Caught in the A.C.T.

GOVERNMENT

CRUELTY, COLLUSION, COVERUP

by Caroline Ambrus

book

Caught in the ACT — Government Cruelty, Collusion and Coverup

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www.act-now.net.au

"Power should not be concentrated in the hands of so few, and powerlessness in the hands of so many."
(Maggie Kuhn, 1905-1995)

Prologue

by Brian Martin

Caught in the ACT contains the stories of several Canberra residents who entered the world described by Franz Kafka — a bureaucratic nightmare. They seem to have antagonised government officials because they resisted arbitrary demands. Even worse, they sought to expose rule violations by the officials who were making demands of them. They entered a long tunnel of letters, complaints, demands, appeals, expense and stress.

The book also contains an analysis of the ACT government and its problematical features, such as having only one chamber and administering a small population where personal connections and conflicts of interest abound.

Most Canberra residents, if they are lucky, will go through their lives and never be aware of the petty bureaucratic struggles occurring in their seemingly placid suburbs. Yet in households here and there throughout the city, there is continual angst and anger at officials and politicians who toss their weight around and are seemingly unaccountable.

I do not know the author, Caroline Ambrus. Nor have I independently studied the cases she describes in exquisite detail. However, the cases ring true based on my long involvement with whistleblowers. So let me explain the connection between whistleblowers and the Canberra residents whose stories are told here.

A typical whistleblower is a conscientious employee who believes the system works. When encountering some apparent problem, this dutiful employee reports it to the boss. Sometimes the right thing is done: the matter is investigated and, if necessary, problems are fixed. But in some cases, the employee has inadvertently stumbled onto something bigger. For example, the boss might be involved in a scam or tolerating corrupt operations by others. The loyal employee, by becoming aware of the issue, become a threat to the dodgy operators. And so reprisals begin: petty harassment, ostracism, referral to psychiatrists, reprimands, even dismissal.

This is just the beginning. The conscientious employee who believes in the system realises that the reprisals are unfair and seeks justice, by appealing to the boss's boss, to the board of management, to the Ombudsman, an anti-corruption agency, the courts or any number of other appeal bodies. Having talked to hundreds of whistleblowers, what happens next is predictable to me: the various appeal processes and agency do not fix the problem. Sometimes they make it worse.

The reality is that taking on a more powerful opponent is nearly always a no-win proposition. Usually the only things that can give the employee a chance are publicity and collective action. Media coverage can make a big difference, and so can efforts by trade unions and action groups.

The saddest aspect of the typical whistleblowing story is the unwelcome realisation that the system does not provide justice. The world can be very unfair, and the rules don't seem to matter to those administering them.

The individuals whose stories are told in *Caught in the ACT* do not fit conventional definitions of whistleblowers. They are not employees, but rather citizens trapped in fruitless struggles over seemingly petty matters. But there are important similarities between their stories and those of whistleblowers. In both cases, something is wrong and, rather than acquiescing, individuals decide to resist, pointing out that the rules haven't been followed. Reading the stories, the actions by ACT officials look to me very much like reprisals — reprisals for refusing to give in and for pointing out that officials have violated their own rules.

In writing *Caught in the ACT*, Caroline Ambrus has taken the most important step in challenging abuses, which is to document the problem and explain it to others. Some of the stories are quite complicated; the careful explanations of their complexities are one aspect of the book that impresses me. In studying cases of dissent, abuse and bureaucratic bungling, the stories are invariably complex, and it is incredibly hard for anyone to explain what happened in a clear and logical fashion.

You do not have to accept Caroline Ambrus' perspective and interpretations, but there is sufficient material here to show that things could be done better, and should be done better. For this reason, this book deserves to be read.

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"In a time of universal deceit, telling the truth is a revolutionary act". George Orwell

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"Behind the ostensible government sits enthroned an invisible government owing no allegiance and acknowledging no responsibility to the People." (Theodore Roosevelt)

Introduction

From 2003 to 2012, I and my ex-partner John Fleischinger were involved in a process of complaint and litigation against the ACT Government. The planning authority's inspectors had committed several wrongful acts in executing a clean up order against him. So we complained. The Government's response was either/or silence, denials and lies. We discovered that its investigative routine was to question its employees and accept their version of events as being the truth, whilst ignoring the evidence we presented. There was no accountability in spite of the Government employees' blatant, unrepentant, unlawful acts which were calculated to inflict as much damage on us as possible. By discrediting us and trying to close down our complaint, the Government escaped unscathed. Reputations were not ruined and the careers of the humblest to the highest public servant and politician lurched forward according to the favour of the Executive at that time.

I searched for complainants who had suffered the same treatment. I discovered cases where the Government had, as in our case, avoided blame through collusion with its employees and a system wide cover up. The guilty bureaucrats were exonerated and the complainant was appropriately informed, usually belatedly. Typically included was the advice that if he or she was not satisfied with the Government's decision then the complainant had the right to apply to the Ombudsman for a reconsideration or to the courts for justice. Apart from passing the buck, this was the epitome of cynicism, given that through various means the Government had made it difficult for anyone to assert their civil or legal rights. The two faces of the Government are its benign public image and the private hell it inflicts on those who question its authority.

The Government's heavy handed responses to criticism and its official denial of the truth in the face of evidence to the contrary, can inflict a debilitating personal crisis. Injustice and unfairness rankles with most of us. The anger and the bitterness can last for a lifetime. To reach closure, the victim of Government wrongdoing has to take action. He or she has to choose to give up the complaint and endure the psychological cost of defeat and shame or to fight on and risk more injustice. This means that she or he is trying to resolve the wrong that led to the complaint, while at the same time having to deal with the corrosive effects of the Government's response. To expose the collusion and cover up, complainants have to persist and take great risks which is what we, and the other complainants, did.

As complainants we exhausted every avenue seeking justice. We started off by believing help was at hand from the scrutiny agencies, from policies, instruments and laws which are set up to curb the Government's tendency to abuse its power. But we did not get a fair hearing and each of us inevitably

ended up in a court or a tribunal in our quest for justice. We discovered that the real role of the scrutiny agencies was to inform the Government of cracks in administration that need papering over. Without an effective complaints processes and a means of redress, people are left exposed to the full brunt of the Government's displeasure, which is a life altering situation.

Public servants have the power to issue orders against citizens which have the force of law. There are onerous penalties for non-compliance. The failure of the scrutiny agencies to examine the actions of bureaucrats and ensure that justice is done, means that the fairness of Government decisions cannot be tested, unless in a court. This put the onus on the complainant to take legal action and usually he or she is either too poor, too busy or too frightened to take on the Government. If a complainant manages to launch an action, the Government tends to misuse of the justice system to defeat a legitimate claim; to make the case go away without a hearing. Politicians and public servants have an obligation to do the right thing, to observe the law instead of using it as a blunt instrument to bludgeon their victims into silence or compliance. But this is about ethics which are an inconvenience, to be avoided at all costs.

Because the ACT is a small jurisdiction, toxic governance is more noticeable. Everybody know somebody who has been bullied by the bureaucrats. This is a microcosm of what is happening in other Australian states and territories. Because the ACT is a city state, friendship and professional networks cuts across the separation of powers. Corruption is about who said what to whom and the why, when, where and how. Like a virus, this information is shared across the networks, regardless of the privacy or other constraining laws. Complainants have found that no matter who was dealing with their complaint, the response was contiguous across the agencies.

The personal stories in this book have not been told. The media rarely reports an individual's struggle against arbitrary authority. And when it is reported, the story is usually couched in palatable terms to sanitize the Government of wrongdoing, is told in a "ten minute grab" and leaves out significant facts which would support the complainant's case. So they are virtually silenced. The aim of this book is to break that silence and tell their story.

The names of the public servants who committed the wrongs against the complainants featured in this book have not been revealed, though they may have been guilty of wrongdoing. The aim of this book is to expose the system that condoned their actions. Naming them would take the focus off the Government which is legally responsible for the actions of its employees. However, the names of public sector executives, politicians and the Judiciary have been revealed. Their words and actions are a matter for public interest which is an accountability measure. Caroline Ambrus

Section 1
The structure of ACT governance

This section examines the structures which underpinns the ACT Government's abuse of power when its responds to criticism of its performance and complaints about its wrongdoing. The rise and rise of the parliamentary Executive means that power is not shared. Like all Governments, money is lavished on projects meant to impress the public. Buildings and artefacts in the Territory proclaim a successful administration, but typically out-of-sight public facilities and municipal services do not get the same attention. The structures of governance share the same fate. The Government lavishes money on setting up scrutiny agencies and other accountability measures. But once they are established, behind the scenes these initiatives are starved of money. The Government's accountability amounts to token gestures meant to impress the electorate but which function in a way that does not affect its grip on power.

"Power is not a means; it is an end. One does not establish a dictatorship in order to safeguard a revolution; one makes the revolution in order to establish the dictatorship. The object of persecution is persecution. The object of torture is torture. The object of power is power. Now you begin to understand me." (George Orwell, 1984)

Chapter 1
The first separation of powers
Parliament – the weakest link

> A tension between separation and concentration of powers will always exist, and the greatest danger will always lie with the executive arm – not judges or legislatures — because in the executive lies the greatest potential and practice for power and for its corruption. Preventing this in our system relies as much upon conventions as constitutions and the alarm bells should ring loudly when Government leaders dismiss or profess ignorance of the concept.[1]

The *Latimer House Principles* and the separation of powers

In theory, the three branches of governance, the Executive, Judiciary and the Parliament, are supposed to function independently to ensure that power is shared and that no person or political party can establish absolute control. But current political practices across Australia regularly breach the separation of powers. The position is possibly worse in the ACT than elsewhere. The Territory does not have the ameliorating influence of an upper house. Further, being a small jurisdiction, Government business is usually conducted off-stage by mates who look out for each other, regardless of which of the three branches of governance they belong to. In the ACT jurisdiction, the big fish swim in a small pool and they keep on bumping into each other.

The rules of mateship goes to the core of corruption in Australian governance. Money does not usually change hands. We seem to think that this is done in third world countries. But at least it's common knowledge that in these foreign jurisdictions, Government officials have their price and once this is paid things get done. Because it is a small jurisdiction, the corruption of the buddy network underpins ACT governance. Rules, procedures and fair process can be bypassed with mates doing deals in back rooms. This has a flow on effect which has a crippling effect on democracy.

The *Latimer House Principles* are the blueprint of democracy and are the most important accountability instrument. The Assembly meeting of the 11 December 2008 endorsed a continuing resolution to adopt the *Principles*. The first principle states:

> Each Commonwealth Country's Parliaments, Executives and Judiciaries are the guarantors in their respective spheres of the rule of law, the promotion of fundamental human rights and the entrenchment of good governance based on the

1. http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/key/SeparationofPowers

> highest standards of honesty, probity and accountability.[2]

This is rather basic, but nevertheless, if Governments were to abide by this, there would be no need for so many scrutiny agencies, integrity instruments, policies and procedures that are established to curb a Government's tendencies to predate on the people. If the parliamentary Executive practiced the *Latimer House Principles*, the opposition would be empowered to make a real difference and the Assembly might be able to pass laws which benefit the community rather than the Executive.

The Assembly's endorsement discussed the role of the scrutiny agencies in that:

> The establishment of scrutiny bodies and mechanisms to oversee Government, enhances public confidence in the integrity and acceptability of Government's activities. Independent bodies such as public accounts committees, ombudsman, human rights commissions, auditors-general, anti-corruption commissions, information commissioners and similar oversight institutions can play a key role in enhancing public awareness of good governance and rule of law issues.[3]

Why should the public have confidence in the "integrity and acceptability" of Government actions, just because it has established scrutiny agencies? The Assembly's attitude that they are a part of the Government's public relations web which reflects the politicians' self interest, not the interests of the electorate. The track record of the scrutiny agencies in the ACT is appalling. This is confirmed by anecdotal accounts, some of which are covered in section two of this book. The Government's chronic failure to adequately fund them results in their commensurate failure to conduct credible investigations and deliver just outcomes. This is the Government's smoke and mirrors trick. It looks good but there's nothing much behind it. Meanwhile, behind the scenes, things happen according to what the parliamentary Executive wants.

The Chief Minister Jon Stanhope's reply to the Administration and Procedure Standing Committee's enquiry into the *Latimer House Principles* (August 2009, Report 2) stated:

> Fundamentally, the separation of powers document exists to protect individual liberty, and to constrain the capacity of any Government to arbitrarily impose restrictions on individual liberty, or otherwise abuse its powers.[4]

2. Standing Committee in Administration and Procedure, *Latimer House Principles*, August 2009, Report 2, p.1

3. ibid., p.17

4. The Legislative Assembly for the ACT, *Government response to the seventh Assembly Standing Committee on Administration and Procedure Report on the Latimer House Prin-*

He also claimed in an Assembly debate that:

> The Government recognises and values the proper roles played by the Legislative Assembly in holding the Government to account, and by the Judiciary as vital constituent elements of the ACT's system of Government. It similarly recognises and values the proper role of the ACT Executive, and will continue to assert the rights and privileges of the Executive as it goes about the business of governing the ACT.[5]

His words were foreboding. The parliamentary Executive rules. It lays claim to rights and privileges whilst commensurably the Parliament has less rights and privileges. There is only so much to go around. It works like this: there is an election, one of the parties ends up with the numbers in the house. The ministers are allocated their portfolios and the business of Government lurches forward, dragging along with it the vast army of public servants and the ministers' personal advisors, who are on the pay roll because the minister needs second opinions and a flattering army of sycophants. It doesn't matter what is the will of the Parliament, whilst the Executive rules because of its superior numbers in the Assembly, democracy is threatened and the legislature is muzzled along with the constituency.

Who is the local member?

ACT parliamentary democracy is further compromised by the idiosyncratic nature of the jurisdiction. Each electorate has multiple local members. This enables them to avoid taking responsibility for a constituent's problem which can be passed on to other local members. A complaint can reside in limbo until somebody gets around to doing something. A further complication is that multiple local members are harder to get rid of at election time. The electorate's conservative voting behaviour guarantees the sitting members continuity of their sinecure. They can perform poorly and get away with it. In the ACT some local members are noticeably lethargic.

A further complication that compromises the separation of power in the ACT and of course in other Australian jurisdictions is that members of the Executive also belong to the Parliament in their role as a local member. The two roles breach the separation of powers and are a conflict of interest. For example, if a constituent is dudded by a bureaucrat and he or she complains to the local member, who is also member of the Executive, what is going to happen? Is the local member going to resolve the constituent's problem and discipline the bureaucrat? Or is the member of the Executive going to exonerate

ciples Inquiry, p.2

5. op. cit., 2007 Week 1 *Hansard* (28 February), p.38-39

the bureaucrat and dismiss the complaint? What is the effect of this on democracy anywhere? If one constituent's complaint is misinterpreted, trivialised or dismissed, then a powerful message goes out to the public service. You can do anything you like as long as nobody finds out. When things go pear shaped and a minister faces a damaging disclosure, everybody ducks for cover and nobody is held responsible. The minister escapes unscathed as her or his party has the numbers in the house.

Stanhope's comment that the separation of powers exists to protect individual liberty and constrains the Government's potential to abuse its power was applicable when the Australian Constitution was first framed. Today, the separation of powers between the Parliament and the Executive is too weak to restrain the Executive's power. Consequently, accountability is usually sidestepped or ignored because it is inconvenient, or expensive or embarrassing. In 2002 Richard Mulgan wrote a paper on accountability in the ACT in which he stated:

> Accountability, it should be noted, is not an unqualified good. Its general rationale is the need to prevent or reduce the abuse of power by those who cannot otherwise be trusted to do what they are obliged to do. But it is not cost less, requiring time-consuming reporting and explaining on the part of those accountable, along with expensive and intrusive institutions dedicated to monitoring and investigating. Trust and goodwill, where they can be relied on, are more efficient means of securing compliance.[6]

But trust, good will and compromise have become old fashioned and have been replaced with a social attitude that takes no prisoners, shows no mercy and the winner takes all. It's a very bleak social climate. Many of us fall victim and there is no help from those with the power to intervene. His comment on the economics of accountability is just so contemporary. Everything these days is about money and it's tough if you don't have any. Trust and good will should not be applied because they are more effective in securing compliance. They should be practiced because they are the right thing to do.

The old warhorses have their say

In 2009, Malcolm Fraser (former Prime Minister of Australia) and Barry Jones (former President of the Australian Labor Party) voiced their opinion on what is wrong with Australian democracy at a La Trobe University forum 7th October, 2009. Their comments describe the parlous state of democracy in the Territory as well as the rest of Australia. Fraser argued that members of the Parliament had lost their independence because party machine discipline prioritised the party over the

6. Richard Mulgan, *Accountability Issues in the New Model of Governance, Discussion Paper No.91, April 2002*, p.4. This can be found at: https://digitalcollections.anu.edu.au/bitstream/1885/41701/3/No91Mulgan.pdf

individual members. He observed:

> You couldn't ram a 600 page industrial relations bill through the senate in two or three days, they'd say we need a senate enquiry and we need to ask a few questions which is a proper role and which ought to happen. Well, in the last 15 years, that role of the senate has been almost entirely undone.

He told the forum that the Australian Security Intelligence Organisation (ASIO) had the power to censure a parliamentary committee report on that Organisation. He said all that was needed was a compliant Attorney General. He maintained that this had an adverse effect on democracy in Australia.

Jones' contribution to the forum was:

> ... power really resides in the executive wing, the legislative wing has diminished tremendously, debates are either gagged or circumscribed or limited and so on, and you know question time becomes really farcical and it's very rare to get serious bits of information put across. So, it's a poorly informed political process and increasingly power goes into the hands of the bureaucracy and ... one of the deeply troubling things is the rise and rise of the power of the consultants and of the lobbyists and in particular … now do you call that corruption?[7]

No wonder democracy is declining all over the world. Unelected officials and ministers' advisors have become the de facto source of power and the minister is the figurehead. It's a silent, covert, coup. The bureaucrats keep elected representatives in power, not the voters. They cover up politicians' mistakes and make sure they get to look good every time. Governance has become corrupted. The extent to which people will submit to injustice is the measure of how much injustice an authority is able to impose on them. There is no mechanism to curb the powers of the unelected elite whilst they operate in collusion with our elected representatives. Bringing power back into the hands of the people is the only answer. Some countries have bloody revolutions, but this is not the Australian way. But we can ask questions and we can use the social media which is emerging as a global force which has the potential to expose and limit corporate and executive interests. Information can be disseminated at a speed that surpasses the printing press, the distributors and the bookshops, all of which are economic and ideological road blocks. The electronic media is unstoppable. Thank you Mr Assange, Mr Google, Mr You Tube, Mr Twitter and Mr Facebook. Or was that Mrs?

7. http://www.latrobe.edu.au/news/ideas-and-society/what-is-wrong-with-australian-democracy

The Executive in action

People have the persistent belief that when they are in trouble somebody in a position of power and influence should be able to help them. As the case studies in this book verify, nothing is further from the truth. Our elected representatives are powerless tokens of a failed democracy. The parliamentary Executive rules ruthlessly and mindlessly and constituents' complaints are quashed without remorse. The only measure left open to local members is to ask the Executive questions about matters brought to their attention by the constituency. Following are three examples of questions on notice to the various Assembly ministers that went basically nowhere.

Monica and Paul Gerondal's building project was characterised with bureaucratic ineptitude. In 1998 the planning authority invalidated their 1975 *Building Design and Siting Ordinance* (BDSO) approval and improperly granted them a *Land (Planning and Environment) Act* 1992 (LPE Act) approval. In 2010, and without identifying the relevant case, Caroline LeCouteur, MLA, asked Andrew Barr, the Planning Minister:

> During 1997 to 1998, was a Deputy Building Controller able to approve the 1978 still in-force "brought forward" approvals to be re-approved under the *Land (Planning and Environment) Act* 1991 without the lawful application approval process of sections 226, 229, 230 and 247 and with compliance of the requirements of Appendix III.1 in relation to the City Plan.[8]

It was a good question and the correct answer would have been a "yes". But Barr adroitly dodged the issue. He answered by identifying the relevant constituents, though LeCouteur's question did not mention any names. He informed the Assembly that the issues arising from the question had been determined by a court. He evoked the Assembly Standing Order 117(c)(iii) that "questions shall not ask ministers for a legal opinion". He informed the Assembly "I believe that it is not appropriate for Members of the Assembly to continue to litigate, or re-litigate, a particular case that is, and has been, the subject of legal proceedings before the Tribunals and Courts of the Territory".[9] Referring back to the question, well he just didn't answer it, not even slightly. If ministers can't answer questions about the effect of the laws that they pass, what are they doing occupying a seat in the Parliament?

In 2002 John Fleischinger received a clean up order. He tried to do the job but the planning authority alleged he had not complied with the order. Consequently, the inspectors cleaned out his yard. When they left they failed to

8 op. cit., 2010 Week 2 *Hansard* (25 February), p.808
9. ibid. p.809

replace the fences they had removed to gain access to the yards. Shortly after, in 2003, fire entered the property through the gaps in the perimeter fence and destroyed all the buildings on the block. He sought answers from the politicians and discovered that the local member was not much help. The only remedy was to ask questions on notice in the Assembly. The following exchange is an examples of how ministers escape accountability. The inspectors had trespassed on Fleischinger's property to get evidence for the clean up order. The Government denied the trespasses for several years in spite of the evidence he included in his regular letters of complaint. Then as a response to a question on notice, two of the acts of trespass were admitted by the Planning Minister, Simon Corbell.[10]

Fleischinger asked follow up questions concerning whether the evidence that led to the clean-up order was obtained lawfully. Barr, the next Planning Minister, replied on 20 December 2007 with the comment that he had no intention of answering the questions in detail, because, according to him, the issues had been decided by the courts and that the questions were designed to "by-pass those judicial arrangements". He claimed:

> This is another case where the lessees flagrantly flouted the law and have not complied with numerous opportunities to rectify the matter that they are required to attend to... The Supreme Court has considered all relevant matters in regard to this case, and neither the ACT Planning and Land Authority nor the ACT Government can act contrary to the decisions of the Court.[11]

The minister's emphasis on how the Government complies with court and tribunal rulings was not relevant to the questions. And even this answer was wrong as, according to the evidence in this book, the Government can breach court/tribunal orders with impunity. The minister's statement contained a couple of errors. Firstly, John Fleischinger had not "flagrantly flouted the law". Any law breaking was done by the inspectors who had trespassed and used the tainted evidence in the Administrative Appeals Tribunal to confirm the clean up order. Another error was that at the time his case had never been to the Supreme Court. With some prompting, the minister retracted the incorrect statement.

Fleischinger requested that the Assembly Speaker, Wayne Berry, refer his complaint about the minister's damaging and incorrect statements to the Standing Committee on Administration and Procedure for a Citizens' Right of Reply. He was informed that this only applied to statements made in the Assembly and not to written answers to questions on notice. A hair splitting, convenient arrangement. Answers to questions on notice are published in *Hansard* and it's

10. qon answer Corbell

11. qon answer Barr

just too bad if the information is wrong or a person has had her or his reputation sullied.

He asked Barr another related question which was:

> Can the Minister advise how the lessee of the block at 54 Morant Circuit, Kambah has flagrantly flouted the law as advised in his answer to question on notice No 1815; if not, will the Minister apologies for making unsubstantiated allegations under parliamentary privilege.

He answered on 28 July 2008 that:

> I have attached some of the photographic evidence collected by officers of both the Commonwealth and Territory Governments over the last 30 years during which time the former lessee repeatedly flouted the law ... I have no intention of making an apology.[12]

The Minister did not clarify which law was "flouted", or how, which made the comments baseless allegations. The origins of the photographs were questionable as many showed details which could only be obtained from within the block.

Fleischinger remained concerned about the minister's disregard for the truth. So again, without mentioning his specific case, he asked the minister as to what precautions would the minister take to ensure, when answering a question under parliamentary privilege, that a person's reputation has not been tarnished, especially when a breach of the law has been alleged. The second question was whether the minister checked the facts of a case before replying in a manner that identified the individual concerned. The Minister answered on the 26 May 2009:

> As Minister for Planning I am subject to the same natural and parliamentary obligations which bind all Ministers. I am not aware of any suggestion of any breach of these principles. Any suggestion of any breach of these principles should be dealt with by a substantive motion of the Assembly. (2) I take every appropriate precaution. I am not aware of any suggestion to the contrary. Any suggestion to the contrary should be dealt with by a substantive motion of the Assembly.[13]

A substantive motion is a ineffective measure to ensure ministerial accountability. The process is dependent on an opposition member risking a negative result as the numbers are usually stacked against him or her, unless a brave politician crosses the floor. The Citizen's Right of Reply needs to be strengthened so that defamed individuals can defend themselves and ministers held accountable. Extending its scope might be a small step, but in real terms it could have a significant impact on public confidence in the political system.

12. qon answer Barr

13. qon answer Barr

Chapter 2
The second separation of powers
The Executive – rule by majority

> What we know about the attorney is that political power is always more important than rectifying weaknesses in governance. What we have come to see from the attorney is that representing pro-Government lobby interests in the community, closing ranks with those lobbies, will happen at any cost, even if that means hiding the facts at the expense of serving the greater good. Steve Pratt MLA[14]

Accountability

In 2004 the ACT elected a majority Government for the first time and it happened to be Labor. In any system of Government, the party that hold power is the one that owes accountability to the electorate. Since the ACT's majority Government there has been no-holds-barred governing and accountability has withered, though the Government has stepped-up the propaganda that the current Labor Government is the most accountable in the Territory's history. If there has been a marked increase in the public sector abuse of power, it can be blamed on majority Government and the fact that the ministers cannot possibly keep up with their numerous portfolios. They are dependent on their advisors and the public sector, both of which have the power to make a fool of him or her. Remember that very British comedy "Yes Minister"? It's also very Australian. However, given the blanket of silence that covers what goes on between the ministers and their staff, nothing much leaks out. This, combined with cabinet solidarity, results in opaque and unaccountable governance.

In theory, public servants should be accountable to the public they serve. But taking responsibility for wrong decisions is routinely avoided. The business sector has more accountability because people can take their business elsewhere. Even politicians are more accountable than public servants as there are elections from time to time which can unseat a local member, or as in the caseof the ACT a bunch of local members. Because there is no alternative, public servants can hold the community to ransom. Compounding public sector loss of accountability is the establishment of independent statutory authorities, outsourcing and contracting. The old system of a stable, conservative, public service hierarchy with well established lines of authority and communication has been ditched in favour of linear, leaner, meaner, fast moving, innovative, temporary employees who are no longer servants to the public and are no longer answerable for what they do. Consequently, individuals can be victimised by power-hungry, lower-

14. op. cit., 2007 Week 1 *Hansard* (8 December), p.182

ranking employees. Departmental executives and politicians close ranks to protect their erring employees and there is nothing much that anybody can do about the cover-up, the collusion and the cruelty. What can be done to one of us, can be done to the rest of us. The questions on notice cited in the previous chapter demonstrated that the relevant ministers avoided taking responsibility by blaming the complainant, passing the busk, relying on incorrect information provided by their employees, manipulating and misinterpreting the law and treating such questions as being beneath their parliamentary dignity.

The accountability debate has been a regular feature of *Hansard* reporting. Both sides of the Assembly are apparently passionate about it. But, it's not merely a matter of the opposition slagging-off at the Government at every opportunity. The persistency of the debates tends to confirm that everybody knows something is wrong but they are helpless in identifying the problem or fixing it. The fundamental question is why? Within our Westminster systems of governance we have an opposition and a Government. But in most jurisdictions in Australia, there are structures, such as an upper house, that is supposed to ensure the balance of power between the two parties. In the ACT we have a unicameral system which means that it's Government on the cheap suitable for a small, unimportant jurisdiction like the ACT. Consequently, the population is exposed to the machinations of a not very user-friendly Government. Further, whilst there is a Government and an opposition, there is just no middle ground. The parties are forever stuck in a ritual of drawn swords at dawn and in the ACT there are no seconds to ensure fair play. This is set in concrete by cabinet solidarity where the numbers game is more important than integrity, honesty and a fair deal for the constituents.

Because the ACT is a small jurisdiction, governance is a concentrated brew. We are more interrelated than larger jurisdictions and what goes down in the Assembly affects us in very personal ways. So when Steve Doszpot, debated accountability as he did in the Assembly in 2011, the effect resonates throughout the community. This debate was remarkably similar to all the other debates on accountability. The routine is that the opposition confronts the Government which puts up a defence. Then it's put to a vote. The Government wins because it has the numbers and that's that. It's choreographed so that there are no winners or losers. It a public performance with an eye to impress the listeners with what a good job politicians of all political colours are doing. The real losers are the public which gets dudded because the issues giving rise to the debates are lost in the invective, the generalisations, the trivialisation, the blame game and the diversionary tactics of politicians who should know better and who put on a display so they get to be elected next time round.

During the debate, Doszpot stated that Stanhope had published a

ministerial code of conduct which epitomised good governance. He claimed that Stanhope had not followed his own advice. He spoke about a Labor Leaders' breakfast in Canberra in 2001 where Stanhope had used words like "disenchantment", "distrust", "anger"and "frustration" in reference to the political process. Doszpot argued that:

> One could be excused for thinking that he was foreshadowing what the ACT electorate would be feeling after a decade of Labor mismanagement. The document talks of Labor's core values of fairness, openness, responsibility, and I quote: "And they are qualities that will characterise a Stanhope Labor Government. We will ensure question time is treated with respect ... Labor believes that responsible Governments are open and accountable ... But we also understand that it is impossible to rebuild and maintain the community's confidence in Government and public institutions unless the business of those institutions is conducted in the most open manner possible. Labor will not hide behind a cloak of confidentiality ... We will stand by what we say."[15]

It's easy to figure out what's going on in politics. Listen to the words, flush out the covert message or the hidden agenda, then believe the opposite.

There was another notable occasion when accountability was a hot issue. During the debate arising from Stanhope's intervention in the Maria Doogan bush fire enquiry, he defined the extent of ministerial accountability. He backed his argument with a bunch of expert opinions. The Commonwealth Government's *Guide to Key Elements of Ministerial Responsibility* stated that ministerial accountability:

> ... does not mean that ministers bear individual responsibility or liability for all actions of their departments ... [and] would properly be held to account for matters for which they were personally responsible, or where they were aware of problems but had not acted to rectify them.[16]

Then Stanhope explained that ministerial accountability means that when mistakes were made by employees within the relevant portfolio, the minister had the role of explaining the matter to the Assembly and proposing remedies to correct the error and to prevent repetition. This is the theory, but in practice political expediency steps in any time the Government is threatened with criticism, and the accountability baby is usually thrown out with the Assembly bath water. Ministers do not admit to anything that reflects badly on the Government, as a study of the *Hansard* debates demonstrates. But they certainly tout their successes at every opportunity.

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15. Legislative Assembly for the ACT: 2011 Week 6 *Hansard* (21 June), p.2133
16. ibid.

Rearranging structures

Then in 2011, the Government yet again rearranged the structure of the public sector to meet whatever new priorities the Executive had decided was appropriate at the time. Usually such changes are carefully engineered to divest the Government of responsibility whilst increasing its hold on power. The Government published its review of the ACT Public Service prior to rearranging its units into directorates. The author of the review, Allan Hawke, argued that the traditional hierarchical lines of authority and accountability were more appropriate when the Government preferred consistency and uniformity over innovation and creativity. He quoted the Australian Public Service Commission which conceded that while accountability was essential to democracy, it was only one of the many qualities necessary for effective governance. The Commission also complained that accountability requirements were expensive, complex, reduced incentive and scope for independent action or innovation in response to new challenges and caused delays in decision making. It noted that while greater transparency can prevent errors it also fosters risk avoidance and conservative decision making.[17] It is predictable that the Commission would regard accountability as being a nuisance. It would prefer doing its business anonymously, exerting control without accountability. Governance can be effective without accountability, but only in an authoritarian regime.

A further weakening of accountability is the outsourcing of Government business to smaller more flexible units. Instead of a vertical system where everybody is accountable up the line to the minister who is then accountable to the constituency, a horizontal system has developed where public servants are accountable to their mates. Outsourcing has given rise to unfair enrichment and without accountability nobody seems to be able to stem this. When there is conflict or pertinent questions, everybody hides behind the old "commercial in confidence", or cabinet confidentiality, or whatever. Innovation and creativity without accountability is risk taking without the consequences. And who would not prefer this to the good old system of having to explain yourself? The public sector's relentless march towards flexibility, smaller units, contracts and outsourcing is more appropriate to a declared state of emergency than to everyday administration. But Governments love emergencies. It gives them a reason for being and blanket permission to tinker with the controls of state to everybody's disadvantage.

So what's in the devolution of administration for Governments? Ministers are freed from the every day nitty-gritty of governance and along with

17. Hawke, Allan, *Governing the City State, One ACT Government – One ACT Public Service*, ACTPS Review Final Report, February 2011, p.224-225

this there goes accountability. Power without accountability is every politician's pipe dream.

Hawke's report stated:

> ... accountability processes should allow new approaches to be tried, and for them to fail provided that lessons are learnt, experiences are captured and new insights are fed back into program design and delivery in a proper system of evaluation and review, and that mistakes are not repeated. Such an approach depends on a transparent and open assessment of risk, and a system and culture that encourages and rewards innovation and informed risk taking ... In setting the detail of accountability frameworks, it is worth keeping in mind that good people will make bad structures work.[18]

It is not okay for public servants to experiment with the public good. In the event of a failure, without clear accountability guidelines, who is going to take responsibility and who pays for the mistakes when people get hurt? Where there is harm, it is inevitable that there will be buck passing, denial, lies and silence.

Another blow to public sector accountability has been proliferating over the last decade or so. With the development of more efficient and varied communication technology, public servants are retreating into privacy enclaves. The shift towards anonymity fosters keeping secrets and telling lies. It's difficult to get the names of the employees who rule the community's daily existence and often only a first name is provided. Public servants have placed many barriers between themselves and the public. For example Canberra Connect protects them from being bothered by their demanding constituency. The ACT Public Service submission to the Hawke review of the public sector recommended to "enhance Canberra Connect as the gateway to all interaction... between the Government and the Canberra citizenry".[19] But between Canberra Connect and Canberra "citizenry" public servants hide behind answering machines. Further, with the concurrent development of privacy laws, privacy concerns have become the alltime excuse for withholding information and for not communicating. This is the quintessence of being non-accountable.

Debate over the 2003 bush fires

The accountability debate re-emerged in the circumstances of Stanhope's appeal against Maria Doogan, the coroner for the bush fire enquiry, on the grounds of her perceived bias against the Government. At the time he was the Attorney

18. ibid., p.226

19. ACT Public Service, *Governing the City State — One ACT Government — one ACT Public Service,* February 2011 ACTPS Review Final Report, p.8

General which most likely gave him validation for his unprecedented foray into litigation. It was one notable occasions where the Parliament confronted the Executive and tried to hold it accountable for its high handed actions. Bill Stefaniak, MLA, had launched a "want of confidence" motion which asked Stanhope to instruct the lawyers representing the Attorney General as well as the Government to discontinue the appeal and to affirm the Government's confidence in the coronial process.[20] The motion failed because Stanhope had the majority in the Assembly. But the debate clarified some of the issues around accountability and the separation of powers which was useful, if only to serve up as a dollop of hindsight wisdom.

Stanhope's response to the motion was to argue that it:

> ... represents a dangerous precedent for the legislature, for the Assembly, to be seeking to direct a minister, the executive, in the execution or the undertaking of a discretion ... for the legislature to come in and put on the table a motion which says 'Minister, you are not to exercise your discretion; you are not to take account of any representations; this is how you are to do your duty.[21]

In reply, Stefaniak argued that Stanhope was putting himself above the Assembly and that "the only reason, in fact, that he is attorney is that he is a member of the Assembly; therefore, he needs to face scrutiny by the Assembly in that role".[22] He continued:

> We do not want the ACT to be some sort of tin-pot dictatorship ... The actions we have seen in the past couple of days regarding this inquest are the actions of a very arrogant Government and Attorney-General. Despite strong opposition and strong counselling against doing what he has done, the Attorney-General has gone ahead, completely contrary to legal precedent. I would imagine that most people in the community would expect a Government to be committed to the process of the coronial inquest, which is to find out the truth and to take steps to ensure that such events do not happen again. On the contrary, this Government is muddying the waters and raising the suspicions of a lot of people in the community that it is a Government covering its back, protecting itself.[23]

There is usually dissent between the Executive and the Parliament in the ACT as it is in all parliaments. But from the onset of the Stanhope years until recently, the Executive seems to have become less accountable and more secretive, much to the dismay of the Parliament. The dominance of the

20. Legislative Assembly for the ACT: 2004-2005 Week 1 *Hansard* (8 December), p.128
21. ibid., 2005 Week 9 (17 August), p.2811
22. op. cit., 2004-2005 Week 1 *Hansard* (8 December), p.197
23. ibid., p.198

Executive over the Parliament was foreshadowed by Stanhope's response to the Assembly's acceptance of the *Latimer House Principles*. To reiterate, Stanhope claimed that he, that is the Government, valued the Assembly's role in holding the Government to account. But he also said "It similarly recognises and values the proper role of the ACT Executive, and will continue to assert the rights and privileges of the Executive as it goes about the business of governing the ACT",[24] which contradicted his views on accountability. Vicki Dunne, MLA, argued that the Assembly was:

> Moving away from the consultative democracy that we had in this Assembly over the past 15 years and is moving towards: "We are the Labor Party, we know what is good for you and we will impose it upon you — the Assembly, and you — the community ... one day you will find out what goes around might come around".[25]

Things have been like that ever since. While subsequent assemblies have become more open with information, they have become less accountable when the Government comes under fire for maladministration or mistake. The arbitrary, chaotic and self absorbed official response to the bush fire threat in 2003 was typical of a "tin pot dictatorship". The various relevant ministers and their staff were doing their thing in their own tin-pot jurisdictions with scant regard for what everybody else was doing and whether they all could do it together to save the day. That is one of the reasons why Canberra burned. Stanhope's initial reaction to the fires was to tell Canberra to "blame me". That was his moment to graduate from being a "tin-pot dictator" into being a statesman of real substance. But after his initial outburst of honesty he became defensive again and played politics at every turn.

