relationship between Freedom of Information (FOI) and Government Business Enterprises (GBEs) in Australia reflects the changing relationship between administrative law and public administration.¹ Creyke has argued that ‘this is a period of profound change to the system of Commonwealth administrative law.’² There is a sea change which, at close quarters, is revealing contradictory results. On the one hand we have decisions like *Teoh*,³ which at first glance represents new heights of administrative law imperialism, on the other we have treasury officials reinventing government for the year 2010 within which there is no need for administrative law;⁴ somewhat like a modern version of More’s Utopia for the public service. In this new corporate Utopia smooth client service delivery and modified market mechanisms will serve the citizen consumer much better than awkward and uncertain recourse to judicial review and the whimsy of procedural fairness. Some, like Justice Kirby, are tempted to accede to the proposition that ‘if the very purpose of corporatisation and privatisation is to take the government out of the marketplace, can courts really be blamed for giving

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1 See Margaret Allars, ‘Private Law But Public Power: Removing Administrative Law Review From Government Business Enterprises’ (1995) 6 *Public Law Review* 44–76.

2 Robin Creyke, ‘Sunset for the Administrative Law Industry? Reflections on Developments Under a Coalition Government’ in John McMillan (ed), *Administrative Law Under the Coalition Government* (1997) 20, 20.

3 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

4 See David Osborne and Ted Gaebler, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector* (1992).

full effect to this policy?’⁵ In this paradigm the problem is simply recasting private law to develop effective mechanisms ‘to protect the individual dealing with the corporation, where once public administrative law could have been invoked.’⁶

Within that changing relationship between administrative law and public administration we find that democratic accountability mechanisms with a citizen focus, like FOI are being equated with private-sector accountability tools, which are described in shorthand as market mechanisms, designed to achieve a particular form of economic rationality. Public choice theorists see the transformation of GBEs resulting in increased efficiency, effectiveness and economic savings. In these visions, administrative law is an anomaly at best and a barrier to reform at worst.⁷ Reduced to this dimension the public policy task becomes merely choosing between equally preferable sets of accountability mechanisms where, by definition, one set is better suited for a market orientated public-sector. The clear agenda is to reproduce in private-sector governance structures and practices in the public-sector.⁸

A further problem for those trying to promote the democratic virtues of FOI (or in Allars’ terminology pursuing administrative law values of openness, rationality, fairness and participation) is that the meaning of public power in the 1990s is undergoing a rapid redefinition.⁹ In this climate of uncertainty the relationship between FOI and GBEs provides an interesting paradigm within which to examine the nexus between administrative law and public administration in the late 1990s. The answer to the question in this paper’s title is ‘We Do!’; the ‘We’ being active citizens of a representative democracy. The accountability being offered by market mechanisms, and a regime of government controls over GBEs, is not interchangeable with that produced by devices like FOI.¹⁰ The drive for accountability via market mechanisms (and associated government controls) is generated in part by those who view the role of a citizen as a passive consumer of goods and services, where the public interest must be converted into a bottom line figure among many others in an environment of competitive neutrality.

Arthurs argues that the key features of the New Economy are

changes in technology and the social organisation of work, globalisation and regional economic integration, and shifts in the boundary between the state and civil society — demand a reconsideration of the ways in which we have previously thought about bureaucracy, government, and the role of the interventionist state.¹¹

5 Justice Michael Kirby, ‘Australian Corporations Law and Global Forces’ (1997) 2 *Flinders Journal of Law Reform* 41, 49.

6 *Ibid* 49.

7 Patrick MacAuslan, ‘Public Law and Public Choice’ (1988) 51 *Modern Law Review* 681.

8 John Farrar and Bernard McCabe, ‘Corporatisation, Corporate Governance and the Deregulation of the Public Sector Economy’ (1995) 6 *Public Law Review* 24.

9 Allars, above n 1.

10 *Ibid*. Allars, offers the alternative solution that the most effective way of ensuring accountability against those exercising ‘public power’ may be to create new private rights of consumers and other members of the public whose interests are affected by the exercise of such power.

11 H W Arthurs, ‘Mechanical Arts and Merchandise: Canadian Public Administration in the New Economy’ (1997) 42 *McGill Law Journal* 29, 29.

In this brave new world, those of us who cling to the wreckage of a public law participative ideology are, in Arthurs analysis, relying on outmoded strategies to deal with the reinvention of public administration as a market.

