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AUSTRALIAN INSTITUTE OF ADMINISTRATIVE LAW (INCORPORATED)

Forum Editor:
Kathryn Cole

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ADMINISTRATIVE LAW AND TAX PRACTICE

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Paper presented to a seminar held by the AIAL, Perth, 15 August 1995

Introduction

While administrative law has always been involved in tax practice, the greater availability of statutory remedies has increased its importance and relevance. The Australian Tax Office is full of administrators who are daily taking numerous decisions affecting the rights of taxpayers; nowadays virtually all these decisions are open to legal challenge.

One feature of the tax system which has always required an analysis of the principles of administrative law is that the *Income Tax Assessment Act 1936* (Cth) ("ITAA") contains literally hundreds of administrative "discretions" conferred upon the Commissioner. More correctly described, many of those provisions are not strictly "discretions" but are subjectively worded preliminary questions of fact, eg. those which are dependent upon "the Commissioner is of the opinion that", "the Commissioner is satisfied that", "the Commissioner forms the judgment that", etc.

Act No 110 of 1964 (Income Tax and Social Services Contribution Assessment Act (No 2) 1964) introduced anti-avoidance measures into the Act and contained many provisions of that type. Their validity was upheld by the Full High Court of Australia in *Giris Pty Ltd v Commissioner of Taxation (Cth)* (1969) 119 CLR 365.

In addition to my honours thesis paper on "The discretionary powers of the Commissioner of Taxation under the *Income Tax Assessment Act*" in 1974, I have published two papers on the Commissioner's discretions: (1977-78) 12 *Taxation in Australia* 523 and (1989-90) 24 *Taxation in Australia* 302.

It would be impossible to deal fully with the applicability of administrative law in tax practice in this relatively short, general paper. I have therefore chosen to select certain aspects of the topic and deal with them only. The areas I will deal with have been grafted onto the tax system in the past decade or so. I will firstly refer to the *Freedom of Information Act 1982* (Cth) ("FOI Act"), the taking over of reviews of disallowed taxation objections by the Administrative Appeals Tribunal in lieu of the Taxation Boards of Review, and some cases in the last three years under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). (I will not deal with the role of the Ombudsman.)

Freedom of Information Act 1982 (Cth)

The FOI Act has been very important in tax practice for at least two reasons: the release to practitioners and to the general public of the Commissioner's internal rulings on his interpretation of the provisions of taxation legislation, and the availability to taxpayers of internal memoranda etc concerning their particular file and disputes with the Tax Office.

The Commissioner's rulings cover the whole range of questions relating to tax

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interpretation. The rulings give an invaluable insight into the Commissioner's thinking on points of interpretation. Although strictly not binding, the rulings carry tremendous weight and are of some legal consequence, especially since the introduction of the self-assessment system of taxation. While the status of rulings is itself a full topic, generally unless the rulings are challenged by taxpayers, the non-adoption by a taxpayer of the approach taken by the Commissioner in a ruling will affect the level of penalty imposed by the Commissioner upon a taxpayer. An escape clause is available to the taxpayer if he or she can establish that the contrary approach taken in his or her return was "reasonably arguable" (section 222C of the ITAA). For the purposes of that provision, in determining whether an approach is "reasonably arguable" a taxpayer may have regard to the "relevant authorities". Under subsection 222C(4) an "authority" includes an income tax law, material for the purposes of subsection 15AB(1) of the *Acts Interpretation Act 1901* (Cth), a decision of a court, the Administrative Appeals Tribunal ("AAT") or a Board of Review, or a public ruling within the meaning of Part IVAAA of the *Taxation Administration Act 1953* (Cth). The explanatory memorandum to the *Taxation Laws Amendment (Self Assessment) Act 1992* (Cth) states: "An opinion expressed by an accountant, lawyer or other adviser is not an authority". Representations made by, among others, the Law Society of Western Australia, to the Treasurer seeking an amendment to that provision have been unsuccessful.

An FOI case which fundamentally changed tax practice in relation to the availability of documents to a taxpayer is *Murtagh v Commissioner of Taxation* (Cth) (1984) 84 ATC 4516.

The taxpayer had claimed deductions in three income years for her share of a loss in a horse breeding partnership. The Commissioner disallowed the losses on the basis that the partnership's activities were insufficient to amount to the carrying on of a business of primary production. The matter was subsequently referred to the Taxation Board of Review (since replaced by the AAT). The taxpayer then applied under the FOI Act for access to copies of all records relating to the assessment of her tax returns for the three years, including documents relating to decisions taken about the assessments, departmental memoranda, reports, submissions, recommendations and general information. The Commissioner decided that some of the documents were exempt from release because they were internal working documents and their disclosure would be "contrary to the public interest". The taxpayer sought a review by the AAT of that decision.

