# *In Search of Legal Objective Standards: The Meaning of* Greiner v Independent Commission Against Corruption

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## 1. *Law, Morals, the Report and the Litigation*

### *Introduction*

The old debate between positivists and natural law theorists on the separation of law and morals takes its modern form in the argument of critical legal scholars that the objectivity which is claimed to be the legitimising feature of law is never achieved.[1] These critical scholars argue that law is not objective in the sense of being free from moral and political evaluative judgment. Legal standards, which are claimed to be objective, can be shown to be subjective. Of course positivists reject simple formalism. A formalist claims that the decisions of courts and tribunals are objective, and hence legitimate, because these bodies simply execute the legislative will expressed in the statutes they administer. Positivists admit that there is room for courts and tribunals to have resort to moral and political norms, but claim that the occasions when this is appropriate are defined by legal standards. Critical legal scholars also reject formalism. But they challenge the objectivity of the legal standards which are claimed to confine subjectivity. The legal standards are, it is argued, themselves replete with subjectivity.

For those who follow the career of the Independent Commission Against Corruption (ICAC), the debate has assumed fresh and practical importance. The ICAC was established in 1988 with a caution — that this new tribunal was not intended to function as a "tribunal of morals" in making findings that public officials had engaged in corrupt conduct. However, in 1992 the New South Wales Court of Appeal held in a majority judgment that the ICAC had erred by crossing the line which separates standards which are legal and objective from standards which are moral, political and subjective. The case was *Greiner v Independent Commission Against Corruption*,[2] a challenge to the findings and

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1 Hart, H L A, "Positivism and the Separation of Law and Morals" (1958) 71 *Harv LR* at 593; Fuller, L L, "Positivism and Fidelity to Law — A Reply to Professor Hart" (1958) 71 *Harv LR* at 630. For a chronology of the debate and a final rejoinder from Fuller, see "A Reply to Critics" (1964) *The Morality of Law* (rev edn) at ch 5. For a classic critical rejection of formalism see Frug, G E, "The Ideology of Bureaucracy in American Law" (1984) 97 *Harv LR* at 1277.

2 (1992) 28 NSWLR at 125.

decisions of the ICAC in its Report on the Metherell affair.[3] The majority of the Court of Appeal emphatically stated that ICAC ought to apply *legal* standards, indeed legal *objective* standards, and declared the ICAC's decision to be flawed by subjectivity.

Two themes emerge from *Greiner v ICAC*. The first concerns the role of the ICAC. It is argued in this paper that the ICAC is a tribunal which applies both legal and non-legal standards. The proposition that a tribunal such as the ICAC should apply legal objective standards without resort to moral and political norms defies theory, common law and common sense.

The second theme concerns the role of the Court of Appeal. In reaching its conclusion that the ICAC's decision was subjective, the Court proceeded upon the implicit assumption that its own judgment was an exercise in objectivity, through the application of legal standards found in the common law and the ICAC's empowering statute. Yet it was with regard to the identification and interpretation of non-legal standards — the dismissal powers of the Governor — that the Court differed from the ICAC. Moreover, the Court claimed to apply common law standards of judicial review but failed to refer to the standard authorities. The reasoning of the majority of the Court of Appeal is itself open to the criticism of subjectivity and failure to apply legal objective standards.

The background of Court of Appeal's decision, found in the *Report* and the litigation, is outlined in this Part. Part 2 of the paper contains a discussion of the core idea in the majority judgment — failure to apply legal objective standards. The argument is made that the majority decision failed to identify the legal objective standards which it required the ICAC to apply. In Part 3 the administrative law principles applicable to judicial review of the ICAC's report are examined, and the conclusion reached that the majority decision of the Court is not sustainable in terms of those principles.

Part 4 of the paper moves to a critical consideration of the decisions of the ICAC and of the Court of Appeal within a wider political and social context. In a context of public demand for a new morality in government, of tensions between courts and tribunals and of doubts about the future for administrative law reform, a recurring theme in administrative law theory is that of institutional competence to interpret the empowering statutes of tribunals. Is a specialist tribunal better equipped to interpret the provisions of its empowering statute than a supervisory court? Can the court claim a special competence in identifying the legal objective standards which confine the subjective aspects of the tribunal's decision-making? If that were true then judicial review itself would legitimise those decisions of the tribunal which are held by the court to be made within the confines of those legal objective standards. The over-arching thesis of this paper, which emerges in the Conclusion — Part 5, is to reject the general proposition that courts always have a special competence of this nature. The standard which the majority of the Court of Appeal required of the ICAC — the application of legal objective standards — was not met by the majority of the Court itself. The Court's decision and the ICAC's decision were riddled with both objectivity and subjectivity.

## *The Report*

In June 1992 the Independent Commission Against Corruption (ICAC) issued a report finding that the Premier, Treasurer and Minister for Ethnic Affairs of New South Wales,

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3 Independent Commission Against Corruption, *Report on Investigation into the Metherell Resignation and Appointment* (June 1992) (*Report*).

Mr Greiner, and the Minister for the Environment, Mr Moore, had engaged in "corrupt conduct" within the meaning of the *Independent Commission Against Corruption Act* 1988 (NSW) (*ICAC Act*).[4] The report was made following a reference in April 1992 by the New South Wales Parliament requesting the ICAC to investigate the facts and circumstances relating to the resignation from Parliament of Dr Metherell and his appointment to a Senior Executive Service position in the Environmental Protection Authority (EPA). Following the publication of the *Report*, both Greiner and Moore resigned from their offices, and soon afterwards from Parliament.

Commissioner Temby reached a general finding in the *Report* that a job was given in exchange for Metherell's resignation, since Metherell made his appointment to a "creative and constructive" position in the Cabinet Office or the Environment Protection Authority (EPA) a precondition to his resignation from Parliament.[5] The appointment to a fifth director's position within the EPA was to be made by secondment from an initial appointment to the Senior Executive Service in the Premier's Department, by-passing the normal procedure of advertisement, interview and merit selection required by the *Public Sector Management Act* 1988 (NSW). An appointment was made by the Governor in Council pursuant to Division 3 of Part 2 of the *Public Sector Management Act* 1988 (NSW) on the recommendation of the Director-General of the Premier's Department under section 13 of that Act, and without advertisement or interview, within hours of Metherell's resignation. The secondment never took place. The consequence of Metherell's resignation was, as expected, that the number of Independent Members of Parliament was reduced from five to four, and the Liberal Party could expect to win a by-election in the vacated seat and improve the government's control of the Legislative Assembly.[6]

Having made this general finding of fact in the *Report*, Commissioner Temby turned to consider whether corrupt conduct within the *ICAC Act* was established. If conduct is to be categorised as corrupt it must fall within section 8 of the *ICAC Act*, and not be excluded by section 9 of the Act.[7] Section 8(2), which sets out various crimes which may constitute corrupt conduct, was immaterial. However, Commissioner Temby found that Greiner and Moore's conduct fell within the definition of "corrupt conduct" in section 8(1) of the *ICAC Act*. First, the conduct involved a partial exercise of their functions as public officials, within section 8(1)(b) of the *ICAC Act*, because they favoured Metherell over all other applicants — not all applicants received equal or similar consideration.[8] Commissioner Temby also found that the conduct could have affected the impartial exercise of functions by another public official, Mr Humphry, the Director General of the Premier's Department, within section 8(1)(a) of the *ICAC Act*.[9] The conduct also involved a breach of public trust, within section 8(1)(c) of the *ICAC Act*, in that Metherell was given a job for extraneous reasons of friendship, of political advantage to the Liberal Party, and of enhancing the prospects of Greiner and Moore of remaining in government and as Ministers.[10]

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4 Ibid.
5 Id at 38.
6 Ibid.
7 *ICAC Act* s7(1).
8 Above n3 at 53. This was true of Mr Dick Humphry as well.
9 Ibid.
10 Ibid.

Commissioner Temby then had to consider whether, despite the conduct's falling within section 8(1) of the *ICAC Act*, it was excluded from constituting "corrupt conduct" because section 9 was not satisfied. Section 9 of the *ICAC Act* provides

> 9(1) Despite section 8, conduct does not amount to corrupt conduct unless it could constitute or involve:
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> (a) a criminal offence; or
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> (b) a disciplinary offence; or
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> (c) reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official.

First, the conduct of Greiner and Moore could not constitute the common law offence of bribery or the statutory secret commissions offence, because two elements of the offences were not established. The offer of the position was not on the facts made in order to influence Metherell's behaviour in public office (but rather to influence him to leave public office), and there was no offer made with a view to inclining a public official to act contrary to known standards of honesty and integrity.[11]

Since there is no sense in which Ministers are subject to discipline, within section 9(1)(b) of the *ICAC Act*, the next question was whether the conduct of Greiner and Moore could constitute reasonable grounds for dismissing them, within section 9(1)(c) of the *ICAC Act*. As Members of the Executive Council and Ministers, they held office during the Governor's pleasure.[12] Commissioner Temby acknowledged the political reality that a Governor is unlikely to be required to consider dismissal of a Minister except on the advice of the Premier or the Executive Council, or as a result of advice given following parliamentary debate which might involve a no confidence motion in the Premier, in a Minister, or in the government as a whole.[13] Commissioner Temby was clear that he was not required to reach a conclusion as to whether the conduct should in fact give rise to a dismissal decision by the Governor, for it was not the ICAC's proper role to reach such conclusions.[14] It was enough for the ICAC to determine that the conduct could give rise to dismissal, in that a decision to dismiss on the basis of the conduct was capable of being categorised as reasonable.[15]

Although no reasons need be given for dismissal where an office is held at pleasure, some reasons appeared to the Commissioner to be easily categorised as not reasonable, such as the ground of race or religion. Some grounds were easily categorised as reasonable grounds for dismissal, such as commission of a heinous crime.[16]

Commissioner Temby concluded that the conduct of Greiner could constitute reasonable grounds for his dismissal, within section 9(1)(c) of the *ICAC Act*. The findings of fact constituting those reasonable grounds were: the major role played by Greiner in the negotiations which led to Metherell's resignation in exchange for the position; Greiner's knowledge of a desire on Moore's part to help a friend; Greiner's knowledge of political

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11 Id at 57–8.
12 *Constitution Act* 1902 (UK) ss35C(2), 35E(1),(2); above n3 at 61.
13 Above n3 at 62–3.
14 Id at 63–4.
15 Id at 64.
16 Id at 62–3.

