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ADMINISTRATIVE LAW: FORM VERSUS SUBSTANCE

*The Hon Sir Anthony Mason, AC, KBE**

Text of the keynote address given to the 1995 Administrative Law Forum: Decision-making and Administrative Law - Form vs Substance, held by AIAL, Canberra, 27 April 1995.

Introduction

The claim that Australian administrative law focuses on form, rather than substance, is largely associated with the criticism that the federal system which was introduced in the 1970s is too heavily dominated by legal procedures and the judicial approach to the detriment of quality in substantive decision-making. To that extent, the claim is one which was present to the minds of the members of the Kerr Committee when they delivered their report recommending the establishment of the present system. We were mindful that judicial review might result in over-emphasis on form, a tendency which was clearly discernible in the mesh of technicalities which surrounded the remedies by way of prerogative writ. We thought that, by providing for the grounds of judicial review in the *Administrative Decisions (Judicial Review) Act* 1975 (Cth) ("the AD(JR) Act"), setting up the Administrative Appeals Tribunal ("the AAT") with jurisdiction to review on the merits and establishing the Ombudsman, we would bring about a distinct improvement in the quality of administrative decision-making and hence ensure that substance was not overlooked through emphasis on form.

Our recommendations proceeded on the footing that it was not possible to replicate in this country the French administrative review system, a system which, in my view, had many attractions. The problem was that the introduction of that system would have required a remarkable change in our administrative and legal cultures. Further, there would have been very considerable political opposition to the introduction of an alien system. Better then to adopt a regime which had legal foundations that were more familiar. Provision for merits review by the AAT would, we thought, assist in generating a substantive approach to decision-making that would flow through to primary decision-makers. That approach, we hoped, would not be too legalistic because the AAT was to be composed mainly of persons who were not lawyers. Even in the context of judicial review of administrative action, I then considered, and still consider, that jurisdiction in relation to judicial review should be reposed in judges who have skill and experience in that field. Not every judge has an understanding approach to review of administrative decision-making and that may be due to lack of familiarity with what it entails.

The distinction between review on the merits (not to be undertaken by judges) and judicial review on the statutory grounds (to be undertaken by judges) was, of course, critical to the regime. That distinction underlies the reasoning in *Australian Broadcasting Tribunal v Bond*[1]

* *Sir Anthony Mason is a former Chief Justice of the High Court of Australia.*

and it supports the rejection in that case of the attempt to achieve judicial review of factual findings for which provision is not made by or under a statute [2] whether as an ultimate and operative decision or as one which is prescribed as an essential preliminary to the ultimate and operative decision.

We sought to attain a balance between providing an effective means of redress in respect of deficient government decision-making processes and ensuring efficient administration[3]. That balance would have been tilted too far against efficient administration if judges were to engage in review of fact finding generally or in review of the merits.

Moreover, that balance was consistent with the separation of powers according to which the courts may legitimate review decisions committed to the executive if those decisions are unlawful, procedurally unfair or unreasonable in the *Wednesbury* sense. Such decisions may be regarded as void and, accordingly, subject to the exercise of judicial power.

The purpose of judicial review

That approach to judicial review was entirely consistent with classic statements of the purpose of judicial review. Sir Robin Cooke, the President of the New Zealand Court of Appeal, has said on more than one occasion that the end purpose of judicial review of administrative action is to ensure that administrative decisions are lawful, procedurally fair and reasonable. For present purposes, that statement may be taken as broadly correct, so long as the reference to "reasonable" is understood in the *Wednesbury* sense. Whether proportionality is an independent ground of review is another question; it certainly is an element to be taken into account in ascertaining whether subordinate legislation is within statutory power, at any rate when the power in question is a purposive power.[4]

Sir Gerard Brennan has said that judicial review is:

> the enforcement of the rule of law over executive action

and that it is:

> the means by which executive action is prevented from exceeding the powers and functions assigned to it by law and the rights and interest of the individual are protected accordingly.[5]

That statement expresses the purpose of judicial review according to the Anglo-Australian tradition. Whether it takes account of all the grounds of review stated in s.5 of the AD(JR) Act is another question, and the answer to that question depends upon the scope of some grounds such as the grounds stated in paragraphs 5(1)(a)[6], (f)[7], (h)[8], (j)[9] and 5(2)(g)[10].

The traditional view is based very largely on the doctrine of separation of powers. According to that doctrine, the function of the judiciary is to determine the legality of executive action and that includes determination of any departure from the requirements of natural justice and procedural fairness. But it is no part of the function of the court to substitute its decision for that of the executive when, by law, that decision is vested in the executive. The function of the court is to set limits on the exercise of the administrative discretion and any decision made within those limits cannot be challenged[11].

There is nothing in these statements of the purpose of judicial review which would support the proposition that it is more concerned with matters of form rather than substance. The same comment applies to the observation of Dixon J. that s.75(v) of the federal constitution:

> was written into the instrument to make it constitutionally certain that there would be a jurisdiction capable of restraining officers of the

> Commonwealth from exceeding Federal power.[12]

All these statements suggest that substance - the application of the rule of law to administrative action - lies at the heart of judicial review. And merits review should reinforce that characteristic of judicial review.

Does experience accord with expectation?

From the lofty heights of Mt Olympus which, as you will recall, was often surrounded by cloud, it has not been easy, without god-like capacities, to divine what is actually happening in the administrative world below. The intermittent experience of the High Court in cases concerning administrative law does not provide a panoramic picture of what is happening at the level of primary decision-making; nor does it provide insights into the culture of primary decision-makers. The office of Solicitor-General gave me a window on that world but, since then, my associations have been with lawyers or, to be exact, judges, so that my knowledge of the administrative and political culture derives from knowledge of particular instances.

Complaints about review of politically sensitive decisions

In some of those instances, dissatisfaction has been expressed with review, especially judicial review, of decisions in politically sensitive areas. Typical examples are migration cases and, more recently, Mr Tickner's response to the Federal Court's Hindmarsh Bridge decision. These criticisms are complaints about substance rather than form in that the assertion is that the courts have gone too far in overruling the administrative decision. Essentially they are claims that the courts have exceeded their function by not deferring to the administrative judgment and by undercutting important executive policies.

Whether these claims are valid in particular cases, I do not pause to consider.

The point is that there is political and executive resistance - just how much is for others to judge - to review of administrative decisions where those decisions impinge significantly on policy areas regarded as very important by government or on politically sensitive questions. Hence the establishment of more specialist tribunals in areas such as migration, along with the statutory amendments designed to curtail judicial review in that area. But, to repeat what I said before, that seems to be a controversy about substance rather than form.

It is, of course, an important question. However, it is a question that extends beyond review of administrative decisions. It has echoes in criticism directed at the High Court on the ground that it is trespassing into the field of the executive and, for that matter, the legislature. That criticism rests on the proposition that executive judgment should reign supreme subject to legislative direction in all matters of policy and in relation to politically sensitive questions. The difficulty is to devise a line which will be effective and at the same time to provide for worthwhile review of the administrative process.

However, the existence of dissatisfaction is an important matter. It may lead to the introduction of legislation imposing jurisdictional limitations which are undesirable and it may perhaps induce governments to believe that they should be looking for judges and tribunal members who will respect the viewpoint of government. So we have a problem because independence of mind is a quality as essential in the case of the tribunal member as it is in the case of the judge. Merits review requires independent decision-making; without it, merits review would be discredited and there might be

pressure on the Federal Court to engage in what in substance amounts to merits review. Like other problems, this problem arises because there is an inadequate appreciation by each constituent element in our system of government of the role of other constituent elements in that system. That inadequate appreciation means that it is very difficult to build bridgeheads across the divides between the legal, political and administrative cultures which have a significant impact upon the decision-making process.

Complaints about judicializing the administrative process

It was Lord Devlin who, in his book *The Judge*, noted that over time the courts had effectively judicialized the process of criminal investigation leading to the criminal trial by prescribing the governing rules which were to be applied. In a more direct way, the Federal Court and the AAT have had a similar impact upon the administrative decision-making process. The application of the legal principles relating to procedural fairness have played a large part of this evolution but I shall deal with procedural fairness and its consequences later in this address.

The point I seek to make here is that the availability of judicial review and the partial adoption of the judicial model by the AAT have imposed a legal discipline on the administrative process. That means that decision-makers are more conscious of the legal issues that arise in connection with decisions to be made and of the principles of procedural fairness. It also means that they generally act upon legal advice. That is all to the good. But it entails more emphasis upon the importance of the legal approach and there is the risk that overt and ostensible compliance with legal rules assumes an undue significance. In other words, legal forms may play a predominant part in decision-making.

Whether that is so or not, I am not in a position to say with any confidence. But what I can say is that is how it works in the orthodox court system and, for that matter, in tribunals which are subject to direct and continuous review by the courts. There is an unwillingness to run any risk of departure from what are thought to be the rules prescribed by the higher courts; there is even a desire to seek guidance in what a court or the AAT has said, notwithstanding that the statement may not have been directed to the question which subsequently arises for decision. This is an approach which I have described in other contexts as "precedent as an attitude of mind". It can lead to a preoccupation with abiding by rules and a stultification of a more flexible approach to decision-making.

Mind you, it doesn't always work that way. Far from it. One can find examples of executive refusal to abide by decisions of single judges on the footing that the executive is entitled to act on its view of the law until it is declared to be incorrect by the High Court or an intermediate court of appeal.

It is possible that the impact of judicial review and merits review by the AAT is an administrative version of what is called "defensive medicine". No doubt some critics of the existing system would say that is the position and that too much attention is directed to compliance with legal requirements to the detriment of substantive decision-making. The consequences of such an approach may be more disadvantageous to administrative decision-making than to curial decision-making. As with the claims made about defensive medicine, claims of this kind do not deny that the review system has advantages but assert that the detriments outweigh the advantages.

Too much concentration on procedural fairness

Viewed from the perspective of the High Court, much time and expense seems to be expended on cases involving allegations of departures from standards of procedural fairness. This is somewhat surprising. One would have thought that, by now, the standards of procedural fairness would be well known. And so they are. Yet the prevalence of these cases is not to be explained by reference to lawyers' persistence in arguing cases that are doomed to fail.

One of the misgivings one has about these cases is that the reconsideration of a matter, following upon a court determination that the initial consideration involved a departure from standards or procedural fairness, may result infrequently in a different decision. In other words, the expenditure of much time, effort and expense may not yield very much in the way of positive and different results. I am not sure that this perception is accurate but it is an impression that I have formed. However, it is important to stress that the courts still find that proper standards of procedural fairness are not observed. That, in itself, is a sufficient justification for the present system to the extent to which the review jurisdiction provides a remedy for denial of procedural fairness. Futility might be recognised as an answer to these cases but the problem with that answer is that it deprives the party of the adequate initial hearing to which the party was entitled by law.

Judicial initiatives to extend the scope of judicial review under s.5 of the AD(JR) Act

That brings me to the particular grounds of review in the AD(JR) Act. All the grounds stated in s.5(1) and s.5(2) are capable of being understood in such a way as to result in invalidity either by reason of excess of power or error of jurisdiction or error of law.

But there have been persistent attempts to use the grounds as a platform for a more wide-ranging review of administrative decisions - something which is closer to merits review. Notwithstanding the absence of any ground relating to erroneous findings of fact, the Federal Court regarded the "no evidence" ground in paragraph 5(1)(h) as a basis for challenging findings of fact, even findings of fact that are preliminary to, and do not form part of, the relevant decision[13]. However, *Australian Broadcasting Tribunal v Bond* [14] rejected that approach on the ground that it would, if adopted, expose all findings of fact to review on that ground and subject executive decisions to wide-ranging review by the courts. Underlying the decision in *Bond* was a concern that the administrative decision-making process, hitherto viewed as a simpler and less complex process than the curial process, would take on characteristics of the curial process if the Federal Court were to engage in a wide-ranging review of findings of fact.

A finding of fact, including an inference of fact, is reviewable for error of law and on the "no evidence" ground, when the finding is made by statute, an essential preliminary to the making of the final decision or the order. Indeed, the making of a finding and the drawing of an inference in the absence of evidence is an error of law[15]. However, in Australia, statements of high authority favour the view that "there is no error of law simply in making a wrong finding of fact"[16]. Lack of logic is not an error of law. Hence, if there is some basis for an inference, ie., it is reasonably open, it is not susceptible to review.

On the other hand, in England, there is support for a "no sufficient evidence" test as applied to findings of fact. There is also support, in England, for review of findings of fact for error of law on the ground that they could not reasonably be made on the

evidence or reasonably drawn from the primary facts. And, perhaps more significantly, in *Mahon v. Air New Zealand Ltd* [17], the Privy Council considered that natural justice requires that the decision to make a finding must be based upon some material "that tends logically to show the existence of facts consistent with the finding and the reasoning supportive of the finding"[18]. In *Bond* Deane J. expressed his agreement with the English approach, but the other members of the Court in *Bond* did not deal with the question.

Overall in Australia, as in the United Kingdom, it is accepted that courts exercising jurisdiction by way of judicial review should leave the findings of fact to the public body appointed by the legislature for that purpose except where the public body acts "perversely", that is, without any probative evidence[19]. It is not for the courts to substitute their views on the facts for the view of the tribunal or officer chosen by the legislature to make the decision. For the courts to do so would be to exceed their role and intrude into the province of the executive or some agency contrary to the disposition made by the legislature.