I ADMINISTRATIVE LAW AND PUBLIC ADMINISTRATION IN FLUX

The aim of this paper is to demonstrate that the relationship between FOI and GBEs reflects the wider state of flux that currently exists between administrative law in general and public administration. Differences over whether FOI should apply to GBEs reveal much more than simple public policy choices. At their heart these differences will determine what role, if any, the values of rationality, openness and participation will play in the future exercise of a significant section of public power in this country.¹² Wettenhall has demonstrated that this process of corporatisation is not a new phenomenon and one of the major themes running through public administration history relates to

the difficulty in developing appropriate formulae to reconcile the needed flexibility for managers of public enterprises with the requirement for continuing accountability. In one famous passage, Musolf described this search as an exercise in 'artful government.'¹³

The Australian Law Reform Commission and Administrative Review Council Report *Open Government: A Review of the Federal FOI Act 1982* (ALRC/ARC Report) represents a strong rejection of the view that the democratic objectives of FOI should be fully exchanged, at the present, for private-sector and other government accountability mechanisms.¹⁴ However the 1996 change of Federal and Queensland governments heralded a new era where the objectives of the *Freedom of Information Act 1982* (Cth) (*FOI Act*) will be seen as irrelevant to GBEs and replaceable by regulatory mechanisms that apply to the private-sector (Corporations Law and Trade Practices legislation) and private-sector accountability mechanisms (corporate reporting, accounting and audit requirements). Looking back to the ALRC/ARC Discussion Paper 59 (DP 59) the templates of these arguments against FOI can be discovered:

It is difficult to reconcile the objectives of the FOI Act which focus on the accountability of executive government which has a duty to act in the interests of

12 Ibid 32. Arthurs argues that 'growing numbers of citizens are increasingly agnostic about the fundamental premise upon which democratic public administration is built — the desirability, legitimacy, necessity and efficacy of state intervention.'

13 Roger Wettenhall, 'Corporations and Corporatisation: An Administrative History Perspective' (1995) 6 *Public Law Review* 7, 14-15.

14 Australian Law Reform Commission and Administrative Review Council, *Open Government: A Review of the Federal FOI Act 1982*, Report No 77/No 40 (1995).

the whole community with a proposal to subject operations in a commercially competitive environment to public scrutiny under the FOI Act.¹⁵

[W]hen government business enterprises are operating in a competitive commercial environment and are subject to corporate reporting, accounting and audit requirements there is no need for public accountability via the FOI Act.¹⁶

Government enterprises should be entitled to the same treatment as private-sector organisations. A 'level-playing field' is best achieved by removing regulatory intrusions into the affairs of GBEs, which do not apply to the private-sector, so that they are best able to compete.¹⁷

Whilst the ALRC/ARC Final Report firmly came down on the side of continuing FOI scrutiny of GBEs, the formulae adopted for this end contained within it the means for significant sectors of government to slip out of an accountability scheme which is designed to serve the public interest. The ALRC/ARC Report has placed us on a continuum which, at one end, contains the accountability administrative lawyers and political scientists wax lyrical about, and at the other, is a chartered accountant's dream of crystal clear bottom line numbers.¹⁸ In one sense the ALRC/ARC Report may have missed the achievement of 'artful government'. As Wettenhall argues

whether the newer State-owned companies (as we have seen, now a dominant form of corporatisation) do not constitute a significant drift away from the accepted standards of public accountability, and whether the 'commercialisation' which is such a strong driving force in the modern movement allows any place for considerations of public interest and public value.¹⁹

The changes which have occurred in recent years have generally been generated by a reinvention of government. That reinvention is probably irreversible in the short term as with most cataclysmic transformations.²⁰ Yet the role of the citizen remains to be crystallised. Ralston Saul's corporatist prince and his Treasury mandarins see only a passive price accepting consumer as the citizen model.²¹ In this model there is only a need for this limited consumer role to be filled. Yet within this transformation of the state and its governing philosophy there is the opportunity for the resurrection of an active citizenry. Administrative law will be crucial in that resurrection. It will ensure the traditional virtues of public and individual value will not be lost in a policy environment designed solely for economic survival or where the only voices are those 'aligned with the dominant anti-state tendency in political discourse.'²² The role of the citizen in

15 ASX Submission 30 quoted in Australian Law Reform Commission and Administrative Review Council, *Freedom Of Information*, Discussion Paper No 59 (1995) para 10.8.

16 Ibid.

17 Ibid, Confidential submission 49 at para 10.8.

18 See Michael Rayner, 'International Trends In Redefining the Role of the Public Sector: Canada's Experience' (1995) 54 *Australian Journal of Public Administration* 303 where the small section entitled 'government accountability' the problem of accountability is seen as being improved with better financial statements.

19 Wettenhall, above n 13, 22.

20 Arthurs, discusses the difficulty faced by the new minimalist state if the pendulum should swing again in favour of a more interventionist approach to governance. Above n 11, 43-44.