advantage to the government and prospectively to him; the fact that a senior public service position was filled otherwise than on a competitive merit basis, and that Metherell was favoured above all other applicants.[17] The satisfaction of section 9(1)(c) in the case of Moore was clearer, because of the presence of friendship as a "motivating force" in the partial exercise of power.[18]

### *The Litigation*

In *Greiner v Independent Commission Against Corruption*[19] the plaintiffs Mr Greiner and Mr Moore sought certiorari and declarations that their conduct was not "corrupt conduct" within the meaning of the *ICAC Act*. They invoked the inherent supervisory jurisdiction of the Supreme Court of New South Wales by way of judicial review of inferior courts and tribunals. Ordinarily, such jurisdiction is exercised at first instance by a single judge in the Administrative Law Division of the Court. However, in this case by consent of all the parties, because of the public importance and urgency of the matter, the proceedings were removed into the Court of Appeal. Normally appeals are heard by the Court of Appeal constituted by the President, Kirby P sitting with two other judges of the Court of Appeal, or by three of those judges. In special cases of great constitutional importance the Court may be constituted by five judges, including the Chief Justice as well as the President.[20] On this occasion, however, the Court was constituted by the Chief Justice and two other judges and the President did not sit.[21]

## 2. *General Critique*

### *Arguments and Conclusions*

The plaintiffs presented two arguments. The first was that section 9(1)(c) of the *ICAC Act* does not apply to a Premier or a Minister. The second was that the process of reasoning of Commissioner Temby in the report in relation to sections 8 and 9(1)(c) of the *ICAC Act* did not expose the reasons why the conduct was corrupt, or why those provisions were applied to Greiner and Moore.

The majority of the Court of Appeal, Gleeson CJ and Priestley JA, held that the determination by the ICAC in its *Report*, that Greiner had engaged in corrupt conduct within the meaning of the *ICAC Act*, was made without or in excess of jurisdiction, and was a

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17 Id at 74.

18 Id at 79. Since the role of another Liberal Member of Parliament, Mr Brad Hazzard, which was "critically important at the outset" of the negotiations, never went beyond "urging and facilitating" and was not an exercise of official functions, he did not engage in corrupt conduct: above n3 at 80. Mr Humphry, the Director General of the Premier's Department, was found to have acted partially by favouring Metherell over all other applicants for the Premier's Department position, but since there were no reasonable grounds for dismissal, there was no corrupt conduct.

19 Above n2.

20 For example, *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372 (*BLF* case), where the Court of Appeal was constituted by Steet CJ, Kirby P, Glass, Mahoney and Priestley JJA, on appeal from a decision of Lee J in the Administrative Division.

21 Gleeson CJ normally sits in the Court of Criminal Appeal, but occasionally presides over administrative law cases in the Court of Appeal, such as *Woollahra Municipal Council v Minister for the Environment* (1991) 21 NSWLR at 710; *NSW Crime Commission v Fleming* (1991) 24 NSWLR at 116.

nullity. Mahoney JA dissented. The majority further held that on the facts found in the *Report*, the determination was wrong in law and ordered the ICAC to pay the plaintiffs' costs.

In order to provide a framework for analysis of the central issue identified by the majority, the requirement of "legal objective standards", and for the later discussion of administrative law principles in Part 3, it is worthwhile to consider in turn the judgments of the three members of the Court.

### *Judgment of Gleeson CJ*

Gleeson CJ held that the conduct of Greiner and Moore at least fell within section 8(1)(a) of the *ICAC Act*, but he did not attempt an analysis of the expressions "dishonest", "partial" and "breach of public trust" appearing in the paragraphs of section 8(1).[22] Mahoney JA also found that there was no error of law in either this holding, or the holdings that section 8(1)(b) and (c) were also satisfied.[23] Priestley JA did not decide the question whether an error of law occurred in relation to the holdings on section 8(1).[24] The real argument in the case therefore revolved around the question whether section 9(1)(c) of the *ICAC Act* was satisfied.

The difficulty in the application of section 9(1)(c) of the *ICAC Act* in the case was that the power to dismiss a Premier or Minister rests in the Governor in Council, or the Governor exercising reserve powers. Gleeson CJ identified three respects in which Commissioner Temby erred in law in the construction and application of section 9(1)(c). Firstly, Commissioner Temby erred in failing to address the question and identify the standards by reference to which the power of dismissal might reasonably be exercised. Whilst Gleeson CJ held that section 9(1)(c) does apply to Ministers, the applicability of the provision must be established according to "objective standards, established and recognised by law". Instead Commissioner Temby had decided on the basis of his own "purely personal and subjective opinion".[25]

Secondly, Commissioner Temby erred in the ways he formulated the test to be applied under section 9(1)(c) of the *ICAC Act*. Thirdly, the reasoning process of Commissioner Temby raised several questions which indicated an error of law. Given the findings made earlier in the *Report*[26] that Greiner and Moore acted in an otherwise lawful manner, that they believed that their actions were lawful, and that a notional jury would not see them as acting "contrary to known and recognised standards of honesty and integrity", how was the conclusion reached that section 9(1)(c) was satisfied?[27]

On the view of Gleeson CJ, then, the plaintiffs were therefore largely successful in relation to their first and second arguments, and really on the same basis.

### *Judgment of Priestley JA*

Priestley JA took the view that section 9(1) of the *ICAC Act* is intended to "overprint the partially unmapped boundaries" of section 8, with "lines known to the law".[28] Priestley JA interpreted "could" in relation to section 9(1)(a) as "would, if the facts were found

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22 Above n2 at 144.
23 Id at 154–66.
24 Id at 185.
25 Id at 147.
26 Above n3 at 72, 73.
27 Above n2 at 146.
28 Id at 184.

proved at a trial".[29] So, in forming a view under section 9(1)(a), the ICAC has a function similar to a magistrate in committal proceedings. To give coherence to the scheme of sections 8 and 9, section 9(1)(b) and (c) should be decided under the same test as section 9(1)(a). The test under section 9(1)(c) therefore is, "would these facts if proved at a trial constitute reasonable grounds for dismissal?" Priestley JA conceded that there is no legal rule to tell us whether the facts would, if proved, constitute reasonable grounds for dismissal, and recognised that the Governor's power is not subject to "legal constraints".[30] Nevertheless, Priestley JA insisted upon the application of legal standards which already exist. The *ICAC Act* had not conferred upon the ICAC a power "of simultaneously stating a new standard and finding the conduct of a public official has been corrupt for the purposes of the Act, because of breach of that freshly created standard".[31]

Priestley JA went further than Gleeson CJ, in saying that at present there is no set of circumstances that make paragraph (c) applicable to a Minister, except circumstances already falling within (a) of section 9(1). That is, only a criminal offence would constitute reasonable grounds for dismissal of a Minister. Priestley JA thought that in the event that a statute were enacted, setting out reasonable grounds for dismissal of Premiers, then facts falling with the statutory grounds would fall within section 9(1)(c) of the *ICAC Act*.[32] However, as the law presently stood, Priestley JA effectively accepted the plaintiffs' submission that section 9(1)(c) does not apply to Premiers and Ministers.

### *Judgment of Mahoney JA*

Mahoney JA, in dissent, said that section 9 of the *ICAC Act* indicates how serious conduct falling within section 8 must be, if it is to qualify as corrupt conduct. Mahoney JA recognised that a judgment as to what constitutes "reasonable grounds" under section 9(1)(c) involves reference to standards beyond legal standards.[33] A Governor may make a dismissal decision on the basis of political and social considerations. Mahoney JA took the view that it was open to ICAC to conclude that there were reasonable grounds for dismissal of Greiner and Moore. These grounds were to be judged by reference to "contemporary standards", and assessment of the degree of seriousness of the conduct. Mahoney JA's personal view was that Greiner and Moore should be condemned, but not dismissed.[34] However, contemporary standards do condemn "the exercise of public power for private gain", and their conduct was serious.[35] So it was open to Commissioner Temby to conclude that section 9(1)(c) was satisfied. The Court should not interfere, for no error of law had been established.

Mahoney JA said that if any injustice had arisen in relation to Greiner and Moore, it had arisen as a result of the operation of the *ICAC Act*.[36] That injustice was that the definition of corrupt conduct in the *ICAC Act* did not accord with the ordinary meaning of the word.

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29 Id at 186.
30 Id at 190.
31 Id at 192.
32 Id at 193.
33 Id at 173.
34 Id at 174.
35 Id at 164, 173–4.
36 Id at 152, 154.

### *Legal Objective Standards*

Both judges in the majority required ICAC to identify and apply legal objective standards, rather than create them. The "objective" aspect of the test will be considered under "Reasonable Grounds for Dismissal" in Part 4. What of the requirement that the standards be legal ones? Looking at the precedents, cases of dismissals of Governors-General or Governors, there was no support for Commissioner Temby's conclusion. Gleeson CJ turned for guidance at two points in his judgment to Dr H V Evatt's work *The King and his Dominion Governors*.[37] Gleeson CJ referred at both points to Evatt's reference to the "vagueness and uncertainty" of the rules governing dismissal of Premiers and Ministers, despite his attempt to set out grounds for dismissal. However, Gleeson CJ insisted that history, precedent and analogy are of assistance in delineating the grounds for dismissal.[38] There was nothing in history, precedent and analogy to support Commissioner Temby's conclusion. Precedents of impeachment for high crimes and misdemeanours did not support the conclusion that section 9(1)(c) of the *ICAC Act* was satisfied. Nor did the dismissal of Premier Lang in 1932 provide support, since it arose from Lang's persistence in a course of unlawful conduct which was jeopardising the financial standing of the State of New South Wales.

Gleeson CJ combed "history" no further for precedents which might have a bearing upon the question of lack of support for the section 9(1)(c) conclusion. Gleeson CJ did not turn to consider the precedential value of the dismissal of Prime Minister Whitlam in 1975. The veiled invocation of the "no evidence" rule of administrative law in the conclusion that there was no "support" for the conclusion under section 9(1)(c) was not explained, and could in any event have provided little assistance, as the discussion in Part 3 indicates. Nor was the promised assistance of "analogy" explored. History, precedent and analogy did not assist Gleeson CJ in articulating any "legal objective standards" structuring the decision-making power under section 9(1)(c).