Another initiative taken by the Federal Court is to use the duty to accord procedural fairness as a formulation for generating a duty to make inquiries or cause inquiries to be made before rejecting the case presented by an applicant. This development in the concept of procedural fairness did not encounter much enthusiasm in the High Court in *Minister for Immigration and Ethnic Affairs v. Teoh* [20].

The irony in these initiatives taken by the Federal Court is that they would possibly lead to wider-ranging judicial review, with the result that the Court would be dealing more with the substance of the administrative decision. As it is, subject to the limitations on its powers described above, the Court is unable to review the merits of the decision so that much of the argument and much of the reasons for judgment are necessarily directed to these limitations on the review ground. For example, much depends on whether an error is an error of law. The time-honoured distinction between error of law and error of fact is less than satisfactory but, in confining the Federal Court's power to review to the grounds enumerated in s.5, the Parliament appears to have intended to restrict the Court's power to review for error of fact.

The Federal Court's initiatives in endeavouring to extend the boundaries of judicial review would bring about more wide-ranging review. If that object were achieved, it would provide greater scope to examine the substance of the impugned decision. Whether that development would meet with executive and political approval is a real question. It assumes that, in a contest between the courts and the AAT for merits: indeed, they might well favour specialist tribunals.

Shortcomings of the system

Despite reassuring statements that the system has brought about a significant change in the administrative culture and an improvement in the quality of administrative decision-making, I am not altogether convinced that these statements are entirely accurate. I accept that there is a better administrative appreciation of what procedural fairness entails and that, in this respect, the quality of decision-making has improved. I accept also that the participation of lawyers in the decision-making process has led to a clearer appreciation of the relevant issues by decision-makers and an improvement in the quality of the reasons given for decisions. These are certainly significant advances.

However, for my part, I doubt that these improvements would endure at the same level if the existing system were to be dismantled. That is because I doubt that

they have succeeded in bringing into existence a new and enduring administrative culture. I suspect that, at the bottom, the legal, political and administrative cultures remain largely separate and distinct. My suspicion may be unduly pessimistic and I hope that it is unfounded.

One question which arises is whether the policy of prescribing general rules and principles to be applied to primary decision-making should be relaxed in favour of a more discretionary approach. It is application of general rules across the board that contribute to the notion that form prevails over substance. This, of course, is a question which traces back to Aristotle though, fortunately for him, he was not called upon to consider it in this context. No doubt arguments can be mustered in support of each of the contending views. For my part, I continue to prefer a unified system of review in which, under the Administrative Review Council ("the ARC"), general rules or guidelines are followed by primary decision-makers. Overall, that is likely to enhance the consistency of decision-making and that is a very important element in administrative, as in other spheres of, justice. It should be possible in the formulation of general rules or guidelines to provide for qualifications or exceptions to cater for unusual cases.

In retrospect, it might be said that the system was introduced in the belief that its virtues would be evident to all so that administrators would be converted into true believers in the advantages which judicialized review would bring to the administrative process. Perhaps, when the system was established, we did not put in place adequate institutional bases for building bridgeheads between lawyers and administrators. Certainly the ARC was given a role and an important one which it has discharged effectively. But it may be that the magnitude and the diversity of the problems were not fully recognised.

Conclusion

Notwithstanding my references to some deficiencies in the existing system, I have no doubt that on balance it has improved the system of administrative justice. The existence of merits review, judicial review under the AD(JR) Act and the Ombudsman have imposed proper standards enforced by appropriate remedies. And the requirement for reasons has improved the quality of decision-making, though this point would have greater force if there were an antecedent obligation to give reasons when the decision is published. As it is, reasons may follow the conclusion not only in time but also in thought.

I doubt myself that citizens' or consumers' charters or codes of conduct would, on their own, be effective. However, I can see a place for them alongside or within the existing system of review so that the courts might be required to take them into account or even to enforce them. Anything that will improve the quality of primary decision-making should be supported and that may mean that we need to formulate both better guidelines for primary decision-making and new criteria for court and tribunal review.

Finally, administrative law training and education, it seems to me, is a very important matter, something which deserves close consideration if we want to develop an administrative law culture which is neither dominated by administrative self-interest nor legal insistence on form and procedure. It may well be unreal to think of a separate system of administrative courts. But that should not deter us from endeavouring to develop a distinct administrative law culture by means of appropriate training and education.

Endnotes

1 (1990) 170 CLR 321

2 ibid. at 341 per Mason CJ

3 ibid. at 336-337 per Mason CJ

4 *State of NSW v Law* (1992) 45 Ir 62; *State of NSW v Macquarie Bank Ltd* (1992) 30 NSWLR 307.

5 *Church of Scientology v Woodward* (1983) 154 CLR 25 at 70.

6 "breach of the rules of natural justice"

7 "error of law"

8 "no evidence"

9 "decision otherwise contrary to law"

10 "exercise of the power so unreasonable that no reasonable person could have so exercised the power".

11 *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 162 CLR 24 at 40-41 per Mason J.

12 *Bank of NSW v The Commonwealth* (148) 76 CLR 1 at 363.

13 *Minister for Immigration v Pashmforoosh* (1989) 18 ALD 77.

14 (1990) 170 CLR 1.

15 *Sinclair v. Maryborough Mining Warden* (1975) 132 CLR 473 at 481, 483.

16 *Waterford v. The Commonwealth* (1987) 163 CLR 54 at 77 per Brennan J.; see also *Australian Broadcasting Tribunal v. Bond.*

17 [1984] AC 808.

18 ibid at 831. See also *R. v. Deputy Industrial Injuries Commissioner; Ex parte Moore* [1965] QB 456 at 488; *Minister for Immigration and Ethnic Affairs v. Pochi* (1981) 149 CLR 41 at 67-68 per Deane J.

19 *Puhlhofer v. Hillingdon London Borough Council* [1986] AC 484 at 507, 518; *Broadbridge v Stammers* (1987) 16 FCR 296 at 300-301; *Apthorpe v Repatriation Commission* (9187) 77 ALR 42 at 53-54; *Television Capricomia Pty Ltd v Australian Broadcasting Tribunal* (1986) 13 FCR 511.

20 Unreported, 7 April 1995.

ADMINISTRATIVE LAW: CHOICE OF REMEDIES

*Dr Hannes Schoombee**

Paper presented to a seminar held by the Western Australian Chapter of AIAL, Perth, 10 May 1994.

Why is the choice of remedies an important issue?

The growth of administrative law has led to the availability of a wide choice of remedies against undesirable administrative action. Given this choice, the first step to be taken by an administrative lawyer advising a client often entails a careful consideration of the range of applicable remedies. The available remedies may offer very different means of redress, be mutually exclusive, and be subject to different time limitations. Other factors which should influence the choice of remedies include the availability of evidence, the projected costs, and tactical considerations such as the need to maintain a working relationship with the relevant decision-maker. These and other issues will be discussed in this paper, with an emphasis on recent developments.

Some basic choices

One of the first questions to be considered is whether recourse should be had to "sharp-edged remedies" such as review or appeal, or whether "softer" remedies such as the Ombudsman or, where available, mediation should be utilised. At an early stage consideration should also be given to the use of avenues which may assist the gathering of information and evidence, such as freedom of information[1] and parliamentary questions.

Two further choices, namely between administrative appeal and judicial review, and between the various judicial review remedies, merit closer attention.

Administrative appeal or judicial review?

Where an administrative appeal is available, and in general terms appears to be a feasible avenue of attack, careful consideration may need to be given to what issues other than the straight forward merits of the decision can be raised before the particular appeal tribunal. Can the administrative decision in issue for instance be challenged on the basis that it infringes the implied constitutional freedom of political discourse? Can other grounds of unconstitutionality (eg conflict with particular provisions of the federal constitution) or the conflict of state and federal legislation be raised? Can delegated legislation supporting the impugned decision be attacked before the appellate tribunal on the basis of *ultra vires*? Is an attack on the basis of *ultra vires* generally available, or is the tribunal limited to matters going to the merits of the administrative decision?[2]

While jurisdictional limits on what a particular appellate tribunal can decide, may preclude arguing some of the issues mentioned, this hurdle can often be overcome or at least alleviated by appealing to the tribunal and then having it refer an appropriate question of law to a court before conclusion of the administrative appeal. An example of such a provision allowing for an interlocutory question of law to be stated is the rarely

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used section 45 of the *Administrative Appeals Tribunal Act* 1975 (Cth).[3]

When choosing between instituting an administrative appeal or seeking judicial review, it should also be borne in mind that there is a growing tendency for the courts, both at federal[4] and state[5] level, to refuse judicial review remedies in the exercise of their discretion, if appropriate avenues of appeal have not been exhausted.

Recent decisions of the New South Wales Court of Appeal suggest that where an administrative appeal to superior court and judicial review are instituted simultaneously merely to gain a procedural advantage, such as an appeal without leave to an appellate court, if the judicial review proceedings turn out to be unsuccessful, the entire judicial review application may be struck out as an abuse of process.[6] But there may be quite legitimate reasons for instituting both an administrative appeal and judicial review, for instance to ensure that there is compliance with the time limits in respect of both remedies. A party wishing to challenge and in the first instance pursue matters of lawfulness rather than the merits may have to file, protectively, an appeal to the appropriate administrative tribunal.[7]

Choice of judicial review remedies

An important but often neglected question is whether administrative action should be challenged directly or collaterally.[8] Where for instance goods have been seized, there may be distinct procedural advantages in suing Customs in conversion rather than reviewing the decision to seize the goods.[9]

In the sphere of (the direct) judicial review remedies, administrative law unfortunately still exhibits a marked "remedy orientation", reflecting what Maitland had said in respect of English law, namely that "to a very considerable degree the substantive law administered in a given form of action has grown up independently of the law administered in other forms".[10] This is particularly so in states like Western Australia where (unlike say Queensland) there has been no significant reform of judicial review remedies. However, even at the Commonwealth level, there appears to be an increasing remedy orientation. Particularly as a result of the *Bond* case[11] any application for judicial review under the Administrative Decisions (Judicial Review) Act now appears to face a routine jurisdictional challenge on the part of the decision-maker at the interlocutory stage. As a result of this, and other developments such as the foreshadowed exclusion of large areas of migration law from the scope of the AD(JR) Act, the importance of the "traditional" judicial review remedies under section 75 of the federal constitution and section 39B of the Judiciary Act have increased.

In Western Australia a potential applicant for judicial review must decide, at the outset, whether to take the prerogative route or to sue for a declaration or injunction. Fortunately the High Court has recently affirmed that on application for prerogative relief, a declaration may be granted instead.[12]

In respect of the various judicial review remedies, the persisting remedy orientation manifests itself in respect of:

- the rules of standing;[13]
- scope of the remedy;[14]
- available grounds of review;[15]
- the operation of statutory ouster clauses;[16]
- judicial discretion to grant or refuse the remedy;[17]
- differences in procedure (more may be said about this aspect).

The obvious point is that prerogative writ proceedings are not suitable for cases involving serious disputes of fact. In such proceedings applicants also face a leave requirement and relatively short periods within which to commence the proceedings. On the other hand an applicant in jurisdictions such as WA is able

to obtain a final decision before the Full Court within a significantly shorter period than by bringing an action for a declaration.

Although traditional interlocutory aids to litigation such as discovery,[18] interrogatories,[19] cross-examination of deponents[20] and subpoenas[21] do not feature in prerogative writ applications, I can see no reason why even in jurisdictions with "unreformed judicial review proceedings" the Rules could not be applied in a flexible way so as to allow for instance the cross-examination of deponents to take place before a single Judge, or even a Master, with the record of a cross-examination then going before the Full Court. In any event, there does not appear to be any sound reason why any judicial review application should at first instance still go to a Full Court, as is the case in WA. Should such matters go before a single Judge (as occurs in the Federal Court), this will not only save judicial time, but allow for more flexibility in the conduct of proceedings.

Current judicial attitudes to historical restrictions on the scope and procedure of judicial review remedies

In states like Queensland state administrative law has now been reformed in a far-reaching manner based essentially the Commonwealth model. However, in states like WA the old prerogative writs still prevail, while in most other states and territories limited reforms have taken place but the prerogative remedies (in the form of prerogative orders) still occupy centre stage.[22] In all these jurisdictions I would urge a court sitting in a judicial review matter to take the view of the New South Wales Court of Appeal which has asserted that accidents of history should not be determinative of the scope of the traditional remedies, and that a question such as what constitutes the "record" for the purposes of certiorari should be determined by an examination of the present role of the court and the proper extent of its supervisory jurisdiction.[23]

Given the English law background of the prerogative remedies, the following observation on the state of modern English law by Clive Lewis in his excellent work *Judicial Remedies in Public Law* (1992) should be noted:

> The previous limitations on the availability of certiorari have gradually been eroded. These restrictions were disappearing before the introduction of the new judicial review procedure [in 1977]. The advent of that procedure added a renewed impetus to the modernisation of judicial review. The major obstacle to the development of the prerogative remedies was the dictum of Atkin L.J. in the *Electricity Commissioners* case that the supervisory jurisdiction of the courts only extended to bodies having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially. This dictum no longer represents the law, if indeed it ever did, and is seriously misleading. It is now clear that the judicial review jurisdiction and prerogative remedies are available against anybody exercising public law powers, whether they be derived from statute, the prerogative, or other non-statutory powers. Any exercise of public law power having a discernible effect may be challenged by a person with sufficient interest in the matter, whether or not it affects "rights," however broadly or narrowly that concept is defined. The concept of a "judicial" act is now completely discredited and has no role to play in determining the availability of the public law remedies. (p 145-6; footnotes omitted)

It should be noted that in English law certiorari and prohibition now lie in respect of:

- decisions which cannot be labelled "judicial" in the sense of subject to the requirements of procedural fairness;
- decisions which do not "affect rights" (see quote above);
- ministerial (ie non-discretionary) functions;
- delegated legislation;

- prerogative and (other) common law powers;
- decisions taken by statutory bodies with reference to a statutory framework but not under any distinct or specific statutory power;
- the exercise by a non-statutory body of public or governmental powers resting on *de facto* control of an area of activity such as company mergers and take-overs, at least where such control is exercised with the consent of government and has some statutory underpinning or support.

