

Corporatisation and Electronic Records: On a Collision Course with Administrative Justice?

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Introduction

Two major developments in the modernisation of public administration have the potential to weaken government transparency and accountability. The first of these is the increasing corporatisation of government, not only through practices such as outsourcing, but also through striving for efficiency and effectiveness by deliberately imbuing some agencies with a culture seen as more akin to the private sector. The second is the increasing use of electronic records. Both of these developments can bring benefits in the form of better service delivery, greater responsiveness and reduced cost. However, if allowed to develop unchecked, both may pose a threat to administrative justice. My aim in this paper is to examine these developments, to outline the potential threat by reference to some specific occurrences and to examine potential solutions to balance performance and accountability.

To set the scene, it is appropriate to start with the concept of administrative justice. Many great legal minds have grappled with this issue, particularly in Australia, and it is not my intent in this paper to revisit their analysis, let alone question their conclusions. The topic has been the subject of a number of papers at previous AIAL conferences and the AIAL Forum contains a number of quality papers on this topic. In choosing a definition for the purposes of this paper, I have chosen to go straight to the top and quote from Chief Justice French's paper *Administrative Justice – Words in Search of Meaning* presented at last year's AIAL forum¹. In that paper, his Honour notes that a minimalist approach to administrative justice would suggest that an administrative decision affecting rights or liabilities will meet the requirements of the law if the decision is made:

- in accordance with the rules which the law prescribes;
- rationally;
- fairly (particularly from a procedural perspective); and
- intelligibly, by the provision of reasons for the decision.

¹ <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj22july10.pdf>

His Honour notes that the last element of intelligibility is crucial to allow one to ascertain compliance with the first three elements. This element is of course closest to my heart as Information Commissioner and I shall unashamedly use it as the main criterion to ascertain whether corporatisation and electronic recordkeeping are on a collision course with administrative justice. I would submit that ascertaining compliance with any other aspects of administrative justice such as efficiency, timeliness, accessibility and affordability similarly demands a measure of intelligibility and transparency.

Corporatisation

For the purposes of this paper, I will take a very broad and unscientific interpretation of the concept of corporatisation. I certainly do not intend it to refer to terms of political theory such as corporate statism or corporate nationalism. Instead, I use the term to refer to certain efforts undertaken by many Western governments in the last few decades in an attempt to make their operations more efficient and responsive through approaches such as outsourcing, privatisation and the creation of state owned companies to deliver essential services. Examples in my jurisdiction of Western Australia include the operation of a prison by a private sector provider, the use of State-owned companies to produce and distribute water and energy, and the delivery of some public health services by the private sector.

In addition to the structural changes identified above, there has also been a more subtle shift in the attitude and language used by parts of government and the public sector in trying to develop a corporate culture. Examples of this include increasing reference to citizens as “customers” as part of developing a customer focus in government. It is this attempt at developing a quasi-corporate culture that is the main focus of this part of the paper.

Unlike structural shifts to outsourcing or privatisation, more subtle cultural changes are rarely driven by an overarching whole-of-government policy or program. They often grow organically, usually out of a desire to improve services, to save public money or to keep up with trends discussed among and between elements of the public sector. They find their outlet in vision statements, strategic plans, brochures, signage, job descriptions, annual reports, codes of conduct and even the names of agencies.

This paper does not seek to comment on the desirability of the corporatisation of government services. Its purpose instead is to highlight the ramifications of such developments on the ability to deliver administrative justice to those who are affected by services provided and decisions made by the state.

Describing citizens or businesses who deal with government as customers is generally done for laudable reasons, such as a desire to increase service standards. However, the use of the term “customer” carries with it much more meaning. A true customer has the freedom to choose his or her service or product from a competitive marketplace. A person interacting

with government generally does not. Often, a person is required to interact with government as a result of a legislative obligation. Examples include the payment of taxes, the application for a licence or the submission to a compliance regime in exchange for the right to carry on a particular type of enterprise. A person does not have the ability to choose their tax regime (without leaving the jurisdiction) nor are they able to obtain a driver's licence from any one of a number of competing licensing authorities. This monopoly position of the state is counterbalanced by the state's behaviour being subject to limitations and scrutiny which do not apply to the private sector. These include obligations of transparency under Freedom of Information laws and the Parliamentary process, as well as the review of agency decisions by courts and tribunals. These obligations reflect the inherent differences between public and private spheres of service delivery. The potential danger in embracing a more corporate mindset is that the importance of these differences may be downplayed or even pushed aside.