Priestley JA's contribution on the search for legal objective standards is more curious. Priestley JA said that the Governor has an absolute power to dismiss, to be exercised according to his or her "understanding of constitutional practice, political necessity and political practicality".[39] The admission was made that the discretionary power is subject to non-legal considerations rather than legal constraints. For this reason, Priestley JA pointed out quite frankly, it is "impossible" to point to any standard established by law which is a ground for dismissal action, the matter never having been dealt with in statute or court decision.[40] The "reasonable grounds" in section 9(1)(c) would therefore have to be grounds reasonable "in the opinion of the Governor".[41] Despite all of this, Priestley JA concluded that the assumption underlying section 9(1)(c) is that the decision to dismiss can be taken only on the basis of "standards established or recognised by law".[42] Since no standards existed, and the ICAC should not have power to create new standards and apply them, section 9(1)(c) would never be satisfied independently of a case of a criminal offence, which would in any event fall within section 9(1)(a).

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37 Id at 144, 147. See *Evatt and Forsey on the Reserve Powers* at 269.
38 Above n2 at 148.
39 Id at 190.
40 Ibid.
41 Ibid.
42 Id at 191, 192.

It is not surprising that no legal objective standards were discovered by the Court. Commissioner Temby abandoned the quest, recognising that "[t]he historical precedents are rare, and highly controversial".[43] The only difference between the ICAC's attempt to identify the legal objective standards, and that of Gleeson CJ, is that the Chief Justice added a reference to Evatt's work and did not admit that the precedents are themselves highly controversial. Had reference been made to some of the more recent scholarly studies of the dismissal powers of Governors and Governors-General, it would have been discovered that bold attempts have been made to set out the principles which should govern such decision-making.[44]

The truth is that the majority of the Court of Appeal simply did not wish to set out any legal objective standards which they may have been able to distil from history, analogy and precedent, with academic assistance. Such a Court of Appeal decision would be an embarrassment to a New South Wales Governor faced with a dismissal situation in the future. The Court itself was under political constraints pertaining to its proper relationship with the executive branch of government, the sort of constraints which are not set out in the form of legal objective standards.

The unnecessary constraint which the Court created for the ICAC was the requirement that the standards it applied be legal ones. Priestley JA admitted that the standards applied by a Governor are non-legal. Why should the ICAC, asked to solve the hypothetical question of whether a Governor applying non-legal standards would dismiss, be required to apply different, legal standards? Clearly that would make the ICAC's task impossible. The ICAC is denied the opportunity of momentarily standing in the shoes of the Governor and drawing upon the reserve of political and moral norms which comprise those shifting social rules called "political conventions". Did the Court mean to say that the ICAC was entitled to have resort to political conventions but misjudged them? Why then did the court say that the ICAC must apply legal standards? Political conventions are assumed by positivists to be distinguishable from legal norms. What the statute requires of the ICAC, namely the application of non-legal norms, is outlawed by the Court.

### *Objectivity and Subjectivity*

When administrators make policy they clearly choose amongst non-legal norms. History, precedent and analogy may provide no assistance in choosing a policy. When administrators make adjudicative decisions, by applying statutory expressions to individual cases, policy may have been chosen already or may not apparently enter into the process. The statutory framework may provide little indication as to whether an administrative task is intended to involve policy-making or adjudication. Policy-making and adjudicative activities are often mixed in the one decision-making situation. Indeed, attempts to draw distinctions between policy and administration have therefore been acknowledged to be artificial.[45] Policy choices are made throughout each layer of administrative decision-making. Yet the majority of the Court of Appeal has insisted upon legal objective standards known and recognised by the law as the only appropriate standards to be applied by

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43 Above n3 at 61.

44 Cooray, L J M, *Conventions, the Australian Constitution and the Future* (1979); Winterton, G, *Parliament, the Executive and the Governor General* (1983).

45 Wilenski, P, *Public Power and Public Administration* (1986) at ch 2.

the ICAC in performing its functions under section 9(1)(c) of the *ICAC Act*. Does this really mean the ICAC may not set standards in the course of interpreting section 9(1)(c)?

There is no doubt from any reading of the *Report* that the ICAC was engaged in an attempt to apply section 9(1)(c) of the *ICAC Act* to a particular set of factual circumstances. In the course of this adjudicative task Commissioner Temby interpreted section 9(1)(c) and did so by reference to political and moral norms. According to the Court's approach, the ICAC's conclusions should have been reached as technical outcomes in an uncontroversial mechanical exercise which requires no more than application of legal objective standards to the facts as found. This formalist jurisprudence has been rejected by positivist and critical legal scholars.[46]

Moreover, *Greiner v ICAC* itself discredits formalism by demonstrating that a search for existing legal objective standards will frequently be fruitless, and that standards which may have some claim to that status may be neglected. Part 3 shows that objectivity was fraught with subjectivity, not only in the decision of the ICAC, but also in the Court's application of administrative law principles.

## 3. *Administrative Law Principles*

### *Legal Standards Governing the Court's Decision*

The discussion in Part 2 indicated that the majority of the Court of Appeal failed to articulate the existing legal standards to be applied by the ICAC. In this Part, attention turns to the legal standards governing the Court itself. What were the principles of the common law applicable to this hard case?

References by Gleeson CJ in passing to the *Public Sector Management Act* 1988 (NSW), to the work by H V Evatt, *The King and his Dominion Governors* were seen in Part 2 to be insufficient to describe the legal standards governing the ICAC. What other sources of authority were mentioned by the majority? Very few. In the main body of his judgment, Gleeson CJ referred only to a recent criminal law decision of the High Court (that courts cannot create new offences)[47], and to two procedural fairness cases which show that reputation is protected by procedural fairness.[48] In the last two pages dealing with the question of relief, Gleeson CJ referred to four cases. The two cases referred to in connection with jurisdictional error were discussed below. Another case referred to was *Balog v Independent Commission Against Corruption*,[49] which was also the only case referred to by Priestley JA, but whose importance has been superseded by amendments to the *ICAC Act*. The lack of reference by the majority to principles of administrative law is, to say the least, surprising.

Let us turn to consider some of the principles which might have been discussed.

### *Jurisdictional Error*

It was clear that the decisions of the ICAC in its *Report* were justiciable, or reviewable by a court. This was not one of those cases presenting a controversial question of the justiciability of the exercise of prerogative power, or of a decision made at a high level of the executive

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46 Hart, H L A, *The Concept of Law* (1961) at ch 7; Frug, above n1.

47 *R v Rogerson* (1991–1992) 174 CLR 268.

48 *Mahon v Air New Zealand Ltd* [1984] 1 AC 808; *Ainsworth v Criminal Justice Commission* (1991–1992) 175 CLR 564.

49 (1990) 169 CLR 625. See the judgment of Priestley JA, above n2 at 192.

hierarchy or by Cabinet.[50] Nor was there any argument that Greiner and Moore had standing, as appropriate plaintiffs to seek judicial review, their reputations being interests affected by the *Report*. However, the issues of justiciability and standing were intertwined in the non-availability of relief in the nature of certiorari to quash the *Report*. Relief by way of certiorari has traditionally not been available in relation to purely recommendatory decisions, which do not directly affect legal rights or subject rights to a new hazard.[51] The relief granted by the Court was therefore confined to a declaration.

Apart from the question of remedies, the case therefore revolves entirely around establishing a ground of review. Only at three points in his judgment does Gleeson CJ briefly mention the ground of review. The passages are found towards the end of the judgment in the summary of the three successful arguments of the plaintiffs, in relation to the question of remedies, and in the formulation of the court's order.[52] The reference to "jurisdictional error" as the ground of review is not accompanied by any explanation as to why the error is a jurisdictional one. As will be shown in a moment, an explanation ought to have been given. There is no mention at all in the judgment of Priestley JA as to why a jurisdictional error has been made by the ICAC, and only indirectly, through his agreement with the declarations proposed by Gleeson CJ, does Priestley JA endorse the conclusion that the ground of review is jurisdictional error.

By explicitly invoking the idea of excess of "jurisdiction" Gleeson CJ places the case within a tradition of supervision of inferior courts and tribunals on the ground of jurisdictional error and error of law on the face of the record, rather than within the much broader notion of ultra vires and abuse of power which apply to administrators generally. It is clear that the division between the excess of jurisdiction tradition and the excess of power tradition is an artificial one, there being no all-purpose or even theoretically convincing definition of which administrators are "tribunals", and hence fall within the first tradition, and which are not. The first tradition is typically conjured up by the presence in the empowering Act of a privative clause purporting to oust the prerogative remedies. The prerogative remedies of prohibition and certiorari have been traditionally respectively invoked to prohibit or quash decisions for jurisdictional error. In the case of jurisdictional error such privative clauses are ineffective, although a privative clause expressed in comprehensive terms is effective to oust judicial review of non-jurisdictional errors of law on the face of the record. But there is no such privative clause in the *ICAC Act*. Gleeson CJ appeared simply to assume the ICAC is a "tribunal", certainly a fair assumption, and therefore to be dealt with in the tradition of jurisdictional error or error of law on the face of the record.

The tradition of jurisdictional error is not without its complexities. But the majority of the Court of Appeal simply did not acknowledge the complexities, or address the difficult questions which the complexities required them to answer. Within the discussion of relief, or remedies,[53] Gleeson CJ referred without discussion to two jurisdictional error cases, *R*

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50 There was no issue of justiciability of prerogative power of the ICAC, or of its status in the executive hierarchy, as making its *Report* non-justiciable. See, for example, *Minister for Arts, Heritage and the Environment v Peko-Wallsend Ltd* (1987) 75 ALR 218. An issue as to the justiciability of a decision of the Governor or Governor in Council to dismiss a Minister did arise in the course of some of the judgments.

51 *R v Collins; Ex parte ACTU-Solo Enterprises Pty Ltd* (1976) 8 ALR 691; the most recent authority being *Ainsworth v Criminal Justice Commission* (1992) 106 ALR 11 at 21 per Mason CJ, at 32–3 per Brennan J, and cited in the judgment of Gleeson CJ, above n2 at 148.