Endnotes

1 On FOI as "substituted discovery" prior to review proceedings, see Wayne Martin, "Administrative Law and Commercial Disputes", Paper 1, The WA Law Society Seminar "Federal Administrative Law" (1987), p 24-5, and in a criminal context, *Sobh v Police Force of Victoria* (1994) 1 VR 41 (Appeal Div); Special leave refused: [1993] 13 Leg Rep Page SL 1.

2 On the AAT (Fed), see *Re Adams and the Tax Agents' Board* (1976) 1 ALD 251; *Collector of Customs, NSW v Brian Lawlor Automotive Pty Ltd* (1979) 2 ALD 1 at 7 (Bowen CJ) and *Re McKie & Minister for Immigration* (1988) 8 AAR 90.

At state level see *Smith v Allen* (1993) 31 NSWLR 52 (CA); *Milentis v Minister for Education* WA Full Ct, 5.11.93, [1993] 15 SAWAJB 108 (on Government Teachers' Tribunal), and generally: Campbell E, "The Choice between Judicial and Administrative Tribunals and the Separation of Powers" (1981) 12 *Fed LR* 24 (esp 43-52).

3 See eg *Commonwealth v Sciacca* (1988) 78 ALR 279.

4 Compare *Queensland Newsagents Federation Ltd v Trade Practices Commission; Ex Parte Newsagency Council of Victoria Ltd* (1993) 118 ALR 527 with *Swan Portland Cement Ltd v Comptroller-General of Customs* (1989) 25 FCR 523 at 530; 90 ALR 280 at 286-7. The High Court is particularly strict in refusing to entertain judicial review proceedings in industrial matters if an appeal is available, eg *Re Walsh; Ex p. MS* (1992) 66 ALJR 644.

5 See eg *Boral Gas (NSW) Pty Ltd v Magill* (1993) 32 NSWLR 501 (CA).

6 See *Meagher v Stephenson* (1993) 30 NSWLR 736 (CA) 739 E-F; *Hill v King* (1993) 31 NSWLR 654 (CA).

7 See *Smith v Allan* (n2) 62G.

8 See my discussion of Collateral Challenge in LBC: *Laws of Australia* Vol 2 'Administrative Law', Subtitle 2.6, Chapter 11, para [282]-[286].

9 *Australian Federal Police v Craven* (1988) 20 FCR 547, 550 (Bowen CJ), 550 (Sheppard J) and Foster J passim. But note, in the context of cross-vesting: *Aerolineas Argentinas v Federal Airports Corporation* (1993) 118 ALR 635 at 652:35-653:10.

10 *The Forms of Action at Common Law* (1909) 298.

11 (1990) 170 CLR 321.

12 See *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581-2; *R v Wilson; Ex parte Robinson* [1982] Qd R 642 at 646G.

13 There is no uniform test for standing - eg the standing rules for certiorari and prohibition are 'more liberal' than those relating to injunctions and declarations: *Re Smith; Ex parte Rundle* (1991) 5 WAR 295 at 305, per Malcolm CJ.

14 Certiorari and prohibition appear not to be available to review the performance of ministerial (non-discretionary) functions or delegated legislation (see H Schoombee (n8) Subtitle 2.6, Ch 4, para [114] and [113], and generally Ch 4). There is now a (regrettable) wealth of case law on the meaning of a decision taken "under an enactment" in the context of the *AD(JR) Act* 1977 (Cth).

15 At common law non-jurisdictional error of law on the face of the record can only be raised by means of certiorari.

16 Note the significance of the remedies contained in s75(v) of the Constitution - *David Jones Finance v Federal Commissioner of Taxation* (1991) 99 ALR 447 at 459-60.

17 For instance "if the defect of jurisdiction is apparent on the face of the proceedings, (an)

order of prohibition must go as of right and is not a matter of discretion". *R v Comptroller-General of Patents and Designs: Ex parte Parke, Davis & Co* [1953] 2 WLR 760 at 764, per Lord Goddard CJ.

18 But see *R v City of Tea Tree Gully, Ex parte Concrete Systems Pty Ltd* (No 1) (1986) 65 LGRA 56 (SC SA Full Ct), and in the Federal Court: *Nestlé Australia Ltd v FC of T* (1986) 10 FCR 78 at 82; *FC of T v Nestlé Australia Ltd* (1986) 12 FCR 257 at 263-5.

19 But compare *Sixth Ravini P/L v FCT* (1985) 6 FCR 356 at 365.

20 In the Federal Court cross-examination of deponents frequently occur in judicial review cases. Under the traditional rules (eg WA RSC O 36 r2(3) the general power to order cross-examination of deponents appears wide enough to encompass applications for prerogative relief.

21 But compare *Mostyn v Deputy FCT* (1987) 73 ALR 396.

22 For a summary of the position regarding judicial review remedies in the various Australian jurisdictions, see H Schoombee (n8) Subtitle 2.6, Ch 1, para [2].

23 See *Glenville Holmes Pty Ltd v Builders Licensing Board* [1981] 2 NSWLR 608 (CA) at 611 (Hope & Samuels JJA); *Commissioner for Motor Transport v Kirkpatrick* (1988) 13 NSWLR 368 (CA) at 378 (Mahoney JA) & 394 (Priestley JA); *Commissioner of Police v District Court of NSW* (1993) 31 NSWLR 606 (CA) at 614-618 (Kirby P), and further *Ex parte Helena Valley/Boya Association (Inc)* (1989) 2 WAR 422; *Tea Tree Gully* case (n16) LGRA at 65-6 (Olsson J). But contrast: *Hinton Demolitions Pty Ltd v Lower* [No 2] 1971 1 SASR 512 (FC) at 537 (Weeks J); *WA v Bropho* (1991) 5 WAR 75; *Victorian Taxi Assoc Inc v Road Traffic Authority* [1989] VR 593 at 605 (Fullagar J).

AM I SPECIAL ENOUGH? THE PAYMENT OF EX-GRATIA COMPENSATION BY THE COMMONWEALTH

*Sarah Major**

Text of an address to AIAL seminar, Compensation for defective government actions after Mengel, Canberra, 1 June 1995.

Introduction

What happens when the actions of a Commonwealth agency result in a situation where the circumstances demand a remedy, but a legal entitlement to compensation does not exist?

The Commonwealth has recognised that, from time to time, there are circumstances which indicate it has a moral obligation to compensate those adversely affected by government policies or actions, or to provide assistance on compassionate grounds,[1] but there is no legal obligation to do so.

Compensation paid in these cases is generally referred to as ex-gratia compensation. Payment is purely discretionary, and the fact that a person has been adversely affected by a government policy does not automatically guarantee payment will be made.[2]

There are two kinds of ex-gratia payments:

- act of grace payments under s.34A of the *Audit Act 1901*, which are made where there are 'special circumstances', and
- payments authorised by Government (usually via a Cabinet decision) made through a specific appropriation describing the purpose of the compensation.[3]

The Department of Finance has policy responsibility for ex-gratia compensation matters. Experience has shown that the Department holds the firm view that ex-gratia compensation payments should only be made in unusual circumstances, and in particular, each act of grace claim must be carefully examined to ensure it meets the special circumstances test of s.34A of the *Audit Act 1901*.

When is a case special enough to warrant an act of grace payment?

While the Ombudsman agrees with the Department of Finance's view that payment is generally only appropriate in unusual circumstances, there have been differences of view about what the term special circumstances actually means. Various holders of the office of Ombudsman have not agreed, for example, that a case has to be unique to be special.

The Federal Court has defined special circumstances as 'something unusual or different to take the matter out of the ordinary course, according to which the [provisions in question] would be expected

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to apply. As a result, the ordinary course appears less appropriate or fair'.[4]

In practice, the point at which a case will meet the special circumstances test of the act of grace provisions is not always clear, as the following example illustrates.

Under the Social Security Act 1991, pensioners are required to notify the Department of Social Security prior to travelling overseas, regardless of the length of their absence. The Department then issues them with a departure certificate. If they fail to obtain a departure certificate, their pension is automatically cancelled after they have been outside Australia for more than six months. In many cases there is no way to requalify for their pension other than by returning to Australia.

Mr G was an 86 year old pensioner unable to care for himself. Since his wife's death in 1988, he lived part of each year with his daughter in the UK and his son in Australia. In 1992 he arrived in the UK and shortly afterwards was diagnosed as having terminal cancer. He was unfit to travel, and six months after his departure from Australia, the Department of Social Security cancelled his pension.

He appealed and won in the SSAT, on the grounds that the notice telling him to advise the Department of his departure was invalid in that it did not require such notification. The AAT agreed that the notice did not require Mr G to notify his departure, but determined that the decision was nevertheless correct at law, as the relevant section of the Act operates mechanically, regardless of whether such a notice was received. The AAT also determined that there is no discretion in the legislation to allow it to overturn the decision to cancel Mr G's pension. The AAT went on to comment on the harsh consequences of the legislation, and referred Mr G's case to the Ombudsman for consideration.

Mr G eventually died overseas without having returned to Australia, and without reclaiming his pension.

Is Mr G's a case for an act of grace payment? Some would say yes; there are sufficiently special circumstances or the law is unjust or unreasonable or oppressive. Others would argue that his pension was properly cancelled under legislation approved by Parliament.

Investigation of Mr G's case revealed a number of other factors worthy of consideration. The notices sent to him not only did not *require* Mr G to notify the Department of his travel, they also did not inform him of the consequences of failing to obtain a departure certificate. Even if the notices had been correct, Mr G could not read them, as he had undergone surgery on his eyes and his eyesight was extremely poor. He also suffered from senility, and the AAT found he was unlikely to remember the content of the notices, even if he could read them.

Do these additional factors then qualify Mr G as having special circumstances sufficient to warrant an act of grace payment? Again, some would argue against payment, as his son and daughter could have read the notices for him and ensured he obtained a departure certificate.

In many cases, it is not only the individual's circumstances which are relevant to determining whether an ex-gratia payment should be made. Legislative, policy and administrative issues may also need to be considered. For example, further investigation of Mr G's case also revealed that:

- the Government's statement announcing the introduction of departure certificates suggests that the legislation may have been intended to affect only those pensioners wishing to live overseas

permanently or for an extended period;

- the Department's files indicate that thousands of other pensioners are departing without notifying, remaining overseas for more than six months, and returning before the Department detects their absence. Contrary to the legislation, these pensioners are not made to requalify for their pension, only to repay pension to which they were not entitled; and

- Mr G was not advised he could claim a UK pension under the terms of the reciprocal Social Security Agreement with the UK. Had he been advised of this possibility, his financial difficulties could have been significantly ameliorated.

Mr G's case also raises fundamental questions about whether, in the context of beneficial legislation, it is reasonable for the law to apply regardless of whether a pensioner has been advised of his or her obligations.[5]

There is no defining moment at which a case becomes worthy of compensation under the act of grace provisions. Payment will depend on the circumstances in each case. However, act of grace claims have generally been more successful in gaining approval where:

- there is maladministration by the person acting on behalf of the Commonwealth which has led to the claimant suffering financial detriment;

- the application of the law produces unintended or anomalous results;

- it is desirable to apply the benefits of changed legislation retrospectively, or

- special circumstances exist which lead to the conclusion that there is a moral obligation on the Commonwealth to make a payment.

The majority of successful claims relate to cases where a person or persons have suffered financial detriment as a direct result of maladministration by Commonwealth government agencies or their agents. In this context, act of grace payments would not be considered appropriate where there is scope for claims under common law. If there is doubt about whether legal liability exists, the matter is referred to the Australian Government Solicitor for advice.[6]

Claimants beware

In reality, the distinction between whether the Commonwealth is legally liable or has a moral responsibility to pay compensation is not always clear cut. Indeed, in some cases there may be both a legal and a moral obligation for the Commonwealth to pay compensation.

The experience of the Commonwealth Ombudsman is that many agencies do not routinely consider all available avenues for compensation. In some cases, claimants are denied compensation on the basis that there is no legal liability, but are not advised that they have a right to seek an act of grace (or other ex-gratia) payment.

The Ombudsman has therefore suggested to the Department of Finance that, as a matter of policy, claimants should be advised of their review rights, especially where claims are denied or partially settled, or where a person may be otherwise dissatisfied with the treatment of their claim.

The Department of Finance's guidelines for ex-gratia compensation list a number of criteria[7] against which any decision to award payment of ex-gratia compensation should be tested, including whether:

- the extent of the losses is substantial relative to the capacity of those affected to absorb them (ie. they would place an unacceptably heavy burden on those affected); and
- the administrative cost involved in paying the compensation is appreciably less than the total amount of compensation.