Two examples of the impact of corporatisation on the scrutiny of publicly funded services are in the form of NBN Co and the National e-Health Transition Authority (NeHTA). The media have reported that both bodies are currently outside the document access regime prescribed by the Commonwealth Freedom of Information Act². The situation with the cross-jurisdictional NeHTA is complicated by its governance arrangements, raising complex issues of jurisdiction which do not arise in a purely intra-state context. In respect of NBN Co, it now appears likely that the company will be subject to FOI in the future, following significant media scrutiny³.

There are also cases where the structural corporatisation of government services has been done in a way which ensures that the scrutiny remains intact from the start. There are different mechanisms which can achieve this outcome. One mechanism is defining certain outsourced service providers as "agencies" for the purposes of Freedom of Information legislation. This was done with private operators of prisons in Western Australia. The private operator has all the FOI obligations of a government agency and applications for access can be made directly to it. Similarly, government-owned utilities meet the definition of "agency" in the Western Australian Freedom of Information Act, and there is no doubt that they are covered by the document access regime in that Act.

The non-structural changes to a more corporate culture may not alter the legal requirements of accountability and transparency, but they can have an impact on how those rights are administered. In being imbued with a corporate culture, agency decision makers may be more ready to claim that disclosure of their documents would place them at a competitive disadvantage. Such a claim could be dismissed if the agency, regardless of its quasi-corporate nature or relative autonomy from government, enjoys a statutory monopoly in the delivery of its operations. However, this may not occur unless a decision refusing access on this basis is challenged by appealing to the Information Commissioner.

² *Legal Expert Questions Decision to Exempt \$35.9 billion NBN from FOI laws*, The Australian, 18 January 2011; *NEHTA Exempt from FOI Laws*, The Australian, 22 February 2011

³ *Mistakes on FOI Limit Transparency*, The Australian, 18 March 2011

The potential problem may be compounded by underlying structural changes which result in the loss of corporate memory or a dilution of a culture of accountability and transparency. For example, an agency may be encouraged to attract staff from outside the sector by allowing it to offer flexible employment arrangements which need not comply with traditional public sector management legislation, or its management may report to a board made up largely of members chosen from outside the public sector for their expertise or profile. Such initiatives may have benefits but they also have the potential to result in a culture which is not as fully steeped in the need for government transparency and accountability as in more traditionally governed agencies.

One illustration of the problem relates to the environment within which an agency makes administrative decisions. In a recent Freedom of Information dispute in Western Australia, a state-owned utility argued that disclosure of a document would compromise the agency's ability to act on commercial principles, which it was required to do under its governing legislation⁴. This highlights the often conflicting pressures placed on agencies which are expected to operate with a commercial mindset, but still remain government funded organisations expending public money on issues of public importance. The increasing use of corporate language has the potential to obscure the latter consideration at the expense of the former.

As noted earlier, this paper does not argue for or against the merits of public sector bodies being imbued with a culture or practices which seek greater alignment with the corporate sphere for the purposes of achieving greater efficiencies, effectiveness or flexibility. Rather, the purpose of the foregoing discussion was to highlight that efforts along these lines need to be considered in the context of the accountability landscape. In particular, any corporatisation of government should seek to avoid placing agencies in a situation of actual or perceived conflict when making administrative decisions.

Electronic Recordkeeping

Recent years have seen a tremendous growth in the use of electronic documents in government. All aspects of government administration have felt the impact of this development. The newer generation of public servant may find it difficult to imagine a world where the dusty paper file was the primary embodiment of the government record.