21 John Ralston Saul, *Voltaire's Bastards: The Dictatorship of Reason in the West* (1992).

22 Arthurs, above n 11, 34.

relation to the government is still unclear. As such, administrative law is still relevant in ensuring the individual does not remain in the position of a passive consumer of goods and that the traditional virtues of public and individual value are not lost. Administrative law must adapt itself to a changing of the guard. This reassessment of administrative law and its purpose is clearly needed as the reinventors of the state are dismantling core structures on wild guesswork. Seddon has captured this sentiment when he notes wryly:

It is a strange phenomenon that a major policy shift is adopted from what appears to be a belief — an article of faith — and then the pros and cons are assessed later. Shoot first and ask questions later. *After* the privatisation and contracting out policy has been well and truly put in place . . . there has been a great deal of commentary, assessment, hand-wringing, critical papers and doubts expressed from a number of perspectives.²³

We are living in an increasingly corporatised state.²⁴ Rapid micro-economic reform initiatives have ensured government, particularly core governmental services, have become corporatised in the name of efficiency.²⁵ This development is inherently ideological. At a general level these developments are seen as merely outsourcing and a move away from centralised administration to market efficiency and managerialism.²⁶ From another perspective these developments are the adoption, by a wide spectrum, of governments of the achievement of public goals by private means.²⁷ The outcome of such a policy shift, in an area like freedom of information, as Finn notes:

effectively nullifies public debate by denying access to the information upon which any rational debate must be based. As a result, the representative relation between government and citizens is debased. It is replaced by government by press release on the one hand and cynicism and distrust on the other.²⁸

Against this backdrop of corporatisation, the role of government and citizen is rapidly changing. There is the rapid development of the 'contract state' in which the role of the government is becoming that of an overseer of the market (albeit as distant as possible) where required, and charged with policy development, administering legislation and overseeing contractual relationships which implement government programs.²⁹ The end goals of these developments are still shrouded in rhetoric, but rely on the assumption that a change in substance will

23 Dr Nick Seddon, 'Commentary: Privatisation and Contracting Out — Where are we going?' in John McMillan (ed), above n 2, 146.

24 John Ralston Saul, *The Unconscious Civilisation (The Massey Lectures)* (1996).

25 Australian Government Solicitor, 'Competitive Tendering and Contracting' *Legal Briefing No 35* (20 August 1997).

26 Alia Lum, 'Contracting Out and its Effect on the Administrative Law Remedies Available to Individuals' *Advanced Administrative Law Paper*, October 1997, 3, unpublished. Copy held at the Law School University of Tasmania.

27 Chris Finn, 'Getting the Good Oil: Freedom of Information and Contracting Out' (1998) 5 *Australian Journal of Administrative Law* 113, 113-114.

28 *Ibid* 114.

29 Peter Sergold, 'Administrative Law in the Changing Public Service Environment' (1996) 10 *Australian Institute of Administrative Law Forum* 4 at 5-6.

naturally result from a change in the form and structure of the bodies,³⁰ so that the government can return to 'core business' functions.³¹ In this simplistic 'contract state' the citizen is a passive consumer who legitimises each set of government contractual arrangements at infrequent general elections. Ministers and their teams will go to the electorate outlining policy destinations for the next four years, indicating pricing of such a package and promises of associated conditions of service and quality.³² Effectively electoral participation becomes merely the challenge of choosing the best helmsman for the next stage of the journey.³³

Some analysts would argue that this simplistic presentation merely recounts the surface changes of a more profound process where most writers are focusing on single strands or mere handfuls of threads. Arthurs argues that

bureaucracy — and public administration which is its paradigmatic form — has been a site of contestation for control of some of the most important concepts and institutions in our society. But these familiar institutions and concepts — democratic government and politics, public administration and public law, corporate management, bureaucracy itself — are constructs, shaped by time, place and circumstance. They are not immutable. All are being reshaped by the advent of the New Economy.³⁴

The New Economy, for Arthurs, is a short hand descriptor which encompasses a set of intersecting trends: rapid developments in technology (especially information technology); associated changes in workplace organisation and culture; the liberalisation of economies; the sweeping changes wrought by globalisation; the advent of a corporatist ideology;³⁵ and profound alterations in ideology, culture and institutions.³⁶ Labels such as the 'contract state', 'the New Economy' and 'corporatism' have different provenances and attempt to capture different changes that have occurred at different rates of speed, and in differing degrees of extremity.³⁷

With the increasing amount of contracting out of government services, the dichotomy between the public and private spheres is becoming increasingly blurred, causing important concerns to arise. What will be the relevance of the existing and potential review mechanisms of administrative law for the individual who may have service complaints?³⁸ This may be of particular importance at the

30 Mark Aronson, 'A Public Lawyers Response to Privatisation and Out Sourcing' in Michael Taggart (ed), *The Province of Administrative Law* (1997) 40, 41.

31 J Odbert, 'Property Aspects of Privatisation: Issues Arising out of Transfer of Property from Public to Private Ownership' (Paper presented at the 30th Australian Legal Convention for the Law Council of Australia, 16th September 1997).

32 For an assessment of the major arguments for and against this type of policy initiative see Finn, above n 27, 119–122.

33 The metaphor of the state no longer rowing but should now focus on steering comes from Osborne and Gaebler, above n 4.

34 Arthurs, above n 11, 32.

35 See Saul, above n 24.

36 Arthurs, above n 11, 32.

37 Ibid 33.

38 See Anita Tang, 'The Changing Role of Government in Community Services: Issues of Access and Equity to Administrative Review' (1997) 56 *Australian Journal of Public Administration* 95.