52 Above n2 at 147, 148, 149, respectively.

53 Id at 148.

*v War Pensions Entitlement Appeal Tribunal; Ex parte Bott*[54] and *Anisminic Ltd v Foreign Compensation Commission.*[55]

If one is looking for Australian authority on jurisdictional error, or the availability of certiorari, *Bott's* case is at most of peripheral interest, and can be disposed of shortly. The case raised the question of the availability of mandamus to compel a tribunal to hear a claim for a pension according to law, on the ground that the tribunal denied procedural fairness.[56] A majority of the High Court held that there was no denial of procedural fairness, but in the course of its judgment summarised the principles governing the availability of mandamus in relation to a tribunal in a case of constructive failure to exercise its discretion. It is to this part of the judgment that Gleeson CJ referred. In *Bott's* case the Court stated that a tribunal's failure to apply itself to the question prescribed by law, or its acting on extraneous considerations, may amount to a constructive refusal to exercise jurisdiction, so that mandamus will lie. The passage contained a warning that superior courts ought not to enter into an examination of the correctness of the tribunal's decision, or the sufficiency of the evidence supporting it. The court also made it clear that the principles governing the availability of mandamus, to compel the fulfilment of some duty of a public nature which remains unperformed, are very different from the principles governing the availability of certiorari. It is curious that Gleeson CJ thought this case worth mentioning.[57]

What of the authority of *Anisminic*? Since the House of Lords decision in *Anisminic*, the distinction between jurisdictional and non-jurisdictional errors has been abolished in the United Kingdom, at least in the case of review of decisions of tribunals.[58] But in Australia, since *Anisminic*, the High Court has consistently affirmed that there is a distinction between jurisdictional and non-jurisdictional errors of law.[59] There are still some non-jurisdictional errors of law which a tribunal, exercising jurisdiction which it properly has, is free to make. These errors are only exposed for review if they appear on the face of the record and are not protected by a privative clause.

Both judges in the majority expressed their concern that no statutory appeal on questions of law to the Supreme Court is provided for in the *ICAC Act*. Yet the failure to deal adequately with *Anisminic* is a failure to observe the distinction between judicial review and statutory appeal. If *Anisminic* applies in its fullness, or if the "record" is interpreted very liberally for the purpose of error of law on the face of the record, judicial review is tantamount to statutory appeal on all questions of law. This point has been made eloquently by

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54 (1933) 50 CLR 228.

55 [1969] 2 AC 147.

56 (1933) 50 CLR 228 at 242-3. The only arguable basis for denial of procedural fairness was that the tribunal ought not to have taken into account two unsworn reports from physicians, who were not available for cross-examination by the claimant. The argument was rejected by the majority.

57 There is more recent High Court authority on this particular point, such as *Re Coldham; Ex parte Brideson* (1988) 166 CLR 338, which itself contains no reference to this old case. *Bott's* case tends now only to be cited in relation to the content of procedural fairness in tribunals. It is the dissenting judgment of Evatt J (at 256) which is cited for its clear statement that even where a tribunal is not bound by the rules of evidence, that does not mean all the rules of evidence may be ignored as of no account, for those rules provide guidance as to the probative value of evidence admitted by a tribunal.

58 *Re Racal Communications Ltd* [1981] AC 374; *O'Reilly v Mackman* [1983] 2 AC 237.

59 *Houssein v Department of Industrial Relations and Technology (NSW)* (1982) 148 CLR 88; *Hockey v Yelland* (1984) 157 CLR 124; *R v Gray; Ex parte Marsh* (1985) 157 CLR 351 at 371 per Gibbs CJ; *Public Service Association of South Australia v Federated Clerks' Union of Australia, South Australian Branch* (1991) 102 ALR 161 at 167 per Brennan J.

Mahoney JA on several occasions.[60] If, as the High Court repeatedly tells us, there are some questions of law which are non-jurisdictional and in relation to which the tribunal is free to err, then a court in judicial review must exercise restraint and take care not to correct them. The majority of the Court of Appeal did not take care. One wonders why they are critical of the absence of a statutory appeal in the *ICAC Act* when the omission nevertheless leaves the Court uninhibited.

A possible response to this argument is that the distinction between jurisdictional and non-jurisdictional questions simply doesn't matter in this case. Since the record of the tribunal[61] is constituted by the referral to the ICAC, together with its *Report*, and since there is no privative clause to protect the ICAC against review of errors of law on the face of the record, then all the non-jurisdictional errors appearing in the *Report* are subject to review by the Court of Appeal. The answer to this response is equally simple. If the ground of review was non-jurisdictional error of law on the face of the record, then the majority of the Court of Appeal should have said so. The majority did not say so. The majority said that there was an excess of jurisdiction, which means the ground of review was jurisdictional error.

Although *Anisminic* is cited by Australian courts, it provides no guidance on its own as to the current state of development of jurisdictional error as a ground of review. In Australia we must turn to recent High Court cases on jurisdictional error.[62] Had the majority of the Court of Appeal paid attention to the recent High Court decisions, they would have been more conscious of the care needed in distinguishing jurisdictional from non-jurisdictional questions. A persistent feature of the recent High Court decisions has been a division of the Court on the question of the characterisation of an issue as jurisdictional or non-jurisdictional, and hence as to whether jurisdictional error as a ground of review is established.[63]

In the context of *Greiner v ICAC*, more than one view of the jurisdictional/non-jurisdictional question is arguable. The view could be taken that the referral by both Houses of Parliament of a question to the ICAC under the *ICAC Act* sections 13(1)(b) and 73(1) is a jurisdictional fact upon which jurisdiction of the ICAC depended in this case. That jurisdictional

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60 *Commissioner for Motor Transport v Kirkpatrick* (1987) 11 NSWLR 427 at 450–1; *Commissioner for Motor Transport v Kirkpatrick* (No 2) (1988) 13 NSWLR 368 at 372–8.

61 This is so according to a conservative version of what constitutes the "record" of a tribunal. See *Hockey v Yelland* (1984) 157 CLR 124.

62 *R v Gray; Ex parte Marsh* (1985) 157 CLR 351; *Re Queensland Electricity Commission; Ex parte Electrical Trades Union of Australia* (1987) 72 ALR 1; *Public Service Association of South Australia v Federated Clerks' Union of Australia, South Australian Branch* (1991) 102 ALR 161.

63 In *R v Gray; Ex parte Marsh* above n62 by a statutory majority (Gibbs CJ, Wilson and Brennan J) the Court held that the question whether there was an irregularity in or in connection with an election for office in a union was a jurisdictional question for a Federal Court judge (the judges in the minority being Mason, Deane and Dawson JJ). In *Re Queensland Electricity Commission; Ex parte Electrical Trades Union of Australia* above n62 the majority (Mason, Wilson and Dawson JJ) held that the question whether further proceedings were not necessary or desirable in the public interest because an industrial dispute should be dealt with by a state industrial tribunal was a non-jurisdictional question which was for the Queensland Electricity Commission, not for the court (Brennan and Deane JJ in dissent). In *Public Service Association of South Australia v Federated Clerks' Union of Australia, South Australian Branch* above n62 a majority (Brennan, Dawson, Gaudron and McHugh JJ) held that the Full Industrial Commission of SA made a jurisdictional error in misconceiving the nature of its jurisdiction to grant leave to appeal, so as to permit a re-hearing of an application for registration of an alteration in a union's rules (Deane J in dissent on this issue). By contrast, in *BHP Petroleum Ltd v Balfour* (1987) 71 ALR 711 all members of the High Court agreed the question was jurisdictional.

fact was incontestably satisfied. The ICAC therefore had no power under the *ICAC Act* section 20(3) to decline to investigate, and indeed had a duty to investigate under section 73(2) of the *ICAC Act*, and a duty to report under section 74(2) of the Act. The remaining questions before the ICAC, including the question whether "corrupt conduct " within the *ICAC Act* had occurred, were non-jurisdictional questions.[64] This view appeals to the common sense conviction first that it was clear the ICAC had jurisdiction to investigate the matter which was referred to it by Parliament; and secondly that since it is the very function of the ICAC to determine whether corrupt conduct has occurred, this could hardly be a jurisdictional question.

The majority of the Court of Appeal did not take the view that the errors of construction they identified were non-jurisdictional errors. But they fail to explain why the errors of construction identified resulted in an excess of jurisdiction. The majority could have adopted either of two possible lines of reasoning. First, they could have relied upon the jurisdictional fact doctrine, characterising the existence of "corrupt conduct" within the *ICAC Act* as a precondition to the existence of jurisdiction of the ICAC to make findings and recommendations.[65] Alternatively, within the liberal version of the traditional doctrine of jurisdictional error, the ICAC "misconceived its function" so badly that it failed to exercise jurisdiction.[66] There is support for the latter being the view of Gleeson CJ in those passages where he says that Commissioner Temby failed to "address the critical question", "avoided the question by the way he posed the issue for determination" and "failed to apply the correct test laid down by section 9".[67] Each of these statements is made in the context of the call for the application of legal objective standards, and is therefore subject to the analysis in Part 2. It may be that the Commissioner failed to address a question which it was impossible for him to answer, that he avoided an unanswerable question which was later posed by the Court and that he failed to apply a test which did not exist.

### *Relevant Considerations*

The conclusion of Gleeson CJ with regard to the errors in the reasoning process of Commissioner Temby could be understood as a conclusion of failure to take into account relevant considerations which the Commissioner was bound to take into account. The matters mentioned were the findings that Greiner and Moore acted in an otherwise lawful manner, that they believed their actions were lawful, and that a notional jury would not see them as acting contrary to known and recognised standards of honesty and integrity.

These considerations were mentioned at slightly earlier points in the *Report*, but were not clearly or closely taken into account in relation to section 9(1)(c). The reference to "known standards of honesty and integrity" of a notional jury was, as Priestley JA acknowledged, a reference to the earlier discussion in the *Report* of the necessary elements

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64 That approach would be consistent with the approach of the majority of the High Court in *Re Queensland Electricity Commission*, above n60, and with the statutory minority of the High Court in *R v Gray; Ex parte Marsh*, above n62.

65 As, for example, in *R v Blakeley; Ex parte Association of Architects, Engineers, Surveyors and Draughtsmen of Australia* (1950) 82 CLR 54 at 90–1; *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100; *R v Dunphy; Ex parte Maynes* (1978) 139 CLR 482.

66 As, for example, in *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473; *Re Coldham; Ex parte Brideson* (1989) 166 CLR 338.

67 Above n2 at 146, 147.

of the offence of bribery, which Commissioner Temby had concluded were not fully satisfied.[68] The test appears to have been mentioned again at this point for the sake of a brief re-statement of the findings of fact before a conclusion was made as to whether section 9(1)(c) of the Act was satisfied.