The Ombudsman does not agree that these criteria are necessarily appropriate for considering whether payment of ex-gratia compensation should be made. A claimant's capacity to absorb a loss and the administrative costs associated with paying compensation should not usually have any bearing on a decision whether to approve a claim.

Should precedents take precedence?

The Department of Finance also takes into account whether payment would serve as a precedent. Although an act of grace payment does not give rise to a legal precedent, the Department argues it may act as a precedent against which future claims are assessed on the grounds of fairness.

Experience shows that the Department has traditionally resisted approving claims which may result in a number of similar claims. The Ombudsman's view is that a claim should not automatically be excluded because it may set a (non-legal) precedent; each claim should be considered on its merits, and if it meets the special circumstances test, it should be approved.

The potentially unreasonable nature of a judgment on the basis of these sorts of factors is demonstrated by the following case study.

A service pensioner and his wife failed to notify the Department of Veterans' Affairs (DVA) of fluctuations in their income which affected their entitlements over a period. Overpayments were calculated and repaid by instalments.

The pensioner complained that he and his wife had paid income tax on their pensions in the relevant tax years, but DVA had recovered the gross amount of the pensions overpaid. In effect, they were being required to pay their income tax liability twice in respect of certain periods. The Australian Taxation Office adjusted their tax commitments for the three most recent tax years, but was precluded by the Income Tax Assessment Act from adjusting for any earlier periods.

DVA declined to exercise a discretion available under the Veterans' Entitlements Act to waive recovery of that portion of the overpayment which equalled the amount of income tax already paid on the basis that the overpayment was attributable to the pensioners having failed to comply with the notification requirements of the Act.

The Ombudsman wrote to the Secretary of DVA expressing the view that it was unreasonable for the Commonwealth to make a windfall gain at the expense of an aged war veteran of modest means, and that the Commonwealth has no moral right to purport to 'recover' from a person more than he or she received. The Ombudsman recommended an act of grace payment equal to the amount of tax previously paid by the pensioners should be made. As is required under an agreement with the Department of Finance, the recommendation was referred to that Department for comment.

The Department of Finance opposed the payment for a number of reasons, including a concern as to the broader precedents which may be set, and hence, the lack of special circumstances in the case.

The Department of Finance's and DVA's refusal to agree to an act of grace payment resulted in the Ombudsman

taking the somewhat unusual step of reporting the matter to the Prime Minister. The Prime Minister agreed with the Ombudsman's conclusions and referred the matter back to the Minister for Finance.

Some four years after the complaint was received, an act of grace payment of $2273.90 was made to the pensioners.[8]

Application of the Department of Finance's criteria in this case would have ensured its rejection. First, payment of the claim would have set a "precedent" because potentially, a number of other individuals are in similar circumstances. Second, the administrative costs of arriving at a decision to pay compensation would have far outweighed the cost of the compensation in that case.

Nevertheless, the Ombudsman considered that these arguments did not sufficiently outweigh the principal issue - that an individual should not be expected to pay income tax liability twice.

Administrative arrangements

The power to approve an act of grace payment is unique. It is an unfettered personal discretion by the Minister for Finance (or persons authorised by him) to spend money for *any* purpose on *any person*. Conditions can be attached to payment, and if those conditions are breached, the payment becomes a debt owed to the Commonwealth.

In a submission to the Senate, the Commonwealth Ombudsman raised a number of concerns about the operation of the act of grace arrangements.[9]

Firstly, under 'trial' arrangements (which have been in place for seven years), most Commonwealth agency heads have been appointed as authorised persons for the purpose of approving act of grace payments up to $50,000 arising from a recommendation by the Commonwealth Ombudsman. All other act of grace claims (for less than $50,000) are authorised by the Minister for Finance or an authorised person in his Department.

All claims for over $50,000 are considered by an Advisory Committee made up of the Secretaries to the Departments of Finance and Administrative Services, and the Comptroller General of Customs. The Committee submits a recommendation to the Minister for Finance on whether the claim should be paid.

Under the 'trial' arrangements, where the Ombudsman has recommended that an act of grace payment is made, that recommendation must first be referred to the Department of Finance for 'comment'.

The Ombudsman has stated that this arrangement results in delays in the processing of requests and the Department of Finance re-canvassing the issues in a particular case, notwithstanding that an Ombudsman investigation has already been undertaken.[10]

The agency responsible for a matter has the final decision whether to approve small claims (less than $50,000) after considering the outcome of the Ombudsman's investigation (where that has occurred) and the Department of Finance's comments. In the case of larger claims (over $50,000), the responsible agency provides input to the Advisory Committee's deliberations, but has no say over the final decision to pay compensation at all.

For claimants, the process appears to be one of red tape and buck passing; it is not clear who has the responsibility and authority for making a decision on their claim.

Secondly, despite the recommendation of a Senate Committee that the power to authorise small act of grace payments should be permanently devolved,[11] the

Department of Finance is proposing to revoke the devolution arrangements.

If the revocation of the devolution arrangements goes ahead, all claims will have to be determined by the Minister for Finance or his Department.

The Ombudsman is of the view that the revocation of the devolution arrangements runs counter to reforms in public administration over the past decade, and that the heads of Commonwealth agencies should have the power to authorise the payment of compensation, regardless of the mechanism under which that compensation is paid.[12]

The Ombudsman has also commented 'it is incongruous that in an increasingly devolved financial management and accountability environment, agency heads can approve expenditure and waive large debts, but are unable to authorise the payment of compensation for defective administration'.[13]

Thirdly, the Ombudsman has expressed concern over the processes by which the Advisory Committee is briefed on large act of grace claims, and the membership of the Committee.

The Department of Finance is responsible for providing secretariat services to the Committee, as well as having a representative on the Committee. Under current arrangements, the Ombudsman does not have direct input to the written brief to the Committee, although a copy of her report is attached. In one recent case where an act of grace payment was recommended by the Ombudsman, but not supported by the Department of Finance, the Ombudsman requested the Department provide her with a copy of the brief to the Advisory Committee prior to its submission to the Committee.

In the Ombudsman's view, the brief clearly indicated the Department of Finance's belief that it has a role in recanvassing an investigation undertaken by the Ombudsman's office. The Ombudsman considered that this was contrary to the arrangements she understood were agreed between the Minister for Finance and the Prime Minister, which defined the Department of Finance's role as providing advice on the precedent and consistency implications of compensation cases involving an Ombudsman recommendation.

The Ombudsman provided comments on a number of assumptions made in the Department's brief and asked that any issues requiring further consideration or clarification were addressed to her prior to the brief being provided to the Advisory Committee.[14]

It is important that the processes for considering large act of grace claims are *seen* to be impartial. Claimants may perceive the Department of Finance's institutional role as protecting the public purse in advance of any objective consideration of the merits of their claim. In one case, a claimant observed that the inclusion of a representative from the Department of Finance was akin to Dracula being put in charge of the blood bank and that she was not at all confident of a fair decision being made.

Nevertheless, the Ombudsman recognises that the Department of Finance has a legitimate policy role to play in the consideration of large act of grace claims. Although it would be possible to establish a Committee of 'independent'[15] agency heads, the Department of Finance would still have input to any decision (given that the act of grace power is conferred on the Minister for Finance), and the Committee may therefore simply add another layer to the processes for considering large act of grace claims.

The Ombudsman has suggested to the Senate Finance and Public Administration Legislation Committee that the membership of the Advisory Committee

which considers large act of grace claims should be revised to include the Secretaries to the Department of Finance and the Attorney-General's Department and a departmental or agency head nominated by the Department of Prime Minister and Cabinet. The Ombudsman's role would be to provide input (where a matter had been investigated) to the Committee's deliberations. The agency head responsible for a matter would have ultimate responsibility for determining whether payment is approved.

This arrangement would place responsibility for determining claims where it belongs; with the agency responsible for the claim. It would also allow for speedier resolution of claims, while ensuring that the agencies responsible for the policy implications of compensation payments have appropriate input.

Specific purpose appropriations for ex-gratia compensation payments

The Department of Finance holds the view that the act of grace power is not 'a means of circumventing legislation or effectively establishing a payments scheme for remedying program or legislative deficiencies. In these latter cases, resort to specific appropriation, such as those for ex-gratia payments....may be more appropriate'.[16]

This mechanism for paying compensation is generally only adopted after extensive government consideration (usually via a proposal to Cabinet), and is relatively uncommon.

Historically, payments by this means have taken the form of compensation 'schemes' (such as the ones presently operating for the Australian Taxation Office and the Child Support Agency) where a number of 'individual compensation cases are dealt with within common guidelines and criteria developed for particular classes of losses'.[17]

Some examples[18] of specific purpose appropriations for ex-gratia compensation payments are:

- the compensation paid to the North Queensland forestry industry following World Heritage listing of the Queensland Wet Tropics in 1987;
- the compensation paid to grain growers for loss of the Iraq market in 1991; and
- the Government's proposal for a scheme to remedy detriment suffered as a result of defective administration.

Compensation to remedy defective administration

In the May 1995 edition of the *Australian Journal of Administrative Law*, Lachlan Roots argued there are 'compelling reasons for the introduction into our system of administrative law of a new and unique general right to damages in two separate forms: one a remedy of damages for wrongful administrative action *per se*; the other a remedy of damages for losses caused by wrongful administrative action'.[19]

In 1991, the Government foreshadowed the establishment of a non-statutory scheme for the payment of compensation for defective administration. The new scheme is still in its developmental stages, but will be established as a specific purpose appropriation for ex-gratia payments.

Although the Government's proposal for a new scheme for compensation for defective administration will be non-statutory, it is likely that it will be sufficiently broad and comprehensive to allow for the payment of compensation for many cases where there has been defective administration.

The Ombudsman has been negotiating with the Department of Finance for some

time over the framework for the new scheme, and the guidance provided to agencies on the operation of the scheme, given that decisions taken under the scheme will not be subject to the *Administrative Decisions and Judicial Review Act 1977*. At the time of writing, details of the scheme were being circulated to Commonwealth agencies for comment prior to being put to Cabinet.

In particular, it is hoped that the new scheme will allow for payment of compensation where a claimant has suffered a financial loss as a result of defective administration, but the relevant statute limits payment (for example, of arrears), a legal entitlement to compensation does not exist, and the claimant's circumstances are unlikely to attract an act of grace payment. The following complaint to the Ombudsman is a case in point.

Mrs J was granted a wife's pension under the reciprocal Social Security agreement with the UK. In these circumstances, her UK pension is deducted from her Australian pension until such time as she qualifies for an Australian pension under domestic legislation. The Department of Social Security noted a review for September 1991 when Mrs J would have met the residency requirement for an age pension, and her UK pension should be treated as income, rather than as a deduction.

In July 1990, after she had informed the Department her husband had died, Mrs J was advised to apply for a widows pension. The Department granted the widows pension, but continued to treat her UK pension as a deduction, even though she qualified for a widows pension under Australian legislation.

The Department then failed to conduct a review of Mrs J's circumstances in 1991, and she was not transferred to the more generous age pension. The errors were subsequently discovered some two years later.

The legislation prevents the payment of arrears for more than three months. Initial advice from the Australian Government Solicitor (AGS) was that the error resulted from the Department's actions, and that legal liability existed and compensation should be paid.

Subsequent advice from AGS stated that although the error was made by the Department, legal liability did not exist as a result of the decision in the UK. Jones v Department of Employment.[20]

In *Jones v Department of Employment*, it was held that the existence of a right of appeal from a particular decision means that there is no common law duty of care on a public servant in the making of that decision.

As a result, Mrs J has no legal entitlement to compensation, and the legislation limits the payment of arrears. Mrs J's case is unlikely to attract an act of grace payment, as it does not meet the special circumstances test and would set a (non-legal) precedent.

However, Mrs J has suffered a loss through no fault of her own, and in the Ombudsman's view, should be compensable under the proposed non-statutory scheme for compensation to remedy defective administration.

As an ex-gratia specific purpose appropriation, the scheme will be highly transparent; it will feature in agencies' accounts and will be subject to parliamentary and audit scrutiny. It is also consistent with recent government reforms in that it matches authority for approving compensation payments with the individuals responsible, and makes them accountable for their actions.

New horizons

At the end of the day, claimants have little interest in which particular mechanism governs the payment of compensation. It is not surprising that many victims of defective administration find the current arrangements confusing and bureaucratic. This often compounds a situation where they have spent considerable time and energy in obtaining an agency's acknowledgment that they have suffered as a result of defective administration.

The Audit Act is shortly to be replaced by a package of Bills, including the Financial Management and Accountability (FMA) Bill which will put in place new arrangements for the settlement of claims (where there is legal liability) and act of grace payments.

In her submission to the Senate Finance and Public Administration Legislation Committee, the Ombudsman commented that the new arrangements proposed in the FMA Bill do 'little to improve the current arrangements for agencies to remedy swiftly "injury" to a client that arises from defective administration'.[21]

She therefore put forward an alternate proposal on how the Commonwealth should administer the payment of compensation. The thrust of that proposal is that the current arrangements need to be reviewed as a whole, and that agency heads should have the authority to authorise payment (subject to a monetary limit) under all possible heads of compensation.