Fragmentation — independent statutory authorities

Organisations are shape-shifters and it's been happening for some years. Recent years have seen the ACT public service splintered into an array of organisations that are part private and part Government. Being neither, the uncertainty in governance has provided opportunities for public servants to avoid accountability. Every time there are changes in organisational structures, often the same people with their same attitudes travel alongside. The rationale for devolving the public sector into smaller organisations is that they are more agile and innovative. It is believed that small, mean and mobile is able to meet the challenges of today's world of terrorism, national emergencies, crime waves, and

24. op. cit., *Government response to the seventh Assembly Standing Committee on Administration and Procedure Report on the Latimer House Principles Inquiry*, p.2
25. op. cit., 2004-2005 Week 1 *Hansard* (8 December), p.135

all the other opportunities that Governments and the media spring out of the corporate cupboard.

The ACT Public Service submission *Governing the City State* suggested that the Government's motives for the establishment of quasi-Government organisations were that these provided:

> ... different control structures or management autonomy; improving efficiency and effectiveness (especially in specialist areas); improving legitimacy and experience in decision making (including by allowing "citizens or specialised professionals into the public decision-making process") and enabling "establishment of collaborative partnerships between organisations within national Government and between organisations belonging to different levels of Government".[26]

There is no reason why this could not be achieved using the old hierarchical system with its built in accountability procedures and policies which worked. It's a truism that "if it ain't broke, don't fix it". The submission argued that given the ACT does not have a local council structure, that is two tiers of Government, then the Government should be "capable of significant institutional agility". It identified the main problem in the ACT being the monolithic public service structure which tends to " ... stifle innovation, encourage insular siloed thinking, and make whole of Government collaboration hard".[27] The submission identified other issues such as the roles and responsibilities of ministers, senior management of agencies, and other Government bodies which were not clearly defined. It stated that " ... the top governance structure of these bodies has rarely been thought through systematically, resulting in unclear responsibility and accountability".[28] It suggested that the creation of statutory independent authorities was not economically viable for the ACT and that the Government should not copy the governing practices of other states. The submission proposed that where it is necessary to create these extra-Government entities then:

> ... the default position should be that the powers are vested in a public servant. Given the primacy of the *Human Rights Act 2004* in ACT Legislation, it could be argued that the capacity and jurisdiction of the Human Rights Commissioner could be expanded to include issues where it is necessary to have decisions made at some distance to avoid conflicts of interest as an alternative to creating a new and separate statutory office. Another option would be to vest responsibility in an office holder in another jurisdiction (as happens now in relation to the ACT Ombudsman).[29]

26. ACT Public Service, *Governing the City State — One ACT Government — one ACT Public Service,* February 2011 ACTPS Review Final Report, p.99
27. ibid., p.61
28. ibid., p.100
29. ibid., p.104

But the ACT's reliance on the Commonwealth agencies such as the Ombudsman and the Privacy Commission to serve Canberra residents disadvantages them as their needs comes second to Commonwealth priorities. Further, the Territory is too small for the large number of stand alone scrutiny agencies that exist at the present time. Their proliferation is symptomatic with the Government's need to be seen as doing the right thing by establishing them in the first place. The hidden factor is that these agencies cannot do their job because they are underfunded and/or their legislation constrains them.

The submission raised the point that the Government's role was to make policy and the public sector's role was to implement that policy without political interference. It was proposed that security of tenure would ensure that public servants could speak impartially without the fear of censure or dismissal.[30] The contract employment of public servants, a recent development over the last decade, means that they are too insecure to speak out and are compliant and pliable in case their contract is not renewed. In the face of a mistake, a contracted employee can move on to greener pastures with a clean slate because the matter is covered up by her or his mates or superiors, who are equally vulnerable and can be relied on not to rock the boat. The public sector is the poorer for this. Accountability and the accumulated wisdom of tenured personnel are gone. The apparent rise in complaints from the constituency about public sector maladministration reflects this administrative abyss. At least a tenured employee would prefer not to sully her or his own nest if he or she has planned to be around in the future. Without commensurate accountability, the creation of statutory authorities, out-sourcing and contracts which has replaced tenure has created an unstable governance climate. This has provided too many opportunities for maladministration and unfair, opportunistic enrichment.

An example of the uncertainty between the Executive and the statutory authorities was in the termination of Neil Savery's contract as the Chief Executive Planner of ACT Land and Planning Authority. According to comments in the Assembly by Doszpot, Savery was:

> ... trying to maintain the integrity of the ACT planning process, through improper Government interference by former Chief Minister Jon Stanhope... According to Mr Stanhope, mounting tensions between Mr Savery and the Government marked the final straw that led to the commissioning of Allan Hawke's review of the public service. The outcome of this review saw the independence of ACTPLA subsumed in the Environment and Sustainable Development Directorate [ESDD]... Getting rid of Mr Savery will not fix the planning problems in this city. You can only do that by addressing the serious issues raised by Mr Savery.[31]

30. ibid.

31. op. cit., 2011 Week 9 *Hansard* (25 August), p.3925

So much for the celebrated independence of the statutory authorities. Bite the hand that feeds you and you're in for a famine.

For all the verbiage about accountability by the Government, the agencies, the academics and the unions, the main issue which is repeatedly ignored or minimised is the diminutive size of the ACT in comparison to other jurisdictions. One contributor to the ACT Public Service submission commented that:

> ... statutory authorities or boards do not in the ACT context create the distance from Government that is possible in larger jurisdictions. This suggests the bar for establishing such entities should be even higher in the ACT's city state Government than elsewhere.[32]

This is right on the money. No matter what happens to ACT governance, you still have the same old incumbents calling the shots. This is as true of the Assembly as it is of the public service. According to anecdotal evidence, the Territory is well known for having an administration that is stiflingly inbred. The population of Canberra is far too small to warrant the bells and whistles Government which was imposed on the electorate. Canberrans are paying for big Government through the nose with every possible revenue raising ploy the Government can create. To put it into context, according to the 2013 figures the population of the ACT is approximately 350,000 and the public sector workforce is over 18,000 with an extra 4500 temporary and casual employees, though it is not known how many of these purportedly serve the ACT. However, assuming this is the case, this makes it one public servant for approximately twenty Canberrans. Further, we are supporting top heavy institutions, so we can't afford essential infrastructure and maintenance. Some Canberra suburbs reflect this neglect.

In order to have the full apparatus of state, the Government has to share its workload between the too few members of the Executive. Too many ministers wear too many hats. It's a wonder they can keep up, well they don't. By shelving the responsibility for administration of the independent statutory authorities, the Government can focus on policy issues as opposed to the daily nitty-gritty of administration. There is a further advantage that because the delineation between policy and administration is a moving feast. When a minister receives a complaint which could be either an administrative or a policy wrong, the minister can pass the buck onto the relevant agency. Very convenient, except for the complainant. Also in ACT politics there is an attitude of "anything you can do I can do better" which is meant to depict the ACT as being "with it" compared to the old, monolithic, traditional states. The ACT reputation for being a progressive jurisdiction was consolidated with the first human rights

32. op. cit., *Governing the city state*, p.100

legislation and for five minutes the Territory had marriage equality. And surely soon there will be a euthanasia bill, so don't die yet!

The Auditor General did a report on statutory authorities in 2002. The main findings were that: there were no requirements for authorities to report on their governance arrangements; statutory roles and responsibilities of the key participants were not adequately defined and those that were defined give rise to inherent conflicts between the participants; most authorities had not adopted the model code of conduct for the disclosure of private interests; there was no central agency guidance on the processes to be used for selecting the members of the boards; and, structural governance arrangements were inadequate, including the absence of any requirement for authorities to establish audit committees.[33]

This sounds like a free-for-all. It was a damming report. Admittedly it was done in 2002 and hopefully things have improved since then. However, the point of including this is to demonstrate how the structural basis of many of our statutory governing institutions has left the door open to abuse and corruption. This has a knock on effect on the rest of the population. The Auditor General expressed this in the polite language of the bureaucracy. In freely translating the Auditor's conclusions, the Assembly has given the statutory authorities permission to: do what they liked without explaining anything to anybody; be as corrupt as they like by failing to give up those interests that conflict with their role in the authority; employ whomsoever they like without regard to their qualifications or experience; and, fiddle the books as they like without getting caught.

The Auditor concluded that:

> Effective corporate governance practice includes formalising governance arrangements and making them clear to all stakeholders. The Annual Reports (Government Agencies) Act, supplemented by the Chief Minister's Annual Report Directions, is a suitable framework for ensuring that this takes place in public authorities. At present, however, the extent of the disclosure of governance arrangements in the public sector is insufficient by comparison with established practice in the private sector.[34]

The copy-cat establishment of statutory authorities by the Government was done in a hurry, done on the cheap, done to emulate the other states and was probably a done deal between mates.

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33. ACT Auditor General, *Governance arrangements of selected authorities, Report*, 5 June 2002
34. ibid.

The leasehold system

Recently several legal issues concerning the leasehold system emerged from Monica and Paul Gerondals' appeal in the ACT Civil and Administrative Tribunal (ACAT) against the termination of their lease by the planning authority. The grounds were that they hadn't finished their extension which had been under construction for several decades. The conditions governing the lease of land in the Territory are far from definitive. The rules are changed with every update of the planning legislation. As the supply of land dwindles, the Executive's control of land tightens and lessees have become increasingly the target for revenue raising. Not only are they obliged to observe the terms of their lease, but since 2007 the planning legislation has imposed further obligations which can result in a lease being terminated even if it has not been breached. The extra obligations are termed "controlled activities" which are many and varied and wide-open to bureaucratic discretion which can and does lead to abuses. Where else in Australia does an authority have the power to make a sale or offer a lease, and then add all sorts of arbitrary conditions after the sale has been made or the contract has been signed that have the effect of ending the reciprocal rights and obligations acquired by signing it in the first place?

In 1992, the LPE Act, Section 188 gave the ACT Planning and Land Authority (ACTPLA) the power to terminate a Crown lease where the lessee had allegedly breached the lease or Part 5 which related to the payment of land rent. The *Planning and Development Act* (PD Act) which succeeded the LPE Act saw these provisions expanded to include a list of controlled activities which could lead to termination of a lease. According to the PD Act when a lease is terminated the following applies:

(a) Sections 291 and 293 allows for compensation to be paid for improvements on a property which the planning authority has acquired through termination of a lease. However, the validity and value of the improvements is decided by the planning authority, minus any expenses incurred in the acquisition.

(b) Section 300(2) and the *Planning and Development Regulation,* Compensation Section 210(2) allows for compensation to be payable for the land by a payment equal to the lesser of the amount paid by the lessee at the time of the grant of the lease and the unimproved value of the land at the date of termination.

In the 1970s, those who purchased ex-Government houses and ninety-nine year leases paid around $9000. The land component of the purchases was not separately assessed at the time. Depending on how the compensation provisions are interpreted, anyone facing the termination of their lease could receive no more the $9000 for a house and land worth approximately $600,000

at todays values. Or he or she may receive $9,000 for the land alone and the improvements as assessed by the planning authority at market value, minus the cost of dealing with the unfinished extension and other costs such as legal and administrative costs and the cost of reassigning the lease.

The *ACT Self Government Act* 1988 (SGA), Section 23 (1)(a) states that "The Assembly has no power to make laws with respect to: (a) the acquisition of property otherwise than on just terms." The PD Act, specifically Section 382(2) and the relevant regulation, is arguably invalid because these breach the SGA. A territorial Government just can't make laws that breach Commonwealth Acts, especially when it involves dealing with Commonwealth land. The Gerondals' legal team applied to ACAT to have the question of validity of terminations referred to the Supreme Court for determination, as ACAT does not have the authority to rule on questions of law. The presiding Senior Member, Wilhelmena Corby, decided the termination was deprivation of a right rather than an acquisition of property which put the conflict between the ACT and the Commonwealth law on hold and allowed the case to go to the substantive hearing. However, the *SGA* refers to the "acquisition of property" which includes both the house and the land. Perhaps the act of deprivation may disallow the use of the land but how does this affect the right to occupy a house when the bricks and mortar are demonstrably owned by the lessee? The planning legislation needs to be disengaged from the leasehold system, otherwise the planning authority will use its power to make trivial, unlawful, incomprehensible orders which can result in lessees being deprived of their house and land for what could be a ridiculously small return.

The legal process attending the termination of a lease is heavily weighted in favour of the planning authority. The PD Act, Section 384 states:

> The planning and land authority must not terminate a lease or license under this part unless it has — (a) by written notice given to the lessee or licensee — (i) informing the lessee or licensee that it is considering terminating the lease or licensee; and (ii) stated the grounds on which it is considering taking that action; and (iii) inviting the lessee or licensee to tell the authority in writing not later than 15 working days after the day the lessee ... received the notice why the lessee or licensee considers that the lease or licensee should not be terminated.

There is something really basic which has not been included in this section. The PD Act does not include any legal obligation for the planning authority to notify the lessee of its reasons for rejecting her or his submissions. Considering the lessee's submission is an in-house process conducted by the very officers who proposed the termination in the first instance. This means that it is not

independent, accountable or transparent. As was revealed in the Gerondals' ACAT appeal, the witness for the planning authority admitted that there was no policy governing the termination of leases.[35] Consequently, a decision that potentially deprives a lessee of her or his home can be made on the basis of unproven allegations or according to the whim of a bureaucrat. Any Government decision made without a policy or guidelines is in danger of being arbitrary which is an administrative wrong. The PD Act stipulates that the bureaucracy gives reasons for the intention to terminate a lease. But if the officer rejects the lessee's arguments against this action, the lease can be terminated without accountability. The only way to force the bureaucrat to give reasons for the actual termination is an appeal to ACAT and request that the member order the Respondent provide reasons for its rejection of the lessee's submission. The PD Act is wrong because it has contradicted proper administrative practice. The next chapter discusses the human rights aspect to this anomaly.

If or when a lessee's arguments against termination are rejected, the lease is terminated automatically and the change is registered on the title deed within 28 days of the termination. This makes an appeal to ACAT a necessity, the alternative being repossession of the property for a pittance. Any appeal involves a risk of losing the case. When in ACAT, the lessee has to apply for a series of interim orders to prevent the planning authority from registering the termination on the title deed until all appeal processes are exhausted. This raises the spectre of a lessee winning the appeal in whatever court it is heard, but unless the interim order or the injunction is granted and the authority prevented from registering the termination, the lessee may have won the case but in the meantime has lost her or his house and land in the process. This is a well sprung legal trap unrepresented litigants could stumble into.

The Gerondals' defence of their home highlighted the facts that: A Crown lease is a document that cannot be relied on. A lease can be terminated and registered on the title deed without fair or due process. The lessee has no guarantee of just compensation for the loss of a lease. The termination provisions of the PD Act and conditions imposed on leases after they have been signed breach the *ACT Self Government Act*, the *ACT Human Rights Act* and *Australian Consumer Law*. It is up to the Assembly to address these issues. Canberrans deserve a leasehold system that cannot be disrupted on the whim of public servants and subjected to the trauma of legal proceedings they are forced to undertake in defence of their homes.

A related problem for ACT lessees is what will happen to their lease

35. *Gerondal and Gerondal v ACT Planning and Land Authority* (Administrative Review) [204] ACAT 51, paragraph 75

upon expiry after ninety nine years. Many areas of Canberra are approaching the end date. Leases in the older suburbs are very desirable real estate. It is a foregone conclusion that the planning authority will be trawling these suburbs for "controlled activities" which gives it the opportunity to terminate leases for a pittance. And guess who or what will be waiting in the wings? The developers. It's only a matter of time before the inner suburbs begin to look like the worst of Queanbeyan, with tower blocks of flats on every corner of land that has been grabbed by the developers. Take a look at Civic. It's beginning!

"All goes awry and lawless in the land,
Where power takes the place of justice."
(Margaret of Austria, 1480-1530)

"Propaganda is the executive arm of the invisible government ."
(Edward Bernays)

Chapter 3
The third separation of powers
Scrutiny agencies – the safety net that isn't

> Social inclusion, or the lack of it, is a huge issue for my office. Last financial year, we received around 39,000 approaches, of which we chose to investigate more than 4000. However, I suspect that for every complaint we get, there are maybe 10 we don't. In general terms, I believe that the people we don't hear from are the people we should be hearing from most, because they are likely to be those members of our community who are the most marginalised and disadvantaged. Alan Asher[36]

The Human Rights Act

The *Human Rights Act 2004* (HR Act) requires decision makers, courts and tribunals to interpret ACT legislation in a way that is compatible with human rights. If the law is open to various interpretations, the decision to be made has to comply with human rights law. It is unlawful for a public authority to act in a way that is incompatible with a human right; or to fail to consider a relevant human right when making a decision. Public authority breaches of human rights have to be heard in the Supreme Court. Human rights issues may be raised collaterally in other proceedings, for example those relating to public housing or the protection of children. However, for a complainant to take action, sufficient education, legal representation and financial means are essential.

Since 2004 there have been approximately 160 cases where individuals have legally asserted their human rights which is not many in a population of over three hundred and eighty thousand citizens. Given the disproportionate number of public servants governing the Territory, it is likely a significant number either are ignorant enough or gung-ho enough to breach a human right without a second thought. Including the Human Right Commission, the ACT has at least eleven scrutiny agencies, plus stacks of integrity policies. One would think that the people of the ACT are the best governed in Australia. These agencies are supposed to stand between the citizens and the Government's march to authoritarian rule. In August 2004 the Government's position paper titled *The Right System for Rights Protection* examined the system of statutory oversight in the ACT. The Chief Minister at the time, Stanhope, wrote:

> Accessibility is a key aspect of ensuring that we respond appropriately to the needs of the most vulnerable in our community and those who are unable to adequately

36. Commonwealth Ombudsman Allan Asher, *Promises, prospects and performance in public administration*, National Administrative Law Forum: Democracy, participation and administrative law, Canberra, Friday, 22 July 2011, unpaged

> represent themselves. The new structure retains Commissioners with specific responsibilities for particular issues. This increases the transparency, accessibility and accountability of the statutory oversight system as a whole ... *The Right System for Rights Protection* reflects a strong Government commitment to protect and promote citizens' rights and improve Government accountability.[37]

This being said, the legislation for the scrutiny agencies has an overkill of prohibitions and exclusions that render them inaccessible to the majority of potential complainants. The needs of the "most vulnerable" are usually not addressed. The *Human Rights Commission Act* limits what the Commission can and can not do. And if the legislation does not do the job, its inadequate funding ensures that the Commission does not have much clout. It can only investigate a complaint if it is about the provision of services by an organisation or business to an identifiable group of people. It does not investigate individual complaints. Given that the Government is the biggest employer and service provider in the ACT, human rights breaches are more likely which will impact an individual rather than a group. So if you are a poverty stricken, disabled, ageing, female member of an ethnic minority, it's an odds on bet that your human rights are going to be breached. The Human Rights Commission *Annual Report 2012-2013* stated:

> In relation to human rights, the Commissioner has no complaint handling function. The Commissioner's role includes providing community education and information about human rights law, reviewing the effect of ACT Laws on human rights, and advising the [an omission] on the operation of the Human Rights Act.[38]

This is not an oversight. The Commission was not set up to parallel the judicial process. The courts are the appropriate forum to adjudicate on human rights law as the interpretation of the law is a judicial function rather than an administrative one. The *HR Act* has no provision for redress of a human rights abuse, except perhaps for an apology. So taking a complaint to the Supreme Court and winning is basically a high risk moral victory. Most people who have had their human rights trashed are at the bottom of the pecking order and they need compensation, not high sounding words. Better access to justice in the Supreme Court is essential and the penalties have to be more effective than a apology and a slap on the offender's wrist. This is enough to take the guts out of the human rights legislation, which renders the legislation ineffective, if it was ever meant to have teeth in the first place. So the continuing public sector abuse of power is not addressed.

37. *The Right System for Rights Protection*, August 2004, An ACT Government Position Paper on the System of Statutory Oversight in the ACT, p.iii
38. *Human Right Commission Annual Report 2012-2013*, p.48

When he introduced the *Human Rights Bill*, Stanhope stated that the *Human Rights Act* will:

> ... promote a dialogue about human rights within the parliament, between the parliament and the judiciary, and, most importantly, within the Canberra Community. It will also serve to educate us and foster respect for the rights of others and greater understanding of our responsibilities towards each other.[39]

In his answer to Stanhope's speech, Stefaniak argued:

> You cannot give balance by simply bunging in a bill of rights ... if people and society are not prepared and are not able to naturally provide rights and act in a civil way, a bill is certainly not going to do that. The bill of rights didn't work in the Soviet Union ... But in 1937 some seven million people had been bumped off in the Ukraine through a man-made famine caused by Stalin. Stalin was gleefully hoeing his way through 90 per cent of the upper echelon of the Red Army. He was an absolute dictator.[40]

Stefaniak's example of what happened in the Soviet Union is reflected throughout other countries, but to a less draconian degree. The debate highlights the disparity between theory and practice. There can be numerous laws that fulfil whatever wish list people might have. But if they are unable to assert their rights, they may as well be starving in some ghetto for all it matters.

As detailed in the previous chapter, the planning authority is not required according the PD Act Section 384 to give reasons for terminating a lease. Given that there is no relevant policy, the decision can be arbitrary which breaches the *HR Act* Section 12(a) which gives residents a right not to have "his or her ... home ... interfered with unlawfully or arbitrarily." During their appeal, the Gerondals asked the Tribunal for an order that the Respondent provide reasons for the termination. The Respondent came up with the "Supplementary Reasons Statement". The Respondent informed the Tribunal that "... consideration of the Applicants' submissions by the reviewable decision maker [was made] before making the reviewable decision."[41] Section 384 states that the planning authority must not terminate a lease until it has (c) "taken into account any reasons for not terminating the lease or license given to the authority by the lessee". What does "taking into account" mean? And given that termination of a lease is a draconian step, one would have hoped that the legislature in its wisdom might have put some limitation on the planning authority's power to wreck people's lives arbitrarily by terminating their lease without informing them of the reasons for doing this.

39. Legislative Assembly for the ACT, Hansard 2003, p.4244
40. Legislative Assembly for the ACT: 2003 Week 13 Hansard (25 November) p.4579
41. op. cit. Gerondal and Gerondal, paragraph 17

On discussing the human rights issue, the Tribunal's decision stated:

> ...if, as here, the clear intention of the legislature is directed at an outcome which is, potentially, inconsistent with the human right in section 12, then the only further matter for consideration by the Tribunal in relation to the HR Act is to exercise the discretion which would result in that outcome in a way that is not "arbitrary". Section 382(1)(b) of the PD Act requires that, before a decision to terminate is made, the lessee is to be provided with a notice, is to have the opportunity to make submissions as to why the discretion to terminate should not be exercised, and the lessee may appeal to the Tribunal in relation to an adverse decision. In the Tribunal's view, this is not an arbitrary process.[42]

With all due respect to the Tribunal, the use of the words "arbitrary" and "process" together is an oxymoron. The *Oxford Dictionary* defines arbitrary as "1. Based on random choice or on personal whim, rather than any reason or system or 2. (Of power or a ruling body) unrestrained and autocratic in the use of authority".[43] Further, a process cannot be arbitrary but a human decision can be.

The PD Act Section 384 puts lessees in the position of having to litigate to ensure the planning authority can be held accountable for its decisions. Whose interests does this injustice serve? The Government which has given the planning authority permission to terminate leases at its whim, knowing that taking matters to any court is a process fraught with uncertainty and costs. Further, before any lessee challenges a terminated lease, it would be helpful for the lessee to be informed as to the reasons for the action. Without this information how can a lessee make the choice whether to appeal or to let the property go. However, the *HR Act* modifies the operation of the PD Act Section 382. The *HR Act* Section 28(2) states "in deciding whether a limit is reasonable, all relevant factors must be considered including ... (e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve". There were less restrictive means to get the Gerondals to comply with the relevant orders, but the planning authority was not interested. Perhaps it was out to get a precedent and the self-litigating Gerondals seemed to be a soft target.

The Respondent worked around the inconvenient human rights by claiming that the reference to "privacy and home" referred to the house and that the land could be subject to the reviewable decision to terminate the lease.[44] The Tribunal rightly rejected this specious argument with the dry comment that "Termination would greatly interfere with the Applicants' home and their human

42. Gerondal and Gerondal v ACT Planning and Land Authority, paragraphs 205, 206
43. http://www.oxforddictionaries.com/definition/english/arbitrary
44. op.cit., Gerondal paragraph 142

rights should not be excluded because of a technicality based on the form of tenure involved."[45] The Government Solicitor's attempt at manipulating the law bought the ACT Government into contempt. If this termination had become a precedent, the potential to affect every leaseholder in the Territory is unsettling.

The Ombudsman

The Ombudsman which investigates complaints about government was established by the Government to investigate itself, so its independent status is questionable. In theory, it is not accountable to the Government. It is also not particularly accountable to complainants. Ultimately, it is accountable to the Assembly, but holding the Ombudsman to this is difficult. If the scrutineer agencies were truly independent, they would have reined in Government maladministration long ago. This being the case, the Ombudsman's workload would consequently have shrunk to more manageable levels than exists at the present time.

The ACT Ombudsman's *Annual Report for 2011-2012* reported out of 763 complaints received only 154 were investigated. Similarly the *2012-2013* figures were that out of 563 complaints 128 were investigated. These statistics are not encouraging for potential complainants. However, these statistics don't mean much unless they are read in conjunction with the complaints the Ombudsman can exclude according to the *Ombudsman Act* which are many and varied and quite subjective. At this point it is worth examining who is likely to complain. The unemployed do not usually complain because Centrelink is keeping them busy with numerous, onerous activities, so they don't have the time or energy to conduct a complaint campaign. Likewise the working poor are too busy as they are trying to keep one step ahead of becoming Centrelink's victims. The rapidly shrinking middle class are too busy maintaining their lifestyle and are probably unwilling to spend their carefully marshalled resources on proving that bureaucrats make mistakes. Then there is the well-to-do who are the most equipped to run the gauntlet of the complaints process, that is if they are ever given anything to complain about. Society has been good to them so why would they rock the boat. Given these hypothetical factors it is amazing that the scrutiny agencies receive as many complaints as they do. Things must be really bad out there.

If the *Ombudsman's Act* doesn't exclude complainants, its policies will do the job. The former Commonwealth Ombudsman, Professor John McMillan wrote an instruction manual titled *Managing unreasonable complaint conduct* which stated:

45. ibid., paragraph 204

> In any given year, ombudsman offices and Government agencies around Australia hear from thousands of customers who believe they have been treated unfairly or unreasonably and who wish to complain about their treatment.
>
> Making a complaint is a valid way of alerting an organisation to a potential problem in the way that it conducts business. Through the investigation of complaints — by agencies themselves or independent bodies such as an ombudsman — agencies can gain a realistic understanding of how or where things might be going wrong.
>
> Getting to the bottom of complaints is an important and valuable exercise for public administrators. It allows them to analyse how they administer policies and programs, deal with customers and manage issues. It also helps them to identify areas that need work, leading to innovative solutions to problems, improvements in service delivery and better decision making.
>
> Understandably, by the time a customer feels 'wronged' enough to make a complaint, they have often developed a strong emotional link to the problem and to its resolution. Sometimes this emotion is expressed in ways that most reasonable people would consider inappropriate—they exhibit 'unreasonable conduct'.[46]

He was really a bit patronising about the emotional plight of complainants. The terms "reasonable" and "unreasonable" are often related to the preferences of the person considering the matter.

Fleischinger's several complaints to the Ombudsman could accordingly could be seen as being unreasonable. He had complained to the Ombudsman when the planning authority and the Planning Minister failed to investigate his case, even after he included uncontrovertible evidence of the inspectors' trespasses. Consequently, the Ombudsman conducted an investigation by questioning the bureaucrats whom it believed, rather than Fleischinger. If the investigator had consulted the files, Fleischinger's complaint would have been validated. He protested about the Ombudsman's flawed investigation and the matter was reviewed and re investigated three times over a six year period. On the last review, the Ombudsman actually consulted the files and discovered that the planning authority's officers were lying about the trespass and other matters. The last review came up with a finding of "administrative deficiency" which probably meant that the planning authority executive did not inform the inspectors that trespass was against the law. The Ombudsman requested that the planning authority apologise for its wrong doing, but this has not been forthcoming.[47]

Professor McMillan's comments about the real role of scrutiny agencies implies that they are not there for the public's benefit, they are there to keep the Government informed. They give the Government the opportunity to keep tabs

46. Commonwealth Ombudsman, *Managing unreasonable complaint conduct*, 1st edition, June 2009

47. communication McMillan to Savery

on the public's reactions to what it says and does. Bureaucrats and politicians make decisions, create laws, policies, guidelines on the run, often according to a political or commercial agenda rather than for the public interest, sometimes without the relevant information and often in ignorance of the effect of these decisions. The Government tends to act and waits for the public to react. If there is no or little reaction, then it assumes it has got it right. If there are objections and complaints, the Government may go back to the drawing board, or may stand its ground, or may try an alternative.

The Government uses the complaints or the appeals processes as a part of its learning curve. Whether it changes a decision or backs down, the political spin is that it is responding to community concerns which is the democratic thing to do. This is public consultation at the end of the legislative or administrative process, rather than at the inception stage. A bonus is that it is Government surveillance on the quiet and without transparency. A cover-up can be conducted using such instruments as Freedom of Information (FOI), privacy concerns, subjudice or legal privilege claim, thus ensuring silence. The other way complaints can be scuttled is through bleeding individuals and community groups dry with drawn-out, demanding bureaucratic process.

If the *Ombudsman's Act* and the manual for managing unreasonable complainants is not sufficient to stymie matters, anecdotal reports describe the Ombudsman's other techniques to resolve complaints are that investigators often:

* do not address the relevant issues, but focus on peripheral issues that do the least amount of damage to the Government;
* do not understand the relevant legislation or misinterpret it;
* do not believe the complainant evidence as against the Government's defence;
* do not allow the complainant to respond to Government's allegations, or fail to take the answer into consideration;
* do not provide the complaint with specific details of how legislation/policies/ and procedure have been applied to the complaint;
* do not insist that the Government responds in a timely manner, answers questions relevantly, provides evidence and documentation;
* arbitrarily close down the complaint and truncate any right of reply.

On 7 December 2010, Allan Asher, the Commonwealth Ombudsman, made a submission to the *ACT Public Service Review* which stated:

> The ACT Ombudsman safeguards the community in its dealings with the ACT Government agencies by: correcting administrative deficiencies through independent review of complaints about Australian Government administrative action; fostering good public administration that is accountable, lawful, fair, transparent and responsive; assisting people resolve complaints about Government administrative

action; developing policies and principles for accountability.[48]

Without any further information, the Ombudsman deserves the benefit of the doubt on some of these points. But what has emerged through research and anecdotal evidence, there is a large credibility gap between the scrutiny agency's claim of what has happened compared to the complainants' experience of what has not happened.

In his submission to the Hawke review, Asher noted that complaints against the Government are handled by the Commonwealth Ombudsman. He recommended that the ACT should have its own Ombudsman. He stated:

> There is a question about whether a more effective model would be for these functions to be established within an integrated, ACT-run agency, in order to focus much more intensively on the specific needs of the jurisdiction. A stand alone ACT agency may also have more success in driving internal change to complaint handling practices and procedures across the ACT public service. The mix of state and local Government type functions which make up the ACT Government's responsibilities do not always sit well alongside agencies provided services mainly for national or international audience.[49]

This issue was raised some years ago by a review titled *The Right System for Rights Protection, August 2004*, *An ACT Government Position Paper on the System of Statutory Oversight in the ACT*. The recommendation was that the *Ombudsman's Act* be amended to provide the ACT Ombudsman with the jurisdiction to deal with complaints by conciliation. The Government agreed in-principle with:

> As ACT Ombudsman functions are performed by the Commonwealth Ombudsman, the implementation of this recommendation will require negotiation with the Australian Government. The Commonwealth Ombudsman does not currently have any conciliation functions. The inclusion of these functions for the ACT Ombudsman would require the specific agreement of the Australian Government to expand the capabilities of the Commonwealth Ombudsman's Office to fulfil this additional role. The Attorney-General will write to the Prime Minister seeking consideration of this matter in the present review of the Commonwealth Ombudsman Act.[50]

So if the Commonwealth Ombudsman cannot conciliate, neither can the ACT Ombudsman. But it can in New South Wales, a state which has its own ombudsman. Stanhope did not take any further action which means that once

48. Submission by Allan Asher, ACT Ombudsman, *ACT Public Sector Review, conducted by Dr Allan Hawke AC, December 2010,* p.2
49. op. cit., *ACT Public Sector Review,* conducted by Dr Allan Hawke AC, December 2010, p.4
50. op. cit., *The Right System for Rights Protection,* p.32

again the ACT people were shortchanged.

Asher's claim that the ACT community is protected by the Ombudsman is rather contradicted by his disclosure that the Commonwealth Ombudsman had national priorities. A specific ACT Ombudsman will never be appointed because the Government does not want this. The Government has also piggy-backed on other Commonwealth functions such as the Federal Police and the Privacy Commission to the disadvantage of ACT residents. Asher also recommended that the Government establish an ACT Integrity Commission to comprise responsibility for Ombudsman, personal privacy, law enforcement inspections, FOI, ethical advice, anti-corruption and lobbyist regulation functions. He recommended that the legislation for privacy, FOI, ombudsman, public interest disclosure and enquiries needs to be updated and further legislation consisting of a code of ethics for members of the Assembly, and their staff, members of the Judiciary and tribunals; that a process be established that covers complaints about members of the Assembly, the Judiciary and the Tribunals; and, that a parliamentary committee be established to scrutinise the activities of all scrutiny agencies.[51]

These recommendations confirm that the ACT is falling short on accountability measures. But accountability will not work unless there are penalties for non-compliance. This is the weakness in the entire suite of accountability measures. Nobody gets fined, sacked or jailed. Given the extent of the Government's cruelty and the subsequent complaints, it is small wonder that these underfunded, tokenistic, scrutiny agencies function at all. We have an Ombudsman which can't conciliate complaints, a Human Rights Commission that can't investigate complaints and a police force that is more interested in big names and big crimes than mums' and dads' little problems.

As a post script, Asher resigned after he was "found out" consulting with the Greens over questions he hoped to be asked at an Estimates Committee hearing. The Government attacked him probably because he was seen as being partisan when, as the Ombudsman, he was supposed to be independent of partisan politics. Also at times he has been quite critical of the Government. Asher's concern about what questions should be raised at the Estimates Committee hearing reflects his concern that the Ombudsman needed the resources to do its job properly[52] and there's nothing improper about that.

51. op. cit., Allan Asher, ACT Ombudsman, submission to *ACT Public Sector Review*, p.6
52. http://www.smh.com.au/national/embattled-ombudsman-allan-asher-resigns-20111020-1m9hf.html

The *Model Litigant Guidelines*

The *Model Litigant Guidelines* are supposed to be an important check on the Government's drive to win court cases using the taxpayer's money to frustrate the course of justice. Given the Government's chronic failure to address complaints, there is nowhere else to go except to court which is the last, unpalatable resort. Unfortunately, it is inevitable that in litigating, a Government will use its superior resources to destroy a litigant's chances of getting a fair hearing and being awarded just compensation. In addressing this David and Goliath imbalance, the Assembly incorporated the *Model Litigant Guidelines*,[53] into the *Law Officer (Model Litigant) Guidelines 2010*. The Guidelines are supposed to impose obligations on the Government Solicitor and the public service to be honest, fair, punctual, conciliatory, consistent, considerate and apologetic where appropriate. In other words the Government Solicitor is instructed not to be dishonest, unfair, tardy, mean, inconsistent, overbearing, devious, or recalcitrant. But according to litigants' and lawyers' experiences, the document does not make a whit of difference.