If an error of law of failure to take into account relevant considerations occurred, of course its effect would depend upon the jurisdictional/non-jurisdictional distinction. In the exercise of jurisdiction which it possesses, a tribunal's error in taking into account irrelevant considerations does not without more result in an excess of jurisdiction.[69] The proceedings will only be vitiated if the error has the effect of the tribunal's purporting to make a determination which the tribunal has no jurisdiction, in the circumstances, to make.[70]

This apart, in the leading authority on this type of abuse of power, the High Court warns of the limited role of superior courts and the danger of trespassing upon the merits of the decision.[71] In addition, failure to consider an insignificant relevant consideration will not warrant interference by a court.[72] The error of Commissioner Temby may have been that he placed his sentences on the wrong pages.

### *Reasonable Grounds for Dismissal*

Gleeson CJ took the view that the test of whether "reasonable grounds" for dismissal within section 9(1)(c) existed was an objective test. The general case-law supports this notion of an "objective test". There is authority, not cited by Gleeson CJ, that where a statute makes reasonableness a standard by express use of that term, the test is not the *Wednesbury* test, but rather an objective test.[73] The *Wednesbury* unreasonableness[74] test is a test of whether a dismissal decision is "so unreasonable no reasonable Governor could have reached it". This is a test more frequently considered by administrative lawyers, as one of the grounds of judicial review for abuse of power.

However, it would have been helpful if the Court of Appeal had explained how the objective test differs from the *Wednesbury* test and referred to authorities supporting the view that the objective test was the appropriate one. Why would such an elaboration of reasons by the majority of the Court of Appeal have been helpful?

First, counsel for the ICAC had argued, unsuccessfully, that the *Wednesbury* test applied.[75] Although not mentioned by counsel, in one case the House of Lords has applied the *Wednesbury* test in the context of a statutory test of reasonableness.[76] Had the Court of Appeal considered cases where administrative application of other statutory tests of reasonableness have been scrutinised by the courts, the Court would have noted that the

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68 Id at 189. The references to this element of the test are found in the *Report* above n3 at 55, 58, 73.

69 *Houssein v Department of Industrial Relations and Technology (NSW)* (1982) 148 CLR 88 at 93–5; *Public Service Association of South Australia v Federated Clerks' Union* above n62 at 173, 175 per Deane J in dissent on the issue of characterisation of such a question as jurisdictional.

70 *Public Service Association of South Australia v Federated Clerks' Union of Australia, South Australian Branch*, above n62 at 175 per Deane J.

71 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 per Mason J.

72 Ibid.

73 *Secretary, Department of Foreign Affairs and Trade v Styles* (1989) 88 ALR 621, reversing *Styles v Secretary, Department of Foreign Affairs and Trade* (1988) 84 ALR 408.

74 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

75 *Written Submissions*, Court of Appeal, *Greiner v ICAC* June/July 1992.

76 *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014.

courts in those cases do not insist upon "legal objective standards" structuring the objective test of reasonableness.[77] In these cases courts are comfortable with the reality that the administrator exercises discretion in interpreting and applying the term "reasonable" as it appears in the statute.

Secondly, one of the statements in the *Report* which was the subject of criticism by Gleeson CJ can be explained by reference to the *Wednesbury* test. Commissioner Temby asked the question presented by section 9(1)(c) positively: would a dismissal on the evidence contained in the *Report* be on reasonable grounds? He then asked the question in reverse: would such a dismissal decision be attacked as unreasonable and accordingly without justification?[78] For a tribunal member concerned to avoid administrative error, it would be a natural process of self-examination to ask whether one's decision would pass the test of *Wednesbury* unreasonableness. This leads one to ask the question posed by section 9(1)(c) in reverse. In this context it would be a double-barrelled question as to whether such a dismissal decision by the Governor would be *Wednesbury* unreasonable, and whether the ICAC's answer to the hypothetical question posed by section 9(1)(c) would be *Wednesbury* unreasonable.

It would be a salutary discipline for any administrator to engage in the self-examination suggested by the *Wednesbury* principle and other principles of administrative law, in order to check the rationality and fairness of their decisions. Gleeson CJ assumed that the reverse question was being asked by Commissioner Temby only of the Governor's dismissal decision. Gleeson CJ and Priestley JA described this process of checking as an avoidance of the question posed by section 9(1)(c), by reason of the question's resting upon an assumption that a dismissal decision had already been made. In a passage appearing later in the *Report*, Commissioner Temby said that a Governor in Council would dismiss "only in the most extreme circumstances" and such action was "unlikely" to arise. Gleeson CJ said that the fact that a dismissal would only occur in extreme or extraordinary circumstances was obscured by the assumption of the Commissioner that a dismissal decision had indeed been made. Heavy reliance was placed upon the passage about "extreme circumstances", as a source of error in the Report, with no less than three references to it.[79]

But Gleeson CJ appeared to slide here from the objective test of reasonableness to a test of the probability of a Governor's dismissing a Premier. Whilst Commissioner Temby's positive formulation of the question was to ask whether the facts found by the ICAC (and indicating that section 8(1) was satisfied) constituted reasonable grounds for dismissal, Gleeson CJ's question was whether would it be likely that a Governor would dismiss on the basis of those facts. Gleeson CJ's gloss on the test transformed it from an objective test of reasonableness to a test of the probability of certain action being taken. Such a test requires some evaluation of statistical incidence of dismissals in similar circumstances by Governors as an aggregate group over the history of New South Wales, or perhaps throughout Australian jurisdictions, or across all common law countries.

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77 For example, *Department of Foreign Affairs and Trade v Styles* (1989) 88 ALR 621; *Swan Portland Cement Ltd v Comptroller-General of Customs* (1989) 90 ALR 280. For comment on the choice of moral norms which accounts for the different views taken by the court at first instance and on appeal in *Styles*, as to what was "reasonable", see Thornton, M, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (1990) at 190–1.

78 Above n3 at 74.

79 Above n2 at 141, 144, 146.

In order to make any decision under section 9(1)(c) of the *ICAC Act* in relation to a Premier or Minister, the ICAC would have to presume a ripening of the conditions of political convention under which it is appropriate for the Governor to consider whether or not to exercise the power to dismiss. There is therefore some justification in a Commissioner assuming that a decision one way or the other had been made by a Governor in such circumstances. However, it may be a matter of debate as to whether the conventional preconditions to exercise of the power are satisfied. The conventions are controversial, as evidenced by the debate in the aftermath of the Whitlam dismissal. Gleeson CJ did not enter into this aspect of the subjunctive conditional form of section 9(1)(c), beyond observing in relation to the structure of the entire definition of "corrupt conduct" in sections 8 and 9 of the *ICAC Act* that: "In the public perception, the conditional nature of the premise upon which it is based could easily be obscured by the unconditional form of such a conclusion".[80]

In a similar fashion, Priestley JA's rough equation of the ICAC's decision-making function under section 9(1)(c) with that of a magistrate in committal proceedings, converting the "could" in section 9(1)(c) to "would, if proved at trial", pointed to questions of degrees of probability, as in a test of the existence of a prima facie case. There is nothing in section 9(1)(c) to suggest that the test should be transformed into such a stringent one. It is because Priestley JA believed it highly improbable that Governors would raise the political standards applied in making dismissal decisions, that he could not envisage a situation falling within section 9(1)(c) which did not involve a criminal offence within section 9(1)(a), unless a statute were passed specifying reasonable grounds which fall within section 9(1)(c). [81]

In the course of this slide from an objective test to one of probabilities, Gleeson CJ observed with regard to the ICAC's hypothetical consideration of a possible dismissal decision by a Governor: "It may well be that the main difficulty about attacking a decision of the kind in question as unreasonable would be the very circumstance that it is hard to define standards of reasonableness".[82] It may well be that the main difficulty of the Court in attacking a decision of the kind made by ICAC is that it is hard to define standards of reasonableness. If the ICAC failed to do so, so too did the majority of the Court of Appeal.

At this point a constitutional lawyer may protest that no Governor would dismiss a Premier for making a political appointment to a public sector position. The ambit of the power to dismiss a Prime Minister or Premier has never been authoritatively defined either by statute or judicial pronouncement.[83] The uncertainty is great because the powers are rarely used. It would be difficult to achieve the consensus needed to codify the reserve powers. On one view the reserve powers are non-justiciable conventions. If this is true, then the conventions are political rules rather than legal rules and are defined by a social practice. They cannot be described as legal objective standards. On another view the reserve powers are not mere conventions but are implied in the Commonwealth Constitution.[84] Some may even argue they ought to be justiciable. If this is true in the NSW context, the limitations upon the reserve powers implied in the New South Wales Constitution are yet to be recognised by the New South Wales Court of Appeal. One suspects that even if by

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80 Id at 129.

81 Id at 192–3 ("there is at present no set of circumstances that comes to my mind"), despite the fact that no criminal offence was involved in the Whitlam dismissal.

82 Above n2 at 146.

83 See generally Winterton, G, *Parliament, the Executive and the Governor-General* (1983) at 150.

84 Id at 124, 151. See Commonwealth Constitution ss62, 64.

judicial pronouncement the core convention were expressed as the rule that "the Governor must act on ministerial advice unless the Minister has been convicted of a serious crime", there would remain social and political norms to be taken into account in ascertaining how the Governor should act in any particular set of circumstances.[85] The additional factor in the circumstances of the Metherell affair was the change in the balance of power in the New South Wales Legislative Assembly which would be achieved by securing the resignation of an Independent whose likely successor would be a member of the government.