The potential benefits of electronic recordkeeping are many, including greater efficiency, flexibility and searchability. Whether all of these benefits are achieved all of the time is another question, but there is no doubting their appeal. The exponential development of communications technologies has also contributed to the revolution in how government communicates, interacts, records, remembers and forgets.

⁴ *Re Roderick Douglas McKay and Kathleen Glenys McKay and Water Corporation* [2009] WAICmr 35 at [29]

From an accountability perspective, electronic records have the ability to enhance transparency and accountability. I would argue that governments now publish much more information of public interest than several decades ago, as a direct result of electronic records and digital communication. Examples include the rapid publication and dissemination of reports, financial statements, issues papers, policy proposals and the like. As just one example of how this can contribute to accountability, the Western Australian Department of the Premier and Cabinet publishes detailed quarterly reports on official travel, showing the instances and costs of all official travel by Ministers and their staff, Members of Parliament and public servants. These reports routinely run into hundreds of pages. It would be hard to imagine such broad and deep information being compiled and published before the widespread use of electronic records and online communications. The cost of compilation, printing and distribution would have been considerable, if not prohibitive. Further, the electronic version of the document allows an interested party easily to search for travel entries relating to a particular department, individual, destination or event and obtain an instant result. This again enhances transparency and accountability.

All Australian jurisdictions place obligations on the public sector governing the creation, storage and destruction of records. In the Western Australian context, the relevant legislative instrument is the *State Records Act 2000*. The State Records Act requires government organisations to develop and observe recordkeeping plans. The State Records Commission, of which the Information Commissioner is an *ex-officio* member, plays a role in reviewing and approving agencies' recordkeeping plans. The State Records Act, like the Western Australian Freedom of Information Act, uses technologically neutral language. It clearly applies to all manner of electronic and non-electronic records. It could certainly apply to some of the more recently developed channels such as text messages and tweets.

While having the ability to enhance accountability, the increasing use of electronic records also has the potential to lead to problems. These arise from an overreliance on a technology or a system at the expense of human judgment. An example of this relates to how agencies search for documents when responding to a Freedom of Information request. A report on the administration of Freedom of Information tabled in the Western Australian Parliament noted that ineffective recordkeeping can fundamentally undermine the intent of Freedom of Information⁵.

Under the Western Australian Freedom of Information Act, an agency needs to consider all relevant documents in its possession or control when responding to an access request. This includes documents which the agency is entitled to access, even though they may not be in the agency's physical possession. It is therefore a routine first step in most agencies to undertake searches of its records management system to locate documents which fall within the scope of the request. This may be an entirely appropriate step in the process, but problems can arise when the results of such a search are assumed to be correct and complete,

⁵ *The Administration of Freedom of Information in Western Australia*
<http://www.foi.wa.gov.au/Materials/FOI%20Review%202010%20-%20Comprehensive%20Report.pdf>

without applying further human judgment and analysis. John McMillan, in his capacity as Commonwealth Ombudsman, touched on a related issue in a paper he presented to the AIAL National Administrative Law Forum in 2008⁶. In that paper, he noted the dangers of officers “uncritically [accepting] erroneous information retrieved from an information technology system, or [drawing] the wrong conclusion when information about a person could not be found on the system”, ultimately leading to wrongful immigration detention⁷.

In my experience, there are at least four ways in which an inappropriate reliance on electronic recordkeeping systems can lead to poor outcomes.

The first is where the person interrogating the system uses search parameters which are unlikely to find all relevant documents. Most commonly, this occurs when an operator uses search terms which are too narrow, for example by only looking for documents which contain an exact phrase rather than looking for documents which contain all (or any) of the relevant words. The problem can be compounded by an inappropriate choice of keywords or other descriptors when a document is first entered into the system. In some cases, the interrogation of the system may be capable of searching the content of all stored documents, in other cases it may only be able to search on keywords and descriptors. To illustrate the effect this can have, I took a sample of six recent Freedom of Information disputes before my office where the quality of electronic searches were in issue. Across those six matters, the agencies had identified a total of 60 relevant documents following searches of relevant recordkeeping systems. Broadening the relevant search terms at the direction of my office produced an additional 33 documents which were within the scope of the applicants’ Freedom of Information requests. Those documents should have been identified and considered by the agencies from the outset.