In addition, any new arrangements should operate in accordance with the following general principles, to be enshrined in executive policy:

- in settling claims, the Commonwealth should have regard to issues of fairness and justice, and should not take advantage of its position in negotiating the settlement of claims;
- agency heads should be authorised to make business judgements about a claim, that is, to pay a claim even though the merits may be open to challenge in order to avoid the expense of such a challenge, where it is appropriate to do so;
- claimants should be provided with (at least) summary reasons for decisions, and general details of how payments are calculated.[22] Claimants should not be expected to waive all rights where only part of a claim is settled;
- the roles of the various agencies involved in making payment should be clearly defined; and
- agencies should be accountable for their decisions via reporting to the Department of Finance, and audit and parliamentary scrutiny processes.

The Ombudsman's proposal is based on experience in negotiating the difficult landscape of ex-gratia compensation. It is designed to enable the Commonwealth to remedy its mistakes in an efficient, fair and accountable manner, with claimants compensable for the full extent of their loss.

Negotiations with the Department of Finance and the Attorney-General's Department are continuing on this matter.

In the interim, it is incongruous that the heads of Commonwealth agencies who manage large budgets and are empowered to make decisions involving millions of dollars which impact on large numbers of people, do not have the power to authorise small amounts of compensation to correct errors made by their Departments.

Endnotes

1 For example, to provide assistance for life saving medical treatment not available within Australia.

2 For example, changes in legislation which reduce or restrict entitlements do not usually result in payment of compensation to those adversely affected.

3 See the Department of Finance's paper 'The Payment of ex-gratia compensation by the Commonwealth', October 1993, for examples of several specific appropriations for this purpose. In recent years, appropriations have also been made to the Australian Taxation Office and the Child Support Agency to allow for ex-gratia payments to remedy 'defective administration' where no legal liability exists.

4 78 ALR 307

5 The Department of Social Security has since substantially revised arrangements for departure certificates. The new arrangements allow for suspension rather than cancellation of pension where a pensioner leaves without obtaining a departure certificate, and enable the vast majority of pensioners to requalify for their pension whilst overseas. Where a pensioner is unable to contact the Department due to circumstances beyond his or her control, he or she may be reinstated at the discretion of the Secretary up to two years after departure.

6 Op cit n3, p4.

7 Ibid, pp iii to iv.

8 See the Commonwealth Ombudsman's submission to the Senate Finance and Public Administration Legislation Committee's consideration of the Financial Management and Accountability Bill 1994, Commonwealth Authorities and Companies Bill 1994 and the Auditor-General Bill 1994, p5.

9 Ibid, pp 3 to 9.

10 Ibid, p9.

11 See report from the Senate Standing Committee on Finance and Public Administration, 'Review of the Office of the Commonwealth Ombudsman', pp 31 to 34.

12 Op cit n8, p16.

13 Ibid, p10.

14 Ibid, p10.

15 The term 'independent' is used to refer to a committee of officials who do not represent any particular party to the claim (other than the Commonwealth in general).

16 Op cit n3, p3.

17 Ibid, p3.

18 For other examples, see Ibid, p3.

19 *Damages for wrongful administrative action: a future remedy needed* now. Australian Journal of Administrative Law 2(3), May 1995, p147

20 [1989] 1 QB 1

21 Op cit n8, p2

22 The Commonwealth would not be expected to provide details which would disclose its position and arguments were a matter to be litigated, but should provide claimants (many of whom do not have the resources to obtain independent legal advice) with sufficient general information to allow them to make an informed decision about whether an offer of compensation is reasonable.

THE IMPACT OF THE MIGRATION REFORM ACT ON THE IMMIGRATION REVIEW TRIBUNAL

*Pamela O'Neil**

Text of an address by Pamela O'Neil to the Migration Institute of Australia Annual Conference, Sydney, 16 March 1995.

Introduction

On 1 September 1994 the *Migration Reform Act 1992* came into effect. Together with *the Migration Legislation Amendment Act 1994*, which made further changes to the *Migration Act 1958* and renumbered that Act, the Migration Reform Act made changes to Australian migration law of equal significance to those made by the *Migration Legislation Amendment Act 1989* which, with effect from 19 December 1989, codified much of what had previously been contained in departmental policy. This paper addresses the impact of the Migration Reform Act on the Immigration Review Tribunal ("IRT") but I will refer to other significant changes as necessary.

Changes to the structure of the review system

One part of the Migration Reform Act, that establishing the Refugee Review Tribunal ("RRT"), was brought into effect, as had originally been intended, on 1 July 1993. The commencement of the remainder of the changes made by the Act was deferred by the *Migration Laws Amendment Act 1993* from 1 November 1993 until 1 September 1994. Apart from the creation of the RRT the Act did not make major changes to the structure of the review system in relation to migration decisions.

The IRT had never had jurisdiction in relation to decisions on refugee status: what occurred in that jurisdiction was the replacement of a previous form of review which did not have a statutory basis, the Refugee Status Review Committee, with the statutorily based RRT. This had previously happened in 1989 in respect of migration decisions other than decisions on refugee status when the Immigration Review Panels, which did not have a statutory basis, were replaced by the IRT. The Administrative Appeals Tribunal ("AAT") retained the criminal deportation jurisdiction which it had always had. It also retained its jurisdiction in respect of the cancellation of business visas on grounds of failure to take a substantial ownership interest in a business or failure to participate in the day to day management of a business and its jurisdiction in respect of decisions refusing to grant or cancelling visas on character grounds, both of which it had gained in 1992.

For the vast majority of migration decisions, however, the avenue of review remained the two tier structure comprising the Migration Internal Review Office ("MIRO") within the Department of Immigration and Ethnic Affairs and the IRT. Significant changes were, however, made to enlarge the jurisdiction of MIRO and the IRT.

* *Pamela O'Neil was, until recently, the Principal Member of the Immigration Review Tribunal.*

Changes to the IRT's jurisdiction

Under the system as in force before 1 September 1994 the jurisdiction of MIRO and the IRT was confined to certain reviewable classes of visas and entry permits. The only decisions which were reviewable were decisions refusing to grant visas or entry permits of the reviewable classes, decisions rejecting nominations or sponsorships lodged in connection with applications for visas or entry permits of the reviewable classes, and decisions by way of points test assessments in relation to applications for concessional family visas. Within this regime there were also further specific exceptions, for example those in relation to decisions refusing further temporary entry permits to holders of entry permits granted for the purpose of English language study and decisions refusing permanent residence to holders of visitor entry permits.

With the exception of the December 1989 entry permits, the capacity to seek review was conferred on both applicants present in Australia and on nominators or sponsors. However, despite provisions extending rights of review in this area, there still remained reviewable classes of visas applied for off-shore for which there was no requirement for nomination or sponsorship and in respect of which there was therefore nobody who had a right to seek review. Confusion was also caused in relation to extended eligibility (family) entry permits where there was no criterion in the Migration Regulations requiring sponsorship (and therefore no entitlement on the part of a sponsor of the application to seek review) even though the departmental form required that there be a sponsor.

On 15 July 1992 the then Minister for Immigration, Local Government and Ethnic Affairs, the Hon. Gerry Hand, announced that, as part of changes also including the establishment of the RRT, the IRT would be given:

> jurisdiction to review decisions on all valid applications lodged in Australia, except for those lodged at the border and those relating to refugee status.[1]

This announcement was substantially implemented by the Migration Reform Act and the associated changes which came into effect on 1 September 1994. The legislative provisions relating to review were simplified and part of what had been formerly contained in the Migration (Review) Regulations was incorporated in the Act whilst the remainder was incorporated in the Migration Regulations 1994. As indicated in the Minister's announcement, the most significant change was that all on-shore decisions refusing to grant visas became reviewable. The IRT was also, for the first time, given jurisdiction to review on-shore decisions cancelling visas. The regime in respect of off-shore decisions refusing to grant visas remained much the same and rights of review in respect of cancellations were not extended to decisions taken off-shore.

Some restrictions do remain with regard to the review of on-shore decisions. The main constraint in relation to decisions refusing to grant visas (other than decisions refusing to grant bridging visas to non-citizens who are in immigration detention as a result of the refusal) is that the decision must be made after the applicant has been immigration cleared: non-citizens whose applications are refused in immigration clearance or after being refused immigration clearance do not have rights of review. Similarly, decisions to cancel visas made at a time when the visa holder is in immigration clearance are not reviewable unless the decision is one to cancel a bridging visa and the non-citizen is in immigration detention as a result of the refusal. The capacity to seek review of on-shore decisions is confined to the person who applied for the visa which has been refused or whose visa has been cancelled.[2] The capacity to seek review no longer depends on whether the

applicant was lawfully present in Australia at the date of primary application but the applicant for review must be physically present in the migration zone when the application for review is made.[3]

As noted above, the old regime is essentially maintained in relation to off-shore decisions. That is, rights of review are confined to some person in Australia rather than being conferred on applicants overseas. However the problem of reviewable classes of visas in respect of which there was no person with capacity to seek review under the old scheme has been eliminated: essentially rights of review exist only in respect of those decisions where there is someone with the capacity to seek review of the decision. The following off-shore decisions are reviewable:

- decisions refusing to grant a visa which could not be granted while the applicant is in the migration zone where the applicant has been nominated or sponsored, as required by a criterion for the visa, by an Australian citizen, the holder of a permanent visa, a New Zealand citizen who holds a special category visa, a company that operates in the migration zone or a partnership that operates in the migration zone;[4]

- decisions refusing to grant a visa which could not be granted while the applicant is in the migration zone where a parent, spouse, child, brother or sister of the applicant is an Australian citizen or an 'Australian permanent resident' within the meaning of the Regulations (that is, the holder of a permanent visa who is usually resident in Australia) and a criterion for the visa is that the applicant has been an 'Australian permanent resident' (essentially decisions refusing to grant resident return visas);[5]

- decisions refusing to grant a visa which could not be granted while the applicant is in the migration zone where a criterion for the visa is that the applicant intends to visit an Australian citizen or an 'Australian permanent resident' who is a parent, spouse, child, brother or sister of the applicant and particulars of whom were included in the application (essentially close family visitor visa decisions);[6] and

- decisions by way of points test assessments in relation to an applicant for a visa which could not be granted while the applicant is in the migration zone where the applicant has been nominated or sponsored, as required by a criterion for the visa, by an Australian citizen, the holder of a permanent visa or a New Zealand citizen who holds a special category visa and the Minister has not refused to grant the visa (essentially points test assessments in concessional family visa cases).[7]

The right to seek review is conferred on the nominator or sponsor or the relevant relative as the case may be.[8] Decisions rejecting nominations or sponsorships are no longer separately reviewable.

As under the old regime, certain decisions are not reviewable by MIRO but come directly to the IRT. These are:

- decisions made by the Minister personally;[9]

- decisions refusing to grant a bridging visa to a non-citizen who is in immigration detention because of that refusal or cancelling a bridging visa held by a non-citizen who is in immigration detention because of that cancellation;[10]

- decisions refusing a substantive visa where the applicant is in immigration

detention when the decision is notified to him or her;[11]

- decisions refusing a substantive visa where the applicant is a member of a family unit of which another member is in immigration detention at the time the decision is notified to the applicant and the applications for visas by those 2 members were combined;[12]

- decisions refusing a substantive visa where the applicant is a person whose right to make further applications while in Australia was, at the time of application, restricted under section 37 of the Migration Act as in force prior to 1 September 1994 or section 48 of the Act as in force on and after that date (that is, applicants who were not the holders of entry permits or substantive visas at the date of application and who had previously been refused an entry permit or visa while in Australia);[13]

- decisions refusing applications for December 1989 entry permits which are taken, under the Migration Reform (Transitional Provisions) Regulations, to be applications for Transitional (Temporary) and Transitional (Permanent) visas;[14]

- decisions refusing a visa made by the Secretary or by an officer holding or acting in a Senior Executive Service position;[15] and

- decisions cancelling a visa.[16]

Changes to the procedure for making an application for review

For the most part, the procedures for making an application for review and the time limits within which applications for review must be made remain unchanged. However it is important to note that time does not run for the purposes of review until a person is correctly notified of a decision. A notice of a reviewable decision under the Act must now state:

- that the decision can be reviewed;

- the time within which an application for review may be made;

- who can apply for review; and

- where the application for review can be made.[17]

For decisions refusing to grant substantive visas (other than where the applicant is in immigration detention) the time limits for applications to the MIRO and the IRT remain, as before, 28 days after the notification of an on-shore decision and 70 days after the notification of an off-shore decision.[18] The time limit for applications to the IRT for review of decisions refusing to grant a bridging visa to a non-citizen who is in immigration detention because of that refusal or cancelling a bridging visa held by a non-citizen who is in immigration detention because of that cancellation is 2 working days after the notification of the decision.[19] The time limit for applications to the IRT for review of decisions refusing a substantive visa where the applicant is in immigration detention and decisions cancelling a visa (other than decisions cancelling a bridging visa held by a non-citizen who is in immigration detention because of that cancellation) is:

- 2 working days after the notification of the decision; or

- if the applicant gives notice to the Tribunal within those 2 working days that he or she intends to apply for review of the decision - 5 working days after the applicant gives that notice.[20]

Because of the strict time limits involved, an applicant who is in immigration detention is now permitted to send an application for review to the Tribunal by facsimile transmission as an alternative to

lodging it in the ways previously available.[21] No fee is payable in respect of an application to the IRT for review of a decision refusing to grant a bridging visa to a non-citizen who is in immigration detention because of that refusal or cancelling a bridging visa held by a non-citizen who is in immigration detention because of that cancellation.[22]

Time-limited review and expedited review

The new regime introduces the concepts of 'time-limited review' and 'expedited review' by the IRT. 'Time-limited review' applies where the Tribunal is reviewing a decision refusing to grant a bridging visa to a non-citizen who is in immigration detention because of that refusal or cancelling a bridging visa held by a non-citizen who is in immigration detention because of that cancellation. In such cases the Tribunal must notify the applicant of its decision within 7 working days unless the Tribunal, with the agreement of the applicant, extends this period.[23] 'Expedited review' applies where the Tribunal is reviewing one of three types of decision:

- decisions refusing close family visitor visas where the application for the visa was made for the purpose of participation by the applicant in an identified event of special family significance in which the applicant was directly concerned and the application for the visa was made long enough before the event to allow for review by MIRO and the IRT if the application were refused;
- a decision cancelling a visa (other than a decision cancelling a bridging visa held by a non-citizen who is in immigration detention because of that cancellation, in which case time-limited review will apply, as set out above); and
- a decision refusing a substantive visa where the person who applied for the visa is in immigration detention at the time the application for review is made.