### *No Evidence*

There is a hint in Gleeson CJ's description of the errors of law made in the reasoning process, of a lack of "support" for the conclusion that section 9(1)(c) of the *ICAC Act* was satisfied. Gleeson CJ also said that there was a "large gap between the factual premise and the ultimate conclusion".[86] Soon after this passage, but in relation to the protection the court gives to reputation, Gleeson CJ referred to *Mahon v Air New Zealand Ltd.*[87] That was a Privy Council decision in which a costs order made by a royal commissioner was set aside on the ground of absence of probative evidence, and certain findings were declared to have been made in denial of procedural fairness. Lord Diplock stated that reasoning supportive of a finding, if it be disclosed, should not be "logically self-contradictory". If "logical self-contradiction" as a variety of the "no evidence" rule was an approach influencing the majority of the Court of Appeal, the majority should have borne in mind the firm rejection of that approach by the High Court in *Australian Broadcasting Tribunal v Bond*,[88] where Mason CJ said that

> want of logic is not synonymous with error of law. So long as there is *some* basis for an inference — in other words, the particular inference is reasonably open — even if that inference appears to have been drawn as result of illogical reasoning, there is no place for judicial review because no error of law has taken place.[89]

### *ICAC's Reasons for Decision*

The error of law made in connection with the reasoning process of Commissioner Temby was expressed by Gleeson CJ not only in terms of lack of support for the conclusions in the *Report*, but also in terms of a failure to *explain* the process of reasoning.[90] Gleeson CJ took the view that the ICAC's statutory duty to report to Parliament[91] carried with it an implied duty to give reasons for conclusions. Priestley JA did not deal with the point. But Mahoney JA expressly rejected the notion that there is any implied duty to give reasons, citing the High Court authority in *Public Service Board of New South Wales v Osmond*,[92] that at common law administrators have no general duty to give reasons for their decisions.[93] Mahoney JA took the view that the statutory authorisation (rather than duty) of

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85 Winterton, above n83 at 127.
86 Above n2 at 146.
87 [1984] 1 AC 808. Above n2 at 147.
88 (1990) 170 CLR 321.
89 Id at 356 per Mason CJ, with whom Brennan J agreed. Deane J was more emphatic as to the availability of the "no evidence" ground of review, but did not go so far as to claim its availability in cases of illogical reasoning processes or self-contradiction.
90 Above n2 at 146.
91 *ICAC Act* ss74, 74A, 74B.
92 (1986) 159 CLR 656.
93 Above n2 at 176–7.

the ICAC to *include* in its report statements as to its "reasons for any of its findings, opinions and recommendations" did not mandate exposure of the value judgments made by the ICAC.

In fact the choices of moral norms made by the ICAC, guided by the concepts of "dishonesty", "partiality" and "breach of public trust" in section 8(1) of the *ICAC Act*, are clear from a reading of the entire *Report*. If consulted, the sophisticated and balanced jurisprudence of the duty to furnish statements of reasons under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) *(ADJR Act)* section 13 would have indicated that a statement of reasons should not be examined as if it were an Act of Parliament or a contract drawn by solicitors with time for review and evaluation; that a court should study the statement carefully and sensibly rather than zealously in pursuit of error; and that the court should not subject the statement to fine or microscopic analysis with a view to finding some error of law.[94] This approach has much to commend it in relation to reports of royal commissions or other investigative tribunals, particularly where there is no argument of denial of procedural fairness as there was in *Mahon v Air New Zealand Ltd.*[95] The approach was followed instinctively by Mahoney JA, but not by the majority of the Court of Appeal.

## 4. *The Wider Context*

### *Formalism and its Critics*

The analysis so far indicates that the majority of the Court of Appeal required ICAC to apply legal objective standards where none exist. The Court required the Tribunal to perform an impossible task. The ICAC had to create standards in interpreting sections 8 and 9 of the *ICAC Act*. But the Court said that ICAC was not entitled to do so.

An assumption of the separation of law and morals is reflected in the judgments of the majority of the Court of Appeal, which strained to avoid recognising that moral norms have a role in administrative decision-making. The majority appeared to hold the view that legal norms will provide answers to all questions, even the question raised by section 9(1)(c) of the *ICAC Act*.

Gleeson CJ said that Commissioner Temby had erred by applying his own "purely personal and subjective opinion", rather than legal objective standards. Gleeson CJ also commented that political considerations do play a part in a vote of no confidence in Parliament, but not in a Governor's decision to dismiss a Premier.[96] Priestley JA quoted from Mr Greiner's second reading speech in Parliament in introducing the ICAC Bill. In that speech, Mr Greiner said that the ICAC "was not intended to be a tribunal of morals", but was intended to "enforce only those standards recognised by law".[97]

Commissioner Temby was well aware of the potential for the "tribunal of morals" criticism, which the *Report* records as having been made in the course of the hearing.[98] However, Commissioner Temby regarded the ICAC as having no option but to create

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94 *Smith v Minister for Immigration* (1984) 53 ALR 551 at 554; *ARM Constructions Pty Ltd v Deputy Commissioner of Taxation (Cth)* (1986) 65 ALR 343 at 349; *Bowring v Minister for Immigration* (1987) 13 ALD 677 at 679; *Ansett Transport Industries (Operations) Ltd v Secretary, Department of Aviation* (1987) 73 ALR 193 at 197; *Powell v Evreniades* (1989) 87 ALR 117 at 122.

95 Above n48.

96 Above n2 at 141.

97 Id at 192.

98 Above n3 at 51.

standards. In the *Report* Commissioner Temby quoted a long passage from a speech given by Greiner in Parliament in answer to the censure motion which led to the referral of the matter to the ICAC. In that passage, in a manner rather similar to the majority of the Court of Appeal, Mr Greiner said that the standards implied in the censure motion, prohibiting political appointments were new standards and very strict ones, and would not produce a workable system of democracy in New South Wales. Nevertheless, unlike the majority of the Court of Appeal, Greiner appeared to acknowledge that the ICAC had power to set the standards, "they are standards that ought to be left to Mr Temby and the ICAC to adjudicate on before this House comes to make any serious judgments".[99]

In response to that quoted view, and accepting that it was the task of the ICAC to set the standards, Commissioner Temby acknowledged the sovereignty of Parliament in setting standards required of public officials, and the ultimate accountability of the Premier and the Minister to Parliament rather than to the ICAC: "In due course of time it will be for the Parliament to decide whether the standard of conduct in public life required by this *Report* is unduly high".[100]

The discussion towards the end of Part 2 indicates that the creation of new standards by administrators is not incompatible with positivism. Positivists also admit that in hard cases courts make new law. In calling for the application of "legal objective standards", which have not been set out in the *ICAC Act*, and which do not exist at common law, is the majority of the Court of Appeal creating new standards itself, rather than applying existing legal standards in the *ICAC Act* and the common law? The discussion in Part 2 shows that the majority failed to articulate the standards ICAC should apply under section 9(1)(c) of the *ICAC Act*. The discussion in Part 3 shows the failure of the majority of the Court to apply in its own decision-making existing standards of administrative law in Australia.

The formalism inherent in the attempt of the majority of the Court of Appeal to separate moral norms or non-legal norms, from legal norms in relation to administrative decision-making is captured best by the theoretical writings of the critical legal studies movement.[101] For critical legal scholars, choosing between values is inescapable and there are no objectively correct results to legal issues. Although mainstream legal theory, to which positivism belongs, rejects formalism, it maintains that some viable distinction can be made between legal reasoning and the broad sweep of political discourse. Critical scholars reject that distinction and seek to uncover political commitments beneath the mask of apparently neutral "legal objective standards". When the majority of the Court of Appeal called for legal objective standards, but could refer only to a few instances of applicability of controversial political conventions, the majority itself demonstrated the interpenetration of politics and law and the falsity of formalism.

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99 Above n3 at 93, quoted passage from address by Mr Greiner to Legislative Assembly on 28 April 1992.

100 Above n3 at 93. Commissioner Temby was also concerned to see the standard raised in relation to the giving of evidence at the ICAC hearing (*Report* at 51–2): "The aim of what I have said is not to see Greiner criticised, but rather to hope that the examination of the question by politicians generally may lead to a realisation that standards of candour are lower than they need be, and ought to be raised".

101 Unger, R M, "The Critical Legal Studies Movement" (1983) 96 *Harv LR* 561; Hutchinson, A C and Monahan, P J "Law, Politics and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought" (1984) 36 *Stan LR* 199.

### *New Morality in Public Administration*

The majority of the New South Wales Court of Appeal has failed to keep step with the emergence of a new morality in public administration. Its decision will remain an anomalous case which does not represent current thinking. The formalism embraced by the majority incorporates a refusal to recognise the mix of political, moral and legal norms which determine decisions of a Governor, or the ICAC, or any administrator exercising a strong discretionary power.

Mahoney JA, in dissent, was responsive to the new morality. Mahoney JA was concerned that the Court should not also condemn Greiner and Moore as individuals. That is why he said that they were "good men who have, by an error as to the seriousness of what they were doing, fallen foul of the *[ICAC] Act*".[102] Perhaps in a similar vein, administrative law theorists may regret the irony of the outcome of the Metherell affair for a Premier who could take credit for the introduction within a short period of time of major administrative law reforms in New South Wales — a range of measures to improve efficiency in the public sector generally and in government trading enterprises, the enactment of the *Freedom of Information Act* 1989 (NSW), the *Subordinate Legislation Act* 1989 (NSW) and the *ICAC Act* itself.

Mahoney JA said it was open to ICAC to conclude that the conduct could constitute grounds for dismissal. Reasonableness was to be judged by the objective standard of contemporary moral standards and by the degree of seriousness of any breach of those standards. What were those contemporary moral standards? The base-line was that public officials should not use public power for private gain. Public officials with wider powers, such as Ministers, should observe higher standards than others. We trust them, knowing they are subject to little formal scrutiny. By contrast, the result of Priestley JA's analysis of section 9(1), is that Premiers and Ministers remain in a special protected position, in comparison with other public officials, despite their broader discretions and the greater trust we place in them. On Priestley JA's view, it is unlikely that a Premier or Minister engages in corrupt conduct except where he or she commits a criminal offence. All other public officials engage in corrupt conduct where partiality or breach of trust is established, such that a disciplinary offence or reasonable grounds for dismissal are established.

In stating the broad principle that public officials should not use public power for private gain, Mahoney JA set a new standard. The standard draws upon a tradition of administrative law principles about exercising power for proper, rather than improper, purposes. This fundamental rationale in administrative law, expressed in a fresh form, fills out the "community standard" and the standard of "seriousness" referred to by Mahoney JA as the standard to be developed under section 9(1)(c) of the *ICAC Act*.

The majority judges in the Court of Appeal are out of step with the new morality, which is reflected in the High Court's development of the common law over the last five years. Both in the field of administrative law, and generally in relation to fundamental common law rights, or civil liberties, the High Court has consistently raised the standard required of administrators. So too have Federal Court judges conducting judicial review under the *ADJR Act*.[103]

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102 Above n2 at 174.