The Federal Attorney General's Department summarised court and tribunal cases which highlighted examples of lawyers' litigious misbehavior as:

* attempting to win on a technical point by arguing that the court did not have jurisdiction because the plaintiff did not name the Minister as the respondent;
* serving affidavits at the last minute impairing the plaintiff's preparation for the hearing;
* taking advantage of an unrepresented plaintiff's lack of knowledge and experience of the law;
* attempting to try a case in the absence of the plaintiff facing deportation instead of bringing the case forward so that he or she could attend, or by arranging a teleconference;
* consenting to the court bringing a case forward and then asking for an adjournment on the grounds that the Government solicitors were not adequately prepared;
* litigating well established facts and admissions unnecessarily;
* introducing irrelevant evidence and unnecessary cross-examination;
* filing at the last minute medical evidence by doctors who had not examined the plaintiff;
* failing to make adequate preparations for the case by not seeking out or producing relevant information and by not identifying and citing relevant Acts;
* changing court room tactics without notice, i.e. abandoning the written submissions for oral presentations and resiling from concessions previously made in writing;
* withholding vital factual information from the plaintiff and from the court.[54]

53. *Law Officer (Model Litigant) Guidelines* 2010 (No 1) Notifiable instrument NI2010–88
54. Australian Government, Attorney General's Department (www.ag.gov.au/www/agd/

According to anecdotal reports, breaches of the *Guidelines* are common. On the 12 January 2009 Fleischinger wrote to the Attorney General, Simon Corbell, alleging the following breaches:

> 1. Admissions by the defendant need not be litigated. I provided the evidence and argued that the Government's strategy of denial was potentially a breach of the *Model Litigant Guidelines* which states: (e) where it is not possible to avoid the commencement of court proceedings, keeping the costs of Litigation to a minimum, including by: (i) not requiring the other party to prove a matter if there is no doubt regarding the truth of that matter; and, (ii) not contesting liability if there is no doubt concerning liability,
> 2. We tried every avenue to resolve the issues before applying to the court. In spite of admissions and the Ombudsman's findings that the Authority had breached its order, it refused to take any responsibility. On 21 August 2007 Neil Savery, the planning authority's Chief Executive Officer, instructed his staff that: "...I want to be able to respond at some point in a manner that is definitive and clearly puts paid to any suggestion of illegality or compensation, as well as restating our right and responsibility to enforce the provisions of the legislation. Can you please give consideration to this".[55]
> 3. On the 23 November 2007, the Ombudsman, Professor John McMillan suggested that ACTPLA apologise to the lessee for the trespasses on his property. Mr Savery's comment clearly breached the *Model Litigant Guidelines* which stated that the Government should consider: (b) paying legitimate claims without requiring the commencement of court proceedings... (d) endeavouring to avoid the commencement of court proceedings, wherever possible... (i) apologising where the Territory or the agency is aware that it or its lawyers have acted wrongfully or improperly.[56]

Fleischinger requested that Corbell advise the Government Solicitor of its obligations under the *Guidelines*. The Attorney General responded with:

> ...the Government Solicitor has a duty to defend the interests of the Territory and the model litigant guidelines do not prevent the Territory and its agencies from testing or defending claims made against them. Further, the matters you raise are the subject of proceedings in the Supreme Court and you are represented by a solicitor. Under those circumstances it appears to me that it would be inappropriate for me to comment further.[57]

On 3 March 2009 Fleischinger replied informing Corbell that:

> ... compliance with Government policy is strictly between the relevant Minister and

agd.nsf/Page/Publications_SummariesofCourtandTribunalmodellitigantcases-2005)

55. communication Savery to T and S
56. communication A to Corbell
57. communication Corbell to A

> the public service. It is not a matter between the Minister and the Courts... So you cannot claim subjudice as an excuse for failing to provide the requested advice to your employees. Nor is compliance with Government policy a matter between the Minister and my solicitors, or between the Minister and myself. But as employees of the Government, solicitors and/or their agents have the obligation to comply with the Government's policies as well as with the *Rules of the Supreme Court.* If they breach the rules, then I, or my solicitor, have the right to raise this with the Court ...you have an obligation, as a Minister, to save the Territory from spending unnecessary time and expenditure with the fruitless exercise of litigating matters already admitted... Your last piece of inappropriate advice to me was to direct any further correspondence to the ACT Government Solicitor, through my solicitors. For your information, I will continue to correspond with you and with the other members of the Legislative Assembly when the issues relate to the ACT Government's political, administrative and policy jurisdiction. If I have any legal issues, I will direct these to the relevant professionals.[58]

On 18 March 2009, the Government Solicitor wrote to Fleischinger's solicitor that:

> Your client continues to correspond directly with the Attorney General in relation to these proceedings. I enclose for your information a copy of [his] latest email dated 3 March 2009. While it is [his] right to correspond I note that it is not possible or appropriate to provide a meaningful reply when matters he raises are at issue in the proceedings and are yet to be tested before, and determined by, the Court.[59]

The Guidelines explicitly state that "Issues relating to compliance with these Guidelines are matters for the Attorney General and not for any court, tribunal or other body".[60] Isn't it time the Government Solicitor actually read the relevant document? Or, do they make mistakes to generate enough misinformation and confusion to deter further complaints?

Fleischinger reported that the Government had made several admissions to the Ombudsman that went to the heart of the case. If the planning authority and the Government Solicitor were observing the *Guidelines*, litigation could have been avoided, or otherwise could have been resolved much earlier than on the first day of the hearing five years after the originating application. However, the Government Solicitor proceeded on regardless, litigious and punch drunk, staggering through about twenty seven directions hearings, a couple of mini-conferences, two Supreme Court hearings and finally three Magistrates' Court hearings, in blithe disregard for the *Guidelines*.

58. communication A to Corbell
59. Government solicitor to lawyer
60. op. cit. *Model Litigant Guidelines*, (5.2)

The model litigant policy Fleischinger relied on in 2009 were published before they were incorporated into the *Law Officer (Model Litigant) Guidelines 2010*. The earlier Guidelines stipulated that public service agencies avoid resorting to litigation where ever possible and to try and mediate issues before things got out of hand. Unfortunately this was removed from the legislated version. This deletion effectively absolved public servants and Government ministers from addressing complaints. Instead the Assembly gave them the latitude to close down complaints and advise complainants take the matter to court if he or she was not satisfied with the Government's response.

On 18 June 2009, Vicki Dunne, MLA, asked the Attorney General as to how many complaints about breaches to the *Guidelines* had been made since 2006; what was the nature of the breaches; and, how they were dealt with. Corbell replied that there had been five complaints in that period and that:

> The complaints during the period 2006-09 generally reflected a person's dissatisfaction with the decision by the Territory to contest their claim rather than a specific concern in relation to the Guidelines. None of the complaints were found to disclose a breach of the Guidelines. Most reflected some misunderstanding of their purpose and effect. Invariably such complaints have their source in the person feeling aggrieved as to the outcome of a matter and that it thereby must be because the Territory failed to act fairly - that is, to accept the claim made without question. The complaints can range from differing views by lawyers as to the procedure to be adopted in particular matters, to a fundamental misunderstanding as to the nature of model litigant obligations and the Territory's right to properly test allegations that are being made...[61]

His claim that people are too stupid to understand the content and the purpose of the *Guidelines* blames the victim, yet again, which is an often used ploy to avoid taking responsibility.

In his answer to Dunne's questions, Corbell claimed that:

> ... the management structure of the ACTGS is designed to promote compliance with these model litigant principles and to secure minimum standards of accountability... These internal measures have enhanced the ability of the ACTGS to assist its clients to act as model litigants by providing timely advice to clients; complying with court-imposed deadlines and acting consistently in the conduct of litigation... Ultimate accountability is with the Attorney General under the Government Solicitors Act.[62]

Nevertheless, the Attorney General did everything he could to avoid accountability for the issues which Fleischinger raised. When he complained about the Government Solicitor's most recent breaches of the *Guidelines*, the

61. op.cit., 2009 Week 7 *Hansard* (18 June), p.2609
62. ibid., 2009 Week 7 *Hansard* (18 June), p.2610

Attorney General's answer was the same as before: that it was inappropriate for him to comment on the substantive issues. He apparently did not pay any attention to the previous letters explaining that his role as the Attorney General was to ensure the Government Solicitor complied with the *Guidelines*, and that compliance was a procedural/administrative matter, not a substantive matter. The Attorney General incorrectly advised Fleischinger to raise the alleged breaches with the relevant court. He ended with his usual defence that "I am satisfied that the Territory is acting consistently with its obligations in its defence of your claims".[63] Accordingly he trashed the Government's policy through his denial, silence and misrepresentation. The evidence was ignored, accountability was abandoned and the complainant was blamed. The Government Solicitor's litigious bad behaviour carried on with the covert permission of the Attorney General was most likely aimed at making the case go away before it was heard. In the event of a hearing, regardless of who wins or loses, there is a published court report and the Government does not want to risk having the facts placed on the public record or reported in the media.

The Assembly debated the *Guidelines* when they came up for consideration in 2010. Shane Rattenbury, MLA, realised there was a problem concerning compliance. He queried how the court system could remedy complaints. He quoted a precedent whereby the Chief Justice in *Kenny v South Australia* made an order against the state after ongoing breaches of court ordered time limits. The Judge stated that the Crown Solicitor's Office should, in fact, be setting an example to the private legal profession and be more expeditious in its conduct. Rattenbury noted "However, it is a very different thing for the courts to take into account the existence of the guidelines in regard to the proceedings that are before them than it is to rule on compliance issues under administrative law in the context of a civil or criminal trial".[64] He stated:

> In real terms, the efficacy of the model litigant guidelines may well rely on the Attorney-General's capacity and determination to enforce them and to follow up on reports of noncompliance. It is less clear at this stage that the processes for ensuring compliance in a constructive way are fully integrated into the practice of the department. It may be that the Ombudsman or Public Advocate should be given a watching brief over compliance with these guidelines. This is a matter for future consideration.[65]

The Government's adherence with the *Guidelines* is important to underfunded, helpless litigants who can only hope that it does not throw its heavy weight behind every legal nuance and every opportunity to win at all costs. Fleischinger's

63. communication Corbell to A
64. op. cit., 2009 Week 9 *Hansard* (19 August), p. 3410
65. ibid., p.3411

experiences with litigation demonstrated that the Government Solicitor systematically breached the *Guidelines*, and without investigation and sanctions this will continue to disadvantage ACT litigants.

The *Model Litigant Guidelines* are precariously placed between substantive and procedural issues and between the Government and the courts. There is too much room for the Government to manipulate the outcome of a complaint and for the courts to say it's none of their business. They should either be scrapped or administered by an independent authority, as suggested by Rattenbury. The *Guidelines* will inevitably fail because they are advisory only which means it is yet another token gesture. Non-compliance means that the Government can abuse its power unchecked, both in and out of court. Given that the Attorney General is dependent on the advice received from his employees in the Government Solicitor's Office, they will inevitably deny any wrongdoing and the Attorney General will believe their version of events instead of investigating the matter.

Freedom of Information

Everybody knows that information is power. Bureaucrats and politicians will often use information as a bargaining chip to stay in control. Information is often withheld, falsified or fed into departmental shredders. Bureaucrats have worked out that if they don't put things in writing, their secrets stay safe. The Freedom of Information (FOI) laws can only work where adequate records are kept. The Government's and the public sector's inadequate documentation about what it does, when, where and how has been an ongoing issue. In 2005 the Auditor General investigated the planning authority's development application and approval process.[66] Out of the Auditor's twenty two recommendations, thirteen highlighted problems with its documentation. Inadequate records mean that accountability and transparency are bypassed. If activities are not recorded, mistakes are doomed to be repeated and the guilty get off scot-free. It can also obscure the real state of affairs which can lead to poor decision making.

An ACT lessee, Mark Power, in giving evidence to the Standing Committee on Public Accounts recounted his experience with the failure of public servants to document their activities. He had appealed a planning authority decision in the Tribunal. The Respondent invited the Reid Resident's Association to be a party to the appeal. This gave him the opportunity to subpoena the Association's records. He discovered that officers of the planning

66. ACT Auditor General, *Performance audit report — development application and approval process*, ACT Planning and Land Authority, Chief Minister's Department May 2005

authority had briefed the committee many time, even though the Association had failed to lodge an objection to his development application before the consultation period closed. Only one of these meetings was recorded by the planning authority's officials.

When questioned by the Ombudsman about the clandestine briefings, the planning officer claimed the authority was not involved. The Association's records verified that this was incorrect. Power asked:

> So what is the issue for the planning system? Put simply, whilst systems can demand correct record-keeping, if the individuals choose to ignore these directions no set of policies or procedures, irrespective of how they are framed, will change the behaviour. If the individuals choose to work outside processes, how one defines those processes is largely immaterial.[67]

He related FOI searches did not disclose one piece of correspondence to the authority from the residents' group. There were no records of meetings, phone calls, letters or emails. He said, "So here we have a delegate of the authority attributing significant detriment to a group with which there is no evidence of liaising. The obvious question is: if the delegate has never spoken with the group, how did he form his opinion?"[68] The disclosure of information by a public servant to a third party is a breach of the Section 153 of the ACT *Crimes Act 1900*. However, it's a given that nobody would be prosecuted.

The 2012 the Canberra Hospital's Emergency Department figures were manipulated to give the impression that waiting times had been reduced. This meant that Government funding was commensurably increased. This fraud had the potential to impact on vulnerable sick people and on the ACT health system in general. The Auditor General, Dr Maxine Cooper conducted an investigation. She reported that the Commonwealth funding under the National Partnership Agreement promised $0.8 million to the ACT which was contingent upon the ACT's timeliness performance in 2012. She stated "This funding may be at risk, as it appears that the ACT is not meeting its timeliness performance targets".[69] This as the basis for funding an essential service provides the workers with the motivation to take short-cuts, thus endangering patients. The same report related that data had been manipulated in other hospitals and that inadequate records and audit trails meant that nobody really knew how hospital emergency

67. ACT Legislative Assembly, Standing Committee on Public Accounts (Reference: Auditor General's Report No 2 of 2005: development application and approval process) *Transcript of evidence, 9 November 2005*, p51

68. ibid.

69. ACT Auditor-General's Office *Performance Audit Report, Emergency Department Performance Information Report*, No. 6 / 2012, Health Directorate, July 2012, p.7

departments were performing, that is except for the patients.

The Auditor concluded after a thorough investigation that the poor control of the information system meant it was not possible to identify the person or persons who were responsible. Whilst one hospital executive admitted the fraud, the Auditor considered it was possible that other people were also involved. She estimated that approximately 11,700 records were manipulated during between 2009 and 2012. The Auditor reported that the executive's excuse for the fraud was that he, or she, felt under considerable pressure to improve on the information that was released to the public. The Auditor noted that the National Partnership Agreement had placed increased focus on waiting time as a measure of a hospital's performance. She noted that "There is a considerable lack of attention on qualitative indicators, which may provide a more appropriate and rounded assessment of Emergency Department performance".[70] In other words somebody should have asked the patients if they were being served.

The Auditor observed that the information management systems were "very poor". She said:

> There is a lack of governance and administrative accountability for this system, which means that there is no identifiable system owner with responsibility for ensuring the integrity of the system and the appropriateness of its access and user controls. [This} ... has wider implications beyond the inaccurate reporting of timeliness performance. There are risks to the privacy and confidentiality of patient information. The very poor systems and practices also mean that there is a risk that the Health Directorate does not meet the requirements of Principle 4.1 of the *Health Records (Privacy and Access) Act* 1997 relating to the safekeeping of personal health information.[71]

The patchy, sporadic, unreliable Government records were a breach of the *Territory Records Act* 2002, but that is apparently of little consequence. The main purpose of the Act is "to encourage open and accountable Government by ensuring Territory records are made, managed and, if appropriate, preserved in accessible form".[72] Given the reluctance of the public sector to record decisions and actions, to keep accurate records and to update their computer systems, it can be inferred that this chaotic state of affairs suits them.

The Assembly debated FOI practices and the legislation from time to time. It became an issue in 2008 when the gas-fired power station and data centre were proposed for Hume. The leader of the opposition, Zed Seselja, MLA, argued that the Chief Minister, Stanhope, had abused the FOI process by issuing a disproportionate number of conclusive certificates. These are documents which

70. ibid., p.6
71. ibid.
72. http://www.austlii.edu.au/au/legis/act/consol_act/tra2002235/s3.html

are designed to circumvent FOI legislation allegedly to protect cabinet confidentiality. He reminded the Chief Minister that before the election he had promised he would not hide information using cabinet confidentiality as an excuse if and when he was in power. Seselja counted the documents the Government had refused to release which were:

> 3,030 pages of documents ... Of the 1,754 pages of documents held by the Chief Minister's Department on the issue, we have received only 239, and of these 105 have been censored, many heavily. Mr Stanhope's department has taken a significantly less liberal approach to release of documents under FOI than has ACTPLA or the LDA [Land development Agency].[73]

The next year the Assembly debated amendments to the FOI legislation. Rattenbury and Dunne argued for less Government controls over what could be released and Corbell of course argued the opposite. His main point was that if public servants were aware that whatever they wrote down could be exposed through FOI, they might be reluctant to give "frank and fearless advice" to the minister. Rattenbury argued:

> In the land of the blind, a one-eyed man is king... The relevant facts, rationales and alternatives on which Government policy is based should be available for public scrutiny. When that happens, it becomes that much harder for Governments and public servants to manage the media by the selective release of information and possible misinformation... Conclusive certificates are aimed squarely at restricting access to this kind of politically high-value, potentially embarrassing information... Sunlight is the best disinfectant and appropriate transparency in decision making is the best defence against lazy, incompetent or corrupt practices.[74]

Dunne argued that the Government used conclusive certificates as a shield against public scrutiny of its functional review in 2006. As a result of this secretive process, schools, libraries and shop fronts were closed and the exercise was not sufficiently justified to the parties and communities that suffered the consequences. Government services were gutted. The people of Canberra paid in costs and loss of community.[75] People say that Canberrans are cynical about politicians and politician processes. It is possible that this masks a culture of learned helplessness and collective depression, especially when so many schools were closed in 2005-2007. The Government's suppression of information about the school closures was taken to the Tribunal by Dunne and Kathleen Barden, who was a concerned parent. In a debate subsequent to the Tribunal

73. op. cit., 2008 Week 6 *Hansard* (25 June), p.1877-1878
74. op. cit., 2009 Week 2 *Hansard* (11 February), p.644
75. ibid., p.653

findings, Seselja called Barr's imposition of conclusive certificates on a large raft of documents "the worst abuses of Freedom of Information law".[76] The *Costello Review* had apparently justified the Government's action in closing the schools, though nobody could be sure as the documents was not made available by the Government. Attempts were made by the opposition to get a copy, but without success. Seselja related how:

> Mrs Dunne chased this, and chased it all the way to the AAT. Quite embarrassingly and quite instructively, it demonstrated that the minister for education, Andrew Barr, had misused conclusive certificates... eventually, when some of these documents were released, we saw that they were amongst the most innocuous documents that one could see... That was a clear misuse of the idea behind conclusive certificates, and the minister stands condemned for that.[77]

Parliamentary scrutiny of the parliamentary Executive over the non release of information was tested in the NSW Parliament 1996-99. Treasurer Michael Egan, on behalf of the Cabinet, refused to table documents in the Legislative Council of which he was a member. The documents related to several controversial issues. The reasons given for his refusal included commercial confidentiality, public interest immunity, legal professional privilege and cabinet confidentiality. The Council was determined to exercise its scrutiny of the Executive and pressed the issues. It eventually decided that the Treasurer was in contempt and he was suspended from the house twice. The matters were disputed in three cases in the High Court and the Supreme Court of NSW. The results upheld that the Legislative Council did have the power to order the production of documents by a member of the House, including a minister. However, the question of the extent of the power regarding cabinet documents will be subject to the interpretation of the court in individual circumstances.[78] Unfortunately the decision is unlikely to have a broad application to other jurisdictions. But we can wish our local parliamentarians had that kind of intestinal fortitude.

Rattenbury reported that in 2008 the Auditor General enquired into the administration of the *FOI Act*. The findings confirmed that various agencies did not provide adequate reasons for failing to provide documents, did not find relevant documents, did not adequately record their decisions and did not comply with the requirement to keep their registers up-to-date under section 8 of the *FOI Act*. He stated:

76. ibid., p.649
77. ibid.
78. http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/key/SeparationofPowers

> TAMS [Territory and Municipal Services] in particular was exposed for having seriously substandard FOI processes. It is disturbing that all the agencies audited appeared to use high-level managers or senior executives to process any FOI requests that have political implications. Presumably, they are chosen for their political skills... there is sufficient evidence that FOI decisions have become improperly politicised. Under majority Government, some FOI requests seem to have become exercises in political damage control... some agencies... protect their minister or the Chief Minister above their responsibility to ensure the fullest possible release of relevant information.[79]

Since Katy Gallagher became the Chief Minister, there seem to be more efforts to ensure that information is made available to the public. Let's hope it's not all smoke and mirrors and when there is criticism of her Government that she does the honourable thing and deals with it responsibly and transparently or falls on her sword.

In 2010 the Freedom of Information bill came up for a debate in the Assembly and Stanhope argued:

> As part of our commitment to open, honest and accountable Government, we support the provision of answers to questions on notice and FOI requests. Last year's budget estimates hearings resulted in approximately 2,550 questions on notice. Just in the current term of this Government, we have fielded a total of 970 questions on notice in the Assembly. There is of course a difference between a genuine request for information, a genuine interest in the answer, and the kind of omnibus, multipart questions which seem to be the speciality of those opposite. Freedom of information is also a crucial element of open and accountable Government but just as the Latimer principles can be subverted and abused, so can FOI.[80]

Perhaps the opposition might not have to ask so many questions if the information was made freely available in the first place. And in spite of the opposition's many requests, the *Costello Report* which led to the school closures was never made available and it should have been.

FOI applies to the courts' administration and the usual conditions apply. But it does not apply to hearings of court cases or the associated court files. It is understandable that the files should be confidential, but court hearings are a public affair and as such the recordings should at least be freely available. The process of recording and transcribing court cases is out sourced to private industry and the court holds copyright. If a person wishes to obtain either the compact disc or the transcript of a case and is not a party to the proceedings, he or she has to provide the court with valid reasons for seeking the information.

79. ibid., p.667
80. op. cit., 2010 Week 4 *Hansard* (25 March), p.1562

Given that court hearings are usually open to the public, the fact that the recordings are restricted is a form of judicial censorship. A researcher cannot enquire into specific issues to get an over-view of how the courts or judges perform. It is not possible to trawl for a judge's attitude towards certain issues such as interpretation of the evidence, impressions of the witnesses and whether the sentencing was fair. Whilst the decisions are usually published, they are probably edited to support the judge's findings.

The censorship of court proceedings perpetuates the myth that judges are inscrutable and legal proceedings are too complicated for a mere mortal to negotiate. Added to that is the increasing refinement of the law into smaller and more discrete pieces of information which lead further and further away from the main issues of a case. The fact that the records of the court proceedings have been contracted to private industry is a transfer of wealth from the public sector to the private sector. The charges for a compact disc is modest, some $30 but the transcripts are expensive, $1.30 a page and the type is 12 point and the lines double spaced. Basically it's a rort. Self funded litigants suffer more than those with corporate or Government funding because an appeal to the Supreme Court means that the whole transcript is demanded, not just the relevant bits.

The Auditor General

The Auditor General's spotlight on the Government and the public sector highlights instances of maladministration and misbehaviour. The Auditor is indispensable, because the Territory does not have an upper house and every other agency has been hamstrung by Government interference or neglect. Further, the instruments of checks and balances have been abused, ignored or eliminated. The Auditor reports to the Assembly not to the Executive and it is funded separately to other scrutiny agencies. These kind of arrangements are typical for auditors-general in other parliaments as it is generally recognised that the office is an important part of the accountability mechanisms. Auditing pays for itself in savings when bureaucracies have to cull their unnecessary spending on the advice of the auditor and on the insistence of the Parliament. It assists the Parliament to hold the Executive accountable through its investigative powers and its published reports which are tabled.

Governments, of course, do not welcome scrutiny, whereas the opposing side will insist on it, mostly without a result. To scrutinise the Government, the Parliament has to have enough information to get the ball rolling. It gets this through questions on notice, questions without notice, annual reports and their associated hearings, budgets and the estimates hearings, FOI, and parliamentary committees. The Auditor General plays a pivotal role in this process which

ensures the Government books are accurate and balanced. The Auditor's other role is to conduct performance audits which inform the Parliament on how well departments and agencies are fulfilling their functions. This is vital information for enabling the Parliament and the community to scrutinise the Government's performance.

In June 2009, the Auditor General, Tu Pham, warned the Estimates Committee that the Government's proposed funding for the next year was not enough to cover the current audit capacity and that she couldn't employ enough staff to undertake performance audits. She suggested "it would be prudent for the Assembly to ensure that we receive additional funding to provide independent advice to the Assembly on the delivery of Government services".[81] Any reduction in the Government's funding would hit the performance audit reports which would suit the Government as an adverse report could potentially cast a bad light on the Executive. Since Stanhope came into office, the Auditor General's *Performance Audit Reports* had dropped from twelve per annum to eight and it was still dropping in 2009 at the time of this debate.

On 19 June 2009, Stanhope responded to the Auditor's assessment of its finances by telling the media that:

> We're currently funding the auditor general four times more than New South Wales funds their auditor general's office and I think there's some issues for us there as well as for the auditor general and it's probably time we had a look at that. I think there's potential for a very hard look at efficiencies within the auditor general's office, I think perhaps it's time for the auditor general's office to be audited so we can have a look at the appropriateness *o*f the level of h*e*r funding.[82]

The Assembly was outraged by Stanhope's threat to audit the audit office. The next issue would have been "Who audits the auditor?" In the Assembly debate, Brendan Smyth, MLA, quoted the *Canberra Times* editorial which compared the level of funding of the auditors' offices in the ACT and NSW:

> NSW has more than six million residents and the ACT has just more than 300,000—a factor of 20. The obvious burden for a tiny jurisdiction is having to fund establishment costs while relying on a lower overall funding and potential revenue from clients... If Government funding to the Audit Office is reduced, the number of performance audits will drop and the level of scrutiny on Government agencies will be lowered... Who else is going to ride shotgun on the internal operations of Government bodies, if not the independent Audit Office?

Smyth suggested that Stanhope's intemperate remarks were because he was

81. op. cit., 2009 Week 8 *Hansard* (24 June), p.2804
82. ibid., 2009 Week 8 *Hansard* (24 June)p.2821

annoyed that Tu Pham had "dared to go above his head: she dared to go direct to the Assembly and appeal for more money".[83] Seselja told the Assembly that the audit office was so underfunded that there weren't enough desks for the office and that "if the Chief Minister gets his way, there will be fewer staff and therefore they will have enough desks".[84]

In defending his comments, Stanhope told the media "every agency and department could argue that to maintain independence from the Executive, the Assembly should set its budget"[85] which was a version of the slippery slope argument. It is hard to believe that Stanhope did not comprehend that the Auditor General functioned as an independent scrutiny agency with the role of monitoring the departments and agencies created and controlled by the Executive. It is a simple concept and Stanhope's comment smacks of political smoke and mirrors meant to fool the public. The Auditor General is not a part of the Government on a par with the public sector and other relevant agencies and authorities. During the debate about the Auditor General, Stanhope made a point of order that the Assembly deal with the other motions on the agenda. It was probably a diversionary tactic. Seselja politely reminded him that the Assembly hadn't finished debating the Auditor. Stanhope defended his point of order which he had lost with:

> The point of order was simply about wasting time because the fragile little violet that is the Leader of the Opposition is the wobble, wobble man, the flim-flam man, the man without a plan, the opposition for opposition's sake Mr Seselja. We have three motions today on the notice paper from the Liberal Party, and each of the three motions essentially proposes that the Chief Minister be condemned. Why should the Chief Minister be condemned? The Chief Minister should be condemned for being the Chief Minister—for daring to win the last election![86]

His personal attack was inappropriate in the circumstances. The Territory has a budget of approximately $3.7 billion per annum. A public company with that sort of cash flow would be scrutinised at many levels, that is from shareholders, auditors, taxation and so on. The ACT does not have the resources to maintain the appropriate level of scrutiny which means that Canberrans are worse off than the mums and dads shareholders of major public companies.

However, the central problem is that the Auditor General does very thorough reports, but nobody seems to be taking much notice. However, at least the relevant information is on the record and perhaps sometime in the

83. ibid.
84. ibid., p.2806
85. ibid. p.2829
86. ibid., p.2816

future the Auditor will have the satisfaction of telling the Government "I told you so". Actually the appropriate occasion for such a comment was in 2003 after the bush fires and after the Auditor's earlier report on the Emergency Services Bureau which was found to be less than efficient. But the report wasn't released until 2003 after the bush fires had passed through. A further example which is pertinent to this book was the Auditor's 2005 *Performance Audit Report* on courts in the ACT. The *Report* found that the differences between administrative and judicial functions were not adequately addressed and that this had impaired accountability. Then in 2011, information supplied by a litigant, which is included in the next chapter, identified this deficiency. But so far nobody in the Territory, including the Ombudsman and the Attorney General, have addressed this issue which is central to the administration of justice. Without a clear understanding of the differences between deliberation and administration, accountability and transparency in the court system are compromised which can result in rough justice being delivered.

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Courts are an aristocratic institution in a democracy. That's the dilemma for an institution that has the function of reviewing the will of the people. We're bound to be 'anti-majoritarian'." (Rose Bird, 1936-1999)

Chapter 4
The fourth separation of powers
The Judiciary – rule by minority

> How does one deal with the rude judge? The slow judge? The ignorant judge? The prejudiced judge? The sleeping judge? The absentee judge? The eccentric judge? ... To say that a judge is answerable only to his or her conscience and the law may hide a multitude of sins, literally. How can accountability be improved but in a way that does not weaken the adherence of the judge, and society, to the principles of judicial independence? Justice Michael Kirby[87]

Courts' administration

The courts and tribunals are the last resort for the complainant. After you have run the gauntlet of the scrutiny agencies, and you emerge disappointed and considerably battered, you gather up your courage and decide to take it to court. If you are planning to litigate against the Government, finding a suitable legal team is a challenge. Many ACT law firms are subcontracted to the Government and local lawyers are often employed or seconded to the Government Solicitor's Office. Consequently favours are owed, mates are rewarded and deals are done. This tactic has the legal fraternity under a degree of control. Whilst the Government cannot directly influence the Judiciary, at least not in a way that is noticeable as politicians are supposed to observe the separation of powers, the next best thing is to have the lawyers in sympathy with the Government. Canberrans who have been put through the legal wringer, and get unpredictable, inexplicable outcomes can bet that it's the outcome the lawyers want and it often favours the Government.

In 2005 the Auditor General conducted an enquiry into the administration of the courts and how this related to the separation of powers. The audit identified that maintaining judicial independence whilst being accountable to the Government for public expenditure was often confusing and often breached the separation of powers. The Auditor stated that:

> The current arrangements do not appear to be conducive to effective administration of courts and indicate a lack of alignment between responsibilities and accountability between JACS [Justice and Community Safety] and the courts; different ethos and processes, and a degree of misunderstanding between the organisations. In particular, Audit observed that there exists a concern from both the judiciary and the Department to potentially step over the boundary separating executive and judicial

87. http://www.michaelkirby.com.au/images/stories/speeches/2000s/vol51/2003/1847-judicial_accountability,_samford.doc.

> responsibilities. This makes it difficult for the ACT to achieve a partnership culture, which is critical for the achievement of Court efficiency.[88]

The separation of judicial and executive/administrative functions is chronically and maybe deliberately kept unclear. Given that the differences between the two are intrinsic to the defining the separation of powers between the Judiciary and the Executive, one would have thought that the Assembly would have defined the differences so that power could be legitimately shared. Without clarification, both branches of governance can avoid taking responsibility for poor administration by casting the blame to the other for any wrongs committed. However, like many ambiguities, the status quo is retained because it is comfortable. There is nothing quite like working in a profession with a structure that allows blame to be cast far and wide and where mistakes can be made without consequences.

Recently, the ACT Chief Justice, Terence Higgins, retired and he was replaced by Judge Helen Murrell. According to a report in the *Canberra Times*, she has hit the ground running. She was critical that the courts were administered by the Government instead of by the courts. She interpreted this arrangement as threatening the independence of the Judiciary. She said: "We must draw a bright line between the executive and the judiciary. The best way to do that is by according self-administration to the courts". She also said that the issue was more acute in the ACT than elsewhere because the jurisdiction was so small. She told ACT lawyers "We … depend upon you to defend the independence of the judiciary from the encroachment of the executive."[89] Her hope that the lawyers will be able to influence the administrative arrangements to suit the Judiciary instead of the Executive was optimistic. Such decisions are made by the Executive which is unlikely to cede even the smallest and most tokenistic bit of control.

An insider's view of the ACT Supreme Court

In order to get an idea as to how the courts really work, it's helps to get an inside view, in other words get down and dirty with the other litigants and experience the side of the justice system that never sees the light of day. On the 1 March 2010, the Government Solicitor applied to have Fleischinger's case against the Government for damages struck off on the grounds that it was frivolous and vexatious. Briefly, a frivolous application is one of little or no value, having no

88. ACT Auditor-General's Office, *Performance Audit Report Courts Administration*, September 2005, p.25

89. http://www.canberratimes.com.au/act-news/chief-justice-helen-murrell-calls-for-Government-control-of-courts-to-end-20131213-2zd5j.html#ixzz2p69OqnPF

reasonable grounds, lacking seriousness or sense. A vexatious application is one which is intended to be harassing, annoying or embarrassing, or has been brought for a collateral purpose. The Government's affidavit virtually claimed that Fleischinger did not deserve his day in court because he was habitually untidy. The Government Solicitor, Wayne Sharwood, would have known that the case was neither frivolous or vexatious according to the planning authority's admissions of error and the serious nature of Fleischinger's claims. According to anecdotal evidence, when people litigate against the Government, its first line of defence is to launch a strike out action regardless of the evidence. This is a ploy to make the case go away and to harass the applicants. Nearly all of the Government's strike out application of Fleischinger's application failed. Master Harper assumed that he had the evidence to support his claim and found in his favour. Costs were awarded against the Government[90] and the case proceeded.

A portion of Fleischinger's claim was that the court declare the clean-up order made by the Tribunal on 21 October 2002 to be invalid. The Master struck-out this part of the claim which had the potential to cast a gloom over the entire case. The Master's judgement disallowed him from attacking the validity of the order. Instead he was put in the position where he would have to defend himself by proving that the Government behaved unlawfully when they executed the order on 2-4 December 2002. The Master's judgement amounted to a final decision as opposed to an interlocutory decision. A final decision disposes of the rights of the parties for all time, but an interlocutory decision does not. An appeal against a final decision goes to the Court of Appeal to be heard by three judges and appeals against an interlocutory decision is heard by a single judge. The Master's decision finally disposed of Fleischinger's right to argue that the order was invalid. This meant in that the case was stalled until the decision was made by the Appeal Court to allow a collateral attack on the decision of the lower court, that is the question of the validity of the order.

The Government Solicitor claimed that the Master's decision was interlocutory, not a final decision. Several times during 2010 several attempts were made to resolve the question as the case had been stalled for some time. The Supreme Court files documented these initiatives.

> 3 June 2010: The record of the meeting stated "may be application about whether the decision of the Master is interlocutory and therefore should be in the Supreme Court, transcript to be arranged".
> 15 July 2010: Our barrister attended a hearing before President Gray to determine whether the Master's order was interlocutory or final. The Government Solicitor was unprepared, so it was not raised.

90. Harper Supreme Court transcript

> 17 August 2010: The issue was raised before the Registrar ME by the ACT, which apparently indicated that it was not going to dispute whether interlocutory or final. The record of the meeting stated "No application for saying interlocutory matter therefore remain in call over for 14/10/10 for February setting".
> 14 October 2010: Listed for a call over in front of Judge Gray, which was cancelled at the last minute without notice to us or reason being given.[91]

At this point nobody in the Supreme Court apparently wanted to commit themselves to defining whether the Master's decision was final or interlocutory. If it had been decided whether the appeal should be before a single judge or three, the issue of whether the declaration of invalidity would then have to be determined by the judge or judges. Without a determination as to which court heard the appeal, the case was in limbo. In another case Justice Windeyer attempted to define the differences between the two kinds of decisions in that:

> The question is a troublesome one; and I have found no analogy on which to base my decision. The position when there is an existing dispute between defined parties does not, I think, provide an analogy. There, as I have said, the cases show that the determining factor is the effect of the order in establishing finally or otherwise the rights of the disputant parties — does it put an end to an existing dispute or existing action?[92]

The alternative to an appeal was to argue the invalidity of the order by reply which is a pre-trial procedure between the opposing parties. But this stood to be criticised by the Government Solicitor, Sharwood, as an abuse of process and rightly so as he could complain that Fleischinger was trying to circumvent Master Harper's decision. This made the Master's strike-out a final decision because Fleischinger had nowhere else to go, except to the Court of Appeal. Sharwood argued in response to Fleischinger's application to the Court of Appeal that: "As a direct attack on the order, the claim is not properly constituted as a challenge to the order. As a matter of reply only, the application has no place in the statement of claim".[93] But Fleischinger's statement of claim was set in concrete and could not be amended or argued by reply because of the Master's strike-out.