In such cases the Tribunal must 'immediately' review the decision and must give notice of its decision on the review 'as soon as practicable'.[24]

The IRT's powers remain essentially unchanged under the new regime. However, the Tribunal now has determinative powers in relation to all reviewable decisions, including those made by the Minister personally. Also, there is no equivalent of section 121 of the Act as in force prior to 1 September 1994, the power that enabled the IRT to give an on-shore applicant the opportunity to make a further application for an entry permit if it appeared to the Tribunal that the applicant might have grounds for making such an application. Under the new regime a primary decision-maker may invite a fresh application for a visa from an off-shore applicant but both MIRO and the IRT are expressly precluded from exercising this power.[25]

Changes to the IRT's procedures

There are likewise few alterations to the provisions governing the IRT's procedures. Of most significance are the modifications introduced to deal with 'time-limited review'. Whereas in the ordinary course of events the Tribunal first considers the documentary evidence and must then notify the applicant that he or she is entitled to appear before the Tribunal to give oral evidence if it cannot make the 'most favourable' decision on the review, in time-limited reviews the applicant may request the opportunity to give oral evidence in a form accompanying the application for review. Where the Tribunal requires a person to provide evidence which it considers necessary in relation to a time-limited review, the person must provide the

evidence within 2 working days after being notified that the Tribunal has required the evidence to be obtained and may provide such evidence by facsimile transmission.[26]

Referral of matters to the AAT

The new regime also introduces a mechanism whereby the Principal Member of the IRT may refer a review involving an important principle, or issue, of general application to the President of the AAT. The President of the AAT may accept such a referral or decline it, and, if the President accepts it, the AAT will be constituted for the purposes of the review by a three member panel including the Principal Member of the IRT (unless the Principal Member was part of the IRT as originally constituted to deal with the matter).[27] I have previously indicated that I do not envisage this process being used more than a few times a year.[28] It has not in fact been used in the 7 months since the Migration Reform Act changes came into effect.

Bridging visas

Perhaps the most interesting aspect of the new jurisdiction given to the IRT on and after 1 September 1994 is the review of decisions refusing to grant bridging visas. These visas are of course themselves part of the changes introduced by the Migration Reform Act. Under the law in force prior to 1 September 1994 a non-citizen who did not hold a valid entry permit was an 'illegal entrant'. An officer was entitled to detain a person whom the officer reasonably supposed to be an illegal entrant. A person so detained had to be brought before a 'prescribed authority', in practice a magistrate, within 48 hours of being detained or, if that was not practicable, as soon as practicable thereafter. If the person was not brought before a prescribed authority they were entitled to be released. The prescribed authority was required to determine whether there were reasonable grounds for supposing the person to be an illegal entrant. If there were, the prescribed authority could authorise the person's continued detention for 7 days at a time.[29] If the illegal entrant's 28 day 'period of grace' had ended, the Minister could, after following prescribed procedures, order his or her deportation.[30]

Under the new regime a non-citizen in Australia who does not hold a visa in effect is an 'unlawful non-citizen'. An officer must detain a person whom the officer reasonably suspects to be an unlawful non-citizen. An unlawful non-citizen who is so detained may not be released, even by a court, unless he or she is granted a visa. Non-citizens in Australia who have not applied for visas or whose applications have been finally determined and who have not made a further application for a 'substantive visa' - that is, a visa other than a bridging visa or a criminal justice visa - must be removed from Australia as soon as reasonably practicable.[31] However non-citizens who would otherwise be unlawful non-citizens because their visas have been cancelled or have otherwise ceased to be in effect may be able to avoid being detained by being granted a bridging visa.

In order to be eligible to be granted a bridging visa a non-citizen must have been immigration cleared or must fall within one of a number of prescribed classes of persons. These include certain of the so-called 'boat people', referred to in the Act as 'designated persons', who may be granted bridging visas, and so released from detention, if they have been in 'application immigration detention' for more than 273 days, if they are the spouse of an Australian or a member of the family unit of such a spouse or if they are under 18 and appropriate arrangements have been made for their care in the community. Secondly, the prescribed classes also include people who:

- entered Australia before I September 1994 without authority and have not

subsequently been granted a visa or entry permit; or

- bypassed immigration clearance on or after 1 September 1994 and have not subsequently been granted a visa;

and who have remained in Australia since 1 September 1994 and have not come to the notice of the Department within 45 days of entering Australia. Finally, the prescribed classes include people who entered Australia on or after 1 September 1994 and who were refused immigration clearance or who bypassed immigration clearance and came to the notice of the Department within 45 days of entering Australia where such persons have applied for protection visas or judicial review of a decision refusing a protection visa and:

- they are under 18 and appropriate arrangements have been made for their care in the community;

- they are over 75 and adequate arrangements have been made for their support in the community;

- they have a special need (based on health or previous experience of torture or trauma) in respect of which a medical specialist appointed by the Department has certified that they cannot be properly cared for in detention; or

- they are the spouse of an Australian or a member of the family unit of such a spouse.[32]

There are five classes of bridging visas but when dealing with people in immigration detention it is only the last of these classes, the Bridging E visa (Class WE), which is normally relevant. There are two subclasses within this class, subclasses 050 and 051. However subclass 051 only applies to the protection visa applicants who entered Australia on or after 1 September 1994, referred to above. The criteria for this subclass simply require that the applicant meets the health and public interest criteria for the grant of a protection visa and that the applicant or a person acting on his or her behalf has signed an undertaking that he or she will depart Australia within 28 days of the final determination of the protection visa application or within 28 days of the completion of judicial review proceedings (if the applicant applies for judicial review). If the applicant has already applied for judicial review of a decision refusing his or her application for a protection visa the criteria simply require that those proceedings not be completed.[33]

The remainder of applications in this class must satisfy the criteria in subclass 050.

These criteria specify that a visa of subclass 050 may be granted where:

- the Minister is satisfied that the applicant is making, or is the subject of, acceptable arrangements to depart Australia; or

- the applicant has made a valid application for a substantive visa and that application has not been finally determined or the Minister is satisfied that the applicant will apply, within a period allowed by the Minister for the purpose, for a substantive visa; or

- the applicant has applied for judicial review of a decision; or

- the applicant has applied for merits review of a decision:

  - to cancel a visa; or

  - to refuse a visa on character grounds;

  or the Minister is satisfied that the applicant will make such an application for merits review; or

- the applicant held a visa that has been cancelled because he or she is a member of the family unit of a person whose visa has been cancelled and the latter person has applied for review of the decision to cancel his or her visa or the Minister is satisfied that the latter person will make such an application; or

- the applicant has made a request to the Minister for the exercise of the Minister's discretion to substitute a more favourable decision for one made by a review officer or a Tribunal; or

- the applicant is in 'criminal detention', that is, the applicant is serving a term of imprisonment (including periodic detention) following conviction for an offence or is in prison on remand; or

- the applicant is the holder of a bridging visa Class E and the Minister is satisfied that the applicant has a compelling need to work, meaning that the applicant is in financial hardship.[34]

The other criteria for this subclass require that the decision-maker be satisfied that the applicant will abide by the conditions, if any, imposed on the visa and that a security has been lodged if asked for by an officer authorised under section 269 of the Act.[35] Section 269 deals with the requirement and taking of a security by an authorised officer for compliance with the provisions of the Act or with any condition imposed for the purpose of the Act or the regulations. By virtue of subsection 5(3), a power which may be exercised by an authorised officer may also be exercised by the Minister and hence by the IRT, standing in the shoes of the Minister.

The IRT's jurisdiction to review decisions refusing bridging visas of subclass 050 is therefore very much like a bail jurisdiction: the Tribunal must consider whether the applicant will comply with any conditions it may impose on the visa and it may require a financial security against the possibility of non-compliance with those conditions. The conditions which may be imposed include a reporting condition and a condition that the holder notify any change of address at least 2 working days in advance to the Department. However, as the Tribunal noted in one of its early decisions on a bridging visa case:

> ... there is nothing in the Act or the regulations which would suggest when or why any of the range of available conditions should be imposed.
>
> ...
>
> It would seem that the Act and the regulations impose a broad, perhaps unfettered, discretion on officers (and the Tribunal) as to what conditions they should impose.[36]

Having considered relevant decisions of the courts the Tribunal concluded that:

> ... it is consistent with the scope and purpose of the Act that the discretion to impose a condition on a bridging visa Class E should be exercised in the national interest in a manner so as to facilitate the effective regulation of the presence in Australia of non-citizens. But this discretion should be exercised in a beneficial manner to ensure that consistent with such regulation, the discretion to impose conditions and thereby in the long run to issue a visa should be favourably exercised. It is not, after all, in the national interest unreasonably to detain people, at great fiscal and human cost. This means that unreasonable barriers should not be put to the granting of a bridging visa, nor should there be any presumption either express or tacit that persons who are in immigration detention should remain there.

The most important conditions to be imposed, the Tribunal suggested, would be:

> ... conditions that make it possible readily to locate, contact and communicate with the non-citizen.
>
> In many cases involving unlawful non-citizens, and indeed almost by definition,

> the applicant for the bridging visa will have been in Australia in breach of migration law for a considerable time. Again, almost by definition, the applicant will have for understandable reasons worked in breach of the law. In many cases they will have at one time or another not used their correct name.
>
> These matters are almost 'given' in this context, and it cannot have been intended by the legislature that they should be seen as reasons for refusing a bridging visa. ... There is no logical reason, for example, why a person who has in the past breached the law by virtue of their very presence in Australia - or by working out of necessity - will necessarily breach the law by failing to comply with reporting conditions.[37]

The Tribunal observed that past activities which might indicate a likelihood that an applicant might fail to comply with conditions included past failure to comply with reporting conditions, a repeated lack of cooperation with departmental officers while in detention, and the refusal to take steps to obtain a passport or other travel document where the applicant knows that the failure to obtain such a document will make removal from Australia difficult or impossible.[38] In the case before it on that occasion the Tribunal found that the applicant had failed to comply with a condition imposed on her in May 1990 requiring her to report to the Department twice a week. She had reported only twice between May 1990 and her detention for working without permission in April 1994. She had given inconsistent explanations for her failure to report, saying first that she was ill and later that she had been afraid that she would be sent back to China if she went in to report. Although she stated that she had a friend whom she could live with there was nobody who was prepared to offer a financial guarantee of her compliance with any conditions which might be imposed on the visa. Accordingly the Tribunal found that she was unlikely to comply in the future with reporting conditions and it affirmed the decision refusing her a bridging visa.

Some other early IRT decisions on bridging visa cases provide illustrations of these principles. In *Re Daus*[39] the Tribunal found that the applicant had no less than nine different identity cards in false names. He had few friends in Carnarvon, where he had lived and worked for only four months prior to being detained in February 1994. The Tribunal concluded that it was not satisfied that the applicant would abide by any conditions it might impose were it to grant the bridging visa sought. In *Re Saleh*[40] the Tribunal noted that the applicant had refused to sign an application for an Indonesian passport. It said that applicants who were in custody and who decided not to cooperate in respect of travel documentation were unlikely to succeed before the Tribunal because:

> by failing to cooperate in relation to their travel documentation they are indicating that there is a high likelihood that they will not abide by the final determination in relation to their status.[41]

The Tribunal noted that the applicant had said that he was fearful he would be deported but it observed that he would not be able to be deported until all his avenues of review were exhausted. It therefore affirmed the decision refusing him a bridging visa.

The three decisions referred to so far all resulted in negative outcomes. However it is important to emphasise that the IRT has reversed departmental decisions and has granted bridging visas in some 60 per cent of the cases coming before it to date. By way of example, in *Re Steve Lee*[42] the Tribunal had before it an applicant who had been convicted of a number of offences involving passport fraud and imprisoned for six months. There was evidence that he was wanted to give evidence at the Coroner's Court in relation to the disappearance of the man whose passport he had used as the basis for an application for grant of resident status but the Tribunal observed that he had not been charged with any offences other

than the passport offences for which he had already served a term of imprisonment. The Tribunal noted that there was evidence that Mr Lee had been a model prisoner. He had substantial family ties in Australia including his Australian citizen wife, their young son and his parents-in-law who were prepared to provide security for his compliance with reporting conditions in the sum of $5,000. The Tribunal therefore granted him a bridging visa subject to a condition that he report twice a week to the Department.