103 See generally Allars, M, *Introduction to Australian Administrative Law* (1990) at chs 5, 6.

### *Tension Between Courts and Tribunals*

The real meaning of *Greiner v ICAC* may be that the majority judges simply did not approve of the *ICAC Act* or the existence of the ICAC. The Court's decision effectively asserted the supremacy of the judiciary over tribunals, and the legislature, despite the clear principle in previous Court of Appeal decisions that parliamentary sovereignty is a doctrine to be accorded primacy by the courts.[104]

### Reputation

Gleeson CJ referred to procedural fairness cases where reputation is affected.[105] It might be argued that a fundamental right to reputation is a deep constitutional human right of Premiers and Ministers (as distinct from other public officials) which can only be overridden by clear legislative language. Despite the growing emphasis given by the High Court to fundamental common law rights in other areas, there is little to support such an undermining of the clear legislative intention of the *ICAC Act*.

### Criticism of *ICAC Act*

There can be detected in the criticism of the *ICAC Act* in the judgments of both Gleeson CJ and Priestley JA, a tone of distrust of the role of tribunals in the legal system. The criticism of the *ICAC Act* tends to be transposed into criticism of the ICAC's decision at a number of points in the judgments. Gleeson CJ's observation about the conditional nature of the premise in section 9(1)(c) of the *ICAC Act*, upon which the conclusion of corrupt conduct is based, has already been mentioned, as an element of the reasoning leading to the conclusion that the ICAC had erred in not applying legal objective standards.[106] Consider some other criticisms made of the *ICAC Act*.

First, both judges in the majority referred to the fact that there is no statutory right of appeal from decisions of the ICAC; and that a person could be found corrupt by the ICAC, then acquitted by a court from any criminal charge; yet the label of corrupt conduct would remain, with "devastating consequences for individuals"[107]. This disapproval of the absence of a statutory right of appeal appears as an over-reaction. An empowering statute featuring the omission of an express facility for appeal to a court pales into insignificance in comparison with those empowering statutes whose privative clauses purport to exclude judicial review altogether and are successful in excluding judicial review of non-jurisdictional errors on the face of the record of the tribunal. As occurred in this case, in the absence of a statutory appeal facility, the inherent judicial review jurisdiction of the Supreme Court may be invoked. Although Gleeson CJ described this as a "narrower jurisdiction"[108] than that of statutory appeal, he paid no heed to the traditional limitations of the scope of that review function, treating the proceedings as if they were a statutory appeal. On the basis of this disapproval of the *ICAC Act*, the majority of the Court proceeded

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104 *BLF* case, note 21 above, *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1.

105 Above n2 at 147. See also the extension of this approach in the judgment of Kirby P in *Independent Commission Against Corruption v Chaffey* (1992) 30 NSWLR 21 (*ICAC v Chaffey*), discussed further n116, n118.

106 Above n2 at 129.

107 Ibid.

108 Id at 130.

to confer upon the ICAC the impossible task of finding legal objective standards. A more familiar proposition applied in the construction of administrative law reform statutes is that remedial legislation should be given a liberal interpretation.

Secondly, Gleeson CJ said one would have *expected* the *ICAC Act* to set out objective and reasonably clearly defined criteria. It is clear that this is why Gleeson CJ stepped in to establish that as a matter of interpretation at common law, such criteria should be applied:

> For reasons that will appear below, the absence of a right of appeal against, or of a procedure for a review of the merits of, a determination of the Commission has a bearing on the approach that should be taken to the meaning of the *ICAC Act* and the way in which the Commission's decision-making functions should be performed. It would be expected that Parliament would have provided for adverse determinations to be made by reference to objective and reasonably clearly defined criteria, so that at least people whose conduct had been declared corrupt would know why that was so, and would be in a position to identify, and, to the extent to which they were able, publicly dispute the process of reasoning by which that conclusion was reached.[109]

This is a novel proposition in administrative law. At the simplistic level of counter-example, it flies in the face of the terms of ombudsman legislation throughout Australia and a host of other criteria found in administrative review mechanisms. Administrative review bodies, like administrators engaged in primary decision-making, are constantly required to apply criteria which are neither "objective" nor "reasonably clearly defined". A call for criteria which are "objective" is a call for formalism. This is the mechanistic jurisprudence of syllogistic reasoning from "clear" major premises and preordained factual findings in minor premises to incontrovertible legal conclusions. It is a demand for the elimination of administrative discretion.

### *Differences Between Tribunals and Courts*

The judgments of the Court of Appeal do not display a complete unawareness of the delicate relationship between courts and tribunals which its decision would traverse. Priestley JA was sensitive to the possible criticism of the Court of Appeal as applying its own "personal opinions", the very error which it attributed to Commissioner Temby. Priestley JA emphasised that he was considering the legality of ICAC's legal conclusions, accepting the factual findings it had made. Nevertheless, the tension between court and tribunal with regard to their respective roles is apparent in the judgment of Priestley JA. Priestley JA pointed out that the difference between pronouncements of the ICAC and those of a court is fundamental. Decisions of a court have final and binding effect on the rights of parties in proceedings before them. Priestley JA said that the ICAC's decisions do not have such binding effect, but confusion can be created in the mind of the public by media reports of the ICAC decision, such as the headline "Greiner Corrupt". Priestley JA took the view that these newspaper headlines were "oversimplified ... to the point of inaccuracy", because Greiner was not corrupt in any ordinary sense of the word corrupt.[110] As argued earlier in this Part, the claimed separation of legal discourse from moral discourse is belied by these observations. These are judicial perceptions of what ordinary people mean by making the moral judgment, "corrupt".

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109 Ibid.

110 Id at 180.

By contrast, Mahoney JA emphasised the limited role of the court. If a statute itself creates injustice, the courts may not be able to provide a remedy. Mahoney JA thus reaffirmed parliamentary sovereignty, in contrast with the majority judges who found administrative error where their real worry was about the provisions in the *ICAC Act* itself. As well, Mahoney JA emphasised that the court may only intervene in cases of misconstruction of the *ICAC Act*, not in cases of error of fact.

### *Administrative Law Theory*

Mahoney JA's approach of judicial restraint is welcome in terms of the trend of theory in administrative law. Tribunals are frequently established in order to achieve social goals which courts are ill-equipped to achieve, or which the ordinary criminal investigative processes cannot achieve. Theorists have warned that courts should not unduly disrupt the functioning of such tribunals. Doctrines of deference to statutory interpretive activity of administrative tribunals is a lively topic for debate and critique of judicial review decisions, in the United States, Canada and also in Australia.[111] Tribunals have to interpret their own empowering statutes daily, applying ordinary English words which are open-textured and vague, and expressions which clearly import a discretion, such as "reasonable grounds". The assumptions that administrative discretion is bad in itself and that courts must play a central role in its control have thus been exposed for scrutiny and questioned. A court which is over-zealous in its supervision of tribunals uses formalistic reasoning to reach a conclusion that a jurisdictional error has been made.[112] This formalistic reasoning claims that open-textured and vague statutory expressions have plain meanings which can be discerned correctly by courts. The court claims that, unlike the tribunal, it is accurately executing the legislative will expressed in the statute. But in reality there is no one objective meaning to be discovered in the text of the statute. The fundamental question is whether the tribunal or the court can provide the more competent interpretation.

The judgments of the majority of the Court of Appeal pay no regard to this well-known field of administrative law theory. There is no hint of recognition of the need for courts to show restraint lest the status and effectiveness of tribunals be damaged. The different roles of tribunals and courts are certainly the subject of discussion in the judgments. The judgments provide a veiled statement that tribunals are inferior to courts. Only courts can authoritatively state the law, and courts will not tolerate tribunals which have resort to moral and social norms. This statement is consistent with the views of the Victorian Supreme Court judges who in their 1988 *Annual Report* attacked "tribunalisation" in Victoria as undermining the constitutional role of the Supreme Court of Victoria.[113]

### *Subsequent Decisions*

The Court of Appeal's decision has been followed in a decision which raised for consideration the interpretation of the expression "misuse of information" in section 8(1)(d) of

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111 Diver, C, "Statutory Interpretation in the Administrative State" (1985) *U Pa LR* 549; MacLauchlan, H W, "Judicial Review of Administrative Interpretations of Law: How Much Formalism can we Reasonably Bear?" (1986) 36 *Univ Toronto LJ* 343; Pearce, D C, "Judicial Review of Tribunal Decisions — The Need for Restraint" (1981) 12 *Fed LR* 167.

112 MacLaughlan, ibid.

113 Supreme Court of Victoria, *Annual Report 1988* (1989); Parliament of Victoria Legal and Constitutional Committee *A Report to Parliament upon the Constitution Act 1975* 39th Report to the Parliament (March 1990) par 2.3; Bayne, P, "Dispute About Tribunals" (1990) 64 *ALJ* 493.

the *ICAC Act*. In *Woodham v Independent Commission Against Corruption*,[114] Grove J held that there was no evidence that a departmental officer's letter commending the actions of a prisoner without mentioning his misdeeds in prison, amounted to a "misuse of information". The letter had a commendatory purpose and was not written in an attempt to deceive the court in the sentencing process. Nor was section 9(1)(b) satisfied, because no disciplinary offence would have been committed. The ICAC had therefore made a jurisdictional error. Grove J used the language of the majority of the Court of Appeal, in emphasising that the ICAC is not a court; that "there was no objective basis" for the ICAC's conclusion of corrupt conduct; and that "the statute does not authorise the commissioner to create new standards to coordinate with his subjective views".[115]

On two later occasions decisions of the ICAC were upheld. Neither decision can be regarded as an application of the principle relating to "legal objective standards" developed by the Court of Appeal in *ICAC v Greiner*. In *Independent Commission Against Corruption v Chaffey*,[116] the Court of Appeal rejected a claim of denial of procedural fairness. In *Independent Commission Against Corruption v Cornwall*[117] Abadee J declared that a journalist had committed a contempt of the ICAC by refusing to name a source of allegations or to produce documents. However, these later decisions reflect the continuing tension between the court and the tribunal.[118]

Ironically, it is the decision of ICAC, not the decision of the Court of Appeal, which will set the agenda for future legislative and public sector reform and thinking. That is because the ICAC has correctly reflected community expectations of public officials, and has exposed dishonesty, partiality, breach of public trust and criminal conduct. The ICAC was entitled to do this, as Mahoney JA pointed out. Courts should not attempt to prevent tribunals from playing the policy-making and educative role, which necessarily arise in the course of their adjudicative decision-making. Judges themselves play this role, in developing the common law standards applicable to administrators. Those very objective immutable legal standards which the Court of Appeal said should be applied by the ICAC are malleable, constantly under revision and incremental development by the courts in judicial review.