Fleischinger's legal team bit the bullet and decided to apply to the Court of Appeal. The attending judges were Justices Malcolm Gray, Richard Refshauge and Anthony North. They dismissed the appeal before it was heard as being incompetent on the basis that the Mater's decision was interlocutory, not final. The reason for this was given by Justice Refshauge who relied on the case of *Hall*

91. ACT Supreme Court Appeal transcript, p.16,
92. op. cit. *Hall v Nominal Defendant*
93. summary of Government Solicitor's argument

versus the Nominal Defendant.[94] He quoted the precedent as saying that a final decision " 'disposes of **all** the matters in dispute between the parties'. That's the test".[95] These words which he quoted several time during his delivery were not included in the precedent as he had claimed.

The way the Court of Appeal used the precedent gave rise to these questions: Why was the precedent used to define Master Harper's partial strike-out as an interlocutory decision and not a final decision? Was the use of the precedent a matter of misinterpretation or was it used to absolve the Court of Appeal from considering the main issue, which was the Court's permission for Fleischinger to conduct a collateral attack on the consent order? If the strike-out had been confirmed as a final decision in the various pre-trial hearings and conferences, wouldn't the Court of Appeal then have to hear the issue of the declaration of invalidity and consider allowing the collateral attack to proceed? A further consideration is that *Supreme Court Rules* 5403 states that "The notice of appeal to the Court of Appeal must state— (a) the order appealed from and the date of the order; and (b) whether the appeal is from all or part of the order; and (c) if the appeal is from part of the order—the part appealed from". So it was entirely possible that Fleischinger's appeal to the Court of Appeal could be from a part of the judgement and not from all of it.

Then the Court of Appeal offered Fleischinger an olive branch. Justice Refshauge proposed that the issue could be resolved by reply, which is a part of pre-trial proceedings, rather than launching a collateral attack. The Court asked Sharwood if he would raise any objections to this approach. He replied that he could not challenge it in the light of his criticism of Fleischinger's application. Justice Refshauge stated:

> Doesn't that mean that the whole thing goes away... If you raise it in the reply, as you're entitled to do, you've now got on the record Mr Sharwood saying that they will not suggest that's an abuse of process... There's a difference between sword and a shield. You may well not be in a position, and notwithstanding what Wheeley J said, you may well not be in a position to make a collateral challenge positively by taking proceedings, but that doesn't necessarily prevent you from taking a collateral challenge by resisting a claim.[96]

What could have been seen as an abuse of the court's process is suddenly made legal and acceptable because a judge declared that it was OK. The legal procedures and the rules are just so flexible.

94. *Hall v Nominal Defendant* [1966] HCA 36; (1966) 117 CLR 423 (23 May 1966)
95. ACT Supreme Court Appeal transcript, p.18
96. ACT Supreme Court Appeal transcript, p.19-20

The question is who won and who lost in this Supreme Court fiasco? Actually nobody lost. The Government won as the case was not heard therefore it was not published. Master Harper won as his decision was not set aside. The Tribunal won as its decision was not collaterally attacked. Fleischinger won because there was no hearing, so there was no loss, so he didn't have to pay court costs and the way was cleared for his lawyers to move on. It was just win, win and win all around. What a clever little court. That being said, the appeal cost him approximately $5000 which he paid out of his meagre resources. When it did not proceed, he asked for his money back at the Supreme Court Registry. He was haughtily dismissed by the clerk. He did ponder as to what action he could take to collect the debt. But taking the Supreme Court through the process of a consumer complaint and debt collection in ACT Civil and Administrative Appeals Tribunal (ACAT) was an exercise fraught with slapstick comedy with an uncertain outcome. In the long run, his lawyers paid the costs to him out of their portion of the money which they received when the Government settled the claim. It was a very generous gesture. However, the aborted appeal and its costs remains one of the unfinished businesses of this case.

An insider's view of the tribunals — the hybrid

The tribunals are a light weight version of real courts. ACAT is the first court of appeal against administrative decisions. Government employees use the appeals tribunal to make the hard decisions they would rather avoid. Quite often an unsuspecting complainant will find herself or himself appealing to the Tribunal as the result of bureaucratic manipulation. A public servant may make an outlandish decision which just has to be appealed. The tribunals were originally established to speed up legal processes whilst introducing informality into the system. However, the lawyers and the Tribunal members follow all the trappings of the judicial system.

ACAT is touted as being a cost free, accessible legal alternative, so people believe they can represent themselves and that justice will prevail. But, the courts and tribunals seem to suffer a hearing defect when a self represented litigant raises her or his voice. The lone, self represented litigant who challenges a Government decision is up against the well represented Respondent with unfettered access to the Treasury coffers. Further, litigants who can't afford a lawyer will be disadvantaged because they are rarely allowed to win against "real" lawyers, even if they know their law and argue it competently. It would be a good idea if the arrangements were changed and lawyers barred from the tribunals all together. This would reduce some of the formality which is what most lawyers love because they are privy to the rules and self represented litigants just stumble around irritating everybody.

ACAT is quite contradictory in the face of the separation of powers. It is neither a creature of the Government nor is it an autonomous legal entity. Section 5 of the *Public Sector Management Act* lists who and what are excluded from its provisions and ACAT members are not mentioned, however, magistrates and judges are. So by default ACAT members appear to belong to the public service and have to comply with the provisions of the Act. This issue was the subject of a constituent's complaint to the Attorney General along with a request that the status of Tribunal members be clarified. The constituent explained to the Attorney General, Simon Corbell, a few times that ACAT members were under the jurisdiction of the Executive not the Judiciary. But he wouldn't have any of that. He claimed that they were excluded from the provisions of the *Public Sector Management Act* because according to Section 5 they were rewarded for their efforts "by fees, allowances or commissions only".[97] The Remunerations Tribunal verifies that members are employees in receipt of a salary and associated benefits. The provision in the Act is meant to cover sub-contracting and sessional members of the Tribunal who are not in receipt of a salary. The Assembly might like to tackle this anomaly and define Tribunal members as either public servants or officers of the court. There is no other alternative

Applicants to the Tribunal often do not realise that it is not a court, so as such, it does not have the power to execute its decisions. If the Tribunal orders a losing litigant to do time in the stocks beneath the statue of Ethos, then the Magistrates' court has to execute the order. The Tribunal can only make recommendations. All orders which need enforcement are remitted from the Tribunal to the Magistrates Court. Whether this can include decisions which go against the Government is not clear. The LPE Act, section 255 used to deal with the Government's non-compliance with orders. It stated: "Offences—orders... (2) A Territory authority shall not, without reasonable excuse, contravene an order".[98] Section 255 was dropped from the *Act* in September 2003. Thereafter Section 258 covered contravening orders and included a footnote stated: "A territory authority is not liable to be prosecuted for an offence against this section".[99] This means that a territory authority is able to breach its own or Tribunal orders without censure and that the dudded party can't take it to court because the Government can't be held responsible. However, presumably the Government, which is a corporate person, could be sued for contempt of the Tribunal. But it probably has never happened in the ACT

97. communication Corbell to A

98. *Land (Planning and Environment) Act* 1991, Republication No 10, 11 October 2002, p.165

99. ibid. Republication No 13, 1 September 2003, p.187

Fleischinger complained to Dr Foskey, MLA, that the planning authority had breached the 2002 Tribunal consent order. On the 15 November 2005, she asked the Attorney General, Stanhope, a question on notice to which he replied:

> If there are people who have approached you, Dr Foskey, with concerns about the behaviour or actions of ACT Government officials or agencies in relation to non-compliance with AAT orders, I would be more than pleased if you would provide me with those details, if you are able to, and I will pursue each of the issues that have been raised with you and seek a response from the relevant ACT official or agency.[100]

Previous to this exchange in the Assembly, in September 2005 Fleischinger had complained to Stanhope about the breaches. So when he answered the question, he had already replied on 27 September 2005 that "I am satisfied that ACTPLA's actions in this instance were not in breach of the Order of the Administrative Appeals Tribunal".[101] If he had taken the trouble to investigate the complaint, he would have found it had substance. Fleischinger also complained about the breaches to the Tribunal. The Registrar answered that "The powers of the Tribunal do not extend to the provision of a remedy for action taken otherwise in accordance with a decision made by it. The Tribunal is, therefore, unable to further assist you in resolving your complaint".[102] Freely translated this could mean that the Tribunal had made the decision, therefore it has the power to ensure the parties complied with it, with the exception of the Government, or whatever. But the Tribunal declined from taking the matter any further in spite of Fleischinger's evidence that the Government had breached the order.

If Fleischinger's complaint about the breaches had been one of many, then it might have had some traction. Given that the LPE Act was in force at the time of the breach, upon receiving a complaint, presumably the Tribunal should have required the planning authority to give a reasonable explanation for the breaches. Fleischinger raised the issue with the Department of Justice and Community Safety. The Principal Legal Officer replied "It is no means clear that this department has any capacity to effect changes that would address the specific issues that you raise".[103] Probably nobody had ever complained before about the Government breaching its own orders, so the department would have to create a precedent and nobody wanted to do that. The social justice of allowing the Government immunity for breaching orders, whilst ordinary citizens can be punished with penalty points, is just so undemocratic. Further Government breaches of Tribunal orders are details in the cases cited.

100. op. cit., 2005 Week 13 *Hansard* (15 November), p.4124-4126
101. communication Stanhope to A
102. communication AAT to A
103. communication JACS to A

However there was a case in the Tribunal which demonstrated that it was capable of holding the Government to account where its order has been breached. Whistle blower Debbie Scattergood challenged Territory and Municipal Services (TAMS) decision not to release documents she requested through FOI concerning her employment with TAMS. TAMS responded by providing documents which were heavily redacted. The Tribunal member, Louise Donohoe SC, made an order that the documents be released in their entirety. Her decision was that the exemption claimed by TAMS didn't apply in this case.[104] The Government responded with more of the same. Donohoe then threatened TAMS with contempt proceedings for not complying with the Tribunal's orders. The documents were reports into the mistreatment of Scattergood after she blew the whistle on waste and mismanagement in the running of a lawn-mowing contract worth $16 million. The Government Solicitor claimed that the Government's refusal to provide the documents was to protect the identity of former and present TAMS workers who were mentioned in the reports and who did not have the opportunity to defend themselves or deny the allegations against them. The Government threatened Scattergood with a defamation action. But if Scattergood allegedly defamed her colleagues, then they would have the option of suing her under the same laws the Government Solicitor had used to intimidate her. And their foray into litigation would be funded by the public purse. Scattergood commented ''Even in the face of contempt finding, they are still trying to hide this material."[105]

Once a tribunal decision has been made, whether it complies with the law or with precedents, there's no going back. The Tribunal refuses to reconsider cases even when new evidence is presented. According to the Section 180 of the *Legislation Act 2001*, the Tribunal does have the power to reopen cases in these circumstances. And there have been precedents that confirm this.[106] Society has a naive belief that members of the Judiciary and tribunals are infallible. They are not, but their decisions stand for all time no matter how many times they have been informed by litigants that a mistake has been made or that new evidence has arisen which implies reconsideration. The term "functus officio" in the legal sense means "we have done our job, so we are not going to do it again". The Judiciary must be the only profession which can stand by their mistakes as the all-time standard in the form of precedents. This was made clear in both John Fleischinger's and Mark Power's court reports. Brian Hatch, the Tribunal member, concluded that Fleischinger:

104. Scattergood & Territory and Municipal Services & Commissioner for Public Administration (Administrative Review) [2011] ACAT 44 (11 July 2011)
105. *Canberra Times*, 1 September 2011
106. *Fleischinger and ACT Planning & Land Authority* [2005] ACTAAT 13 (11 July 05)

> ... stated that many items of value to him were removed during that clean up by the contractors. It does not appear that the applicant took any steps for 2 years in relation to that. Had there been strong concern in relation thereto I find that the applicant would have taken steps in order to protect his rights.[107]

What rights in the circumstances? This statement was not entirely correct. Fleischinger's letters to the Tribunal[108] outlined the history of the matter and his efforts at getting the Government to admit fault. However no attempt was made to correct the published report and the Tribunal staff just commented that the emails had not been brought to the attention of the relevant member, which means that possibly somebody forgot to file them. Similarly in Power's case matters were brought the attention of the Tribunal with the same result, the published report was not corrected. How many precedents are based on an incorrect interpretation of the law or the facts?

If a litigant is not happy with either the Tribunal or the Magistrates Court, he or she can appeal to the Supreme Court. But it's expensive, it's formal and its approach to interpreting the law is driven by the lawyers not usually by common sense. The costs of application fees, courts costs and the costs of losing are crippling. These can be remitted in certain cases, if the litigant is stony broke and possibly living on the streets. Anyone with a bit of saving or a modest bit of property is considered rich enough to pay their own way. The Government uses the tribunals and courts as a way of avoiding vexing questions and complaints. It often advises the complainant to take the matter to court if he or she is not satisfied with the Government's response to a complaint, knowing this is not likely to happen. Complainants may go as far as to taking the matter to the Ombudsman or the Tribunal as there are no costs involved. But most baulk at going to the Supreme Court. However, one of the issues a complainant has to face is the propensity of the scrutiny agencies to rush the job, to take short cuts, to gloss over the issues, especially if the matter is a complex one, and to generally fail to deliver the appropriate degree of justice. They know that they can get away with short shrift treatment as the vast majority of litigants and complainants will give up before facing the asset stripping, mindless, monolithic Supreme Court.

The main issue in the ACT is that the tribunals, courts and the scrutiny agencies have to deal with the large number of cases that come before them. Given the Government's chronic failure to ensure that complaints are investigated and resolved and given the chronic failure of the scrutiny agencies to remedy the Government's misbehaviour, the only way to make a recalcitrant, deceptive public servant come clean is to litigate. However, if complaints were resolved according to

107. ibid.
108. emails to tribunal

the pre-legislated *Model Litigants' Guidelines* whilst the issue is under the control of the administration, then court action might not be necessary. The scrutiny agencies could wind down their activities and the courts might be able to catch up with their case load.

The former Chief Justice of the ACT, Terence Higgins, commented to the *Canberra Times* in 2005 that:

> ...departmental officers [are] accustomed to treating courts as a sub-branch of their department... The role of the courts is to see that justice is done according to law and that frequently requires them to stand between them [the appellants] and the other arms of Government.[109]

He was probably referring to the Administrative Appeals Tribunal, though this was not specified. If the Government's officers treated a real court with such familiarity, they would probably be censured. When considering Government decisions, ACAT has the role of standing in the shoes of the decision maker. So a tribunal decision is the equivalent of an executive decision, not a judicial decision. Tribunals can depart from the rules of evidence, inform themselves as is appropriate and generally make their own rules to fit any given situation. They do not have the authority to rule on points of law which is appropriate as tribunals are reputed to be courts of not so competent jurisdiction.

The Administrative Appeals Tribunal issued two paradoxical decisions which seemed tailored to favour the Government. Monica and Paul Gerondal's and Robert Moore's cases revealed the planning authority's incorrect decisions in dealing with development approvals under the repealed Building (Design and Siting) Act 1988 (BDSA) where the lessees had unfinished building work when the new LPE Act 1991 came into force. The two cases were remarkably similar but President Michael Peedom's decisions were diametrically opposed in spite of the fact that both decisions were in the Government's favour. The LPE Act operated differently to the BDSA. Section 230 covered approvals of development applications for the design and siting of new work. However, before a section 230 approval could be granted, the requirements of section 231 covering objections to the development has to be considered. Accordingly, neighbours have to be notified according to section 229 and their objections under section 231 have to be taken into account before approval can be granted under section 230. The process is consequential and amendments according to section 247 cannot be approved if the requirements of previous sections have not been met. It really quite simple, but the planning authority's officers and the Tribunal complicated matters with red herrings amounting to legal and/or jurisdictional error.

109. *Canberra Times*, 20 August 2005 p.1-2

Moore applied for a planning approval for an extension to his house pursuant to the BDSA.[110] He had lodged amendments which were also approved under that BDSA. Then on 8 May 1997 he applied for the approval of minor, cosmetic works which were already completed. The amendments were approved according to Section 230 of the LPE Act. This was under the wrong section as it was not a new development application and amendments should have come under section 247. However the development had already been approved according to the BDSA. Now Moore had two approvals, one under the BDSA and another under the LPE Act for the same plans, which is questionable and costs twice as much in fees. Nothing happened for some years. Presumably Moore finished the work according to his valid BDSA approval or his invalid LPE Act approval. Then 6 March 2006, he lodged amendments to the original 1990 BDSA plans under Section 247 of the LPE Act. The planning authority advised him to lodge a new development application because his BDSA 1992/93 approvals were no longer in force and therefore were incapable of any amendment pursuant to Section 247 of the LPE Act.

So Moore appealed to the Tribunal with the President, Peedom, hearing the case. The applicant argued that his 1997 LPE Act section 230 approval should have been capable of amendment according to section 247. The planning authority replied that the LPE Act approval under section 230 was a mistake and that it should have been under section 247 as it was for amendments. Peedom confirmed that the section 230 approval was incorrect and the planning authority agreed. The Tribunal dismissed the appeal on the basis that it did not have the jurisdiction to make a decision. The opposite outcome applied to the Gerondals' case. In both cases the planning authority's officers did not apply the law correctly and in so doing they breached both Moore's and the Gerondals' rights to continue their building and amendments under the original repealed law, not its replacement, the LPE Act. By trying to impose the provisions of the new law on projects straddling both planning regimes, the planning authority officers were making life easier for themselves and an added bonus was that the LPE Act gave the authority much more power to control the planning process and the outcome.

In 2005 the Auditor General did a performance audit of the planning authority's development application process. The authority provided 2004-2005 figures on the percentage of cases which the Tribunal had found in favour of the Government which were compiled from all cases that were appealed. The Government won in seventy to eighty five percent of cases.[111] The Auditor stated:

110. *Moore and ACT Planning & Land Authority* [2006] ACTAAT 30 (17 October 2006)
111. ACT Auditor-General's Office Performance Audit Report, *Development Applica-*

> The majority of Administrative Appeals Tribunal (AAT) decisions generally find in favour of the Authority, which suggests that the Authority's decisions are generally fair, as they can withstand independent scrutiny.[112]

This is a highly contentious conclusion. The former Chief Justice, Terence Higgins, questioned this[113] and most likely the large number of those who appealed and lost would also question it. Without access to the transcripts of their hearings, there is no way of assessing the fairness or otherwise of the proceedings.

Territorial justice — just don't complain

There is no ACT legislation or an independent, administrative process to hear minor complaints about judicial unprofessionalism, misbehaviour, maladministration and incompetency. There is a judicial in-house complaints policy which allows complaints to be decided by the head of the jurisdiction. Because it is neither independent nor transparent, the process invites further maladministration. The head of jurisdiction is in the unchallenged position of being able to make the final decision as there is no further process for appealing the outcome of a complaint. The in-house complaints process can be used to hide administrative deficiencies, favour colleagues, operate for personal advantage or to further punish the complainant by arbitrarily dismissing the complaint. Further, the present complaints policies do not take into account how complaints against a head of jurisdiction are handled. There is no mechanism, at least in the ACT, by which he or she has to stand down when there is a complaint against him or her. Given that the process is potentially corruptible, the whole jurisdiction can be affected.

Any judicial complaints process can only cover complaints about poor administration as opposed to judicial deliberations. Legal, substantive issues can, in theory, be appealed to a higher court. However, the differences between administrative and legal issues are usually not understood and have not been clearly defined by the Judiciary, by the laws, or precedents, or by public sector administration. Professor John McMillan attempted to address this in his report *Commonwealth courts and tribunals, complaint handling processes and the Ombudsman's jurisdiction*.[114] Confusion arises when maladministration can be

tion and Approval Process, ACT Planning and Land Authority, Chief Minister's Department, May 2005, p.34

112. ibid., p.4

113. *Canberra Times*, 20 August 2005 p.1-2

114. Professor John McMillan, *Commonwealth courts and tribunals, complaint handling processes and the Ombudsman's jurisdiction*, report by the Commonwealth Ombudsman under the Ombudsman Act 1976, Report No. 12/2007

argued as an error in law rather than an administrative failure. This depends on judicial interpretation and in the absence of clear definitions, decisions are discretionary. Further, the obfuscation of the law and the closed legal shop creates a barrier that excludes the community which has to accept what it gets because there is no alternative. When a judicial officer receives a complaint, the temptation is to avoid the question of whether the matter is administrative or substantive and advise the complainant to appeal to a higher court, which is usually the Supreme Court. But this is often not feasible, desirable or affordable, especially when a complaint can be dismissed arbitrarily as being beyond the higher court's jurisdiction because it is not based on a point of law.

In respect to a judicial complaints process, a litigant reported a case where she had become involved in a collision between two cars and she was being sued. Linda Crebbin, the General President of ACAT, presided. The informant had reversed slightly in a car park and stopped. At that moment the other vehicle collided with her's, a fact which was confirmed by the physical evidence and by her expert witness. It took Crebbin two years to reach a decision which went against the Respondent. She was ordered to pay $3,250 plus interest which had accrued over the two years which was nearly $800. The first two pages of Crebbin's decision were taken up with excuses for the delay which she claimed were her family problems, her unfamiliarity with ACAT processes, as she was new on the job, and her heavy workload. Prior to the hearing, she had advised the Respondent incorrectly about legal representation so she was left to argue her defence herself.[115]At the hearing the President did not consider the third party liability which was intrinsic to the Respondent's defence. She decided against the expert witness without the opinion of a rebuttal expert and she swept the premeditated destruction of evidence by the applicant under the judicial carpet. The Respondent had no choice but to appeal or pay, so she appealed.[116]

The Appeal President, Bill Stefaniak, waived the extra interest and agreed that she should have been allowed to have legal representation, of course. Nobody should venture into a court or a tribunal without it. He acknowledged most of Crebbin's errors and found that the appellant was indeed stationary at the time of the collision. However, he upheld Crebbin's decision that she compensate the other party because he claimed that she had not reversed safely as required by the *Australian Road Rules*, Rule number 296 "Driving a vehicle in reverse". The *Rules* had a penalty for non-compliance which the Appeal President did not pursue. This raised the question of his use the *Rules* as justification for his decision.[117] The list of the ACAT authorising laws does not include legislation

115. letter to Crebbin
116. Crebbin judgement L case
117. Stefaniak appeal L case

related to a vehicle collisions either in a parking lot or on the road. Further, the *Australian Road Rules* as an authorising legislation for ACAT is not mentioned.

However, not willing to give up, the litigant applied to ACAT for an interim order to set aside the decision on the grounds that administering the *Australian Road Rules* was beyond ACAT's jurisdiction. The application didn't get past the Registrar. He informed her that he was not going to accept it on the grounds that it was an abuse of process according to the ACAT Rule number 9,[118] which was ironic given that she was the one trying to make a point about abuse of process. He advised her to appeal to the Supreme Court. Public servants seem to have one belief, that nothing is right or wrong until a real judge says so. So they are reluctant to make decisions which that might create a precedent. Their advice to resort to legal action potentially clutters up the superior courts with issues that the public sector has declined to resolve. And registrars of ACAT are public servants until the law says otherwise.

The litigant lodged a complaint with the Ombudsman about Crebbin's flawed administration of the case. The *Ombudsman's Act* section 5(2)(d) forbids investigation into a tribunal member's deliberations about the law and which in theory can be appealed to a higher court. The Act intended that the Ombudsman does not usurp this process, which is reasonable. By default, the Act allows investigation of a member's administration of a case. The litigant included Professor McMillan's Report[119] with the complaint, but the Ombudsman declared categorically that it had no jurisdiction to consider judicial deliberations. The litigant protested that she was not asking for the Ombudsman to consider judicial deliberations but to consider the administration of the case. The differences were lost on the Ombudsman. The Ombudsman apparently did not want to take on the task of decoding Professor McMillan's instructions on the differences between administrative and judicial processes.

In 2005 the Auditor General did a *Performance Audit Report* on the ACT courts. One of the key findings was:

> Governance and accountability are not clear, partly because of the division of responsibility between judicial and administrative functions. There are opportunities to clarify accountability through a review of overall governance structures, and through better budgeting and reporting.[120]

That was in 2005. Obviously nothing was done according to the litigant's experiences with ACAT in 2009. Further Fleischinger's experiences in the

118. ACT Civil and Administrative Tribunal *Procedure Rules 2009* (No 2) Rule 9, p.6
119. op. cit., McMillan
120. ACT Auditor-General's Office, *Performance Audit Report Courts Administration*, September 2005, p.3

Supreme Court where the administration could not decide whether an appeal goes to either one judge or three, confirms that the separation between judicial and administrative functions is unclear and is not well understood by many legal practitioners.

In December 2012, the Justice and Community Safety Directorate published a discussion paper called *Judicial Complaints and Arrangement of Court Business.* Submissions were invited but nothing has been heard since. The courts still rumble on, maybe picking up their pace a little since the Attorney General tried to sort out some of the problems which caused delayed decisions. Apart from the *Ombudsman's Act*, there is no legislation or an independent administrative process that covers complaints about minor acts of judicial unprofessionalism and misbehaviour. The only legislation in the ACT is the *Judicial Commission Act* which limits complaints to serious matters. If the complaint is successful, the officer concerned is dismissed. It's an all or nothing approach to complaints and the process is convoluted requiring the agreement of the Attorney General, the Judicial Complaints Commission and the Assembly. It's used only for serious mistakes or judicial incapacity.

In 2009 this process was invoked for the first time in the ACT over complaints about the Chief Magistrate Ron Cahill's performance. This case demonstrates the Government's lack of accountability as well as its propensity for conducting vendettas. Given that the ACT is a small jurisdiction and everybody in the legal community knows everybody else, sometimes it is necessary to bring counsel or magistrates from other states to guarantee a fair trial of someone in the public eye or a fellow legal officer. Cahill found himself in that situation when a friend and colleague was charged with an assault on his daughter. The name of the person was suppressed though the story spread like wildfire throughout the Territory. The Magistrate who was engaged to sit on the case was Deputy Chief Magistrate Peter Lauritsen from Melbourne. The Melbourne *Age* stated:

> During the hearing, Lauritsen is believed to have told the court he had been sent a detailed background briefing on the case. Prosecutors later asked Mr Lauritsen to adjourn the case indefinitely while an external investigation was carried out. They have alleged the documents, sent by email, included details of the case against the accused, case law and a copy of a suppression order.[121]

The question is why did Lauritsen spill the beans? Did anyone else learn about the emails and put pressure on him to make that announcement? He would have known it would cause the proceedings to be shut down and that an enquiry of sorts would eventuate. The answers to these questions are speculative and

121. http://www.theage.com.au/national/police-probe-act-chief-magistrate-20091103-hva4.html#ixzz2l1iGyikB

may never be known. What is of interest to this book is the judicial complaints process and how this was handled by the Attorney General.

Two magistrates John Burns and Karen Fryar learned about the emails and forwarded copies to the Attorney General Simon Corbell. On the strength of the documents he decided to set up the Judicial Commission to determine whether or not Cahill should be sacked. This was debated in the Assembly and Dunne quoted an article in the *Canberra Times* by Jack Waterford who argued:

> ... it is legally doubtful that there was ever a legally constituted judicial commission in the first place. This is because Corbell, and those advising him, seem to have little understanding of what the law required, and did not follow the steps laid down by the law. There had to be a complaint, and in writing. Corbell was advised orally by Magistrate Burns of his concerns that a message sent from Cahill's office to a Victorian magistrate might be intended to "get at" that magistrate. Burns did nothing in writing. Later, another magistrate, Karen Fryar, emailed some documents to Corbell, but it is doubtful... that these can be described as a written complaint...
>
> Neither Burns nor Fryar regarded themselves as having made a complaint under the Act. Neither (rightly) accept any responsibility for what Corbell decided to do after hearing of their concerns. Corbell has said, repeatedly, that the commission was invoked on the complaints of Burns and Fryar, but his mere saying so cannot repair the deficiency.

Corbell defended Waterford's proposition by claiming that a complaint:

> ...must relate to the behaviour of a judicial officer and, secondly, it must be written, identify the name and address of the source, identify the judicial officer and give full particulars of the matter. Whether the person who provides the information to me intends to make a complaint under the act is irrelevant to whether I am satisfied that the requirements of the act are met. I am entitled and, indeed, may even be required, to treat any communication which possesses the features set down by the act as a complaint under the act. It would be inconsistent with my role as Attorney-General and first law officer under the Law Officer Act 1992 to do otherwise than treat communications as complaints provided the essential features are satisfied. In considering a complaint as Attorney-General, I cannot be confined to a rigid form of documentation. The purpose of the act is to provide a mechanism by which potential judicial misconduct may be examined, and I must view my role under the act with that in mind and not be confined by artificial limits on form.[122]

His protest was a bit repetitive which suggests that he was unsure about what he had done. His claim that he was entitled, or had the duty, to consider any old form of communication as a complaint under the *Judicial Commissions Act* was not spelt out in the Act. His protest rendered the two Magistrates irrelevant.

122. Legislative Assembly for the ACT: 2010 Week 11 *Hansard* (19 October), p.4555

They were probably looking for advice and he, without consulting them, took it the next step and processed it as a complaint. According to Dunne, the Attorney General was "salivating with anticipation" and "his excitement was palpable" at the prospect of setting up the enquiry.[123]

In early November 2009, he had announced plans to amend the *Judicial Commissions Act* if the Judicial Commission had not finished its investigation before Cahill retired on 15 December 2009. On 17 November 2009 Cahill had resigned and Corbell stated on that day that:

> Now that Mr Cahill has resigned from office, the provisions of the Judicial Commissions Act cannot apply. Therefore, I will be recommending to the executive this afternoon that it end the appointment of the commissioners... As the act no longer applies, it would most likely not be legally possible to retrospectively amend the act in circumstances where the judicial officer has resigned prior to the commencement of the commission's hearings.[124]

The Attorney General was hugely optimistic if he thought he could amend the *Judicial Commissions Act* in time to give the Government the power to pursue Cahill after his retirement. Shane Rattenbury MLA, supported changing the Act. He stated that the Green's motives were not to pursue Cahill into retirement, but that the Assembly was facing the prospect of an unsatisfactory outcome. He claimed that "the matter would be left hanging in the air, justice would not be served and justice would not be seen to be served".[125]

Cahill's resignation was the right thing at the right time. The *Judicial Commissions Act* give the Commission police-like powers to investigate and then has the luxury of deciding the issues on the balance of probabilities which can mean anything. Nobody in their right mind would subject themselves to such a discretionary system of so-called justice. On the other hand a criminal investigation required a standard of proof "beyond any reasonable doubt". As well as trying to convene a judicial commission, Corbell had referred the matter to the Director of Public Prosecutions (DPP) which in turn referred it to the Australian Federal Police. The investigation was dropped on 2nd September 2010, presumably because there was no conclusive evidence of any wrongdoing. The irony of this saga is that: If Cahill had allowed himself to be put through the Judicial Commission's wringer and if he was found guilty of misconduct, then he could have been sacked well after he had retired. The second irony of this saga is that the man who allegedly whacked his daughter got promoted by Corbell to a

123. ibid., p.4560
124. ibid., 2009 Week 14 *Hansard* (17 November), p.5099
125. ibid., 2010 Week 11 *Hansard* (19 October), p.4564

much higher sinecure, lucky fellow.

On 29 September 2010, the *Lawyers Weekly* interviewed Dunne, MLA, about the Cahill resignation. She said that the Government's handling of the matter goes to the heart of:

> ... openness and transparency in Government... I expressed concerns when the judicial commission was first established (November 2009) about whether due process and proper procedures were followed... By releasing the documents, we can see whether proper guidelines were followed.

The *Lawyers Weekly* reported that Corbell ruled out conducting a review of events into the Government's decision to commission the inquiry. When he was contacted by the publisher, he failed to respond.[126] When the Government is cornered, its response is usually a thunderous silence.

This is an example of how the Government behaves when a complaint is handed on a platter that could offer a political advantage. Corbell was quick to investigate, presumably because Cahill would be a prize trophy if Corbell had managed to get his way. The Government did not treat the so called complaint with the usual delays, denial, blaming the victim, passing the buck and misrepresenting the issues. Some people are more important than others. Is this a Government that governs for us all? The cover-up of the relevant Cahill documents is an insult to the constituency. Nobody will ever know whether a long-standing, presumably respected member of the Judiciary was justified in what he did, or careless, or whether he deliberately tried to influence the outcome of a case.

126. http://www.lawyersweekly.com.au/news/judicial-inquiry-docs-must-be-released-

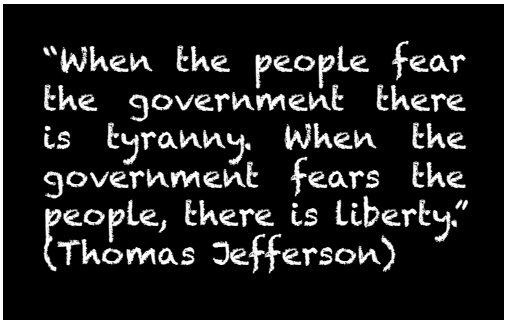
"The minute you hear 'freedom' or 'democracy', watch out because in a truly free nation, no one has to tell you you're free." (Jacque Fresco)

Section 2
How Government wrongs affect people

The theory of governance emerges from the governing elite which is made up of bureaucrats, politicians, the Judiciary and the academics. How this impacts on real people is rarely taken into account. They issue edicts from bureaucratic bunkers and are not transparent or accountable. They are able to commit extreme actions and institute draconian policies as they don't have to worry about being voted out of office like the politicians. They are able to get away with it under the scrutiny radar. Confronting this invisible horde about its wrongdoings is a journey that few people would wish upon themselves.

Whilst Governments and their offshoots seize the opportunity to place themselves above accountability, there will inevitably be victims. This section traces how the Government has targeted individuals who have fought back against the Government's cruelty, collusion and cover-up. They have discovered that their tormentors are bureaucrats with personal agendas who will ruthlessly execute these regardless of the collateral damage. Then when found out telling lies or being criticised for inappropriate actions, they hide behind the relevant minister who will defend the Government's public image regardless of the wrongs committed by its employees.

Of the three cases in this book, both John Fleischinger and Monica and Paul Gerondal contributed towards their dispute with the Government. But this does not excuse the cruelty and cover up conducted by the planning authority's officers and inspectors. In contrast, Mark Power did nothing wrong. Yet he was subjected to the same regime of abuse, dishonesty, avoidance, and unlawful behaviour as was the other parties. So this forestalls anyone from blaming Fleischinger and Gerondal for their part in the administrative nightmare generated by the planning authority. The routine was the same in each of the three cases.


"When the people fear the government there is tyranny. When the government fears the people, there is liberty."
(Thomas Jefferson)

Chapter 5
Complaints and Government "investigation"

The complaints process

Government departments solicit complaints from the community. Authorities rely on this to ensure that the person complained about will comply with their sometimes unreasonable, intrusive instruments of power. It's a system of Government surveillance on the community which saves it from hiring an army of secret police. However, this creates an aura of distrust in the community and can pit neighbours against each other. It does not seem to matter whether the complaint is trivial, the authorities will take it up nevertheless and process it until blood has been spilt, metaphorically speaking.

People who complain about their neighbours are protected by the provisions of the PD Act 2007. Chapter eleven stipulates how the public can make complaints and what happens thereafter. Included in follow up action is that the authority reports back to the complainant about the process of investigation and what action was taken or not taken. The same chapter creates an offence if the person on the receiving end of the complaint causes detriment to the complainant in any way, or victimises or intimidates him or her into not making, or withdrawing, the complaint.[127]

Most of the people who were the subject of a complaint from a neighbour were judged guilty by the bureaucrats from the beginning. Anything they said in their defence is routinely misinterpreted, disbelieved, ignored or trivialised. The Government inspectors and their neighbourly collaborators are not required to adhere to the stringent process of investigation that is required of the police for a prosecution. This steps outside the judicial principle that a person is innocent until proven guilty. Many laws have given public servants the power to make orders, investigate breaches and levy penalties which is equal to the power exerted by the police and the Judiciary. But public servants operate under the radar so anything goes. Because they are the extension of the parliamentary Executive and are under the protection of the relevant minister, any wrongs they commit are either not addressed or are covered up. Nobody gets to hear about how they screw up people's lives in pursuit of their undeclared priorities. There is no accountability so there is no punishment. In fact, the only crime is getting caught and embarrassing the chief executive officer or the relevant minister.