In *Re Shobna Devi*[43] the Tribunal was dealing with an applicant who had obtained permanent residence on the basis of a contrived marriage. When this subsequently came to light she had become an illegal entrant by operation of law. She had subsequently applied for a Class 816 entry permit providing evidence of educational qualifications which she knew to be false. The Tribunal stated that it recognised that Ms Devi was frequently deceptive and that she had resorted to deceit in order to obtain permanent residence in Australia. However it said that 'failure to tell the truth does not necessarily indicate a general propensity to flout legal or procedural requirements'.[44] She had previously been released from custody pending the outcome of an application for review she had brought in the Federal Court and she had complied with reporting conditions on that occasion. She had a fiance who was prepared to provide a financial security in respect of her compliance with conditions in the sum of $3,000. In light of these considerations the Tribunal set aside the decision under review and granted Ms Devi a bridging visa on receipt of a security in the sum of $5,000, $3,000 of which was provided by her fiance.

One final example may suffice. In *Vijendra Kumar Sharma*[45] the applicant admitted that he had tried to hide when departmental officers had detained him. He also admitted that he had documents in the name of Vijay Kumar but he stated that this was the name he was known by and denied any intention to mislead. He had married an Australian citizen and he had an Australian citizen child. He also had a friend whom the Tribunal accepted as being a reputable person who was interested in helping him to sort out his immigration status. The Tribunal observed that it considered the departmental decision-maker had been unduly influenced by a view which the decision-maker had formed with regard to the likelihood of success of the application which Mr Sharma had made for a Class 818 entry permit. The Tribunal said that it was important for decision-makers to separate the issue of the likelihood of success of any substantive application from the issue of the likelihood of the applicant abiding by any conditions which might be imposed on a bridging visa. The Tribunal found that there was nothing in Mr Sharma's history to show that he would not comply with conditions and it therefore granted him the bridging visa which he sought.

It is interesting to note that a product of the Tribunal's relatively high set aside rate in bridging visa cases has been an apparent change in the departmental practice in these cases. The Tribunal has observed that the numbers of bridging visa reviews coming to it have diminished over the last few months and, while it has no statistics as to the pattern of decision-making in this area, one obvious explanation is that departmental officers have modified their approach to these cases in light of the Tribunal's decisions.

Cancellations

The other area which may be of interest in terms of the impact of the Migration Reform Act on the IRT is the review of decisions cancelling visas. As noted above, this is a completely new jurisdiction. To date the Tribunal has dealt only with cancellations pursuant to section 116 of the Act: it has not had any cases arising under section 109, the cancellation

power which has replaced the old section 20 procedure in relation to false or misleading statements made in visa or entry permit applications or passenger cards. The section 116 cases it has had, moreover, have related essentially to visa holders breaching conditions attaching to their visas, specifically holders of visitor visas and bridging visas breaching conditions prohibiting them from working and holders of student visas breaching the condition which requires them to satisfy course requirements.

Section 116(1) states that the Minister 'may' cancel a visa if the Minister is satisfied that the holder has not complied with a condition of the visa. In *Re Huan Ching Tseng* the Tribunal stated that it was:

> ... of the view that the proper interpretation of section 116(1) is that the decision to cancel is at the discretion of the Minister. The Act is silent, however, as to what matters are to be considered in exercising the discretion to cancel a visa.[46]

In that case the Tribunal found that Mr Tseng had failed to satisfy course requirements. He had been enrolled in a hospitality course at the Gold Coast TAFE and his official attendance records indicated that he had attended a total of only 6 classes of the 25 scheduled for the period from 25 July 1994 to his exclusion from the course on or about 6 September 1994. Mr Tseng disputed these records but accepted that he had been excluded from attendance at the course by the Gold Coast TAFE by reason of his poor attendance record. He claimed that his failure to attend had been the result of illness and a temporary need to work to support himself when financial support from his parents had ceased due to financial difficulties. The Tribunal found Mr Tseng's explanations unconvincing and inconsistent. It observed that there might be a case for giving a person in Mr Tseng's situation a second chance, as for example where they remained enrolled or had been accepted into another course of study. In the present case, however, the only evidence was that Mr Tseng had been excluded from the Gold Coast TAFE and that he was not enrolled in any other course of study. Accordingly the Tribunal affirmed the decision cancelling his student visa.

This case may be contrasted with *Re Kam Wan Yip*[47] where the applicant had likewise failed to attend classes in a TAFE course. The evidence was that Ms Yip had dropped out of Year 11 studies at Southside Christian College early in 1994 and that in June or July 1994 she had made inquiries at TAFE regarding enrolment in an office skills course. She had been advised that her enrolment in such a course was contingent upon her achieving a certain score in an English proficiency test but that if she failed to attain that score she would still be eligible for enrolment provided that she also enrolled in an ELICOS course. She sat the test and apparently assumed that she had obtained the required result to enrol in the office skills course without further studies in English. However TAFE accepted her only for enrolment in an English course, commencing on 15 August 1994, and when she discovered this she ceased attending classes. Subsequent to the cancellation of her visa she sought to re-enrol at TAFE and, when this proved impossible, she enrolled in an ELICOS course at a private institution which would subsequently allow her to undertake business studies at the same institution. The Tribunal found that Ms Yip had at all times had a bona fide intention to study and that her age and her limited ability in English had contributed to the confusion in relation to her enrolment in the TAFE course. Her family was present in Australia and had undertaken to provide her with support in her studies. On the facts as it found them in this case the Tribunal considered that it should exercise its discretion to set aside the cancellation of the visa.

Conclusion

The changes to the jurisdiction of MIRO and the IRT made as part of the package of changes contained in the Migration Reform Act and associated legislation have resulted in a significant expansion of rights of review for applicants in Australia. The IRT is still breaking new ground in its decisions on bridging visas and visa cancellations but there is evidence that its positive approach to the legislation is already influencing departmental decision-makers in this area.

Acknowledgment

Acknowledgment is made of the contribution to the above address by Mr Giles Short, BA LLB, who was Director of Research, Immigration Review Tribunal, at the time that it was prepared.

Endnotes

1 Media Release No. MPS 35/92, 15 July 1992.

2 Migration Act, sections 339(2)(a) and 347(2)(a).

3 Migration Act, sections 229(3) and 347(3).

4 Migration Act, paragraph (e) of the definition of 'Part 5 reviewable decision' in section 337.

5 Migration Act, paragraph (f) of the definition of 'Part 5 reviewable decision' in section 337.

6 Migration Act, paragraph (g) of the definition of 'Part 5 reviewable decision' in section 337.

7 Migration Act, paragraph (h) of the definition of 'Part 5 reviewable decision' in section 337.

8 Migration Act, sections 339(2)(b) and (c) and 347(2)(b) and (c).

9 Migration Act, sections 330(2)(a) and 346(1)(b).

10 Migration Act, sections 338(2)(c) and 346(1)(c).

11 Migration Act, sections 338(2)(d) and 346(1)(d), and Migration Regulations, regulation 4.09(a)(i).

12 Migration Act, sections 338(2)(d) and 346(1)(d), and Migration Regulations, regulation 4.09(a)(ii).

13 Migration Act, sections 338(2)(d) and 346(1)(d), Migration Regulations, regulation 4.09(a)(iii) and (iv), and Migration Reform (Transitional Provisions) Regulations, regulation 8.

14 Migration Act, sections 338(2)(d) and 346(1)(d), and Migration Regulations, regulation 4.09(b).

15 Migration Act, sections 338(2)(d) and 346(1)(d), and Migration Regulations, regulation 4.09(c).

16 Migration Act, sections 338(2)(d) and 346(1)(d), and Migration Regulations, regulation 4.09(d).

17 Migration Act, section 66(2)(d).

18 Migration Regulations, regulations 4.02(2) and 4.10(1)(a) and (c).

19 Migration Regulations, regulation 4.10(2)(a).

20 Migration Regulations, regulations 4.10(1)(b) and (2)(b).

21 Migration Regulations, regulation 4.11.

22 Migration Regulations, regulation 4.13.

23 Migration Act, section 367, and Migration Regulations, regulation 4.26.

24 Migration Regulations, regulations 4.23, 4.24 and 4.25

25 Migration Regulations, regulation 2.11.

26 Migration Regulations, regulation 4.17.

27 Migration Act, sections 381, 382 and 384.

28 O'Neil, P, 'The Experience of Introducing Merits Review to a New Portfolio: Recent Changes and New Trends in Merits Review of Immigration Decisions', in *Admin Review*, No.35 (Autumn 1993), pp2-6 at p4.

29 Migration Act as in force before 1 September 1994, sections 14 and 92.

30 Migration Act as in force before 1 September 1994, Section 59.

31 Migration Act, sections 13 and 14, 189, 196 and 198.

32 Migration Act, section 72, and Migration Regulations, regulation 2.20.

33 Migration Regulations, Schedule 2, clause 051.212.

34 Migration Regulations, Schedule 2, clause 050.212.

35 Migration Regulations, Schedule 2, clauses 050.213 and 050.214.

36 *Re Qing Mei Fu* (IRT Decision 4388, 20 September 1994), p5.

37 *Ibid*, pp 6-8.

38 *Ibid*, p 9.

39 IRT Decision 4113, 14 September 1994.

40 IRT Decision 4401, 14 September 1994.

41 *Ibid*, at p 4.

42 IRT Decision 4387, 6 October 1994.

43 IRT Decision 4396. 13 September 1994.

44 *Ibid*, p 6.

45 IRT Decision 4409, 20 September 1994.

46 IRT Decision 4498, 31 October 1994, p 9.

47 IRT Decision 4622, 7 December 1994.

RESEARCH NOTE: COLLECTING INFORMATION ABOUT TRIBUNALS

*Robin Handley**

Introduction

This note reports briefly on a research project undertaken by the Centre for Court Policy and Administration, which is part of the Law Faculty at the University of Wollongong.

The background against which the project was initiated is the continuing proliferation of tribunals, at both state and federal government levels. While in recent years governments have set up an increasing number of tribunals to make primary administrative decisions on a wide range of issues or to review decisions which might formerly have been reviewed by the courts,[1] the establishment of these new tribunals seems to have been largely an ad hoc process, particularly at the state level. No attempt had been made to collect information about tribunals across Australia, nor does there seem to have been any attempt to identify the range of appropriate tribunal models which could be utilised to achieve a specific objective.

While steps have been taken in some jurisdictions at least to identify the tribunals operating in that jurisdiction,[2] as yet there is no clear picture of the part played by tribunals in our system of government. The Administrative Review Council (ARC) has been interested in the operation of tribunals for a number of years but its functions are limited to inquiring, reviewing and making recommendations in respect of Commonwealth tribunals reviewing administrative decisions.[3] The ARC recently published a report on a review of Commonwealth merits review tribunals.[4] It has no jurisdiction in respect of state tribunals.[5] In the states and territories, the departments of courts administration see control over the establishment and operation of tribunals as part of their function. But tribunals are established under a variety of ministerial portfolios and, in the past at least, there appears to have been little co-ordination or oversight of tribunal activities as a whole. Between the different jurisdictions, communication about tribunals is limited largely to discussions between specialist tribunals with similar functions who meet from time to time at annual conferences or to consider common problems.[6]

Recognising the lack of any comprehensive information about the part played by tribunals in our system of government, the Centre for Court Policy and Administration decided to undertake a small research project, the main objective of which was to develop, test and refine a research methodology for the collection of information about tribunals with a view to establishing a database. But before starting on the methodology, the first issue which had to be resolved was what we meant by "tribunal" in the context of the project.

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Defining "tribunal"

Determining whether a particular body is a tribunal is less easy than might at first appear.[7] Taking as an example the names given to tribunals, while some do include tribunal in their name, others use Agency, Authority, Board, Commission or Council.[8]

The traditional dictionary definition of "tribunal" is a court or seat of justice. Modern usage, however, suggests that in a legal context, at least, the word "tribunal" is used in contradistinction to "court" to mean a body (which could be constituted by a single person) in which administrative decision-making powers are vested, whether it *makes* primary decisions itself or *reviews* such decisions.

A tribunal which makes primary decisions will typically be adjudicating disputes or making determinations about entitlements or the exercise of rights. If a tribunal reviews a decision, this may involve not only an examination of the process followed by the original decision-maker and the evidence relied upon, it will also involve a re-examination of the merits of the decision - with the tribunal standing in the shoes of the original decision-maker. Some tribunals may only *recommend* particular action (for example, to the responsible minister) rather than make a *determination*.

An important characteristic of tribunal decisions, like court decisions, is that they often affect the rights, privileges, duties or obligations of individuals or associations.[9] Thus, in making their decisions, which will include determining the material facts and interpreting and applying the law, tribunals are expected to act in accordance with principles of fairness and justice.[10] In relation to this project and in the context of the characteristics of courts and tribunals, it should be noted that no attempt has been made to address the difficult issues raised at Commonwealth level by the doctrine of separation of powers. Whilst the distinction between judicial and executive functions, recently highlighted by the High Court decision in *Brandy v Human Rights and Equal Opportunity Commission,*[11] is an important consideration in the design of Commonwealth tribunals, it was not felt necessary to address this in defining the term "tribunal" for this project.