So much has been acknowledged by the High Court.[119] The objectivity claimed by courts is shot through with subjectivity. High Court and Federal Court judges are now openly acknowledging the law-making role which they play, in developing the common law standards applicable to administrators and others. There are legal standards, but no objective ones, with regard to the administrative law basis for judicial interference with tribunal decisions on the ground of jurisdictional error. The administrative law principles

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114 (1993) 30 ALD 390.

115 Id at 397.

116 Above n105. The language of Kirby P in dissent in *ICAC v Chaffey*, distinguishing ICAC from a court, was reminiscent of that of Gleeson CJ in *ICAC v Greiner*. However, *ICAC v Chaffey* involved the construction of s31 of the *ICAC Act*, which provides for the public or private nature of an ICAC hearing and must be understood in connection with the common law principles of procedural fairness.

117 (1993) 116 ALR 97.

118 See Allars, M, "Fairness and Objectivity in the Independent Commission Against Corruption: A Tribunal in Need of Judicial Discipline?", paper presented at *Recent Developments in Administrative Law and Constitutional Law*, Australian Institute of Administrative Law (NSW Chapter) and NSW Bar Association, 9 June 1993, Sydney.

119 *Dietrich v R* (1992) 109 ALR 385, especially at 402–4 per Brennan J.

are constantly under revision and incremental development by the courts in judicial review. However, the Court of Appeal did not develop the principles incrementally in this case. The failure to pay regard to the existing case-law on jurisdictional error, the references to cases of only peripheral relevance, and the poverty of theoretical analysis of the relationship between courts and tribunals, stamps the majority decision as anomalous, explicable only in the particular political context within which it occurred. The decision will not provide good authority for the law relating to jurisdictional error in the future.

### *Reversing Reform?*

Within a week of the Court of Appeal's decision in *Greiner v ICAC*, the ICAC announced that it would not apply to the High Court for special leave to appeal. The basis for the decision was a desire of the ICAC to bring the Metherell affair to an end; a High Court decision would not be of lasting significance as statutory amendments are likely; an appeal would therefore be a waste of public funds and divert ICAC's resources from its continuing work.[120] It was clear that the *ICAC Act* would be amended. The majority decision had effectively left the definition of "corrupt conduct" unworkable in relation to Ministers. The Parliamentary Committee on the ICAC would have to consider what amendments should be made to the *ICAC Act*. That consideration was triggered by a majority decision of the Court of Appeal which, in terms of legal principle, was itself open to question, as argued in Part 3.

Following the Court of Appeal's decision, the ICAC issued a *Second Report* on the Metherell investigation.[121] This report was expressed to have been made for the purpose of correcting the record, stating the effect of the Court of Appeal decision, and suggesting desirable changes to the *ICAC Act* in order to accommodate the decision of the Court of Appeal. This is not the place to discuss the suggestions made by the ICAC in the *Second Report* for amendment of sections 8 and 9 or for restriction of its role to making findings of fact. Suffice it to say that criticism of the investigative and recommendatory role of the ICAC in achieving its goals ignores the similar roles of ombudsmen, the National Crime Authority, the Australian Securities Commission and royal commissions.[122] Like these tribunals, the ICAC affords procedural fairness to those affected by its decision-making, and is subject to judicial review. The ICAC is just one of the new avenues of accountability of administrators which function in a manner different from courts. Other avenues are freedom of information legislation, regulatory review, Administrative Appeals Tribunals, ombudsmen and a range of other tribunals. The tribunals which provide new avenues of accountability of administrators are themselves made accountable in a variety of ways. In the case of the ICAC, the *Freedom of Information Act* 1989 (NSW) applies in respect of functions which are not related directly to its investigative work, and the investigative work is scrutinised by its Operations Review Committee and the Parliamentary Committee on the ICAC.[123]

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120 The reasons are set out in Independent Commission Against Corruption, *Second Report on Investigation into the Metherell Resignation and Appointment* (September 1992) at 5–6 (*Second Report*).

121 Ibid.

122 For a comparison of the standard setting role of ICAC with that of ombudsmen, see Allars, M, "A New Morality in Administrative Law" (1994) in Argument, S (ed), *Administrative Law Forum 1993: Administrative Law & Public Administration: Happily Married or Living Apart under the Same Roof?*

123 *Freedom of Information Act* 1989 (NSW) s9, Sch 2; *ICAC Act* Pts 6, 7.

In the *Second Report* the ICAC defended its very existence, pointing out that corruption can damage the fabric of a community. The ICAC made the important point that it perceives itself as "an agent of change" to improve integrity in public life.[124] Recommendations setting out more detailed standards, including proposed legislative change, were made in the ICAC's *Third Report*, which was the response to the second question referred to the ICAC by Parliament in relation to the Metherell affair.[125] The *Third Report* re-emphasised the importance of merit selection procedures in public sector employment. Special scrutiny by an independent committee of eminent persons was recommended in situations where an applicant for a public sector position has served as a Member of Parliament within the preceding two years. Merit selection was recommended for appointment to membership of boards, trusts and similar bodies. Judicial appointment on the basis of merit through a documented and published process involving expressions of interest was also recommended. That these standards reflect community standards will be evident if others join the ICAC in advocating such change during the 1990s.

### *Report of the Committee on the ICAC*

In the wake of *Greiner v ICAC*, the Committee on the ICAC recommended in 1993 that section 9 of the *ICAC Act* be repealed.[126] However, the Committee also recommended that a new section be inserted into the *ICAC Act* requiring the ICAC to apply objective standards, established and recognised at law, in any findings which it makes about named or identifiable individuals in public reports.[127]

One can understand the Committee's concern that were the offending section 9 to be removed, the common law pronouncement of the NSW Court of Appeal would become completely obsolete. For it was in connection with the construction of section 9 that the Court said in *Greiner v ICAC* that the ICAC must apply legal objective standards.

However, it was section 9(1)(c) which propelled the ICAC into the difficult realm of the political conventions structuring the Governor's power to dismiss Ministers. Once the ICAC is relieved of the need to consider the hypothetical relating to the Governor's dismissal power, what impact can the requirement to decide according to legal objective standards have upon its decision-making? If this is a matter of concern, why not require other tribunals such as the NSW Ombudsmen, professional disciplinary bodies and royal commissions to decide according to such standards? They too have power to damage reputations.

The insertion of such a provision into the *ICAC Act* is not likely to trigger effort by the ICAC to work within its statutory framework where no such effort existed before. It is plausible to suppose that the ICAC already attempts to work within its statutory framework. If the ICAC does act in excess of the definition of its jurisdiction, it will in any event commit a jurisdictional error. The common law ensures that remedies are available in such a case. There is no more need to write into the *ICAC Act*:

> The ICAC shall act in accordance with legal objective standards" than there is need to write in: "The ICAC shall not commit jurisdictional error because if it does it has

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124 *Second Report* at 7.

125 Independent Commission Against Corruption, *Integrity in Public Sector Recruitment* (March 1993) (*Third Report*).

126 Parliament of New South Wales Committee on the ICAC, *Review of the ICAC Act* May 1993, par 1.7.4.

127 Id at par 4.4.3.

committed a jurisdictional error and its decision is subject to being declared void by the Supreme Court.

If the Committee is concerned that the ICAC abide by every provision in its empowering statue, not just those defining its jurisdiction, then it should recommend that recommendations of the ICAC be subject to an appeal on questions of law. That would ensure that the ICAC is not left free to make errors of law in relation to non-jurisdictional questions. This does not appear to have been a concern of the Committee.

## 5. *Conclusions*

Administrative law theorists agree without exception that tribunals exercise discretion, amending or creating standards in the course of adjudicative and policy-oriented decisions. Only the formalist would deny that this standard-setting activity occurs in the arena of the merits, where the statute clearly confers discretionary power upon the tribunal and subjectivity is expected. Most theorists also agree that when interpreting provisions in its empowering statute, the tribunal also chooses standards. Critical legal scholars argue that subjectivity intrudes here as well. However, the Court of Appeal has insisted that the ICAC exercises no discretion in this interpretive decision-making in relation to section 9(1)(c) of the *ICAC Act*. There is no discretion to be exercised by the ICAC, since legal objective standards governing the Governor's dismissal power indicate the meaning of the statutory provisions.

Constitutional lawyers may content themselves with the robust conviction that the Governor would not have dismissed in such a case. But the administrative law perspective casts a more subtle light upon the decision. The issue for an administrative lawyer is whether it was *open* to the ICAC to reach a conclusion that the conduct in question *could* constitute or involve reasonable grounds for dismissal by the Governor. The Court of Appeal's majority decision reflects a conviction that the Court has power, with one interpretive stroke, to eliminate the strong discretion which the ICAC undoubtedly exercises in interpreting the provisions of the *ICAC Act*. The ICAC's decision inevitably incorporated subjectivity.

Turning to the role of the Court of Appeal, the Court's requirement of objectivity in the ICAC is further weakened by the Court's own failure to identify the legal objective standards which the ICAC ought to have applied. A search for the legal objective standards governing the grounds for ministerial dismissals by Governors and Governors-General will not be satisfied by studying *Greiner v ICAC*, any more than by having resort to history, precedent, analogy or scholarly works.

Moreover, the Court's decision offers a poor guide to the principles upon which a supervisory court may interfere with a tribunal's decision in judicial review. The Court fails to refer to the standard common law authorities on jurisdictional error. The majority judgments are themselves flawed by the failure to rely upon legal objective standards.

Administrative lawyers will remain quietly bemused by the decision of the majority of the Court of Appeal. When power is exercised pursuant to sections 8 and 9 of the *ICAC Act*, strong discretion has to be exercised to choose standards of conduct for public officials. Subjectivity cannot be distinguished from objectivity, whether in the tribunal's decision or the judgments of the majority of the Court. The future lies in quiet analysis of the dissenting judgment of Mahoney JA. That judgment seeks a shared rationale for traditional common law principles of administrative law and the newly emerging morality ushered in by the *ICAC Act*.