In respect to wrongs committed by employees of any organisation, including public servants, the law and precedents on vicarious liability mean that employees can exceed their delegated power as long as they can claim that it

127. *Planning and Development Act*, Part 11.7, section 385, p.371

was in pursuit of their employer's priorities. The employer is legally responsible for any damage done. Employees with personal agendas, poor judgement and malicious intent can do extensive damage to members of the public, but nothing can be done short of complaining to the employer, or in extreme cases by launching litigation. It is often difficult to prove that the wrong committed by the employee was beyond what was required by the employer. Consequently, personal responsibility is minimised and accountability is sheeted home to the employer. Employers and employees tend to present a united front in the face of criticism to defeat and deflect any complaint.

When neighbours complain

When a neighbour complains to the planning authority, the officers conduct what they would claim to be an independent investigation. Nothing is barred. Nothing is sacrosanct. Neighbours, community groups and other public service agencies are consulted. Spies walk past your house inspecting it and if the matter of the complaint is not visible from the street, they will wait until you are out and invade your back yard to get the evidence. The pace is relentless. The lesson from this is to be invisible, don't upset your neighbours and smile for the inspector's camera when he of she encroaches on your privacy and trespasses on your land. This is the reality of living in towns and cities and puts a deadly weapon into the hands of unreasonable or sometimes psychotic neighbours who have nothing better to do than to persecute the people around them. This de-facto surveillance system threatens neighbourhood cohesion. There is nothing worse than feeling you are being watched and your every move reported to some remote authority. By splintering the community, Governments increase their power and control. It happens everywhere. Sometimes it's called communism, totalitarianism, democracy or whatever, but it's the same tried and trusted recipe for seizing power and exerting control.

The three cases outlined in this book, concerning John Fleischinger, Mark Power and Monica and Paul Gerondal, demonstrate that protests about the Government's wrongful investigations and erroneous conclusions fall on deaf ears. The Government typically responds that officers had conducted a thorough investigation and the complaint was found to be valid. However, the three cases revealed that Government investigation amounted to a conversation between the relevant public servants which predictably exonerated everybody. The Government's files were just not consulted and the objector's evidence was ignored. If the objector referred the matter to scrutiny agencies, the Government's briefs consisting of the same unfounded, untested allegations. This circular situation persists until the objector gives up and accepts the injustice or takes the

matter to a court or a tribunal. Given that very few cases against the Government actually make it to a hearing, neighbours' allegations and the Government's dishonest "investigation" are unlikely to face the stringent test of judicial reality.

The in-house investigations of complaints are neither independent nor transparent, so the findings are questionable. When loyalty kicks in, collusion and cover-up are inevitable. If the objector does not accept adverse findings and presents further arguments, the process enters a new phase of retribution. The bureaucrats make every effort to cause inconvenience or real grief to anyone who questions their competence or their authority. The objector may refer the matter to the relevant minister, who will then refer it back to the department. The reply that comes back will be a sanitized version which exonerates the employee, the department and the minister of any responsibility in the matter. The minister accepts this on its face value and the complaint is closed down. He or she then presents a potentially misleading report to the Assembly and to the objector. If the objector questions the validity of the investigation, the minister can opt out by claiming it's an administrative matter that is the responsibility of the relevant authority and that it is not appropriate for her or him to intervene. Accordingly, accountability is always the responsibility of the other party. This process works for the Government because at this point most people give up and get on with their lives, if they can. The public service's investigation has complied with the policy of addressing complaints whilst suppressing criticism of the Government.

The futility of this process is well known in the ACT. Being a small jurisdiction most people know of somebody who has been done over by the Government. This book includes published cases of objectors who have taken on the Government and have lost or suffered a long, drawn out fruitless campaign. Jeremy Hanson MLA commented that:

> It is no wonder that people are scared to make complaints — if they are so easily discounted or covered up. I spoke with someone who is a victim of the complaints system and their words were that you have to have rocks in your heads to complain, because you get crucified.[128]

If a complainant opts to persist, it takes patience, time and effort to penetrate the Government's defenses. He or she needs to build up the case using every trivial piece of information it provides. For example, sometimes the definition of a word is all it takes. Every time public servants respond they tend to make admissions, or mistakes, or tell more lies, heaping one on top of the other in a shaky edifice that does not stand up to close scrutiny. But in every bit of Government waffle, there are grains of truth. Evidence will accumulate because

128. op. cit., 2010 Week 2 *Hansard* (24 February), p.627

bureaucrats do not usually consult the files and if they do, the material is filed haphazardly. Documents go missing and the progress of the complaint is not often recorded. Complainants have had the experience of getting a document through FOI which has gone missing when a court case is mounted. Often the employeed who has worked on the initial complaint has been moved on and her or his successor has to acquire the background knowledge. So short cuts and mistakes creep in.

This is an interrogation technique that gets results, even from recalcitrant officials. It is possible to advance a case, even if in small, seemingly insignificant, increments. But any written response from the bureaucracy will be expressed in the public-service dialect which can be misleading and confusing. This is a ploy which is intended to provide an impenetrable shield against complainants who have the gall to challenge authority.

Government investigation through trespass

The LPE Act is quite specific about the preconditions governing inspections. Sections 266 states that inspections can occur with the lessee's consent, with a warrant or that the matter is so urgent that immediate entry is necessary. Section 267 requires that the inspector identify him or herself, inform the lessee that he or she can refuse consent and if consent is given that he or she sign a form to that effect. In the Fleischinger, Power and Gerondal cases, the inspectors failed to identify themselves, the lessee's permission for an inspection was not sought and the inspection would go ahead from within the property whether the lessee was present or not. Did the inspectors deliberately ignore their statutory duty and the common law? The requirements of the Act were clear enough. Further, it is common knowledge that trespass is unlawful because it violates a landholder's right to decide who comes onto her or his land. The inspectors were willing to trespass to get information which epitomises their attitudes towards both the laws they are supposed to uphold and the people they are employed to serve. Given that for many years inspectors were able to get away with trespass knowing that it was unlawful, this enabled them to commit other violations of the law and abuses of human rights with impunity.

On 6 May 1994, a planning authority inspector arrived unannounced at Fleischinger's property with a view to arranging an inspection. His report stated:

> I could see no reason to seek an inspection of his block at that point we could see that it constituted a significant problem and we would have been limited in the extent of the block we could access. I asked if he would agree to an inspection and sign the appropriate authorisation in 3 weeks.[129]

129. inspection records

That was the last time he or any of the other inspectors paid lip service to the legislative requirements. Over 2002, when they attended the property, even if the lessee was at home they failed to identify themselves, inform him of his right to refuse an inspection or give him a consent form to sign. If he was not home the inspection went ahead regardless. In order to see the yards it was necessary to enter the block as they were not visible from public areas or over the neighbours' fences. So there was a strong temptation on the part of the inspectors to short cut the requirements and to "visit" the block at their convenience.

On 7 May 2002, an inspector visited the block and reported that:

> ... Apparently [another inspector] visited this site this morning also but as it is a battle axe block [he] was unable to view the problem, which is mainly adjacent to public land at the rear of the block, or frontage onto public land ... We observed the site and noted the hoardings and material now on site are almost as bad as it was originally before action was first commenced against the lessee ...[130]

After this aborted inspection, he instructed his underling to conduct further inspections which occurred without the lessee's consent on several occasions during 2002 and later.

When Fleischinger's case was settled out of court, the lawyer gave him all of the documents. Included were statements made in 2013 by two of the inspectors which were to be used in evidence. The inspector described that he would:

> ... go straight to the door of the house on the property and knock to see if anybody was at home. If someone was home, I would explain why I was there and what I was investigating. I would then ask to look at the property to confirm or deny the allegation. I would also ask whether I could take photos ... If there was no response at the door of the house, I would the leave the block and take what pictures I could from outside the block. Prior to 1999, if there was no response we would remain on the block and take photos, but that practice ended in 2000.[131]

There is evidence to suggest that the practice did not end in 2000 as the same inspector was trespassing on Fleischinger's block as late as 2007.[132] The other inspector's statement claimed that he always carried his inspector's card, that he sought permission of the lessee to conduct an inspection and that if the lessee was not at home he would view the property from outside the boundary.[133] However, the records and the lessee's anecdotal evidence confirm otherwise.

130. inspection records
131. K evidence
132. communication Savery to Ombudsman d
133. T evidence

In both the Power and Fleischinger cases the issue of trespass was raised in the Assembly via questions on notice. Regarding Power's allegations of trespass, in May 2007, the Planning Minister was asked "if site inspections were conducted, was the requirement to obtain written consent from the lessee complied with?" Andrew Barr's answer was simply "No!"[134] When allegations were made that the courtyard had increased in size, Power asked the Planning Minister "When was the site inspection conducted that allowed the ACT Heritage Council to draw the conclusion that 'the area covered by the courtyard appears to have greatly increased' recognising that the area in question is not visible from the public domain?" The answer was that allegations were raised in a written complaint and that an inspection was conducted on 3rd December 2003 but the answer did not clarify who had inspected and what was inspected. The Planning Minister also claimed that "ACTPLA was acting on advice received from officers of the ACT Heritage Unit."[135] By so saying, he implied that other officers/neighbours/departments were guilty of trespass, not employees within his portfolio.

The issue of trespass on Power's property was again raised in a discussion between Zed Seselja, MLA and the Planning Minister, Corbell, at the hearing by the Select Committee on Estimates.[136]

> Seselja: Given that he has spoken to you and raised serious issues, even though he has not put in a formal complaint, are you not concerned enough to investigate further?
> Savery: I was concerned enough to take the issues up in an informal capacity with the officers responsible, who have denied the claims that have been made.

Savery gave the same dismissive treatment to Fleischinger's allegations of more than twenty occasions of trespass over a ten year period. In answer to the lessee's please explain questions, he commented that the officer concerned had left the planning authority so he was not able to confirm the matter one way or another.[137] In his evidence to the Standing Committee on Public Accounts Power stated:

> I wasn't at that time given the option to exercise my right ingrained in the land act to refuse access and/or give my consent for such a meeting. At that stage I was not aware of my rights and they were not given to me, explained to me.[138]

134. Estimates 2007 Question on Notice, Planning E07-081, p.6-7
135. ibid., E07-081 and E07-084
136. ACT Legislative Assembly, Select Committee on Estimates (reference: Appropriation Bill 2005-2006) transcript of evidence, 24 May 2005, p.632
137. Savery letter to Fleischinger
138. ACT Legislative Assembly, Standing Committee on Public Accounts, transcript of evidence, 9 November 2005, p58

Similarly, in Fleischinger's case on 17 April 2007, a question on notice asked the Planning Minister, Corbell: "Was the permission of the owner or resident sought and/or received when a Planning and Land Management inspector entered block 3, section 158 Kambah to take photos on 13 September and 10 October 2002". The Minister's answer was that it was unlikely that the owner gave his permission.[139] After Fleischinger had confirmed through the question on notice that the inspector had trespassed on his block seeking evidence, he wrote to the Tribunal on 6 May 2007 requesting the President strike out the consent order on the grounds that the planning authority's evidence was tainted with illegality. The Registrar misconceived the issue Fleischinger had raised which was the new evidence of trespass. In theory, this should have led to the original decision made by the planning authority and confirmed by the Tribunal being set aside and a new order sought. The Registrar's answer informed him that the Tribunal had refused to review the 2002 consent decision in 2005 when he had appealed a rectification notice to clean up his block again. However, the Tribunal did recognise it had the power to change the original decision, but declined to do so.[140] The issue of trespass was not considered.

The inspectors' trespasses on Fleischinger's block were investigated by the Ombudsman. It was confirmed that trespass had occurred on several occasions. But the authority's chief executive officer Neil Savery's excuse for his officers' behaviour added insult to injuries. He wrote to the Ombudsman "While I fully acknowledge that the proper consent to entry was not obtained [John Fleischinger] did have multiple opportunities over the course of 2002 to raise this as an issue".[141] It was not Fleischinger's job to remind the inspectors that their duty was to comply with the legislative provisions of the LPE Act. Further, if he had been informed of his rights to refuse an inspection according to the provisions, then perhaps he would have done that and he might have been saved years of anguish. Savery's tactic of blaming the victim was a low blow under the circumstances.

When the PD Act was released, the legislators made a feeble attempt to over-ride hundreds of years of law and precedent in respect to property rights and trespass. Section 389 (3) of the Act states "An inspector may, without the consent of the occupier of premises, enter land around the premises to — (a) ask for consent to enter the premises." Section 386 of the Act defines "premises" as including the land. Accordingly an inspector can roam all over the land seeking permission to enter it, which is a bit of an anomaly. Naturally, the inspector will have a bit of a sticky beak whilst he or she is on the land without the owner's

139. qon number 1477
140. *Fleischinger and ACT Planning & Land Authority [2005]* ACTAAT 13 (11 July 2005)
141. communication Savery to Ombudsman

permission and of course will rush back to the office and write up the excursion as an inspection. However, the validity of this could be appealed in any court or tribunal. This is yet another example where the Assembly, most likely at the behest of the planning authority, has attempted to broaden the powers of the authority whilst diminishing its accountability. The rights of property owners in most jurisdictions are being expediently eroded by Governments. But at the same time the costs of ownership in the form of taxes, fees, imposts and duties increase. Perhaps it's time to revisit rental as an option.

The Gerondals' block was inspected without their knowledge or consent several times. Usually they were not at home but the inspections from within the block proceeded regardless. On 27 October 1997, Monica Gerondal had confronted an inspector about entering her block. The inspector's report stated that she had:

> ... told me that I had no right to go an inspect her property given the undertaking I had given her earlier, she then implied that inspectors from this section had been on her land without her knowledge or approval. I told Mrs Gerondal that none of the inspectors would go onto private land uninvited, I said that in this instance all observations had been made either from Territory land in front of the block or neighbouring blocks.[142]

Then in 2000, the same inspector visited the block intending to conduct an inspection. The report dated 30 November described in detail the contents of the back yard including the contents of a garage which was "overflowing with building materials and refuse". Whilst on the block, they were confronted by a tenant who was not pleased to find them in the backyard and that they should contact the owners in future before visiting.[143] Again on 7 February 2002 there was another inspection of the block conducted by the same inspectors. He reported that the tenant had said to him that:

> ... he remembered me and said that the last time that I had been there with a female associate that I had broken the gate to gain access to the backyard where he had found us.[144]

The matter was discussed at the Gerondals' tribunal appeal. Monica Gerondal questioned the inspector about his entry to the property in the following exchange:

> [inspector]: ... no I haven't, I've entered your property to the extent of the front door ... I

142. inspection records
143. inspecion records
144. inspection records

> categorically deny that I have ever gone past a locked gate, whether it be the Gerondal property or anywhere else. It is not worth my job to do so ...
> Monica Gerondal: ... there is a structure which appears to be a garage which is "overflowing with building materials and refuse", now what is that structure please?
> [inspector]: ... We did not go on the block. Now from wherever - at this stage I cannot call to mind where we were - we made that observation from, but we can only make it our best guess. Short of actually going onto a site which we didn't have approval to do ...
> Monica Gerondal: You did on that occasion?
> [inspector]: In - at - at this stage I - I can't recall that.[145]

During the hearing Monica Gerondal told the President, Michael Peedom, she had been advised by her solicitor that photographs taken within the boundary of a block were not legally acceptable. He replied: "Well I am not aware of any authority that would deprive the Tribunal from having regard to them, if you are able to identify some legal impediment then I'll listen to what you say.[146] He should have confirmed that evidence obtained through trespass would be disallowed in any reputable court or tribunal. Given that the couple were self represented, his duty of care owed them a better response than that. He could have enquired more deeply into Monica Gerondal's allegations, but he chose not to. It is evident that the Judiciary can only pursue those lines of enquiry that have been argued. But Monica Gerondal had raised the issue of trespass and given that the Tribunal's rules allow it to make wide ranging enquiries, Peedom's reluctance to follow this through smacks of favouring the Government. If he had made a finding of trespass, he might have had to decide that the Government's case was flawed and that the Tribunal could not make a lawful decision on the evidence. Yet the Tribunal sanctioned the trespasses even after complaints had been made which impugn its credibility.

145. transcript 246-252
146. transcript p.14

"The best way to take control over a people and control them utterly is to take a little of their freedom at a time, to erode rights by a thousand tiny and almost imperceptable reductions. In this way, the people will not see those rights and freedoms being removed until past the point at which these changes cannot be reversed." (Adolf Hitler, Mein Kampf)

Chapter 6
Cruelty and cover-up, up close and personal

The Fleischinger, Gerondal and Power cases demonstrate Government cruelty, collusion and cover up in the kind of detail which is not readily available to the general public. Most news stories gloss over details, favour the Government and are told in grabs that do not satisfy an enquiring mind. Further, "the devil is in the detail" which is the why Governments speak in opaque generalisations or bureau-speak. Where there is no detail, there can be no blame, and without blame there is no accountability.

In each of the cases the Government's investigation was initiated by a hostile neighbour's complaint to the planning authority. The lessees questioned the validity of the investigation and the consequent decisions. When they received an unsatisfactory response, they appealed to the scrutiny agencies and the courts. The cases provide evidence of how the Government behaves when it defends its employees. When Fleischinger complained about how he was treated, the Government's responses followed the usual formulae. These are cited in this "summary of responses" document[147] which clearly demonstrates that nobody was consulting the files or taking his evidence into account. The same process was applied to each case. The Government avoided discussing the details, consulting the files, verifying the facts and communicating or mediating with the lessees. In each of the cases there were the same kind of delays, silences, denials, lies, mistakes and so on. This was no coincidence. This was the Government's planned, practiced, unconscionable method of dealing with challenges to its authority.

Mark Power — mud slinging

Mark Power, a local business man, had purchased a "renovator's delight" in Reid. On 15 July 2002 he lodged a development application to construct an extension to the house. The planning authority approved the development application without any conditions. The work was completed and on 12 November 2003, the lessees received their Certificate of Occupancy and Use (COU). Power had done everything by the book but after he had received the COU, the planning authority and the environmental agencies managed to generate enough allegations to keep a bunch of bureaucrats, advisors, ministers and lawyers busy for several years. The lessee's privacy was invaded on a regular basis with spies walking past his house and invading his back yard. The planning authority conducted

147. summary of responses

surprise inspections. His personal information was shared between agencies, the planning authority and local residents. He was hauled into the Magistrates Court to answer the criminal charge of repairing his home. This harassment reached such a crescendo that he submitted to the Standing Committee on Public Accounts enquiry that:

> ... on Valentine's Day, which was a Sunday, an A4 black envelope turned up in the letterbox. My two youngest children walked in and said, "Dad, is this a bomb or anthrax?" It wasn't; it was simply a promotional magazine. But it got to the point where that was the effect on people, on our life.[148]

How did this happen?

The following information was taken from the Powers' evidence to the Standing Committee on Public Accounts.[149] Before 4 November 2003 a complaint had been lodged with the planning authority that the render on the extension was not according to the approved plans which specified that the render was to "match existing". Several builders had identified the existing render on the main cottage as being originally smooth but it had become drummy and weathered over the years. So extension was rendered smooth to match what would be the smooth render for the rest of the house when it could be reapplied. There was no deviation from both the development and building approvals. But on the same day the COU arrived, the planning authority and the Heritage Unit conducted an unannounced, unlawful site inspection to assess the complaint.

Power contacted the Heritage Council. The Council confirmed that the original render had been smooth. He forwarded a copy of the report to the planning authority but there was no response. Then on 3 December 2003 there was a meeting at his house with representatives from the Heritage Council and the Heritage Unit. They confirmed that the original render had been smooth. However, the Heritage Council advised Power that he had to amend the original development application to get permission to apply smooth render to the rest of the house. So the next day he lodged an amendment which he withdrew later as he was concerned about the necessity of doing this. The legalities at this point were unequivocally clear. Firstly, after a COU has been issued for a development that has been approved without any attendant conditions, the matter is closed. There is no further obligation on the part of a lessee to lodge amendments relating to that development. Secondly, the planning authority cannot demand that an amendment be lodged for works that do not require approval under part

148. ACT Legislative Assembly, Standing Committee on Public Accounts (Reference: Auditor General's Report No 2 of 2005: development application and approval process) *Transcript of evidence, 9 November 2005*, p.59

149. ibid, p3-

6 of the LPE Act, specifically for repairs and maintenance which are exempt activities. The issue is clarified on the *Land Regulations 1992*. Section 40 (1) confirms that work done for repair is not subject to development approval.[150]

On the morning of the 10 February 2004 contractors commenced removal of the old render on the cottage for the purposes of effecting long overdue repairs and restoration. Immediately the planning authority arrived with a Stop Work Order prohibiting Power from continuing the work. The inspector advised him that he had to lodge an amendment to his development application. On the same day his neighbour wrote to the planning authority alleging several deviations from the development application. The next day, Power lodged the amendment which he was assured would promptly approved given the Heritage Unit's endorsement of smooth render. Then on the same day the Manager of the Heritage Council informed Power that she had been advised that the decision in favour of smooth render was incorrect and that the matter would be reconsidered by the full Council. She also alleged that there were variations from the development approval. The timing suggests collusion between the complainant, the Heritage Council and the planning authority. On the 17 February 2004 the planning authority issued a Notice of Prohibition under part 6 of the LPE Act to prevent removal of the old render.

The authority approved the amendments to the development application but placed three conditions which included rough cast render and a colour not of the lessee's choice. These were approved under Section 230 of the LPE Act which was incorrect. This section is for new development applications, not for amendments to approved developments. Power's application should have been approved under Section 247. On the 6 April 2004, he appealed the planning authority's imposition of these conditions in the Administrative Appeals Tribunal. The mandated mediation failed with neither party being willing to compromise. Also the documents submitted by ACTPLA suspiciously did not include the COU which had been previously issued.

At the directions hearing on 22 June 2004, the Tribunal President, Michael Peedom, pointed out to the planning authority's delegate that he had made an incorrect decision under Section 230 of the LPE Act and that he should have used Section 247 instead. He cited at least two other occasions where the planning authority had made the same mistake. The hearing was put on hold until the error was corrected. By the 20 January 2005 the planning authority had not made any effort to comply, so Power advised the Tribunal accordingly. The Deputy Registrar answered that the Tribunal did not have the jurisdiction

150. *Land (Planning and Environment) Regulation* 1992 (repealed) SL1992-5 made under the *Land (PLanning and Environment) Act* 1991

to force the planning authority to comply with its decisions. Finally, on 8 March 2005 the planning authority refused the amendment they had been directed by the Tribunal to review the previous year. Coincidently, the very next day the *Heritage Act 2004* was fully enacted which tightened requirements for development applications to observe heritage values. This legislation was retrospectively applied to Power's development.

On 10 May 2005, Power appealed the latest refusal in the Tribunal. The authority had responded by alleging that the render and the absence of window bars would cause "significant detriment" to the community, though this was not verified as the source of the allegation was not identified. Then the Government Solicitor provided Power with a notice that he was going to seek a ruling on a legal point. In other words he was working on his strategy on how to get the Government off the hook. The case was scheduled for a hearing in the Tribunal 16-17 August 2005. The lessee, who was self-represented, was confronted by a total of eleven people representing the Government which included a consultant barrister to argue the seriously contentious case about minor amendments, one being the render of a cottage. Peedom allowed the Government Solicitor to mount his argument.

In his ruling issued the following day, Peedom had to point out to the planning authority's delegate that he had yet again made the decision under the wrong Section of the LPE Act, being Section 230 instead of 247. He commented that the "respondent's officers have still not developed a good understanding of the legislation which they administer". The case did not proceed to a hearing. The legal arguments mounted by the Respondent's barrister were accepted by the Tribunal. Peedom's decision was to set aside the planning authority's refusal of the amendment application because it was made under the incorrect section of the LPE Act and to substitute the same decision, that the amendment wasn't approved, but under the correct section of the Act, that is Section 247.[151] This had the aura of a planned outcome. The Respondent certainly did not want a trial as there were matters in the lessee's evidence the Government Solicitor probably would not want aired in the Tribunal, notably the COU issued on 12 November 2003.

In a letter to the Tribunal, Power explained that:

> Under the *Land (Planning and Environment) Act* 1991, the effect of Section 247 is to operate when an approval has been granted to undertake building work and Prior to the issue of a Certificate of Occupancy and Use (COU)... We wish to advise that we had received a COU under Section 53 (3) of the Building Act 1972 on 12 November 2003, three months prior to the Respondent in our matter requesting us to lodge an amendment under Section 247 of the Act... The issue of a COU... precluded the

151. *Power and ACT Planning & Land Authority* [2005] ACTAAT 20 (17 August 2005)

> Respondent in our matter requesting us to submit an amendment to building work that was already complete... I believe the only appropriate decision would have been to rule the amendment was not required and hence the Tribunal could not rule on the matter.

The Tribunal cautiously answered the letter on the 2 September 2005 stating:

> The Tribunal notes that if it were to accept your suggestion that the power under section 247 could not, in the circumstances, be exercised, the result would be that the amendment for which you applied would not have been made and that any approval which existed prior to your application would remain extant. The decision of the Tribunal produces the same result.[152]

This was an ambiguous way of saying that the amendment was unnecessary, therefore the Tribunal ruling would have been invalid. The focus on the "same result" glosses over the mistakes, inequities and the flawed process experienced by the lessees in their dealings with the planning authority and with the Tribunal appeals process. The Tribunal refused to re-open the appeal or correct the record which now stands, and has been used as a precedent.

After the Tribunal hearing in 2005, Power continued maintaining his home and removing the cement render. The work had remained untouched since the Stop Work Notice had been issued 10 February 2004. By now all the render had been removed and the old, crumbling bricks were exposed to the weather for many months. The planning authority didn't lose any time in resuming its harassment. On 17 October 2005, a Notice of Prohibition was issued preventing Power from applying new render to the walls for the next sixty days. The excuse was that the old render had been removed without the sanction of a development approval. Consequently, on the 12 December 2005, the Senior Investigator of the Environmental Protection Agency wrote to Power alleging that "unapproved building/renovation works" were undertaken at the residence. He claimed that this breached Section 74 of the *Heritage Act* by "diminishing the heritage significance of a place or object". However, he wrongly retrospectively applied the Act to works already completed. He informed Power that he wished to conduct an interview which would be tape recorded and would be under legal caution. He wrote that: "in the course of the investigation other offences may be identified and pursued". Power replied asking for details concerning the allegations, what was allegedly diminished and how, who raised the allegations, when and how often, what authority did he have for conducting an

152. op. cit., Standing Committee on Public Accounts (Reference: Auditor General's Report No 2 of 2005: development application and approval process), Power Supplementary submission

investigation, the details concerning the investigator and the terms of reference of the investigation.[153] How did the Environmental Protection Agency get into the act? Is it coincidental that it occupies the same building as the Heritage Unit? Further when Power asked question of the Agency, there was no answer.

When the Notice of Prohibition expired within the sixty working days, it was renewed on 15 December 2005 for another sixty days. When it had lapsed on the 23 March 2006, Power hired a plasterer to replace the render. On the same day the planning authority visited the site and issued yet another Notice of Prohibition. This time Power videotaped the proceedings. He wrote to the planning authority giving eight reasons why the notice was unlawful. Meanwhile the plasterer continued with the rendering. The next day the authority returned to the site and threatened the plasterer with a $50,000 fine if he continued working. Power returned the Notice with the comment that it was invalid. The rendering continued until it was finished. The cottage's fragile brickwork had been exposed to the elements for over two years and the rendering was by now urgent. Meanwhile, the planning authority and its collaborating agencies were considering their next move against this lessee who had dared to confront them with their errors and omissions. So they did the only thing that was left to them. They tried to put him in jail.

On 13 April 2006, the planning authority accosted Power at his workplace to deliver a summons to appear in the Magistrates' Court on 18 May 2006 to answer two criminal charges. The summons alleged that Power had undertaken works on his property without planning approval and that he had committed a "controlled activity", which is forbidden under the planning laws. Power's position, which he maintained throughout the period of his persecution, was that as a maintenance activity the works did not require approval under Part 6 of the LPE Act and that they were not a "controlled activity", according to the definition in the Act. He made representations to the Director of Public Prosecutions (DPP), Richard Refshauge, arguing that the charges were technically inaccurate and that there was no public interest in pursuing them. In investigating the matter, the DPP himself conducted meetings with Power for over four hours and had obviously liaised with the planning authority. Even then it took Refshauge eight weeks to decide that the act of repairing a home was not a criminal activity. He informed Power that he would not offer any evidence to the Court. So the case was dismissed with costs going against the Government.

Even after this, unbelievably, the persecution of the Power family continued. On 12 July 2006, the planning authority's Chief Planning Executive, Neil Savery, wrote to Power informing him that there were still unapproved

153. ibid.

works on the property and as a result he had placed a red "compliance flag" on the file as a warning to anybody planning to purchase the property that trouble lay ahead.[154] Power responded by informing Savery of his many errors and demanded that the flag be removed.[155] It is still there long after Savery had left.

Everybody who joined in harassing Power ignored that he had received the COU. No one tried to explain why the planning authority was demanding an amendment to the development application after the Certificate had been issued. As late as 18 July 2006 Savery was still demanding a new development application, this time in respect to the render and the windows which needed replacing. Perhaps the reason for this piece of corporate stupidity is that the planning authority's Development Application form, which is still available on the ACT Legislation web site, states to tick the box where if the application is a "Minor amendment (S247) — to an application already approved where a Certificate of Occupancy has not been issued."[156] Nothing could be clearer than that. So why did the planning authority approve Power's amendments under Section 230 of the LPE Act as a new development on two occasions instead of approving it as an amendment under section 247 of the Act? Either the planning officers didn't understand the legislation or their agenda was to bypass the conditions of the application form. By doing this they were enabled to treat the COU as being irrelevant. In addition, any approval according to section 230 requires neighbours' notification and the time to receive and consider objections to the proposed development. The approval of the Power's amendment as a new development was intended to bypass these legislative requirements. This problem also arose in the Gerondals' case.

The finality of the COU was discussed at length in the Assembly's Select Committee on Estimates in 2005. The exchanges are worth reporting as the issues which plagued Power and his family for years were covered.

> Savery: ... [on development approvals] where there are matters relating to heritage or significant trees or other legislation, there may be parts of the system that require some ongoing monitoring in order to maintain compliance with those other pieces of legislation. (p.626)
>
> Corbell: ... once a [planning] approval has been given, at what point does that approval cease to have effect? I guess that the answer to that is it does not. If someone seeks to vary their structure so that it is at odds with or different from the approval without getting a new approval, then potentially the authority has the capacity to take compliance action if a complaint is made about unauthorised work or non compliance with the condition of approval. (p.627)

154. ibid.

155. ibid.

156. http://www.legislation.act.gov.au/af/2003-11/20030829-7614/pdf/2003-11.pdf

Smyth: ... in this case they received their building approval, which included ... a masonary wall. The certifier certified that it was in broad agreement with the development application and after several things had occurred... was the issue of the masonary wall raised. These people have had a wall that was built, that was seen, that was certified, that was seen by ACTPLA staff, that was seen by heritage staff, that was rendered, that was painted and only many months after other things had occurred was the issue of the wall raised. So, I ask you again: how can this family, representative of all families, therefore, have certainty in their process that at some later stage someone cannot consult their file and come back and ask that rectification work be undertaken? (p.629)
Corbell: ... the circumstances are extremely specific to this case, and they relate, in particular with heritage requirements in the area where this family lives.
Smyth: Which were not in place when the wall was built.
Corbell: ... the planning authority is simply doing its job in that it has been advised by people who do have statutory authority for heritage matters that certain aspects of the development should not be allowed. Now the timing around that and the detail around those matters are things that clearly, I think, leave quite a lot to be desired. The planning authority is instigating action because of advice it has received from the heritage council about whether or not certain aspects of the development on this family's property are consistent with the heritage council's requirements. (p.629)
Corbell: [This case] highlights the problem of the way referral agencies work in the planning system, where the planning authority itself is required to refer a matter for a decision to another agency ... It is desirable, I think, that we clarify the ability of referral agencies to reconsider matters after they have provided advice to the planning authority and the planning authority has provided that advice to the applicants. I think that's an example of what has happened in this case, where the referral authority — in this case the Heritage Council — changed its mind after its initial advice. I think that is unacceptable. The changes that the Government is now considering as part of a system reform project are designed to stop this sort of toing and froing, backwards and forwards to referral agencies. ... This case highlights a weakness in the existing system ... — there is no restriction on referral agencies within Government reconsidering, revisiting or changing the advice they give to an applicant in relation to a DA. I think it is an unreasonable imposition... The issues you raise are important and think the complaint on the part of *[By resolution of the committee, a name was here expunged from the record]* is not without foundation. (p.631).[157]

The Planning Minister had made it clear to Savery that the Powers had been treated unfairly because of the retrospective application of the *Heritage Act* and because the planning authority officers had changed their minds about the cement render. The Planning Minister tried to soften his criticism of the planning authority by sheeting the blame home to the Heritage Council. This

157. ACT Legislative Assembly, Select Committee on Estimates, (Reference: Appropriation Bill 2005-2006) transcript, 24 May 2005 p. 626-631

case raises serious concerns that people entrusted with either executive or ministerial positions are apparently powerless to modify what the rank and file of the public service get up to. The question is: Who is in power? Why was this case allowed to continue when it was obvious that there was simply no case to answer? The taxpayers of the ACT need to know if their money is being used to run public service vendettas against targeted individuals. Typically, in the Power's case as with other cases in this book, the bureaucrats accepted the neighbour's allegations without substantiation and passed these around agencies and politicians in the form of briefings. It didn't matter how many times Power or Fleischinger pointed out the errors and provided the evidence, they was ignored and the public service juggernaut rumbled on driven by miscreants.

Apart from ignoring the evidence, at various times in various briefings the Government unlawfully breached Power's and his family's right to privacy. Because he had appealed the planning authority's rejection of his amendment in the Tribunal, he had the opportunity to subpoena documents. He discovered that during 2004 and 2005 the executive officer of the Heritage Council and the planning authority regularly briefed members of the Reid Residents' Association, other private citizens and the National Trust about matters concerning his Development Application and amendment. The briefings breached the LPE Act section 247 (3) which stipulates that the only parties who can be informed about an amendment are those who had lodged a formal objection to the Development Application. Public servants and their agencies are forbidden to disclose information obtained as a result of their employment without proper authority. Failure to get that authorisation breaches the *Public Sector Management Act 1994*; the *Crimes Act* section 153; the *Privacy Act (Cth) 1988,* Information Privacy Principle 11.1; and, the *Human Rights Act 2004* section 12 (a). With so many laws one would think that something would stick.

John Fleischinger — an "unsightly" yard

John Fleischinger had a passion for collecting all sorts of goods and chattels he stored in his several yards at his residence at Kambah. He had been subjected over the years to neighbours' complaints and consequent clean up orders. The yards could not be seen unless the person entered it or viewed them from a high vantage point. The LPE Act, as with most local Government acts, has a provision for keeping the land clean. But ACT legislation and regulations are silent on the definition of "clean" so it's up to the bureaucrats to determine the meaning, according to their or the neighbour's preferences. The lack of clarity in ACT law and in policies has given public servants a disproportionate degree of discretion over matters which really should not concern them. The main objection to

an untidy yard is that it's an "eyesore". But the involvement of Government authorities in aesthetic matters is questionable. An untidy yard is not necessarily an unclean yard and Government authorities should not have any business on poking around people's things because some bureaucrat or neighbour doesn't like the look of them. There are two criteria of legitimate concern to authorities. These are whether the collection is biodegradable and is causing a stink or whether it is a fire hazard. Otherwise, a collection is a person's private business.

Fleischinger had a lot of building materials which were intended for an extension which was a part of the original plans for the house. During the 1990s his next door neighbour complained repeatedly to the authorities about the yard next door. He could not see into it at ground level as it was surrounded by high fences. He had built a garage on the side of his house with a terrace on the top. It was probably not approved by the authority as it breached the required distance from the side boundary for a construction that could be used to invade a neighbour's privacy. The neighbour actually invited the Department of Urban Services, Lease Administrator to observe Fleischinger's property from his "verandah"[158] which was the allegedly unapproved terrace. The invective in the neighbour's letters included such comments as "The owner of this block continues on his merry way dumping refuse in his usual stealthy manner often at dawn and up until 11p.m. at night".[159] He applied for an order to force Fleischinger clean up the yard.[160] Over a period of some years, he did not let up on his campaign to get his neighbour to comply with his aesthetic standards. He told Gary Humphries, MLA, that:

> [John Fleischinger] tidied up the area and removed one of the four car wrecks from the property. However as a "protest" or whatever, [he] has recently placed his version of an "art deco" arrangement of a broken old toilet with a single wooden crutch alongside a potted geranium! We find it offensive but I can live with this and it will be a source of amusement for guests visiting us ... [He] does not appear to have removed any rubbish from the block, he merely shuffles it around the block to confuse the Departmental Inspecting officers and to convince them he is making clean up progress. We see this so called progress every day and it is obvious the tactics that are being used by [him] to avoid compliance with the Registrar's orders.[161]

If the neighbour had not built his elevated terrace, he would have no idea what Fleischinger was doing. As for his aesthetic sensibilities, the whole arrangement was probably a random event.