A second way in which undue reliance on searches can potentially result in an injustice is where documents have, for whatever reason, not been entered into the agency’s records management system. This may be due to perfectly legitimate factors, such as the documents having only been very recently created or received. Or it may simply be down to poor recordkeeping practices. In any event, the Western Australian Freedom of Information Act applies to all documents of an agency, not just those which have been entered into a recordkeeping system.

A third and more subtle set of circumstances is where the nomenclature applied to a subject matter of a Freedom of Information request has changed. This can occur in relation to the names of government agencies, decision-making bodies or the names of initiatives themselves. A body which is initially known as a consultative committee may become a steering committee, or a project to construct a hospital may become a project to develop a health campus. Depending on the wording of the access application and the sophistication of

⁶ *Ten Challenges for Administrative Justice* published in (2010) 61 AIAL Forum 23

⁷ Commonwealth Ombudsman, *Lessons for Public Administration: Ombudsman Investigation of Referred Immigration Cases*, Report No 11/2007 at 4-5

the applicant, it may be incumbent on the agency to consider such developments in searching for documents and making a decision on access.

The fourth way in which searches for documents can lead to poor outcomes is where the system being interrogated uses some form of auto-archiving function. An illustrative example of this involves email systems. Many widely used email systems use some form of auto-archiving. This results in emails which are older than a certain age being moved to an archive folder. The emails usually remain accessible to the user, but a search across the user's email account may not find them unless the search is specifically configured to search across archive folders. Again, there have been a number of instances of this in disputes which have come before me.

An important step which agencies can take to reduce the risk of electronic recordkeeping resulting in an injustice is to ensure that records management is seen and valued as a crucial element of effective organisational governance. Staff need to be sufficiently trained, competent and supported in their records management function⁸. Particular thought also needs to be given to staff turnover in this area, as this can have detrimental effects on the ability of the agency to be transparent and accountable if the issue is not proactively managed.

More fundamentally, the negative impact of all of the above scenarios can be minimised or even eliminated by treating electronic searches as merely one element of identifying relevant documents when dealing with an application for access to government documents. The searches should always be supported by informed human judgment and analysis. In a small agency, this may be as simple as the Freedom of Information officer consulting with his or her colleagues about the subject matter of an access request and thus tapping into their recollection about what documents might exist and how they could be found. In a larger agency, it may require discussions with those officers most directly involved in the subject matter together with well informed searches of electronic and hard copy records. In either case, a clear and complete record of all such searches and discussions should be kept.

I would argue that the potential for electronic records to hamper accountability and transparency is far outweighed by the benefits which electronic recordkeeping has brought in terms of accessibility and usefulness of information. However, systems and their use are rarely perfect and shortcomings should be acknowledged and managed. The issues identified above highlight the need to remember the human element in creating, managing and finding records. Electronic recordkeeping systems should never be thought of as complete or infallible. They are useful and necessary tools in ensuring accountability but must always be supported by tapping into the knowledge and memory of individuals within government organisations.

⁸ *The Administration of Freedom of Information in Western Australia* at page 39

Conclusion

The title of this paper asks whether corporatisation and electronic records are on a collision course with administrative justice. My answer to that question is that they don't have to be. However, to chart a course which avoids the collision requires us to acknowledge some fundamental issues about the relationship between government and those who are governed.

In the case of the corporatisation of government, we must always acknowledge that government is not the same as the private sector. It is almost certainly desirable to strive for the highest possible standards of service and efficiency. But we must not pretend that the provision of services by a single provider under a statutory monopoly can be directly compared to the provision of services in a competitive marketplace. The former must continue to meet higher standards of transparency and accountability, regardless of how energetically the provider seeks to embrace a corporate culture.

When it comes to the reliance upon electronic records, we must acknowledge that decisions are ultimately made by people, not systems. Recordkeeping systems are a wonderful tool which can strengthen transparency and accountability, but they cannot be relied upon without their output being subject to critical human analysis, memory and judgment.