Thus, for the purposes of the project, the broad meaning of tribunal was adopted, that is including both tribunals *making* primary decisions and tribunals *reviewing* primary decisions, either within or external to other administrative structures, or as a mixture of both. Although this description of a tribunal is relatively straightforward, in practice, as noted above, identifying a particular body as a tribunal can be difficult. This is not something explored more fully in this project.

In testing the research methodology developed, we focused, quite consciously on two tribunals whose main function is primary decision-making. The reason for this is that the ARC and others currently studying the operation of tribunals have tended to focus on review tribunals and have not looked at the operation of primary decision-making tribunals. We did not wish to duplicate their work. Moreover, these studies have focused on Commonwealth tribunals. We therefore chose to test our methodology with two state tribunals, the NSW Guardianship Board and the NSW Residential Tenancies Tribunal. Nevertheless, we think that the information which emerged from our testing is sufficiently general in nature

to cover all types of administrative tribunals as we have defined them.

The approach adopted

In determining how to develop a research methodology to collect the required data for the establishment of a tribunals database, a range of research methods was considered in the context of the resources likely to be available for such a project. Our aim was that the data collection process should be sufficiently straightforward to be carried out by a research assistant with only minimal knowledge of tribunals. Another aim was that the process should be economical in terms of time (and therefore money). This meant that more time-intensive methods of data collection such as extensive interviewing could only be used sparingly where essential. The methodology ultimately adopted comprised the following:

- *A master list of data* to be collected about tribunals was devised. The intention is for this master list, which comprises a number of different classifications, to be the primary reference point for a researcher undertaking data collection and collation. The master list is also a useful starting point for developing design and evaluation criteria, discussed below (see **Other Proposed Action**).

- *A search list of public documents* was devised, identifying the information that particular categories of document can be expected to yield. Much of the information required for a database is readily available from public documents and can be easily collated from this source. When available from public documents, the information need not be sought elsewhere - duplication in the collection process should be avoided.

- *Observation of tribunal hearings and viewing of premises.* An observer should attend tribunal hearings and view tribunal premises recording his/her observations with regard to specified criteria. This is necessary to ascertain how a tribunal actually works, For example, a tribunal's stated procedures may not reveal the full picture of what happens in practice. The physical premises and the way they are equipped, for example the layout of the hearing room or whether specific facilities such as a phone or tea/coffee machine are provided, can have a significant effect on how an applicant responds to the process.

- *Questions for tribunal management.* A list of questions was developed for a researcher to ask of tribunal management. Detailed information about tribunal management does not always appear in public documentation. Information about the tribunal's internal administrative process, for example its case management system, is important.

- *A questionnaire for tribunal members.* A standard questionnaire for tribunal members was designed and tested for use with a variety of tribunals.

- *Questions for stakeholders.* A list of questions was developed for a researcher to ask of stakeholders. For the purpose of this project, a stakeholder was defined as any party to a tribunal decision-making process, or person or class of person or organisation representing that party (including, for example, community agencies), whether directly or indirectly, who is interested in the outcome of that

> tribunal decision. However, in many situations, it is just too difficult to ask questions of individual applicants. An applicant leaving the premises after a hearing often will not feel inclined to answer questions about what has just happened, and that person's response may well be coloured by the outcome of the hearing. Therefore it is not intended that questions be asked of individual applicants. But it is more feasible to approach the departments, agencies, organisations etc involved, and more can probably be achieved from doing so because they will have more extensive experience of dealing with the tribunal.

This methodology was tested and refined by is application in collecting data about the NSW Guardianship Board and NSW Residential Tenancies Tribunal. Copies of the documents relevant to the six components of the research methodology, together with comments on their usage, appear in a more detailed report available from the Centre for Court Policy and Administration.

Establishing a tribunals database

Now that the original objective of the project - the developing, testing and refining of the research methodology for collecting information about tribunals - has been achieved, the next step would be to use the methodology to establish a database of information about tribunals. Such a step depends, however, on further funding being available.

Other proposed action

As the project progressed, we became aware of how the methodology and data collected might aid both the design of new tribunals and the evaluation of existing tribunals.

Tribunal design criteria

Having identified the information which should be recorded on a database, it is not difficult to formulate a series of standard questions to elicit relevant information which will inform tribunal design. For example, this might assist the development of a flow chart/algorithm identifying the options as to structures, powers, procedures etc which can be used to achieve a particular result in terms of the functions of a proposed or existing tribunal. Such an approach could be useful where a new tribunal is being proposed and the specific form it might take is under consideration. Moreover, where the evaluation of an existing tribunal is being conducted, design options could be used to assess whether the current design (including, for example, structure, composition, powers, procedures, access, case management, accountability) is best suited to the performance of the tribunal's functions, or whether there are alternative design features which would promote the better performance of its functions.

The standard questions designed to elicit relevant information to inform tribunal design might include the following (which are intended as examples and do not aim to be comprehensive):

(a) Is the decision made by the tribunal significant for the individual?

- What factors make the decision significant for the individual?
  - financial effect - impact on the person's livelihood
  - removes/limits privileges or rights eg personal liberty (such

as freedom of movement, right to work by imposing licensing requirements)

- imposes factors eg reputation/social standing, self-esteem, family life, personal interests such as recreational pursuits.

- In terms of tribunal design and process, the more significant the decision, the greater the need for:

  - access to information/advice
  - representation: what form of representation? Legal, other, as of right?
  - a right to be heard - in person or only to make written representations?
  - public hearings
  - the process to be quick but fair?
  - formality/informality: what level?
  - tribunal members with appropriate qualifications and expertise
  - multi member tribunals (drawing on part time members) so that a variety of views are brought to bear
  - a demonstrably independent tribunal
  - appropriate remedies?
  - a power to investigate for the tribunal if the necessary information is not before the tribunal?
  - a further avenue of appeal on merits, law or both?

(b) Is the decision made by the tribunal significant for the government?

- What factors make it significant for the government?

  - Financial cost: effect on the tribunal's composition, powers/procedures, remedies
  - provision of government information?
  - Public interest/benefit, social or welfare considerations: effect on the community
  - government's mandate
  - whether it is newsworthy and its effect on electoral/ community support - will it affect votes?

- In terms of tribunal design and process, the more significant the decision is, the greater the need for:

  - tribunal independence and objectivity
  - economical tribunal composition and processes
  - efficient management
  - an opportunity to put the government's case to the tribunal, whether in the form of a written submission or presentation at a hearing
  - representation on the tribunal itself
  - policy and rule making
  - accountability

Evaluation of tribunals

Secondly, having identified the relevant data and designed appropriate classifications required for the database, this information could

also be used for designing a method for evaluating a variety of existing tribunals. For example, it may be possible to identify a set of "standards and indicators" for this purpose. This emerged from a realisation that the constraint of designing a methodology that could be undertaken by a research assistant, also suggested the possibility of developing a set of clear observation statements or indicators.[12] To develop standards and indicators of general application will be difficult and time-consuming. Nevertheless, a preliminary attempt to draft a set of standards and indicators of accessibility, which follows, suggests that this is feasible.

We have not yet tried to assign values to these standards and indicators. Once developed, the application of these standards and indicators to particular tribunals should be relatively straightforward.

> Principle: **ACCESSIBILITY**
>
> To ensure that the tribunal is accessible to all those who are entitled (who have standing) to bring a matter to the tribunal for determination (whether this involves a primary decision or the review of a primary decision).

Standard 1:
Physical access

Indicators

(a) *Access for making an application*

- can this be made orally (eg by phone) or must it be made in writing?
- is the tribunal registry accessible for lodging an application either personally or by phone (008 toll free number?) or by post?

(b) *Access to premises and hearing*

- are the tribunal premises and hearing venues easily accessible by public transport?
- does the tribunal pay the travel and accommodation costs of attending a hearing?
- does the tribunal take account of any travel limitations of the applicant?
- does the tribunal hold out of office hearings (eg country locations) to suit applicants?

(c) *Scheduled hearing times*

- does the tribunal schedule times to suit applicants?
- are out of business hours hearings scheduled?

(d) *Access to tribunal premises, hearing rooms etc*

- is provision made for those with disabilities?
- are the premises, hearing rooms etc court-like or more informal in appearance?

Standard 2:
Financial access

Indicators

(a) *Financial cost to the applicant*

- is there an application/filing fee?
- is legal aid available?

- can the applicant be ordered to pay the costs of the other party?

Standard 3:
Intellectual access

Indicators

(a) *Understanding of the tribunal's jurisdiction, powers, procedures etc:*

- would any person be able to understand these?
- for this purpose, does the tribunal provide written information or oral advice? Are tribunal members or staff available to give advice?
- if oral advice is given, is this given before, at or during the hearing?
- is written information or advice available from other agencies?

(b) *Publicity/education*

- does the tribunal seek to publicise itself? If so, what form does the publicity take?
- does the tribunal engage in education programs? If so, what form do these take?

(c) *Representation*

- can an applicant be represented before the tribunal? Legal representation? Other form of representation? By whom?
- Does the tribunal assist unrepresented applicants during the course of the hearing?

Standard 4:
Language/ communications

Indicators

(a) *Interpreters*

- available in a range of languages?
- available at the applicant's request?
- arranged at the tribunal's cost?
- arranged by the tribunal?
- arranged taking into account different cultural perceptions?

(b) *Facilities available for the hearing impaired*

- what facilities are available?

Conclusion

The project having been completed, where next? As suggested above, the Centre for Court Policy and Administration proposes to use the methodology developed to establish a tribunals database. In view of other work being undertaken at the ARC and at the Law Faculty of the Australian National University, initially the Centre proposes a database for New South Wales tribunals. This would entail, as a first step, a search to prepare a list of all existing NSW tribunals. There is no such list currently. The second step would involve using the methodology developed to establish the database. Ultimately, the Centre would like to see the database extend to include all state and Commonwealth tribunals. But as with many projects, we are dependent on appropriate funding being available.

Endnotes

1 The Victorian Supreme Court drew attention to this in their annual report dated 1 December 1989. See "Victorian Supreme Court's concern over development of specialist tribunals" (1990) 64 ALJ 385.

2 For example: Queensland. Electoral and Administrative Review Commission, *Report on Appeals from Administrative Decisions*, Brisbane: The Commission, 1993; Rick Snell, "Hunting for the Etceteras: Tribunals and Statutory Bodies in Tasmania" forthcoming in the *Australian Journal of Public Administration*; Mark Aronson, "An Administrative Appeals Tribunal for New South Wales: Expansive Legalism, or Overdue Reform?" (1993) 52 *Australian Journal of Public Administration* 208 at 211ff.

3 *Administrative Appeals Tribunal Act* 1975 (Cth), s51.

4 *Better Decisions: Review of Commonwealth Merits Review* Tribunals. See also the Administrative Review Council Discussion Paper, *Review of Commonwealth Merits Review Tribunals* (Canberra: AGPS, 1994). The merits review tribunals in which the ARC is primarily interested are the Administrative Appeals Tribunal, the Immigration Review Tribunal, the Refugee Review Tribunal, the Social Security Appeals Tribunal, the Student Assistance Review Tribunal and the Veterans' Review Board.

5 By contrast, in Britain, the Council on Tribunals is responsible for keeping under review the constitution and working of most tribunals in England and Wales, and Scotland (the latter being the responsibility of the Council's Scottish Committee). The Council also advises on proposals for the establishment of new tribunals, although this function is not recognised in its governing Act. The Council was established by the *Tribunals and Inquiries Act* 1958 but now operates under the *Tribunals and Inquiries Act* 1971, as read with the *Transfer of Functions (Secretary of State and Lord Advocate) Order* 1972. On statutory recognition of the Council's advisory function, see its *Annual Report for 1990-1991* (London: HMSO, 191) at para 3.51.

6 Eg meetings between tribunals with responsibility for reviewing decisions on mental health.

7 Discussed eg by Lindsay Curtis, "Agenda for Reform: Lessons from the States and Territories", and Rosemary Balmford, "The Life of the Administrative Appeals Tribunal - Logic or Experience?" in Robin Creyke (ed), *Administrative Tribunals: Taking Stock* (Canberra: Centre for International and Public Law, 1992), at pp 32 & 50 respectively.

8 Lawrence Maher, "The Australian Experiment in Merits Review Tribunals" in Oliver Mendelsohn & Lawrence Maher (eds), *Courts, Tribunals and New Approaches to Justice* (Bundoora, Victoria: La Trobe University Press, 1994), p 73 at p 74: Martin Partington, "Rethinking the Structure of Administrative Justice in Britain: A Proposed Agenda" in Mendelsohn & Maher op cit 107, at 120.

9 Lindsay Curtis, "Agenda for Reform: Lessons from the States and Territories" in Robin Creyke (ed), *Administrative Tribunals: Taking Stock*, op cit, p 32 at p 34.

10 Lawrence Maher, "The Australian Experiment in Merits Review Tribunals" in Mendelsohn & Maher op cit 73 at 75.

11 *Brandy v Human Rights and Equal Opportunity Commission*, Full Bench of the High Court, judgment of 23 February 1995.

12 J Goldring, R Handley, R Mohr & I Thynne, "Evaluating Administrative Tribunals" in S Argument (ed), *Administrative Law & Public Administration - happily married or living apart under the same roof?* (Canberra: Australian Institute of Administrative Law, 1994), p 160.

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