158. affidavit, p.107
159. ibid., p.81
160. ibid., p.89
161. ibid., p.112

In August 1996 there was a meeting between the Manager and the Project Officer of the DUS Compliance Unit and Michael Moore MLA. The report of the meeting stated:

> We discussed the difficulties of applying common standards and that we act to apply justice and equity and try not to deprive people of their rights. We also made reference to the personalities involved in this matter and the dispute matters between the parties and between the complainant and another adjoining neighbour. We agreed that it was important that the Department or the Government was not seen to be assisting the complainant to persecute Mr Fleischinger.[162]

The issue with the complaining neighbour was resolved in court when his neighbours on each side obtained a restraining order against him.

The inspectors usually side with the complainant and the subject of the complaint is not given a fair hearing. Unfortunately this gives psychotic neighbours covert permission to persecute everybody around them. This conversation was also typical of how public servants really behave. Their comments to Moore that "We discussed the difficulties of applying common standards and that we act to apply justice and equity and try not to deprive people of their rights" is diametrically opposed to what they actually do, and did to Fleischinger. This is an example of where public servants tell the politicians one thing and then proceed to do the opposite.

It is not enough for the planning authority to receive neighbours' complaints. There is evidence that in Fleischinger's case that the compliance officers did the rounds of his neighbours touting for more complaints. Three inspection reports dated from 11-13 November 2002 detailed how the compliance inspector colluded with Fleischinger's neighbours seeking to add to the original complaint which was lodged earlier that year.[163] This was addressed in a meeting between the Ombudsman and planning authority on 7 June 2007. The file note recorded that in Fleischinger's case the inspectors had lost objectivity. The authority's executives informed the Ombudsman that "They have changed some practices they do not canvass neighbours for complaints, for example."[164] It is hard to believe that the inspectors have suddenly adopted a "hands off" approach to neighbourly complainants as the other two cases bear all the hallmarks of the Government's continued collusion with the community. Of the three cases, this is the only one that has been resolved. Fleischinger sued the Government and the case was settled out of court on the first day of the hearing.

162. ibid., p.128
163. investigation records
164. meeting notes

Fleischinger received the 2002 clean-up order from DUS on 10 July 2002. It stated: "I hereby direct the lessee under subparagraph 256 (5)(b)(x) of the Land (Planning and Environment) 1992 Act to clean up a leasehold by removing the accumulation of miscellaneous items and debris from the land and to continue to keep the land clean to the satisfaction of the Territory".[165] An order given by an authority has to be clearly understood by both parties. This order was too open ended and vague to be understood by anybody. However, it gave the planning inspectors the opportunity to put their own interpretation on what "clean" meant which was their intention. According to the LPE Act, Section 256 (5) (a) (ii), an order has to have a start and an end date. The Act at that time did not allow the planning authority to hold lessees hostage for an indefinite period of time. This was confirmed by a Tribunal hearing in 2005 where Fleischinger appealed the planning authority's rectification notice to clean up the land again. The member, Hatch, reasoned:

> The respondent in this matter contends that section 257(3)(c) applies. That paragraph says that an order can be made telling a lessee "to stop, or not begin, a controlled activity other than a development". A controlled activity pursuant to Schedule 5 of the Act includes "a failure to keep a leasehold clean". The respondent therefore contends that an order to keep a leasehold clean is not only an order to clean up the leasehold but not to commence the controlled activity of failing to keep the leasehold clean. My finding is that such an interpretation whilst possible is heroic. My finding is that an order can be made with respect to the controlled activity pursuant to Schedule 5 in relation to failing to keep a leasehold clean. Pursuant to section 257(3)(j) an order can be made to clean up a leasehold. Those orders do not, in my finding, extend to an order that a leasehold be kept clean. My finding is that, where such an order is made and the leasehold is cleaned up, then the order is spent.

In 2002, Fleischinger tried to satisfy the Territory. Shortly before the inspectors' clean up, he had asked if he had complied and was hoping for specific instructions.[166] The "satisfaction of the Territory" was never revealed at any time throughout this saga. There was also evidence that the planning authority misrepresented the extent of the clean up it required. Firstly, the neighbours had to be satisfied. According to inspector's memo to his underling, on 7 November 2002, he was to consult with the neighbours in deciding "acceptability of the block".[167] Then the instruction was issued to:

> Continue to monitor progress and after next Monday arrange contracts for the removal of all remaining materials on the block and the adjacent public land and

165. T order notice
166. communication F to ACTPLA
167. T memo to P

unapproved substandard structures and rubbish materials in those as well.[168]

Predictably, Fleischinger failed to clean up sufficiently to please either the neighbours or the planning authority. On 2nd to 4th December the inspectors descended and cleaned up, removing every stick and stone from the property, leaving it as bare as the day he bought it.

The total extent of the clean-up was confirmed on 29 January 2003 when a planning executive advised the Planning Minister that neighbours were not satisfied with Fleischinger's efforts some years earlier so the planning authority decided that "a much more comprehensive clean up was required to ensure the block was raised to a satisfactory state".[169] The lessee had the right to know this well before the due date for the completion of the order of what was required, but the authority was silent on the matter. On the 24 September 2007 the Planning Minister answered the question on notice: "Was the lessee informed in writing as to what the satisfaction of the Territory meant in relation to a clean up of the block, either by himself or by the planning authority before the clean up was conducted?" He answered "no" and admitted that "the value and or use of the items in the yard was not a relevant consideration for the clean up".[170]

Before the due date for the clean-up, the inspector informed Fleischinger that if he didn't demolish and remove the garden sheds then the authority would do this and he would be charged for the expense.[171] This was a high-handed variation of the Tribunal's consent order. The original complaint did not include removing unapproved structures, so demolition of these was not included in the consent order.[172] Further, this direction came too late for Fleischinger to comply as he would have to relocate the contents of the sheds, which at that late date was impossible. As a post-script to the threat that he would have to pay for the clean-up, at regular intervals from 2002 to 2013, the planning authority sent him reminders to pay the account of some $6000. His case for damages, which was settled out of court, included writing off the account. But even then the authority sent yet another reminder. Fleischinger's lawyer made short work of it. Either the inspectors were bent on making him pay, or the authority's left hand didn't know what its right hand was doing.

The December 2002 clean-up was more typical of a "dad's army" than professional public servants. The consent order was breached in several respects.

168. T memo to P
169. J brief to planning minister
170. qon answer Barr
171. communication T to F
172. T order notice

But the worst of it was that the inspectors attacked the boundary fence with a chainsaw to get access on 2 December 2002, creating three significantly wide openings. They failed to remedy that gaps in the fence before they left. Fleischinger couldn't do the job as the inspectors had taken his tools, fencing and building materials along with the rest of his possessions. On 18 January 2003, the bush fire entered the property through the openings in the boundary fence and destroyed everything else, including the house and garages. The photographs depict the destruction and trace how the fire entered the property through the fence gaps.[173] When Fleischinger complained about the inspectors' failure to restore the fences when they left, the authority's Chief Planning Executive, Neil Savery, stated:

> With respect to the fences and gates, I am informed that the boundary fence, some of which was just metal sheeting, was not removed. A makeshift gate was removed to facilitate the clean up but was replaced at its conclusion.[174]

The photographs depicting the significant gaps in the fences confirm that the inspectors did not tell Savery the truth.

When the inspectors executed the order they breached it by clearing the terrace, an approved structure attached to the house, demolishing the sheds and taking material from the roof of the house. Fleischinger warned the inspector that the terrace was beyond the reach of the order. The inspector ignored him and threatened to call the police if Fleischinger impeded the clearance in any way. This was the most egregious breach. The area contained a substantial amount of the lessee's possessions which included valuables, antiques and collectables. He conducted a FOI search of Mugga Lane Waste Management Facility records for 2, 3 and 4 December 2002. He checked the records against the number plates of the trucks that took his goods and chattels to the tip. The three trucks went to the tip on 2, 3 December. On 4 December, the last day of the clearance only two trucks went to the tip. The truck which was filled with items from the front terrace did not go to the tip on that day.[175] Presumably its contents ended up in private hands.[176] The planning authority admitted that clearing the terrace was a breach of the order but Savery justified this by claiming that everything taken was "rubbish covered by the order".[177] This was a brazen way of avoiding taking any responsibility for what was really break, enter and theft. Finally, all the breaches of the order were confirmed by the Ombudsman's 2007 letter to the

173. fire path
174. communication Savery to A
175. Mugga Waste Facility FOI
176. letters 2005
177. communication Savery to A

planning authority.[178]

One of the main problems was that there were no Government guidelines as to what was a clean block. So anybody accused of keeping an untidy yard was at the mercies of the passing parade of inspectors, all of whom had their own ideas. Then in 2005 after a question on notice to the Planning Minister, Barr, the planning authority came up with the following criteria for a clean block, which was fair enough:

> Visibility: The area of the lease to be assessed must be:
> a) Visible from the street;
> b) Visible from other areas of the public domain, walkways, reserves, parks etc.; or
> c) Visible (easily) from adjacent blocks at ground floor level or from natural ground level at least 1.5m from a side boundary and at least 3.0m from a rear boundary of the block.
> Coverage: 30% or more of the visible area of the lease that is not occupied by approved structures is occupied by one or more of the items or class of items listed.

The items included machinery and parts, derelict vehicles, bottles, builders' soil, refuse, scrap metal, items associated with residential activities, but in quantities greater than usually associated with residential activities.[179] If these criteria had been in place in 2002, the clean up would have been less traumatic for Fleischinger. At least he would have had some control over what was removed and from where. The fences would have remained intact, the bush fire would not have entered the yards and the property wouldn't have been destroyed and he wouldn't have had to endure the years of grief and physical pain that followed.

In the years following the disastrous clean-up, Fleischinger complained to the Government and as many other agencies as possible. In every instance the denials were remarkably similar. Power's example described the process of "briefings" which spreads misinformation like a virus amongst the bureaucracies. The same thing happened in Fleischinger's case. A typical denial was the Planning Minister, Corbell's answer of the 14 February 2003 to Fleischinger's letter of complaint which stated:

> PALM, [Planning and Land Management] the ACT Government Solicitor and Government have received a full report on the actions of inspectors in this case. I am assured that PALM on this occasion acted reasonably and within their lawful powers to enforce this order made against you and which took effect by a consent order of the Administrative Appeals Tribunal [AAT] on 25 November 2002.[180]

178. letter from Ombudsman to Savery
179. qon answer Barr
180. communication Corbell to A

Of course the Minister believed the inspectors. They cannot double-check every story fed to them by employees, even if there are doubts. That's not the way governance works. Further, Ministers will protect their public service employees every time. Governance is like a protection racket that closes ranks when ever there is an outside threat. Governments and gangs have much in common. For all outward appearances, the gang is impenetrable. If a gang member has made a mistake which is likely to expose the gang to outsiders, it will turn on the erring member, but nobody will get to hear about it. This arrangement is at the root of governance. The gang has the power, not the member/minister who is the token leader for the time being.

This was confirmed in the way the Government handled Fleischinger's complaint. One of the inspectors who was involved in executing the order was sacked for being dishonest. Fleischinger found out in the most unlikely way. When his case was settled out of court, he received the Government's legal documents. There was a meeting between the Ombudsman and planning department executives where the trespasses and other matters pertaining to Fleischinger's complaint were discussed. He received a redacted version of the report through FOI which had concealed some of the details including the name of a relevant employee who had been sacked. However, the Government's voluminous affidavit for his court case included the document in full. Consequently, the Government Solicitor wrote to his solicitor in a panic requesting that the revealing page be pulled and replaced with the censored version. There were at least six copies of the affidavit and apparently not all the offending pages were replaced. He received one of the uncensored versions. It stated "[CS] said he would confirm when [the named person] left the organisation. He recalls that it was summary dismissal for alteration of Government records".[181] This particular employee who had persecuted Fleischinger relentlessly was caught out doing dodgy stuff. It is a shame that his name cannot be published. To do so would divert attention away from the crooked system that allowed him his unchecked reign of wrongdoing.

Then in 2006 Fleischinger put the vacant land up for sale. It was a desirable block and there were prospective buyers. On 14 December 2006, one couple had a pre-application meeting with the planning authority to canvass what they would be allowed to build. At the meeting, the planning officers alleged that the site was contaminated. The notes of the meeting stated:

> contamination — EPA — past uses on land possible contaminants. No testing has been done — EPA would need to be satisfied that block is suitable for residential use, needs assessment w/soil testing — clean up schedule in place by Compliance — EPU — polluter pays, remove soil which is contaminated — EPU won't support until consultant

181. ACTPLA and Ombudsman meeting

> provides satisfactory result must be suitably qualified in land contamination.[182]

When the planning authority cleaned up the block in December 2002, presumably it was done to the "satisfaction of the Territory". If the authority had any concerns about potential contamination it should have been raised then and not when there were prospective buyers about to put their money on the table. After the remains of the residence was demolished, a report dated 25.11.05 stated that the block was not on the Environment Protection Unit (EPU) Register of Contaminated Sites.[183] This report was on planning authority files and has been issued with the title searches the prospective buyers had conducted. After hearing about the planning authority's stance, Fleischinger contacted the EPU. A meeting was held at the block with the Contaminated Sites Officer who consequently notified the planning authority that:

> As a result of site observations and discussions with the lessee regarding activities undertaken at the site Environment Protection does not consider that the site poses a significant risk of harm to human health or the environment and therefore does not require an environmental assessment of the site at this time.[184]

This should have been the end to the matter. But the planning officers persisted in suggesting to prospective buyers that the block was contaminated and that a development application would not be approved until soil testing had been done and the site found to be clean.[185] Soil testing is prohibitively expensive and would have to be conducted over many areas on the block to be a valid assessment. Prospective buyers continued to insist that Fleischinger conduct soil tests. He refused on the grounds that this was not necessary according to the advice he had received from EPA. The block finally sold. The buyer apparently ignored the contamination allegations and built his house. Given the EPA's advice to the planning authority, the continued allegations of contamination could be seen as being vindictive. Why did the authority's officers ignore the EPA's advice? Were they that reluctant to let their victim off the hook?

Paul and Monica Gerondal — the bamboo wall

Monica and Paul Gerondal presided over an unfinished extension for some forty years. The next door neighbours complained at regular intervals about how the bamboo from the Gerondals' garden had invaded his backyard and about the unfinished building work. The property became famous in the media as the

182. meeting ACTPLA
183. conveyancing search
184. communication EPA to ACTPLA
185. communication between lawyers

longest running building project in the history of the Territory. The approval was granted in 1975 and up to now the extension has not been completed, though only the finishing touches remain. In common with Fleischinger's neighbour, this neighbour conducted intensive surveillance on a regular basis and reported ongoing issues to the authorities and the media.

The bamboo was not always regarded by the planning authority as a problem. On 21 December 1998, the building inspector reported that he had inspected the block and found that: "the block was reasonably screened from the street; the property was well screened from neighbours; and, tree and bamboo growth helped screen the block and was to be regarded as an asset".[186] On 7 February 2002 the compliance inspector investigated the neighbour's complaint about how the bamboo had invaded his yard. His report stated: "Check with noxious weeds to see if bamboo has been declared a pest plant".[187] The LPE Act defined horticultural activities subject to orders as vegetation overhanging a public place which obstructs or inconveniences the public and failing to control or propagating a pest species.[188] To counter the neighbour's bamboo complaint, in 2003 the Gerondals located the previous neighbour. He confirmed that the bamboo was a part of his garden when he was residing there in the eighties[189] and that it had spread into the Gerondals' yard.

One such story was featured in the *Canberra Times* 4 July 2013 stated:

> Watching from the sidelines, next-door neighbours ... cannot believe what has been happening (or, rather, not happening) over their back fence since they moved in 17 years ago in 1996 ... "When we looked at the house [in 1996] we were told it [the work next door] was an extension ... Nobody said it had already been going on for 20 years."
>
> Mrs Gerondal said the [neighbours] were serial complainers running a campaign of harassment against her and her husband. "They go to the media every six months; it was *The Chronicle* last time. If we have any further harassment from the neighbours we will be seeking legal and lawful redress," she said.
>
> [The neighbour] said he was neither busybody nor crank. He doesn't dislike the Gerondals per se and could even live with the mess next door for the sake of peace and quiet. What does bother him is seeing the law being made an ass by people he suspects are serial litigants who lodge a fresh action every time an umpire rules against them.[190]

186. investigation records
187. investigation records
188. *Land (Planning and Environment Act)*, op.cit., schedule 5, p.204
189. statement
190. http://canberratimes.domain.com.au/real-estate-news/saga-of-renovation-with-no-end-in-sight-20130703-2pck8.html

Some people are serial litigants and some serial complainants. It's just bad karma when they live next to each other. However, if the law is an ass, it was hardly the neighbour's business. He did say he wasn't a "busybody or a crank" but according to his own words, he was, otherwise he would have chosen "peace and quiet".

The state of the Gerondals' yard and the unfinished extension was taken up by the planning authority and over the next twenty years the lessees were subjected to a series of orders and inspections. They appealed to the Tribunal and then to the Supreme Court, both of which they routinely lost because they represented themselves and because they were not that familiar with the law and procedures. The question of the bamboo has never been resolved. It continues to flourish. The house extension is in its last stages of completion, the remaining work being the interior fit out. The building project had spanned nearly forty years and was administered under three consecutive planning regimes. Their project started under the old *Building (Design and Siting) Ordinance 1964* (Cth) (BDSO). The ordinance became an act after ACT self Government (BDSA). In 1991 it was replaced with the *Land (Planning and Environment) Act 1991* (LPE Act) and later in 2007 was replaced with the *Planning and Development Act* (PD Act). The building project must have been the only one in the Territory that spanned the changes in the planning legislation. The case is worth studying in that it reveals the failure of the planning officers and the Tribunal to come to grips with the transitional provisions between laws.

By applying logic to the situation, people have a right to expect that their projects would begin, continue and be completed according to the law at the time approvals were granted and when the work commenced. Any changes in the legislation and the rules, in theory at least, cannot be applied retrospectively to projects that overlap the different legislative schemes. When people make a commitment to a significant project, they have a right to certainty that the same law will apply to any stage of the project regardless of any new legislation which arises. This is covered in the ACT *Legislation Act* 2001[191] (and similar acts in every jurisdiction) which instructs that a repealed law has a continuing operation. The principle is that any obligations or rights according to a repealed Act should continue to be administered as though the legislation was still current. Further, the LPE Act allowed the BDSA to provide valid approvals concurrently with the Act. It lists activities subject to orders and states that: "having a building or structure that was constructed or erected without approval required by — (a) division 6.2 of this Act; or (b) the Buildings (Design and Siting) Act 1964".[192] This suggests that the Gerondals' BDSA approval was still valid despite the enactment of the LPE Act.

191. *Legislation Act 2001* No 14 of 2001, 94 (1), p.107
192. *Land (Planning and Environment) Act* 1991 No 100, Schedule 5, p.204

The planning authority has on two occasions retrospectively applied the planning laws to the Gerondals' building project. Approvals under the BDSO did not specify a time limit for completion of a project. The building project had remained unfinished for twenty years which frustrated the planning authority. The building inspector needed the provisions of the LPE Act Section 256 to impose various conditions on the approval which was not available to him under the BDSA. So he purportedly transferred the project to the jurisdiction of the new Act. The transfer was done in a hurry and without the usual administrative protections that regulate development in the ACT. In general, when a planning approval is granted the applicant is given permission to construct a building of a specific design, in a specific position and built with specific materials. A development approval can only be granted once for the same project. The planning authority cannot change its mind, especially when a project is well and truly started, or finished as it was in the Power's case. Yet this is what happened to the Gerondals when the planning officer accordingly stamped the floor plans with the LPE Act "reapproval" in 1998.[193] Further, the inspector should have stamped the site plan which was the relevant one for design and siting approvals.

Getting a LPE Act approval was not a matter of merely stamping a set of plans. There were several processes that needed to be complied with before a project can be approved. Section 230 covered approvals of development applications for the design and siting of new work. However, before a Section 230 approval could be granted, the requirements of Section 231 covering objections to the development have to be considered. So if a person planned to build a three storey house, the neighbours have to be notified according to Section 229 and their objections according to Section 231 have to be taken into account before approval can be granted under Section 230. The process is sequential and amendments according to Section 247 cannot be approved if the requirements of previous sections have not been met. It really quite simple, but the planning authority's officer bypassed the legal requirements so that status of the Gerondals' approval was questionable.

There were several features in the couple's extension that were not capable of approval under the new Act due to changes to the Territory Plan and its Appendix III over time. For example the height of the construction and its distance from front and side boundaries did not comply. While these features were allowed under the BDSA, they did not comply with the regulations current in 1998. Perhaps the planning officer did not want a situation to develop whereby if the neighbour was notified of the application, objections could have been received concerning the proposed overshadowing of their block. But by this time the double

193. floor plan

storey wall adjacent to the fence had been built so the overshadowing was actual.

This was the first incorrect decision. Thereafter, the planning authority's focus was on covering up the error or to rationalising it so that it had the illusion of legality. The authority consulted the Government Solicitor during 2002 to clarify the legal situation and get advice about how to deal with the two approvals. On 7 March 2002, the Government Solicitor advised that:

> It is my opinion that the provisions of the Consequential Provisions Act do not apply because at the time of the commencement of that Act the leaseholder already had approval for the design and siting and the Consequential Provisions Act only provided that Part VI of the Land Act applied to proposals for external design rather than approvals. If I am wrong, the approval has a sunset clause and is not longer valid ... Despite the approval pursuant to the *Building (Design and Siting) Ordinance* being given to the leaseholder, as he has not completed the development prior to the commencement of the Land Act, any development undertaken after the commencement of the Land Act is subject to that Act. However, Section 225 (1) provides a defence to undertaking a development under the Act. It may be that, if the leaseholder is not provided with approval under the Land Act, he is able to rely on "reasonable excuse" element of section 225 (1) ... In my opinion, despite the lack of a development approval once a building approval has issued it is valid.[194]

All of which was rather confusing, indecisive and ambiguous which gave the planning authority a reasonably credible cover story.

On 19 July 2002, the Government Solicitor again advised the planning authority that:

> It is important to note that the incomplete extensions are not "approved development" for the purposes of the Land Act. Rather, they were approved back in the 1970s under the *Building (Design and Siting) Ordinance 1964* (Cth). That series of approvals is no longer current and, in my view, the leaseholder is unable to rely on them to complete the building work.[195]

The lawyer's advice in both instances failed to distinguish between a design and siting approval and a building approval. The Gerondals had a design and siting approval which should have been in perpetuity but according to the Government Solicitor they were unable to rely on this to continue with the building work. Given that building approvals are not given unless they comply with the development approval, there was no reason why the Gerondals shouldn't have the building permit to complete the work.

194. communication N to ACTPLA
195. communication Kettle to ACTPLA

On 20 December 2002, the planning authority bit the bullet and issued two orders which were:

> ... "to complete previously approved extensions to (their house)" by 6 November 2004; and to "significantly reduce the extent of overgrowth of trees and vegetation on the block (on which their residence is located) and to keep the (block) permanently in a clean maintained state, including the storage of building materials within the confines of an approved structure" by 24 January 2003.[196]

The order to clean up the yard was an expedient and arguable use of the law. There is no clarification of what a clean leasehold is. Further, untidy gardens proliferate in the Territory and it was unfair to pick on the Gerondals' garden. The garden had several varieties of bamboo and reeds which were intertwined so removing the bamboo meant removing the reed and other plants.

The lessees appealed the orders in the Tribunal. The President, Michael Peedom, commented "In my opinion, the invasion of the bamboo to adjoining land justifies the making of an order".[197] According to the transcript of the hearing, Peedom had difficulty with the planning authority's order to clean the block of bamboo. He stated:

> [The order] just says clean up the leasehold so when we enquired from PALM [Planning and Land Management], and we've done this many times about standards and guidelines as to what we are really supposed to do in terms of the Act, we haven't found anything yet particularly related to the application for an order where it covers anything about vegetation on private land.

But Peedom capitulated to the Government and ordered the couple to:

> ... trim or prune all vegetation on the block that is bamboo that extends beyond any boundary of the block so that it does not extend beyond the boundary, and in such a way that prunings and loppings fall only within the boundaries of the block; and ... trim, prune, or remove all vegetation on the block that is bamboo, to the reasonable satisfaction of the Territory.[198]

In his decision Peedom noted that the vegetation in the Gerondals' front yard did not overhang a public place, the vegetation in the back yard was not a fire hazard, or a shelter for vermin and that the lessee's yard was not visible from adjoining neighbours' yards or from public land These observations did not validate his order to trim all the bamboo on the block because it was

196. *Gerondal and Minister for Planning* [2003] ACTAAT 32 (30 June 2003)
197. ibid.
198. transcript

allegedly invading the neighbour's garden. This had more to do with keeping the neighbours' leasehold clean than their yard. Bamboo has never been listed as a pest plan but this was not relevant. It was a well sprung trap. The fact that the LPE Act did not define what "clean" meant gave the inspectors the opportunity to include anything they did not like about a block or about the lessees.

Peedom accepted the validity of the purported 1998 LPE Act approval. He avoided any reference to the BDSA approvals. Given that the Gerondals represented themselves, they were unable to mount effective arguments about the effect of transition laws, so Peedom confirmed that:

> ... the amendments approved on 29 July 1998, were expressed as an approval granted pursuant to Section 230 or section 245 of the Land Act to the plans C, D, E and F brought forward from the dates of their respective approval as well as the amendments contained in the plans approved on 29 July 1998... In my opinion, the plans contained in Exhibit 7 are inextricably linked and are now to be regarded in their entirety as approved pursuant to the provisions of the Land Act.[199]

This ignored the approval requirements of the LPE Act which were put in place to protect the users of the planning system and to reduce disparate planning elements to an ordered logical sequence. However, the issue had been settled. Because Peedom said that in his opinion the Gerondals had their LPE Act approval, the planning authority had the means to harass the lessees from time to time when they remembered the unfinished business at their suburban address.

The couple appealed the Tribunal decision to the Supreme Court which was dismissed at a great financial cost to them. The Court decided that the grounds of appeal were not points of law. The Tribunal order was confirmed and the matter remitted for compliance time frames. The couple trimmed the bamboo to what they believed was the "satisfaction of the Territory" and removed the clippings by the due date, 6 October 2004. But the gardening was not inspected until 16 June 2005, eight months later and the inspectors did not write up the inspection report until 9 August 2005.[200] At this point the order should have lapsed for want of administration. But not to be deterred the planning authority took out a warrant to inspect the property for compliance with the bamboo order. The objective of the warrant was to ascertain: "whether or not a controlled activity is being conducted in or on those premises in accordance with, or in contravention of, an order".[201] That was as good as it got. According to section the LPE Act Section 274 (4), warrants are supposed to state the purpose for which

199. *Gerondal and Minister for Planning*, op. cit.
200. inspection records
201. W warrant

it is issued, the nature of the relevant offence and a description of the things subject to the warrant.[202] These provisions are included to prevent Government authorities from conducting "fishing expeditions". The warrant was silent on the state of the building work which gave the Gerondals grounds to assume that the authority was not concerned with the unfinished state of the extension.

On the 20 December 2005, they received a Rectification Notice which can only be issued where inspectors consider an order has been breached. The Tribunal cannot review such a notice. It stated:

> ... that you remove all vegetation on the land that is bamboo by digging out the entire plant both cane and rhizome. Further you will dispose of all the canes, rhizomes and entire plants at an appropriate waste or recycling facility ... This notice is issued on the grounds that you have failed to comply with an order requiring you to remove, by 6 December 2004, all vegetation on the land that is bamboo.[203]

The original order issued by the Tribunal in respect to the bamboo gave the Gerondals some choices as to how to deal with it, which was "to trim, prune, or remove all vegetation on the block that is bamboo to the reasonable satisfaction of the Territory". However, if Peedom had been a gardener, he would have realised that the bamboo would grow back no matter how many times it was trimmed, pruned or removed. Further, his order did not stipulate that the bamboo be trimmed continually. But presumably he couldn't make that order as it would need a start and end date according to the LPE Act. The couple had complied with the Tribunal's order and they hoped their gardening would satisfy the Territory. They wrote to Savery asking him to define the "satisfaction of the Territory" but this was not provided as the letter was not answered.

Given that the inspection was not conducted on the date ordered by the Tribunal, the order should not have had any subsequent legal effect after the 6 October 2004. The fact that Peedom did not order that the bamboo be culled every time it grew casts doubt on the validity of the Rectification Notice. A notice cannot be issued on an order that has already been obeyed. A similar situation was evident in Fleischinger's case. After the Territory had cleaned up his block on 2-4 December 2002, presumably to the satisfaction of the Territory, the order ended because it had already been administered. In 2005, the planning authority issued him with a Rectification Notice based on the order that the lessee continue to keep the land clean. He appealed this in the Tribunal which resulted in a dismissal as it is a non-appealable instrument. The member, Brian Hatch, confirmed that compliance with the order had been effected when the

202. *Land (Planning and Environment Act)*, op.cit., p.178
203. rectification notice W to G

authority cleaned up the block and that was the end of it.[204] The same could be applied to the Gerondals' bamboo.

The Rectification Notice gave the couple until the 31 January 2006 to comply. It actually spelt out the "reasonable satisfaction of the Territory" except that it was most unreasonable and punitive. The couple were now ordered to remove all traces of bamboo on their property. This diverged from the Tribunal order that required trimming and pruning. It had become a new order not a Rectification Notice and should have been issued as such with the appeals processes available to the lessees. The same thing happened to Fleischinger when he asked the planning authority to inform him of the "reasonable satisfaction of the Territory". His letter was not answered.[205] A few days later, this was revealed when the inspectors removed everything from his yard, leaving it as bare as the day he bought it.

The planning authority's routine for issuing and administering orders is done to the disadvantage of lessees. In both the Fleischinger's and the Gerondals' cases the orders were vague and lacking in detail, but nevertheless required work to be done by a certain date to the "satisfaction of the Territory". Further this "satisfaction" was supposed to be communicated to the lessee before the work is done so that there are clear guidelines for compliance. The work is supposed to be inspected on the date stipulated in the order. But this does not usually happen. By failing to make specific orders, the lessee is put in the position where a breach is inevitable, no matter what work has been done. Further, by failing to inspect on the due date, the planning authority is in breach of its own or the Tribunal's order. But there is nothing a lessee can do to address this as there is no administrative process in place. The issue is contempt of the Tribunal, but it would taker a brave litigant to take this one up.

After working on the extension for the last few years, Paul Gerondal applied to the planning authority to renew the building permit which was about to expire. The Tribunal had made the decision that the Gerondals unquestionably had a LPE Act approval. As a response to the application, on 19 November 2007, the planning authority wrote to the lessees demanding that they lodge a schedule of items and costs for building completion plus a set of new plans before an owner builder permit would be issued.[206] This came as surprise to the couple and their certifier as they had already had two consecutive permits without the imposition of such conditions. Further, in 2003 the Tribunal ordered the Gerondals to complete the extension according to the existing plans, which

204. *Fleischinger and ACT Planning & Land Authority [2005]* ACTAAT 13 (11 July 2005)
205. communication F to ACTPLA
206. communication S to G

contradicted the planning authority's 2007 demand for new plans. The couple replied questioning the legislative basis for the imposition of new conditions. This obstruction once again put a stop to the building work which up to that point had been proceeding.

Things slumbered on until 2013. Then a story was featured in the *Canberra Times* about how the Gerondals had failed to comply with court orders to trim the bamboo and finish the extension. So the planning authority decided that the best way to resolve the whole affair was to terminate their lease. Some of this has been discussed in chapter two. For nearly the last twelve months the frail, sick, old couple have defended their right to remain in their home of over forty years. They submitted reasons to the planning authority why the lease should not be terminated which were all arbitrarily rejected. Given the history of the Gerondals' failed attempts to represent themselves in previous hearings, the officers possibly believed that the couple would represent themselves again if they appealed to the Tribunal and would predictably lose. The terminated lease could then be registered on the title deed which would be a precedent for similar bureaucratic actions. However shortly after proceedings commenced in the Tribunal, legal representation became available which is just as well for the Gerondals, but also for other vulnerable ACT lessees who may have similar problems with the authority.

The substantive hearing was held and the Tribunal set aside the planning authority's termination. The Gerondals won. It is unlikely that the Government will appeal the decision as there were too many gaping holes in their case. The following material is taken from the published decision on the ACAT web site.[207] The planning authority's Notice of Intention to terminate the lease listed four breaches being: a. breach of section 361 of the PD Act - failure to comply with the AAT activity order; b. breach of section 367 of the PD Act - failure to comply with the rectification notice; c. breach of Item 1(a) Schedule 2 of the PD Act – failure to comply with a provision of the Crown lease, Clause 1(c); and d. breach of Item 2 Schedule 2 of the PD Act – failure to keep the leasehold clean. The main issue which arose from the hearing was the effect of the transition of laws and whether the Respondent had the authority to apply the PD Act to an order that was issued under the LPE Act. Following is a summary of the Respondent's arguments and the Tribunal's responses.

The Respondent stated that the provisions in the LPE Act that were used to issue the Gerondals with the AAT order and rectification notice had their equivalents in the PD Act. The "accrued rights and responsibilities" which

207. http://www.acat.act.gov.au/judgment/view/8329/title/gerondal-and-gerondal-v-act.

survived the repeal of the LPE Act were that the Applicants had a duty to comply with the orders and that the Respondent had a right to enforce those orders.[208] The Tribunal concurred with this but with the provision that any order issued under the LPE Act, Section 253, limited the Respondent's compliance action to what was allowed under that Act. The Tribunal stated:

> The Tribunal accepts that the compliance action of termination of lease under Chapter 11 of the PD Act is more onerous than the compliance action available under Part 6 of the LPE Act in relation to activity orders and rectification notices. The Tribunal accepts that the presumption against retrospective operation of legislation is only displaced by clear wording to that effect. In the Tribunal's view that clear wording is absent from the relevant legislative provisions of the PD Act. The Tribunal accepts that termination was not, and is not now, available as a compliance action by the Respondent if the Applicants have breached the AAT activity order or rectification notice made under the LPE Act.[209]

In respect to the Respondent's allegation that the Gerondals had breached clause 1(c) of their lease, the Tribunal stated that there was no provision in the lease for termination if the lessee fails to maintain the buildings.[210] Then the Respondent included, in the closing submissions after the case had been heard, a fifth alleged breach which was of clause 1(d). It states: "That the lessee will not without the previous approval in writing of the Commonwealth or the Minister on behalf of the Commonwealth erect any building on the said land or make any structural alterations in any building erected on the said land." This was not included in the Notice of Intention/Termination which initiated the case (see previous page points a-d). The Tribunal told the Respondent that it was not satisfied the Gerondals had been notified of this allegation.[211]According to the PD Act, before a lease can be terminated, the lessee has the right to be informed of all the grounds, which aside from common courtesy is a legal requirement. Could it be inferred that by now the planning authority had scraped the bottom of the barrel for tactics on how to win? Further, given the extensive history of the various approvals which the Gerondals have disputed for nearly twenty years, it is surprising that the authority would want to go there. The Tribunal commented dryly that it "accepts that breach of Clause 1(d) of the Crown lease is not a matter that the Respondent relied on in making the reviewable decision and is not a matter that can now be relied on by the Tribunal.[212]

208. ibid., paragraph 129
209. ibid., paragraphs 178-181
210. ibid., paragraph 195
211. ibid., paragraph 193
212. ibid., paragraph 221

In respect to the allegations that the Gerondals had breached Schedule 2 of the PD Act, the Tribunal stated:

> The Tribunal does not accept that the inclusion in the list of controlled activities, in Schedule 2 of the PD Act, of "failing to comply with a provision in a lease" in Schedule 2 Item 1(a) and "failing to keep leasehold clean" in Schedule 2 item 2, has the effect of making these activities a 'contravention of Chapter 11' of the PD Act within the meaning of section 382(1)(a). The Tribunal considers that the Respondent would need to have taken some other compliance action in Chapter 11 before these matters would be brought within the operation of section 382(1)(a) as a "contravention of Chapter 11".[213]

This basically means that in order to effect compliance of the current orders and Rectification Notice, the planning authority can use either the compliance measures available under the repealed LPE Act or issue new orders under the PD Act so that Chapter 11 replete with its sanctions becomes operable.

In 2005 the planning authority was prevented from terminating a lease by the Administrative Appeals Tribunal in the Tokich case.[214] Michael Peedom, the President, stated:

> In determining what is the correct or preferable decision for the Tribunal to make, it is necessary, in my view, to have regard to the fact that the termination of a lease involves serious consequences for the lessee and other persons with an interest in the land. The fact that Mr Gallagher was unaware of any case in which a residential lease had been terminated other than one case prior to 1989 demonstrates some recognition on the part of the authorities responsible for administering land in the Territory that this is so ... In achieving the correct balance of competing considerations the objective of ensuring the orderly development of the Territory should not be to the detriment of laws designed for the protection of citizens in the course of doing so. That protection is unable to be waived and does not cease to exist despite conduct that might raise legitimate questions as to whether such protection is deserved.

Peedom's decision was based on ethical and social considerations. The planning authority would have been aware of this case, but nevertheless proceeded to terminate the Gerondals' lease, forcing them to face an expensive, traumatic appeal in the Tribunal. This case reveals that the authority's compliance administration has become morally bankrupt and legally inept. The compliance officers and planning executives knew that the elderly couple were in poor health partly caused by the stress of the prospect of losing their home. Yet they proceeded with the termination without exhibiting a shred of human decency.

213. ibid., paragraph 222

214. *Tokich versus ACT Planning and Land Authority* [2005] ACTAAT 7 (16 May 2005) para.119-120

The Government does not mediate — it litigates

In all three cases, there was no effort on behalf of the planning authority to mediate matters to avoid costly administrative and legal proceedings. Unfortunately the attitude of bureaucrats is to expend enough of what it takes to win or to exhaust the complainant's resources so that he or she gives up the pursuit of justice. Further, mediation implies a degree of accountability which the planning authority is reluctant to observe, even as a token gesture.

On 31 October 2013 there was a Planning and Environment Dispute Forum organised by the Environmental Defenders' Office. The Environment and Sustainable Development Directorate (the latest name for the planning authority) was invited to make a presentation. The planning authority's representative, Ben Ponton, spoke in glowing terms about the Directorate's engagement in mediation. Monica and Paul Gerondal were in attendance. At the time, the planning authority was threatening to terminate their lease and they were in the process of pleading their case. As a result of the forum they approached the Directorate and suggested mediation. The response they received from the planning authority's executive, John Meyer, was: "Cognisant of the history of dealings with your lease, I don't believe that mediation is the appropriate course of action. I have advised Mr Ponton of my decision in this instance."[215] The planning authority never attempted mediation at any time during the long dispute.

The first hearing of the Gerondals' appeal was a request that the planning authority to give reasons for its termination. When forced by the Tribunal to do this the reasons put forward were woefully inadequate. At that hearing the Government Solicitor suggested that the authority was prepared to mediate with the Gerondals, presumably to finish the extension. The Gerondals agreed but the mediation was never arranged. They tried to extract the building file from the planning authority so that they could engage a certifier who then would verify the various approvals and permits. But in spite of frequent requests and a subpoena, the file was not forthcoming. Without the relevant information, the Gerondals and the certifier cannot move forward. Any further chance at mediation was frustrated by an unknown employee who was sitting on the file. This puts the planning authority potentially in contempt of the Tribunal.

Mark Power similarly experienced the planning authority's reluctance to mediate. He related that:

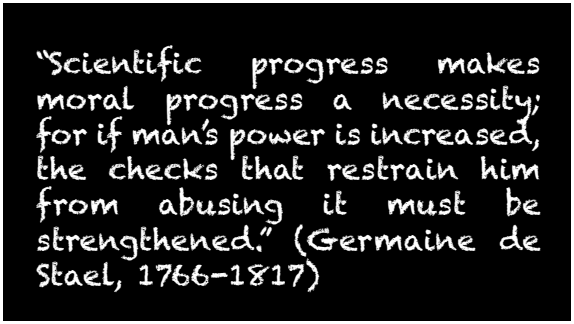
> I have had lots of claims and allegations levelled at me for two years. No one has bothered to say "Mark, come in here, sit down and I'll show you why you're wrong." Every time I've raised anything, I've said, "This is incorrect ... here's my evidence." No

215. mediation email

one has bothered to say, "Well thank you Mr Power, what you've said I understand, but what about this?"[216]

Likewise Fleischinger had the same problem. When the inspectors came unannounced and uninvited to his block during 2002, they did not inform him about the specifics of what they wanted him to do to clean up the block. The "satisfaction of the Territory" was never defined in spite of his request for information.[217] The Government does not seem to appreciate that a global command to clean up something or anything is confusing and meaningless. Its failure to issue specific instructions to Fleischinger led to him suing for damages after the inspectors cleaned up his block back to the bare earth. Further, whilst the matter was in court, the Government failed to mediate until at the last minute when the parties were attending the first day of the hearing. The mediation issue has been covered in the section on the Model Litigant Guidelines in chapter three.

According to the experience of complainants in this book, the Government would rather litigate than mediate. It has deep pockets and its chronic need to be seen as being right in every dispute has turned the Government into a mindless, serial litigator. We all pay for this in terms of hard cash and in damage to the social fabric.



216. op. cit., Standing Committee on Public Accounts, (Reference: Auditor General's Report No 2 of 2005: development application and approval process), *Transcript of evidence, 9 November 2005*, p.60

217. communication F to ACTPLA

Chapter 7
Other cases of Government cruelty

Whistle blowers — Trish McEwan

The cases featured in this book are the stories of whistle blowers whether they are in employment in the public sector or whether they are ordinary citizens who have been affronted by Government misbehaviour and have taken a stand. The cases covered in this chapter were debated in the Assembly and published in *Hansard* or in the *Canberra Times*. Along with the unpublished material in this book, these confirm the experiences of the often anonymous complainants who get a raw deal from the Government. Taken together the inevitable conclusion is that Territorial governance is in poor shape.

Trish McEwan was a former teacher at the Bimberi Youth Justice Centre. She was interviewed by the ABC on 29 Mar 2011, approximately two years after the Centre was opened. She made allegations of assaults and human rights abuses. She claimed that staffing shortages, a culture of bullying among staff, along with a lack of procedures, guidelines and training resulted in a volatile situation which had the potential to cause harm. She spoke about the low staff morale and that many had left, leaving a skeletal staff to deal with current inmates and new arrivals who were on remand or were in for long sentences. She related where a fourteen year old boy was seriously injured after the use of force by a staff member and that she'd arranged a medical appointment for him. She stated:

> I'm not here to debate a use of force compared to an assault. However that incident in itself was a good example of the fact that there were no protocols or procedures known to myself, the education staff, as to how to report a critical incident in the centre, our concerns for students, issues for the students' mental health for their drug and alcohol issues.

She identified educational concerns that were not being addressed which were: intensive literacy assistance; disability education; and the lack of an indigenous liaison officer.

McEwan says she was going public with her concerns to encourage more people to come forward and speak to the inquiry which had just been established by the Human Rights Commission. She stated she had been supporting it from the outset, but that she was starting to lose confidence. She told how she had become concerned about the review process because:

I have become aware of incidents where [former colleagues] had been encouraged or at

> least guided in the way they should respond to the review by their supervisors. I would still like to believe that the review process will be successful in bringing the truth to light at the centre, but I'm not confident that workers will freely contribute to [it].

She sent a letter to Chief Minister, Jon Stanhope, outlining her concerns. He responded that staff and detainees were being supported to come forward and make submissions to the inquiry. He confirmed that minutes from a meeting of the Aboriginal and Torres Strait Islander Services team stated that employees who were asked to speak to the inquiry should first consult with their superiors to work out a "strategy" before responding. But he rejected any allegations of collusion. His excuse was that the language used in the meeting was clumsy and what was seen as collusion was in fact an offer of support for staff taking part in the inquiry. He claimed that when officers are asked to appear before an enquiry "they're offered assistance, they're offered counselling, they're offered support".[218] Assistance, counselling and support comes within a brush of collusion.

The Australian Education Union, ACT Branch put in a submission to the Review. The submission claimed that communications between managers of the Centre and teachers were "ineffective and inadequate". The Union stated:

> The decision-making processes concerning educational programs had been uni-directional and ... appeared to come from the Centre management ... There was an absence of genuine consultation in regard to key decisions and as a result there were some significant surprises for teachers and centre staff.[219]

The submission alleged that the centre management was obstructing education programs such as kitchen, horticulture, wood and metals programs. These restrictions were in place as there were no supervisory staff to ensure that all tools were accounted for[220] which was the reason the courses could not run.

The submission related that the usual practice at youth detention centres was to have a youth worker/custodial officer present in the classrooms. This enabled to teachers to focus on individual student needs without having to exert discipline. The support staff were able to develop a good rapport with the students. Consequently a secure and safe environment was created. In mid-2010, the support staff were removed from the classrooms and stationed in the nearby courtyard. The teachers were required to call for the support staff to assist them when students became disruptive. This generated a level of suspicion and

218. http://www.abc.net.au/news/2011-03-29/bimberi-whistleblower-fears-death-in-custody/2638274

219. Australian Education Union-ACT Branch, *Submission to the Bimberi Youth Justice Centre Review*, April 2011, p.1

220. ibid., p.6

resentment among the students toward teachers whom they labelled "snitches". Unruly, offensive and threatening behaviours and other issues rose sharply. The Government's rationale for the change was to create a sense of "normalcy" in the classrooms. As any relief teacher will confirm, "normal" classroom behaviour is as bad as the behaviour of incarcerated students at their worst. So the Government delivered normalcy which is a major cause of mainstream students failing at the most basic of literacy and numeric skills. The Union argued that:

> It is disingenuous to suggest that the removal of the youth workers from classrooms is a positive step since teachers report a significant decline in students accessing an educational program. The change resulted in custodial officers/youth workers becoming purely custodial officers. Their role became much more adversarial than supportive as they were only called on to run interference in threatening situations. The combined roles of the teachers and the custodial officers was reduced to one of control and punishment and moved away from a rehabilitative direction.[221]

The Human Rights Commission's report raised other disturbing issues. Force and restraints were used for minor breaches and the Use of Force Policy was apparently not consistently applied and records were not properly kept in accordance with legal requirements. The report stated that:

> The Commission has similar concerns in relation to the use of segregation, in that records were not being kept appropriately, and the review process is not sufficiently transparent and rigorous. It appears that young people on segregation were often denied access to full educational programs, contrary to policies. Bimberi has developed the practice of locking young people in their cabins for "time out" if they are noncompliant, without authority under policies and procedures. Also there was inadequate recording of reasons for locking down units for 'operational reasons', for example staff shortages.[222]

Other issues the Commission identified were that the children did not participate in decision making, they were not given information concerning their rights and obligations, phone calls were limited as a form of discipline, the free phone calls system to scrutiny agencies was not operating properly, there were no general visiting legal services and the children didn't have enough warm clothes. [223] Children who have to be incarcerated deserve better conditions that those which caused them to go off the rails.

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221. ibid.

222. ACT Human Rights Commission, *The ACT Youth Justice System 2011: A Report to the ACT Legislative Assembly,* p.16

223. ibid.

Whistle blowers — Debbie Scattergood

Debbie Scattergood worked in Territory and Municipal Services (TAMS). In the course of her employment she became aware of internal documents which revealed contractual anomalies. The contractor had been allowed to bill the Government for extra work which had already been completed as opposed to the correct way of getting departmental approval first. Basically it was a rort. In late 2007, she exposed contractual anomalies amounting to $16 million for mowing and garden maintenance in the Woden-Weston area. For that price who wouldn't buy a lawn mower and have a go? As a result of her disclosures, she suffered discrimination at work for four years. Then her department tried to restructure her out of a job and she was the subject of a biased report in an attempt to cover up departmental wrongdoings. Because of this, Scattergood suffered reactive depression and financial distress whilst trying to defend her reputation. She had to sell her home to meet her ongoing legal costs.

There were investigations into the allegations. She was vindicated by an external audit which found a significant number of the contractor's claims were not priced in accordance with the contract's schedule of rates. The investigations also included two written reports by Henry Price, a draft report and supplementary report which was about Scattergood personally. The first report said Scattergood was viewed as a "competent and hard-working middle manager". It also said Scattergood was told by TAMS executives she was targeting a particular employee, however, the report found it was more accurate to say "she was being discredited and maligned for having legitimately raised a genuine concern". An TAMS investigation in late 2008 exonerated one of the relevant employees of harassment against Scattergood. But a later analysis later found it was "patently unsatisfactory" and it was likely biased against Scattergood. The Price report said one disclosure about the conflict of interest had been inadequately researched by the department or "possibly even covered up". The report also noted that any discrimination she experienced was inadvertent but tangible. In addition, the department did not take her diagnosed depression into account.

Workmates who reportedly discriminated against her "unintentionally" were not punished under the *Public Interest Disclosure Act* because of an apparent loophole in the law. She eventually received a letter of apology from TAMS Chief Executive Gary Byles. He said: "I regret that systems and individuals within TAMS failed to properly recognise and support you and for that I am sorry". He said there was the potential for staff to be disciplined in accordance with the *Public Sector Management Act*. While the letter noted the discrimination she suffered was either unintentional or because

of "misplaced efforts to repair the deteriorating situation," it also said this did not excuse "inaccurate, unjustified decision making or the failure of individuals to fulfil their obligations as public servants". However, she was threatened by the Government Solicitor that if she didn't stop the public release of any more information about her case then she would be sued for defamation. Government lawyers claimed that they were trying to protect the identity of former and present TAMS workers potentially implicated in the reports.[224]

Scattergood was thoroughly vindicated in the TAMS strategic budget review of 2009. However, Alistair Coe, MLA, complained to the Assembly that:

> Getting this document out of the Government was a real effort. It took over a year of Government resistance. It took a year of questioning. It took a considerable amount of effort from the opposition to get this document to be public. ... It is pretty interesting that they should have a document which calls on the Government to be more transparent and they will not even table it. They would not even table a document which talks about them becoming more transparent and how they are not.

The key findings of the review was a lack of TAMS' transparency in financial dealings. It stated that the department needed to strengthen its financial management and organisational performance frameworks in order to demonstrate to the Government what additional resources are required, and what would happen if these are not provided. The review explained that in a competitive environment for funding, the Government is not likely to provide additional funding for TAMS "unless it has confidence that this money will be expended transparently, consistently with its priorities and achieve value for money". The review enumerated future goals as:

> Greater transparency, and understanding from an organisational wide perspective, of financial performance, accountability for performance and accurate costing of service delivery ... Once an accurate and transparent understanding of corporate overhead usage is obtained, the Department will be able to make informed decision.

Coe stated: "This is a scathing report and it is understandable that the Government did not want to release it ... Fortunately, through the opposition's pressure, it was finally released".[225] Hopefully Scattergood was vindicated.

Stanhope answered Coe's criticism in a generic style which has become standard procedure when the Government is on the defensive. In this particular openness and accountability debate he opened by proclaiming that:

224. http://www.canberratimes.com.au/act-news/whistleblower-threatened-20110901-1wqx5.html, 1 September 2011

225. Legislative Assembly for the ACT: 2010 Week 4 *Hansard* (25 March) p.1562

> Openness and accountability in Government are the foundations of trust and respect and perhaps in no parliament in the country is openness so pronounced and accountability so great as in this parliament, with its unique nature of parliament where minority Government is the rule rather than the exception and where we live in such intimate contact with the community we serve.

Then he extolled the Government's most recent efforts to ensure accountability and transparency by touting the new arrangements with the Greens. He mentioned forty-four commitments on parliamentary reform agreed to on 31 October 2008. He claimed that "the implementation of these parliamentary reforms contributes to a more open, honest and accountable Government".[226] Moving right along, he instructed the opposition on how the Westminster system worked and accused the Liberals of playing fast and loose with the conventions. He told the Assembly that in 2008 his department received $250,000 to: "strengthen the Government's focus on accountability and performance,"[227] whatever that means. It just doesn't occur to members of the Executive that if they improved their attitudes, most of the accountability measures that cost the Government and the community buckets of money could be eliminated. He did not even mention the appalling TAMS report which was one of the main reasons for the debate. To put Stanhope's strategy in a nutshell, tout achievements, go global, blame others, sidestep the issues with smoke and mirrors strategies.

Whistle blowers — bullying at the Canberra Hospital

Complaints about bullying at the Canberra Hospital Obstetrics Department had been around for some years before the Assembly debates on the issue in 2010. Everybody knew about it. There had been stories in the media. Obstetricians and other staff had left in significant numbers. The situation had become dire enough to stir the slumbrous Assembly into having a debate, conducting enquiries and promising accountability. But it was to be more of the same. The way the Government treated the Hospital complainants had all the hallmarks of its cruelty, collusion and cover up. Except in this case, the publicity, the possible fallout in health effects and the sheer numbers of people complaining and voting with their feet caused the Government to react in an effort to redress its appalling track record in dealing with the bullying issue. But the Government chose a strategy to keep a lid on matters so that its and the Minister's reputation were unsullied.

Over fifteen months 2009-2010, nine doctors, including four registrars, left

226. ibid., p.1565
227. ibid., p.1568

the obstetrics unit. By leaving, the registrars were walking away from receiving their qualifications which was a career ending move. Some of the staff's comments were that "they were victimised and ruined by this toxic work environment". The first responses which came from the Health Minister, Katy Gallagher, and the Acting Chief Executive of ACT Health, Peggy Brown, were to deny that complaints had been made,[228] which was a typical way of scuttling the issues. Jeremy Hanson MLA stated:

> I am willing to believe that she [Brown] did not know what was going on, that she had been misled either intentionally or inadvertently. I still assert she should have known. But you have got to remember that it is Peggy Brown who has made the decision not to release this information ... You have got the chief executive saying no complaints have been made, that they left for personal reasons, when it has been demonstrated not to be the truth. In fact, we know it is not because the Clinical Review said: "There is evidence of systemic reticence to address staff performance issues in the Maternity Unit at the Canberra Hospital, particularly issues of inappropriate behaviour by certain medical staff". ... The people who are making the decision not to release information may be those who have the most to lose from the release of that information.[229]

Canberra Hospital's employee Dr Elizabeth Gallagher said she was informed that a verbal complaint was not a formal complaint.[230] When Brown talked to ABC Online she stated that the department had not received any formal complaints. She said: "We have an open approach and if there are concerns we clearly want to address them but we can't address them in the absence of information about what the concerns are".[231] Given that there was no written record of complaints, she was able to deny that there had been any. This was taking semantics to the extreme.

Hanson stated that there was "a deliberate strategy not to put anything on paper".[232] He quoted Dr Andrew Foote who said "I've spoken to a number of people at the hospital and there is a real dread, and fear and sense of helplessness ... It sends the message, what's the point in complaining about bullying because nothing will get done".[233] When the Health Minister and the Acting Chief Executive of ACT Health finally realised that the complaints were going public, there was no alternative but to acknowledge them. Then the tactics changed.

228. ibid., 2010 Week 14 *Hansard* (8 December), p.5913
229. ibid., p.5914
230. ibid., 2010 Week 2 *Hansard* (24 February), p.625
231. ibid., p.626
232. ibid., 2010 Week 2 Hansard (24 February), p.628
233. ibid., 2010 Week 14 *Hansard* (8 December) p.5917

Gallagher dismissed the complaints as "doctor politics" and "mud slinging" and that there had been a ten year war in the Obstetrics Unit. The attack on the complainants intensified. Gallagher and Stanhope tried to intimidate the doctors. Stanhope stated " ... it probably would be reasonable in this context for the external expert reviewer to also perhaps do an audit of all complaints to the medical boards current and say over the past ten years that involve obstetricians".[234]

Jeremy Hanson, MLA, indignantly declared:

> What a disgraceful thing to do — to try and dig up dirt, to have a witch hunt on these doctors who have been bullied, who have resigned, who have bravely come forward ... That is why the AMA and the National Royal College of Obstetricians describe this as a witch hunt, as bullying and as a thinly veiled threat.[235]

The ACT Liberals were calling for an enquiry under the *Enquiries Act*. Hanson stated that "We wanted to make sure this was not buried, that we found out what was going on, that we dealt with the cultural aspects and that we allowed witnesses to come forward". According to Hanson, the Labor Party opposed this on the grounds that:

> Katy Gallagher decided that secrecy and cover-up was the more important aspect of this. That is why she set it up under the Public Interest Disclosure Act. She is trying to pretend that she has got nothing to do with it now, that it is at arm's length: [she said] "I can't be briefed on it. I can't be told what's in the report". Well she set it up so that she could not ... What is in that report that she knew would be in that report that the minister wants to hide? ... you said in *Hansard* "At the end of it that further information will be made public". Where is that information? It has not been made public.[236]

An examination of the *Public Interest Disclosure Act* (PID Act) applicable at the time of the debates in 2010 reveals that Gallagher may have been right. Firstly the definition of the "proper authority" to receive a disclosure did not include Assembly Ministers. Secondly, the confidentiality provisions did not authorise Ministers under the Act to receive information, but they might have been able to under another Territory act, though this was not clarified.[237] The Act was updated in 2013 which allowed Ministers to be the "proper authority" to receive complaints. Another section on disclosure to third parties stipulates that

234. ibid., p.5915
235. ibid., p.5915
236. ibid., p.5916
237. *Public Interest Disclosure Act* 1994 A1994-108, Republication No 5 Effective: 13 April 2004 – 31 January 2013, Confidentially section 33, p.22

if a complainant has not received satisfaction within a certain time, he or she can make a disclosure to the Assembly or to a reporter.[238]

Whilst Gallagher may have been legally correct in her interpretation that she was not authorised to receive disclosures by the PID Act current at that time, how can the parliamentary draftsman write such a law that absolves the Minister from accountability in such an important process as public interest disclosures? This is about allegations of public sector wrong-doing which surely would be at the heart of accountability in a democracy. We believe that these things happen in third-world countries, but not here. Did Gallagher use a lapse in the legislation to avoid taking ministerial responsibility in this case? She was not elected to govern at an "arm's length".

During the debate, she accused Hanson of wanting " ... to get involved and find out who did what to whom, when, how and what is the punishment for that?" rather than being concerned about the issues. He denied it several times. She adopted the moral high ground and he was put on the defensive.[239] However, without the names and the specific details, everybody is under suspicion. Anyone guilty of "inappropriate behaviour" can get away with it because nobody takes effective action. The victims are usually powerless and their credibility is questioned, whereas perpetrators who are in positions of power are given the benefit of any doubt. If the perpetrator was the Hospital's handyman and not an important obstetrician, he or she would have ended up being named, shamed, sacked and jailed. It did not help the situation that doctors are in chronic short supply and maybe the minister decided that a bad doctor was better than none at all.

Gallagher hammered the point that the opposition was accusing the Government of a cover up.[240] Again, this is an attempt to control the high ground. Hanson argued:

> The minister says, "It is all in my speech."That is right; it is all in your speech. But where does it say that you cannot release the recommendations, minister? Where does it say that you cannot release the findings? No-one has said, "We want individual findings ticked off against individuals so that there can be a witch-hunt". That is your supposition. That is the straw man that you create—that Mr Hanson is after individuals. No, he is not. He is after the findings so that we can know that you have done your job, to ensure that your department is functioning perfectly.[241]

238. *Public Interest Disclosure Act* 2012 A2012-43 Republication No 1 Effective: 1 February 2013 section 27, p.21

239. op. cit., 2010 Week 14 *Hansard* (8 December) p.5921

240. ibid., p.5920

241. ibid., p.5933

However, this saga has all the hallmarks of a very clever cover-up. There had been the routine of delay, denials, belittling, blaming and threatening the complainants, sidestepping the issues, failing to answer specific questions by going global, all in an effort to get rid of the problem. Finally, and when the media became involved, the Minister and the Canberra Hospital executive reluctantly addressed matters but not without a struggle of sorts.

The PID Act is a double edged sword. It does protect whistle blowers, but it also protects the perpetrators of wrongs which are most likely unlawful and should be aired in a criminal court. Gallagher stated:

> The public interest disclosure process was as a result of advice from the Government Solicitor and feedback from others who wanted to participate in the review. It was not something I chose, Mr Hanson, because I have no role in this. At that time it was agreed across a broad range of people that that was the best way forward.[242]

The fact that the Government Solicitor advised the minister to use this, rather than a more open enquiry process, allowed the Government the opportunity to cover the matter up. The Government claimed that the public interest disclosure process would protect the victims. But the non-disclosure of the perpetrators' names means that it's likely that they will continue their activities but with care not to get caught the next time. It should also be remembered that the obstetricians had taken their complaints to the media through Dr Foote's representation and many of the facts were already in the public domain. If they were prepared to go public, then any further exposure, such as the names of all the parties and the nature of the issues would only help their cause, not hinder it, which is what the Government did by resorting to secrecy.

The fact that Gallagher claimed that she had no part in choosing the enquiry process and that she would not be privy to the results is unbelievable. As the minister she would have had the choice of how to deal with, and remedy, the complaints. After all this was her job as the Minister of Health. Hanson commented: "The minister is trying to pretend that she does not have any responsibility here, that is a public servant doing this, but the minister is accountable".[243] The Minister had failed to take responsibility or appropriate action soon enough, so she was derelict in her duty. She managed to wriggle her way out of this by deflecting the complaint elsewhere and by using the PID Act to her political advantage. Given the governance principle that the role of the Parliament is to set policy and the role of the public sector is to

242. ibid., 2010 Week 2 *Hansard* (24 February), p.634
243. ibid., 2010 Week 14 *Hansard* (8 December), p.5916

administer it, accountability is not well defined and the lines between policy and administration are kept conveniently blurred so blame and responsibility can be a pass the parcel game.

Gallagher told the Assembly that she would release the conclusions the disclosure enquiry had reached. The information she imparted was:

> Individual meetings have been held with individuals and with staff involved in the disclosures. Dr Peggy Brown conducted these meetings in the week before she went on sick leave. Letters have been provided to individuals who have been involved in the disclosures. In addition, feedback has been provided to identified individuals in relation to the findings of the investigation; further action that is required, as deemed appropriate, taking into account the investigation; providing training for managers and staff in relation to adult learning principles, conflict resolution, bullying and harassment and complaints procedures; a reviewing of a range of internal processes, including meeting procedures and complaints resolution procedures; reviewing matters relating to staffing, for example, the roles and position descriptions and staffing levels.[244]

If nothing, Gallagher is the mistress of motherhood statements.

Brendan Smyth MLA was disappointed. He took her to task with:

> There is nothing in what you have said that reveals whether or not the inquiry was effective, whether it was efficient, whether it actually addresses the questions that were raised, what outcomes will be taken, how can we have an assurance that it will never happen again? We are no more knowledgeable at the end of this debate than we were at the start of the debate, because you simply will not tell us. This is a snow job.[245]

He observed that there was nothing in the PID Act that would prevent Gallagher from giving more information.[246] Given that the saga started off with the Minister denying that there was a problem, her concluding statement confirmed that there were indeed problems. It is not on record whether the Hospital's initiatives were successful. The issue seems to have disappeared. Whether this reflects the employees' satisfaction that they are in a safe workplace, or whether they have just given up, is not known. But given the long standing nature of the bullying and the trauma suffered by the employees, it's most likely that they gave up which would suit the main players, the Hospital executive and the politicians of the Executive.

244. ibid., p.5919
245. ibid., p.5934
246. ibid.

School closures

The 2006-2007 school closures by the Education Minister, Barr, were perhaps the lowest point in the executive/community relationships in the history of the Territory. He proposed to close 39 schools and ended up closing 23. When he announced his grand plan to the Assembly he stated:

> ... renewing our schools is a commitment to provide children and young people in the ACT with a vibrant, responsive and world-class public education system, a system that is second to none, one that celebrates and values diversity, strives to achieve excellence and is accessible to all ... these changes will require the minister, before a decision is made about a proposal to close or amalgamate Government schools, to tell school communities about the proposal and to listen to and consider their views ... the consultation process[will] focus on access to and provision of quality educational opportunities, openness and transparency, effective community engagement leading to sustainable decisions, provision of relevant information in a timely and accessible way, opportunities for feedback, and seeking the views of school boards likely to be affected by the proposals.[247]

Barr saw himself as modernising the education system which was to close small schools and replace them with education factories, churning out the next generation. He did say:

> ... you get the sense that people in the education system are not prepared to look beyond the 1970s model that we have in this city. Well, I have been minister for eight weeks, and I am proposing to look forward to what our system can be, not just next year, but in five years and in 10 years and in 2020.[248]

No doubt he was referring to the school building of that era which could have been updated more cheaply than closing the schools. Also, it took him all of eight weeks to catch up with decades of ACT educational practices which have served Canberra very well until Barr arrived on the scene.

Vicki Dunne, MLA, pointed out that the Education minister was short on educational theories and long on platitudes which emphasised words like "choice" and "diversity", as if you can get that in a factory bent on producing the same old sausages, for those of you who remember Pink Floyd's "The wall". She argued "there has been no attempt to address ... the curriculum issues, the overworked and underpaid teachers and the lack of discipline or the different approaches to discipline, whether it is a matter of uniforms, values or structure".[249] For all Barr's rhetoric about consultation, he failed to do just that.

247. ibid., 2006 Week 6 *Hansard* (7 June), p.1825
248. ibid., p.1826
249. ibid., 2006 Week 13 *Hansard* (13 December). p.4092

The saddest submission about the school closures was put in by the Flynn Public School Parents' and Citizens' Association Inc. to the Standing Committee on Education, Training and Youth Affairs in 2009. It described the effect of the school closure on the children that:

> Parents were forced to find a new school within five working days after the decision to close it was announced, while simultaneously cleaning out community assets from Flynn and while grieving. To make it even more traumatic, Government workers entered the school before it was closed and started packing up desks and other assets around the children without the knowledge or consent of the Principal.[250]

Some of the effects listed were that: children lost their friends and social networks as they were re-enrolled in over 22 schools; they were forced to suddenly come to terms with a new environment and new classmates, as a result loss of confidence, depression and bullying occurred; the parents' transport costs of taking children to school had increased because the children could no longer walk to school; at least $300,000 was removed from the Flynn community which was the result of fund raising over 30 years, the morality of which is questionable; the community lost connections and felt devalued by the Government which refused to support the school for relatively few dollars, whilst spending millions elsewhere; valuable programs were terminated which included Italian, Kids with Courage, Dads "n" Kids, social skills and music programmes and the LOOK? Blue Earth programme; Flynn was well equipped with information technology whereas other schools where the children went did not have these facilities; play groups, before and after school care closed; the resources of the new schools were strained by the influx of students such as the loss of music rooms which were needed as classrooms; the list goes on.[251] Would any of this happen in the private school system? Many children who attend public schools come from cash strapped families. They are easy to victimise as they don't have the resources to fight back. Barr's educational wrecking ball did a lot more damage that he or any Assembly members would ever envision.

The submission related how Barr had visited the school in May 2006 and:

> It is now clear from departmental records that the Minister would have already planned to close schools at that time and Flynn was almost certainly on that list ... The Flynn community believes that the Minister visiting the school as part of the consultation about closing schools, but failing to tell the community of the Board at the time, may constitute a breach of s.20(6) of the Education Act. He should have told

250. Flynn Public School Parents' and Citizens' Association Inc. to the Standing Committee on Education, Training and Youth Affairs — Inquiry into school closures and reform of the ACT education system
251. ibid., p.7-8

> us that he was planning to close the school at least during his visit if not beforehand.[252]

The *Education Act 2004* section 20 (5) is quite specific about the Minister's process of closing and amalgamating schools. Before making such a decision, the minister must take the following steps (a) tell the school community that the minister is considering closing the school and give reasons for the decision; (b) set up an independent committee to assess: educational impacts, economic impacts, environmental impacts and social impacts of amalgamation or closure; (c) based on the results of the report, consult with the school community for at least six months on either closing or amalgamating the school. Section 20 (7) stipulates that consultation with the school community should: (a) focus on provision of quality educational opportunities; (b) be open, equitable, respectful and transparent; (c) involve effective community engagement; and (d) ensure that information is provided in a timely, equitable and accessible manner. According to the Flynn submission most of this was not done. How is it that the Assembly is powerless to insist that minister observe the laws they purport to administer? The Act was meant to prevent the cruel process Flynn Primary School suffered.

Stefaniak argued in the Assembly that:

> Thirty-nine schools were fingered and then there was consultation. If the Government was intent on closing schools it should have gone through an open consultative process. It should have had discussions with schools, assessed, used proper data and taken the school communities into its confidence before it made any decisions. That is a way of actually taking people with you. Yes, there will always be some disappointed people, but that would have been a much fairer way.[253]

Then he said "We put to you great criteria of how to go about this process, which you have rejected several times this year ... You have arrogantly closed these schools".[254] Why didn't Stefaniak remind Barr that he had obligations to comply with the process as stipulated in the *Education Act*? If the Assembly cannot ensure that ministers observe the legislation, who else can? It seems that Barr treated the schools closures as a "job lot" whereas the legislative processes required for closure would be seen as being long, involved, tedious and which might not get the result the Minister wanted, which was to close the schools.

The submissions from Flynn, Hall and ACT Council of Social Services all criticised the process Barr had undertaken. The Flynn submission identified that he had made a decision to close schools before going through the consultation process and the six months of consideration before a final decision could be

252. ibid., p.13
253. op. cit., 2006 Week 13 *Hansard* (13 December)p. 4098-4099
254. ibid., p.4101

made. Through manipulating the process and acting in a dictatorial manner, Barr managed to put the schools on the back foot, not the Government. He took short cuts which disadvantaged the already disadvantaged. Since then, any information on school closures had been difficult to get. There was no trace of the document *Towards 2020*. The only other information that could be located was the three submissions mentioned. It seems that the Government would like to obliterate all traces of this low point in ACT education.

The 2003 bush fire coronial inquest

The reports and the debates about the fires highlights that the theory and the practice of accountability are poles apart. The public servants and politicians responsible for the community's safety were intent on avoiding blame for the worst disaster that had ever hit Canberra, rather than getting to the bottom of what happened. The dysfunctional nature of Emergency Services Bureau was identified in 2002 by the ACT Auditor General, Mr Jo Benton. There were various reports on the risk bush fire posed to the capital which were written decades before 2003. But nothing was done.

After the 2003 fires, bureaucratic and ministerial ducking and weaving in response reached new lows. A large part of the ACT was torched and Magistrate Maria Doogan's coronial inquest was bent on identifying the origins and causes of the disaster. The fallout was not only ash and smoke. The coronial enquiry bought into focus the separation of powers and ministerial and public sector accountability. Stanhope, in his capacities as the Attorney General and as a witness, joined nine public servants in an appeal in the Supreme Court against Doogan. Their grounds were that she had taken the enquiry beyond its jurisdiction and that she was biased, both allegations being very speculative. The appeal did not stand up to judicial scrutiny and was dismissed. Stanhope's involvement, for whatever the reasons given him at the time by his lawyers, was extremely ill advised. It was beside the point whether he was either wrong or right, but his action in joining the appeal against Doogan sent a message to Canberrans that their recovery was not high on his list of priorities.

The main question everybody asked Stanhope was "Why didn't you warn us?" Doogan found the answer and it was not pretty. The Australian attitude to bush fires is relevant to what happened to Canberra. Dr Foskey participated in the Assembly debates following the release of the Coroner's findings. She cited nine earlier reports about bush fire control in Canberra. These included:

> I have to ask why this report [McBeth Report] was hidden by the Follett Government, which commissioned it, and can only assume that the Government could not bear to have the criticisms in it aired publicly. ... I question the wisdom of that. Did people

> pay for the earlier ALP Government's attempt to keep citizens in the dark regarding the ACT's fire risk potential with their homes and their lives? I think it is unlikely that successive Governments would have commissioned so many reviews if there had not been deep concerns about the services charged with the protection of Canberra, its natural and built environment and its people. Problems identified include: cultural differences between the services—career and volunteer firefighters and between urban and rural firefighters; lack of a shared ethos; different administrative and reporting lines; and uncertainty about geographical and operational boundaries.[255]

These reports were consigned to the dust bin of history. Each successive government has had to reinvent solutions to the problem, but according to the shambles of 2003, nothing had been done for a long time. Canberra is touted as the "bush capital" but the capital bush fire in 2003 revealed the dark side of this hype.

In the Assembly debate following Stanhope's foray into litigation, Steve Pratt, MLA, cited the Auditor General's report into the Emergency Services Bureau written in 2002 which was released during 2003. He stated:

> I refer you to Joe Benton's May 2003 audit report, which was presented in this place and which, very sadly, the Chief Minister decried at that time. He absolutely talked down Joe Benton's audit report. Of course, Joe Benton has now been well and truly vindicated in terms of what McLeod was to find and what Doogan has finally found about what was then a "dysfunctional Emergency Services Bureau".[256]

Stanhope was certainly informed of weaknesses in the Emergency Services Bureau before the 2003 fires. Why didn't he take urgent action then, given that the 2001 bush fire had fired a warning shot over the Territory? Doogan reported that in the lead up to 18 January 2003, Stanhope had failed to ask the Emergency Services executive Lucas Smith whether the fires would impact on the suburbs. Stanhope's explanation was:

> I had a certain mindset which had developed as a result of the briefing that I received on the Monday, conversations I had on the Wednesday, and the nature and tone of the briefing that Cabinet was receiving that this was not at that time a real live possibility, that it was not a possibility of any high expectation ... I had not received advice that led me to believe that this fire would destroy property within the suburbs of Canberra.[257]

Not only would his "mindset" have developed because the Emergency Service executives failed to communicate the urgency of the developing situation, but his attitude is typical of many urban Australians. People who live in cities are to a large extent insulated from the full force of bush fire events. We think we are

255. ibid., 2007 Week 1 *Hansard* (28 February), p.42
256. ibid., 2007 Week 3 *Hansard* (14 March), p. 496..
257. Maria Doogan, *The Canberra firestorm*, volume 1, p.238

immune to the worst that nature can offer. But the executives Stanhope relied on should have known better. They had the knowledge and the experience but for inexplicable reasons they were complacent. Those who forget history are bound to repeat it. They should have trawled the libraries for all the reports which identified Canberra as a bush fire risk. If they had, and had taken the appropriate action in time, many of us would have been spared.

Some of the Coroner's conclusions about the behaviour of the Emergency Services Bureau personnel were:

> • By the evening of 17 January 2003 the senior personnel of the Emergency Services Bureau — Messrs Castle, Lucas-Smith, McRae and Graham — were in possession of information confirming what they already believed; namely, the fires posed a serious risk to the edge of Canberra, and the impact was likely to occur within the following 24 hours.
> • The same senior personnel of the Emergency Services Bureau did not consider it necessary to issue warnings to those people in the urban area who were in the direct path of the fires and, consequently, no warnings were issued.
> • The media update issued at 8.50pm on 17 January 2003 was inadequate and misleading and did not reflect the situation that pertained and was known to senior personnel at the Emergency Services Bureau at that time.
> • By the evening of 17 January 2003 the Emergency Services Bureau had no plans and no strategies for dealing with the fires the following day, when it had been predicted the fires would enter the ACT pine plantations and advance towards the urban edge (other than to leave it to the Fire Brigade personnel).
> • Mr McRae failed to heed the evidence presented to him about the predicted fire spread and so did not activate his so-called trigger to cause warnings to be issued to the residents of Canberra.[258]

She commented "They knew".[259] The personnel about whom she had made adverse comments had their right of reply which was published in the report. They were Jon Stanhope, Mike Castle, Peter Lucas-Smith, Tony Graham and Rick McRae.[260] Their replies were extremely detailed with the main theme being their corrections of Doogan's evidence and conclusions. They may have been right or she may have been right. It all depends on points of view and the interpretation of details. But nevertheless people died.

The New South Wales fire authorities did not put out the McIntyre Hut fire before it crossed the border. The Emergency Services Bureau had all the organisational problems which had been identified, so there was little they could effectively do. There was too much fire and too few of them. Further, they were

258. ibid., volume II, p.107
259. ibid., p.160
260. ibid., Appendix A

deluded into the belief that they would be able to stop the fire at the eaten out grasslands and that the ACT Fire Brigade could handle any fire that reached the suburbs. But the extremely wide fire front entered Canberra through corridors of dense vegetation such as the pine forests. They should have known that could happen, given the damaging forest fire of the previous year which came very close to the city. Doogan meticulously documented what she called the "corporate loss of memory" which occurred over the ten days before the fires. Many of their responses to her questions were "I can't recall"and "I don't remember". She observed that:

> For example, the then head of the Department of Justice and Community Safety, Mr Tim Keady, offered such a reply on 85 occasions; the person responsible for public relations, Ms Marika Harvey, on 95 occasions; the ESB person responsible for planning, Mr Rick McRae, on 139 occasions; the Chief Fire Control Officer, Mr Peter Lucas-Smith, on 196 occasions; the ESB Executive Director, Mr Mike Castle, on 315 occasions; and the ESB Operations Manager, Mr Tony Graham, on 358 occasions.[261]

This loss of memory is very concerning and suggests a deceitful purpose. Other professionals have to comply with accountability measures. When they stuff up, heads will usually roll. But it seems that public sector employees are a protected species because they come under the benign umbrella of the relevant minister who will admit no wrong, take no action and blame nobody because problems in her or his portfolio do not exist.

Doogan quoted Sir Peter Lawler who was an expert in public administration and the Westminster system. He had a personal interest in the enquiry as his house in Duffy was destroyed. He stated:

> ... simply to wave the issue away by saying that those involved did their best and, without proper analysis of the failure, rush to set up a new emergency services agency risks perpetuating failure. If responsible officers in the relevant departments and agencies of the ACT Government did their best, then in this case their level of competence proved unequal to the demands of their office ... Their integrity and honesty are not necessarily in question. Responsibility might properly fall on those who appointed them or those within administration or governance responsible for their supervision, direction and support.[262]

The problem with making structural changes to solve a problem is that usually the problem is inherent to the attitudes of the employees. Unless you bring in a new workforce, the same old employees will make the same old mistakes and nothing is learned. Retribution for wrongs is the only way to ensure that things

261. ibid., p.51
262. ibid., p.153

are done correctly next time. The public servants' appeal against Doogan was a likely reflection of their fear of blame and retribution. Predictably, she did blame them, but there were no apparent consequences. The only suffering was of the people, palpable in every shopping centre, on the streets and everywhere else in the city where they gathered together on that afternoon of 18 January 2003, trying to come to terms with the realisation that they were no longer immune to the savage beast of bush fire. Those of us who had friends and family damaged and destroyed by the fire will not forgive the Government's pre-fire neglect and the post-fire paltry assistance, though the people of Canberra gave generously with money and emotional support.

This hurt was bad enough, but Stanhope's betrayal of their trust shortly after his remarkable "blame me" speech and his dip in the dam to help save the life of the pilot of the crashed helicopter will be long remembered in spite of anything else he has done to benefit the city. Stanhope's responses to Doogan's adverse comments about him were included in her report. In respect to the issue of blame he argued:

> I acknowledged that I said words to the effect, "*if you want to blame somebody, blame me*". ... The reason I made that statement was that "*... in the aftermath of the fire, there were significant levels of understandable anger within some sections of the ACT community*". My statement was: "*... a response to what I regarded as completely unjustifiable slurs on the ACT fire fighting service and Emergency Services Bureau in the main by journalists and the media ...*" My intention was "*... to express my support for emergency services personnel and for fire fighters, and I responded perhaps with some heat and at the time with some frustration and even anger to what I regarded as continuing slurs on my officials and attacks on my town. And I stand up for my town and I stand up for my officials*".[263]

Stanhope was perhaps not aware that his loyalties in this instance were split between his town and his officials. Under the circumstances he could not be loyal to both at once. His officials figuratively stood by while Canberra burned, at least the most important of them did. The firefighters on the ground tried hard to douse the flames. But it's most likely that they were underfunded, under resourced, under organised and under staffed and overwhelmed. Stanhope's quote reveals a minister who will stand up for his or her employees regardless of the nature of the wrongs committed and the mistakes made. It happens all the time. The minister and his employees are a united front, ready to do battle against anyone who questions their credibility.

263. ibid., p.A10

Revolve — what goes around returns with interest

Waste is big business. The economics of the industry and the risks of corruption were spelt out in a paper published in 2002 titled "Taking the whiff out of waste".[264] Independent Commission Against Corruption (ICAC) identified the following risk factors: Government regulatory activity, allocation of scarce resources, contracting and cash handling. ICAC noted that allegations of corruption included: favouritism when tendering or contracting for waste management services, misuse or theft of public resources, failure to make or keep proper records, fraudulently altering records (such as the tare weight for trucks entering and leaving tip sites) and, bribery and collusion between interested parties. Every jurisdiction that handles waste is at risk of these inherent corrupt practices. The ACT is no different. In fact the story of Revolve is the canary whistling in a dark and dangerous coal mine.

In 2004 the ACT Auditor General, Tu Pham, put out a *Performance Audit Report* on data reliability in respect to the ACT "No Waste By 2010" strategy. The Auditor's findings were damming and concurrent in many aspects with the ICAC findings. The Auditor identified the main issue where corrupt practices were possible and likely. Tu Pham stated:

> The weight assessment system at the waste depot's weighbridge, although computerised, relied on the honesty of the weighbridge operators. The weight assessment system permitted weighbridge operators to override its calculation of the weight of waste being delivered by a vehicle and to record instead a lighter weight. [It] also permitted the weighbridge operator to omit to record any charge in respect to vehicles passing over the waste depot's weighbridge. This meant that commercial operators could pass into the waste depot and dump the waste they were carrying free of charge.[265]

The fees charged at the weighbridge go to the Government. Consequently, whoever has control of the data has unbridled access to Government coffers.

All of these facts were know to the Government before Department of Urban Services (DUS) allowed Theiss to gain control of the waste industry.

The story of Revolve is a sorry saga of the Government's mismanaging the procurement process and its blatant favouritism of one contractor over others. In 1998, a Commonwealth job-creation project gave a group of unemployed people in the ACT the opportunity to work recovering what could be re-used

264. *Taking the whiff out of waste, identifying the potential corruption risks in the waste sector*, an ICAC discussion paper, April 2002

265. *Performance Audit Report on data reliability in respect to the ACT "No Waste By 2010" Strategy*, p25

from the Mugga Lane rubbish tip and on selling these to the general public. The organisation called Revolve was consequently established. Its success inspired others in Australia, the US, UK and beyond to set up their own community-based recycling enterprises. In 1995 Revolve had 34 employees many of them unemployed, and it turned over approximately $1.25 million per annum.[266] It previously saved around 7,000 tons of waste from going to landfill every year and actively supported local charities and community groups.[267]

Then DUS did something quite unprecedented to Revolve on or about 20 November 2002. At that time Theiss, as the administrator and operator of the landfill site, was a service provider to the Government. Revolve was an independent business subcontracting under Theiss. Gerry Gillespie, the Director of Revolve, claimed that Revolve was forced by the then manager of ACT NOWaste, Leigh Palmer, to sign an agreement with Theiss. It stipulated that Revolve still continued to pay rent to the Government, but in addition that Revolve supply two staff to the transfer station to staff the Theiss operation. Gillespie stated:

> This put Revolve at an extreme disadvantage. The rent, in effect, went up from a small amount of money per year of around $7000 to $90,000 in one go. That action, I would submit, under section 51AA of the Trade Practices Act, forced Revolve into an agreement that it did not want to enter ... It was, in fact, unconscionable conduct.[268]

The next questionable act was the way DUS contracted out the weighbridge services in 2006. According to Gillespie, Revolve put in a tender to run the weigh station. He stated:

> Not only did Revolve not receive consideration for that contract; it was not consulted during the tendering process, despite the fact that it was the only company that submitted a conforming tender, and it was not consulted in any way by Procurement or ACT NOWaste about the nature of that contract. The contract was then given to Theiss on the basis ... that no suitable contracts were submitted. This is simply and clearly not true ... The contract for the weighbridge was then written into ... the landfill contract. To me, this is unlawful, because it is outside the procurement process ...I can understand ... that under the procurement act the minister has the right to make appointments without due consideration if he thinks there is a suitable case. [But] Revolve had put forward a legal conforming tender.[269]

266. Legislative Assembly, Standing Committee on Public Accounts, *Transcript of Evidence*, 4 March 2010, p43
267. *The Guardian* 25 April, 2007
268. *Transcript of Evidence*, op.cit. p.38
269. *Transcript of Evidence*, op.cit. p.39

In October 2006 DUS put the recycling operation up for tender. Revolve and Aussie Junk responded. The question is: Why was the Revolve business put out to tender? How can the Government justify this? Gillespie explained that:

> Revolve has always been a tenant on the landfill. It never was and never has been a service provider. There was no need ever to put that business out to tender because the business [Revolve] was not providing a service under the normal constraints of the act ... the ACT Government did not have the right to call a tender for Revolve's business. It did have the right ... of a landlord to put its site up for release at the end of a lease.[270]

If the Government had put out other similar organisations such as the charity op shops out to tender, there would be an outcry. In fact when Revolve was squeezed out of the recycle business 6000 Canberrans signed a petition.[271] When tenders were called for, the Government was tendering out the business and not the site. In fact, Revolve had an agreement with Theiss since 28 November 2002 to operate the business on the Mugga site.[272] Further, Revolve's stock was not waste but were donations from the public directly to Revolve, bypassing the tip. As such the goods and chattels did not belong to the Government as does waste which is left on nature strips to be picked up. The Government gave the business, which was not its to give, to Aussie Junk which was owned by a wealthy Gold Coast entrepreneur. He was interested in the money, not what was good for the community. A short time after commencing operations, Aussie Junk went out of business. When it failed, DUS gave the business to Theiss.[273] In so doing the Government bypassed procurement law. The correct action would be to give the business back to Revolve as the default tenderer or to call new tenders.

Over the years Theiss has developed a stranglehold over all things rubbish in the Territory. The company operates in Mitchell and Hume the landfills, the weighbridges, the Transfer Stations and the Resource Recovery Centres. As Gillespie observed in Revolve's submission to the Committee on Public Accounts:

> The same operator is paid three times to handle the same product and the more they handle the more they are paid ... the difference between Theiss putting 100,000 [tons] of waste to landfill and 200,000 [tons] of waste to landfill was of the order of $300,000 per year. No wonder they wanted to get rid of Revolve — we are the only prospect of improved recycling figures for the ACT in the forseeable future — any

270. ibid., p.38
271. ibid., p.46
272. www.revolveact.org.au/index.php
273. Revolve, *Submission to the Inquiry into ACT Government Procurement*, 25 August 2009, Legislative Assembly, Standing Committee on Public Accounts

> material recycled is material which neither goes over the weighbridge or to landfill. This cost[s] Theiss and Treasury income ... No business in this industry can claim objectivity when they are paid more to landfill than they are to recycle. How many parts of one industry can one company own before alarm bells ring.[274]

In an Assembly debate in 2009, Steve Pratt, MLA, discussed the tonnage of waste which went to landfill. In the seven years from 1994 to 2001 a reduction in the amount of waste going to land fill was in the order of 50,000 tons. In the seven years from 2002 to 2009 the reduction was in the order of 10,000 tons.[275] This coincides with the time that Theiss established its rubbish monopoly. Given that the company is paid for how much waste it put into land fill, is it any wonder that the figures show that the amount going to landfill steadily increased, or rather not decreasing at a comparable, appropriate rate? The Government has predictably responded by making more areas available for waste disposal instead of examining the structure of the industry and removing incentives for companies to fiddle the figures and pocket the profits. So much for the Government's frequently touted "No waste by 2010". Like many slogans, it was empty rhetoric, which is what Government's do so well.

The Executive exposed — accountability to the Legislative Assembly

In 2011, the Government released a paper titled *Strengthening Performance and Accountability: A Framework for the ACT Government*. The paper proposed that performance and accountability structures must be able to respond to the dynamic environment of public administration.[276] The tail is wagging the dog. The public service likes to be seen as dynamic, so short-cuts are taken. Accountability is compromised, so the Government responds to this by changing the structures to keep up with what's happening in the public sector. This was confirmed by the Government's strategic planning objectives in the publication. Matters were listed under two columns: Objectives and Actions. Under the Objectives column, the Government has listed "Strengthen transparency and accountability for Government Priorities". The actions column has no entry for this priority.[277] The Government is not setting the accountability agenda but responds to the latest public service failure to be open or accountable.

In 2013 in the Assembly, Zed Seselja, MLA, initiated a debate on

274. ibid.
275. op. cit., 2008 Week 9 *Hansard* (20 August), p.3381-3382
276. ACT Government, *Strengthening Performance and Accountability: A Framework for the ACT Government,* Policy Division, ACT Chief Minister's Department. p.1
277. ibid., p.11

Government openness and accountability. He raised several examples where the Government had been less than honest. They were: the salary paid to the ACT Electricity and Water chief executive was substantially higher than was published in its annual report; the Government refused a debate with the opposition over the 2013 budget in an open forum on radio 666; the Government involvement in Canberra Hospital's doctored Emergency Department figures; the Government's failure to investigate and take action over bullying of Obstetric doctors at the Canberra Hospital.[278]

The Government replied to these accusation by touting its accountability credentials in market places stalls, on line initiatives such as Twitter cabinets, "time to talk", the Data ACT portal, release of approved Cabinet documents and the outcome of Cabinet deliberations. Gallagher claimed:

> As a Government we are taking a broad approach to enhance the openness of the way we govern, encompassing transparency, participation and collaboration. As Chief Minister I believe that as a first principle information available to the Government should be made available for use by the community. While there will always be restrictions here, this is our default position ...[279]

The Minister had been asked specific questions about issues where the Government was vulnerable. Gallagher avoided giving specific answers and she diverted attention from the issue by boasting about the Government's successes. The result was a bunch of motherhood statements which glossed over the awkward questions. Gallagher is a good politician. Good politicians know how to avoid taking responsibility when things get hot, how to use diversion tactics, how to gloss over the details and how to generate spin on the run.

Jeremy Hanson, MLA, summed up the debate with:

> The problem is that when you hide things, when you do something like that, when lies are told and promises are broken, you cannot wash that away, as much as you would like to. I know that you would like to think, "We had an election, so that's all behind us", but the sad reality is that these things do tend to build up and, after a time, when you have a Government that has been around for a long time, these lies, these deceits, these broken promises tend to build up and it is the baggage that starts to weigh down these Governments that have been around for a long time.[280]

Hanson is referring is the death of democracy by a thousand cuts. Maybe it's time we really made sure that Government is "of the people, for the people and by the people". This book is about people the Government persecuted because

278. op. cit., 2013 Week 6 *Hansard* (7 May), p.1648-1663
279. ibid., p.1656
280. ibid., p.1660

our pretend democracy provides fertile ground for tyranny to fester. Maybe it's time we stepped back and came to grips with reality. Democracy is a basket case and if we don't take affirmative action to protect this our national heritage then we are in for a rough ride as the Government, both state and federal, will sell out to or lose out to the multinationals which will be dictating the air we breathe, the water we drink, the food we eat, the clothes we wear and everything else that can possibly be commoditised and contaminated, including our thoughts, our prayers, our ambitions and our very souls. God forbid!

"We rotate tyrants and call it self government."
(unknown)

"In politics, it seems, retreat is honourable if dictated by military considerations and shameful if even suggested for ethical reasons..." (Mary McCarthy, 1912-1989)

Chapter 8
Conclusions

The main questions that arises from complainants who have experienced the Government's cruelty is: do you change the system or do you change the people? It's really unanswerable. Systems can be changed more easily than people. Whether new laws and policies are instituted to address the problems described in this book, nothing will change unless penalties are levied against public servants who deliberately breach them. The classic example is the planning inspectors' continued and unrepentant acts of trespass. Everybody knows that trespass is a crime. The planning legislation's provisions forbids it by stipulating how inspections have to proceed. Yet the inspectors chose to do otherwise and they got away with it, wholesale. The same applied to all the inspectors' breaches of other laws and policies which are mentioned in this book. There have to be penalties. If penalties are levied against members of the public alleged to breached a planning provision, then the same has to apply to those who breach the provisions they administer.

The wish list — changing laws and policies

Where the Government breaches Tribunal or court decisions, contempt of court, or other appropriate provisions should be made easily accessible to complainants and litigants. Laws which allow public servants immunity from prosecution need to be amended to allow such proceedings.

Where the planning authority has the power to issue orders for which penal provisions apply, the investigative procedures should be of a standard exercised by the police. The person subject to the complaint should be presumed innocent and subsequent investigations should be evidence based, not hearsay based. The Australian Federal Police Professional Standards Committee, the Ombudsman and the Human Rights Commission should be empowered to investigate allegations of corrupt investigations before proceedings can be heard in a court or tribunal.

Where the planning laws fail to define and particularise provisions and where decisions are discretion based, relevant legislative instruments need to be generated to minimise bureaucratic discretion and to prevent abuses of power. Where this is not possible, bureaucratic discretion should be open, accountable, documented and supervised by superior officers, the proof of which is made available to the complainant.

Where advice from a related Government agency has been given to the planning authority and a lessee which has been acted on by either, changing

the advice under any circumstances should be prohibited. Further, any advice should be taken to represent the views of the relevant organisation, and not be contradicted by individuals officers with more authority.

Where an unconditional development approval has been issued by the planning authority and the lessee has fully complied, a certificate signifying same should be issued which cannot be challenged anther organisation.

Where a development application is advertised, late objections should not be considered. Further that after the deadline for objections, no information concerning the development application should be issued to any party.

When a lessee is in dispute with the Government, that mediation be compulsory before either party is able to apply to a court or a tribunal for resolution. The mediation needs to be conducted by an independent third party to ensure that none of the parties have
prejudiced the outcome through non-cooperation or withholding relevant information.

The Government's Standing Committee on Justice and Community Safety needs to be more proactive in dealing with complainants' allegations of Government breaches of ACT laws. The Standing Committee's resolution of appointment is:

> To perform a legislative scrutiny role and examine matters related to community and individual rights, consumer rights, courts, police and emergency services, corrections including a prison, governance and industrial relations, administrative law, civil liberties and human rights, censorship, company law, law and order, criminal law, consumer affairs and regulatory services.[281]

One of the aims of this book is to bring the issues raised herein to the notice of the Committee and to members of the Assembly. Hopefully, one day when they recover from their torpor, they will address some of the anomalies in ACT governance.

The planning authority needs to be more circumspect about to whom it delegates coercive powers. It is likely that its compliance section will attract employees who are in it for the power it gives them over perceived lesser mortals. Its compliance officers and investigators were found to be untrained in the laws they administer, that they were capable of bias and malice, that they had little interest in establishing the facts, that they had scant regard for lessees' human rights and that they hid behind the power and authority of the political system. The planning authority needs to be reprimanded for turning these people loose on the Canberra population. It does not matter how innocent or guilty a person

281. http://www.parliament.act.gov.au/in-committees/standing_committees/Justice-and-Community-Safety/jcs/resolution-of-appointment

might be, it is not good enough that the planning authority's officers act against the community interest and harass vulnerable individuals in a personal pursuit of ambition or gratification. This needs to be addressed at the highest level.

The driving force

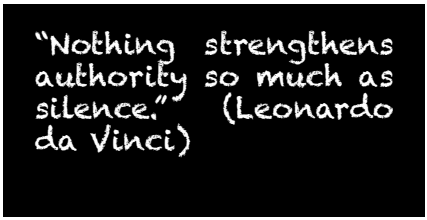
What drives public servants and politicians to act out the behaviours described in this book? In general there seems to be an upsurge of bullying in the workplace and the rise of authoritarianism in politics and public administration, coupled with arbitrary decision making. This is reflected throughout governance everywhere. Behind the scenes, unelected officials and ministers' advisors are seizing power. It's a silent, invisible coup. The bureaucrats and advisors keep elected representatives in power, not the voters. They cover the mistakes politicians make and keep their public image immaculate. There is no mechanism to cull these usurpers whilst they operate in collusion with our elected representatives. Until our politicians address this problem, our hands are tied.

The social climate of capitalist monetary values and corrupt institutions provide the fertile grounds for the erosion of accountability which is evident in most jurisdictions. Capitalism is about profit for power and power for profit. An additional factor in the ACT is the ad-hoc, disjointed, chaotic, opaque and irresponsible corporate and political structures which are identified in this book. These have provided a stamping ground for upwardly mobile opportunists equal to the lawless frontier in spaghetti westerns. Because we are a mini state, everybody knows somebody who has been bullied by public servants.

The Government projects a benign image to the electorate whilst in secret it instils fear into those who would criticise it. There are two layers of reality at work. People tend to believe the Government and blame the victim for her or his victimisation. The attitude is that "you must have done something wrong" to attract such adverse attention. The Government crushes complainants and conceals the cause of their complaint. But at the same time it will boast about its achievements and denies its wrong doing. It progressively defunds the agencies meant to protect the community from executive excesses and disables the instruments of accountability. It breaches and manipulates the law whilst individuals who make a wrong step are punished, sometimes well out of proportion to their alleged crime. It plays favourites instead of treating everyone as equal. And the administrative and political elite enjoy their ill-gotten gains whilst the vulnerable in the community are impoverished, abused and dispossessed. This is Government. This is a travesty.

The victimisation of any one of us by those in positions of power and authority can be easily extended to groups or communities. It's expediential. It's

practiced on a small scale on the most vulnerable and when Governments or big businesses have the opportunity, authoritarian rule becomes a reality. The community's apathy about politics masks a sense of growing helplessness which equates to depression on a population-wide scale. To counter this we have to fight small but think big. Our individual protests have an impact. These days the electronic media is the hotbed of the twenty first century revolution. Get wired, get angry and get going! And while you are doing this remember: "Nil Desperandum Illegitimi Carborundum" which means "Never Let the Bastards Grind You Down".



The author
Caroline Ambrus

1938	Born: Kyogle, NSW
1960s	Commonwealth Public Service employment
1970s	Art School studies and Bachelor of Education, Library Association of Australia Registration Certificate
1980s	Art Teacher/ Librarian, Canberra Schools/ Colleges
1975	International Women's Year grant: History research and bibliography of Australian women artists
1984	"*The Ladies Picture Show*" published by Hale and Iremonger
1980s	Solo shows – 1980 Canberra Theatre Centre; ANU. Arts Centre; 1981 Barry Stern's Gallery; 1983 Arts Council Gallery; 1984 Tilly Devine's Cafe and Gallery of Women's Art; 1985 Profile Gallery; 1996 Queanbeyan Visitor's Centre, 2013 M16; has participated in many group shows
1992	Established – imprint and printing business: irrePRESSible Press
1992	Author & publisher: *Australian Women Artists, First Fleet to 1945, History, Hearsay and Her Say*
1995	Author & publisher: *The Unseen Art Scene*
2005	ACT Writers' Centre award for children's literature *The Year of the Mean Queen* – political narrative poem
2000s	Children's books: *Flight of the Fat Fairy, You Can't Land Here, Black Dog Blues, Bushfire wind, Pikelet's Gift.* Adults' books: *The illustrated Dole Diary*, *The Artful Dole Bludger*, *Capital Tyranny, I Never Lie to You*

The work of Caroline Ambrus, author, publisher and artist, is held in many libraries in Australia and overseas. The work reflects her personal search for equity and social justice, which is integral to her career, embracing a wide range of issues.

"Fear is the foundation of most governments. Government uses fear to destroy liberty." (John Adams)

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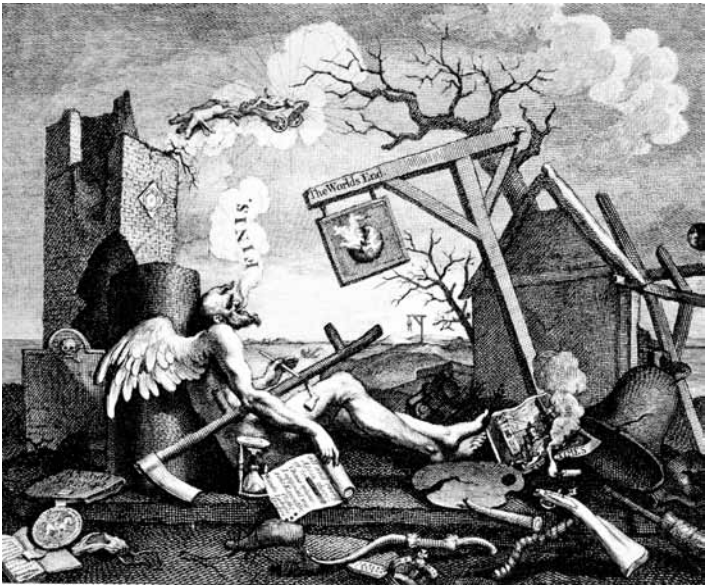

Just when you thought you'd finished.

Epilogue

The issues discussed in this book emerged from 2001 to 2012. It is appropriate in late 2014 to assess whether the ACT Government has acted to remedy the kind of injustices and wrongful actions exposed in this book, or whether it rolls complacently on without remorse or self-reflection.

A final round up

John Fleischinger never recovered from the loss of his home either personally or economically. But he makes the best of what he's got. At least his case reached closure. The legal proceedings put the Government on the back foot. Its capitulation and settlement was an admission of fault. Fleischinger requested an apology at the time, but the Government told his lawyer that this was not a part of the offer agreement. Given that an apology was suggested by the Ombudsman, the Government's refusal was spiteful and smacked of a petty bureaucracy.

The case of Monica and Paul Gerondal grinds on. After the Tribunal win, the planning authority regrouped. The officers are currently holding meetings with the couple to identify the way forward. It seems that the bamboo is no longer an issue. At this point the Gerondals' lawyers are insisting that the planning authority follows its own procedures and policies to determine the legal status of the various approvals. Without this certainty, the Gerondals cannot engage a certifier. The relevant plans may be difficult to identify without the authority admitting its errors. The question is whether the Tribunal's approval of the plans in 2005 takes precedence. However, this did not cover any amendments.

In Mark Power's case, the red flag remains on his property file, but the reference is to "potential" unapproved works, whatever that means. It really is a pathetic gesture of revenge which was about all the Government had left in its arsenal of dirty tricks. However, he has had the satisfaction of the planning authority doing a complete about-turn on the issue of the render. Another lessee in the same suburb built an extension and was faced with applying new render and replacing the old. When he asked for advice, Power suggested that he put in a development application. The lessee did that and the planning authority informed him that repairs and replacement of render was maintenance which did not require planning approval which was what Power told the bureaucrats time and time again over nearly a six year period.

In each of the three cases problems were identified which the Government tried to correct. But none of the lessees had the satisfaction of the relevant officers making a personal approach, admitting their errors or offering apologies. Their attitude was that "We have rules and you have to obey". In reality the lessees

were confronting a marauding juggernaut. What could be more frightening? It's time to put a human face on government. Public sector accountability, accompanied with rewards and punishment, may be the only way to prevent a continuance of the relentless persecution of individuals the ACT Government targetted as worthless or as a threat.

Same old, same old, — trustees on the take

In 2010 Alan Asher recommended that the Government establish an independent ACT Integrity Commission to issue ethical advice and address allegations of corruption[1]. But the Government still conducts in-house investigations, in other words interrogating itself and usually exonerating, its employees. A prime example recently emerged which highlighted many of the ACT public servants' inefficiency, dishonesty, lack of documentation, archaic accounting practices, ignorance of information technology and outright opportunism.

The ACT Public Trustee's (PTACT) *Annual Report* for 2013-2014 related that in response to the Auditor General's criticism of PTACT's accounting procedures, it had installed computer software called TACTICS which analysed financial data for inconsistencies. The first thing the software revealed was that there were irregularities in the accounts and over one and a half million dollars was reported missing. The *Canberra Times* reported on 6 March 2014 that the funds had been depleted by two senior employees over a period of seven years. They had targeted vulnerable clients who were unlikely to notice that their money was missing. Police and auditing firm KPMG were investigating claims of debit card frauds, cash thefts from ATMs, contractor kickbacks and false paperwork trails. It is necessary to note however, that the PTACT have responded to the thefts by suspending the alleged officers without pay, pending an investigation and it has mooted repaying the money to affected clients plus interest. But the question is how could this happen and for so long?

The PTACT *Annual Report* admitted "...the systems and processes used by the Public Trustee to prepare the financial statements of the Trust Account and Funds continue to be prone to error due to the lack of an accounting system and use of manual processes to record transactions".[2] This is an appalling admission from a government authority which has a budget of millions and is in charge of the life savings of vulnerable citizens. The use of manual processes is just laughable and is prone to rorting as the two PTACT employees found. They and their contracting mates in the private sector must have laughed all the way to the bank with their ill-gotten gains.

1. see page 37 of this book
2. PTACT Annual Report, p.38

The Auditor General's Performance Audit Report No 2, 2012[3] noted:

> Despite it being a requirement, only 5% of the ACT Government's information management systems have a security plan; and even fewer, some 2.24% have a threat and risk assessment. The reasons for this were not able to be ascertained... There is a need for an electronic records management system. Such a system would require classification of electronic data, and specifications of who may access it. Currently, there are no plans to introduce such a system for ACT Government directorates and agencies.

The greater threat to ACT Government computer networks comes from within, with employees quick to exploit weaknesses in the system for their own gain. Senior executives who were educated before the information technology era are usually not as computer literate as younger employees. But they allocate resources and it seems that computer security is low on their priorities. They probably think that security is a padlock on the front door and an armed alarm system. They do not comprehend that the computer network is the heart of the organisation and is as vulnerable as the building that houses it.

The flaws in governance identified in this book, such as inadequate or poorly organised supervision of Government employees, combined with the lack of accountability, transparency, training and documentation has provided a fertile ground for dishonest public servants to misappropriate Government funds. The manipulation of Mugga weighbridge information, the Canberra Hospital waiting times and the Territory and Municipal Services subcontracting of services could have been avoided with appropriate information technology systems and employees educated in their use and restricted in their access where necessary. The public sector dinosaurs that run the Territory need to learn new tricks or spend the money employing computer experts to do the job for them. But whilst the Government is running the show on a shoe string, these things will continue to happen.

The Government lurches on

Of the other issues mentioned in this book, the status quo is pretty much retained. The Government tinkers around the edges but manages to change very little for the better, or even for the worse. We had the same sex marriage debacle with the High Court putting the ACT very much in its place. Our politicians need to learn that the Assembly just can't pass laws that contradict Commonwealth laws. The case of Monica and Paul Gerondal[4] highlighted the Legislative Assembly's

3. Auditor General's Performance Audit Report No 2, *Whole-of-Government Information and Communication Technology Security Management and Services* 2012, p. 5-9
4. see page 24-25 of this book

foray into matters beyond its jurisdiction. When members of the Legislative Assembly were notified of leasehold issue and how the ACT's *Planning and Development Act* was in conflict with the Commonwealth *Self Government Act,* the response was a thunderous silence. The ACT Federal representatives in the Commonwealth Parliament were notified and also failed to respond. Why does it take a High Court decision to convince these people?

The Ombudsman is pretty much constrained as it always was. Its *Annual Report of* 2013-2014, stated that 76 out of 467 complaints were investigated. These figures are consistent with earlier years[5]. The question is: why were so many complaints terminated before investigation? Were they trivial, or were they beyond the Ombudsman's jurisdiction, or did they expose matters the Government wanted hidden? If these question were to be answered, one could say that the Ombudsman was truly transparent and independent. But without any explanation, the assumption is that the Ombudsman, like the Government it serves, lacks accountability. The only plus in this bleak scenario is that on 1 July 2014 the Ombudsman became an officer of the Legislative Assembly with the role of reporting to the Speaker, not to the Executive. However, the Executive controls the Ombudman's budget, so this is probably yet another token gesture.

The Chief Minister, Katy Gallagher began her reign with the usual integrity spiel which is something that incoming political leaders tend to do. On the 16 April 2012 she released a press statement titled "New bar for ethical government in the ACT". In 2012 she added the new *Ministerial Code of Conduct* which recommends the usual suite of integrity measures. Codes of conduct are only effective if politicians take them seriously. An example of her disregard for ethics was as the Minister for Health she distanced herself from the manipulation of the Canberra Hospital Emergency Department waiting time figures[6] during an Assembly debate in 2012. The figures were fudged so that the Hospital could extract more Commonwealth money than it was entitled to. The Assembly opposition alleged that one of her very close relatives was involved[7]. The debate also focussed on the Minister's secretive plans to acquire Calvary Hospital and get rid of Clare Holland House. The opposition argued during the debate that she had lied to the Assembly and to the people of Canberra about her intentions. So much for open government.

Amongst this governance gloom and doom there has to be a little light entertainment. And the most appropriate title for this is:

5. see page 33 of this book
6. see page 44 of this book
7. ACT Legislative Assembly, *Hansard*, 22 August 2012, p.3118

What's good for the goose is good for the gander

During his years of dispute with the ACT Government, John Fleischinger wrote countless letters. At one stage, in a fit of frustration he sent around a broadcast email titled "seventeen unanswered letters" to all the relevant politicians and planning authority executives who had ignored his complaint.[8] The Chief Minister, Jon Stanhope informed Fleischinger that he had forwarded the email on to ACTPLA. He commented that "ACTPLA is an independent authority and it would be inappropriate for me to accede to your request to 'apply pressure' on it."[9] Given that he was Chief Minister at the time, he had the option of deciding what was appropriate, but he chose not to intervene. Doesn't this suggest that he was complicit in the bureaucrats' unlawful behaviour?

However, in 2014 Stanhope was on the receiving end of the same kind of treatment he dished out to complainants as the ACT Chief Minister. After he resigned, he became the Administrator of the Commonwealth's Indian Ocean Territories which came under the Department of Infrastructure and Regional Development. A *Canberra Times* story on 22 September 2014 related how he had complained to the Department about problems on Christmas Island relating to health, education and social problems. The public servants had not answered or acknowledged his letters. He told the *Canberra Times* that the territory was administered "by non-representative, unaccountable and very distant public servants". In response, the Department claimed it had consulted the islanders in regular community forums. Apparently they were not impressed as complaints were made to the Commonwealth Ombudsman and the Australian Human Rights Commission. The *Canberra Times* reported that "Jon Stanhope has taken the extraordinary move of making an official apology to each resident of the islands, and savaged the conduct of his employer... over its 'unacceptable' attitude to the islanders." It was reported that he claimed the Commonwealth Government held the people of Christmas and Cocos Islands in contempt.

This is not surprising. Stanhope's behaviour in the ACT was typical of politicians and public servants everywhere. But when the roles were reversed and he was ignored, he became aggrieved. He was just making representation for his constituency. Imagine how he would feel if it was his home which was invaded by bungling or malicious bureaucrats, his life put on hold for futile legal and administrative proceedings and his wife and children traumatised by the unwanted attention. What has happened to public servants in recent years? When did they start telling lies? When did they stop answering letters, returning phone calls and talking to the people they were supposed to serve?

8. document 17 letters

9. communication Stanhope to Fleischinger