At the Tribunal, the Commissioner argued that the taxpayer would gain an unfair advantage if she were given access to the Tax Office working documents, claiming that this would enable her to know the facts on which the Commissioner had based his assessments, and what facts he was not aware of. According to the Commissioner, the process of negotiation and settlement between taxpayers and the Tax Office would be severely damaged unless settlement could take place in a "mutual half-light", ie in an environment where each party was not fully conversant with the other's case. The Commissioner also contended that disclosure of the document would hinder the conduct of the proceedings before the Board of Review.

The 3-person AAT, presided over by Davies J, held that the decision under review should be set aside. The AAT held that the taxpayer was entitled to access to the documents since no grounds for exemption had been made out.

Not surprisingly, the AAT said that disclosure of the documents was not contrary to the public interest. The "public

interest" looks to matters such as the overall need for confidentiality within the Australian Taxation Office and the nature of the documents to which access is sought, whether they are documents relating to a purely routine assessment, or whether they are documents concerned with the investigation of tax evasion or a similar matter in respect of which there are special reasons for confidentiality. The present case was a routine one and involved no element of special sensitivity.

Disclosure of the documents would not, in the present circumstances, have a prejudicial effect on the proceedings before the Board. The granting of access would not hinder the Commissioner in the presentation of his case or unfairly assist the taxpayer in the presentation of hers. The documents in issue did not display the names of witnesses or statements of witnesses.

The AAT held that it is highly undesirable that the taxation system should proceed on the basis of negotiation in a mutual half-light. Both the Tax Office and the taxpayer should work together to ascertain the relevant facts and to arrive at the proper conclusion as to the amount of tax payable having regard to the whole of the relevant facts. The granting of access to documents which show the factual basis on which the Tax Office has proceeded is likely to advance this process.

That one decision (*Murtagh*) was the dawn of a new era in the conduct of tax disputes. Taxpayers were empowered to ascertain exactly what the Tax Office had written internally in relation to their particular cases.

Administrative Appeals Tribunal

One factor which distinguishes the tax area from other areas of decision-making subject to AAT review is the availability of concurrent review paths for taxpayers seeking review of objection decisions. The taxpayer may either seek a review by the AAT (with a right to appeal to the Federal Court on a question of law) or appeal directly to the Federal Court.

The review by the AAT is "on the merits", which involves a review of the facts and law that support the decision, in order to decide whether it is the "correct or preferable" decision; this description refers to a decision being taken according to the law and, if there is a choice of more than one lawful decision, to the decision that represents the most appropriate exercise of the discretion vested in the decision-maker (Administrative Review Council, *Appeals From the Administrative Appeals Tribunal to the Federal Court*, Discussion Paper, May 1995, para 2.8; *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 589). A common description of the way in which the AAT conducts merits review is that it 'steps into the shoes' of the decision-maker. It is this ability of the reviewing body to exercise the powers and discretions available to the administrative decision-maker that differentiates merits review from judicial review. Judicial review involves the assessment by a court of whether an administrative decision (including the decision of a tribunal undertaking merits review) was reached by a lawful process and was within the range of decisions permitted by law. However, a court created pursuant to chapter III of the federal constitution is not able to substitute its own preferred view of the merits of a decision for that of the administrative decision-maker, because that would involve consideration by the court of non-justiciable issues (ARC Discussion Paper, para 2.11).

In the tax appeals direct to the Federal Court, the Court can decide questions of both fact and law, but can only conduct judicial review of any decisions concerning the exercise of powers or discretions, ie the Court cannot substitute its own decision on the merits for that reached by the Commissioner.

The AAT system for reviewing the disallowance of objections by the Commissioner has generally worked well.

Of particular value is the system of preliminary conferences, which can include the convenience of telephone conferences.

One "downside" aspect for a taxpayer seeking to minimise costs is that the preliminary work can resemble the steps involved in a court case, eg statement of facts, issues and contentions, further and better particulars, discovery of documents, witness statements, etc.

Some relevant recent papers on the performance of the AAT are "Practitioners are Fed Up!" by NHM Forsyth QC (1993-94) 28 *Taxation In Australia* 325, "AAT Reviews: *Are* Practitioners Fed Up?" by Dr Paul Gerber (1993-94) 28 *Taxation in Australia* 499 and "Inadequate Fact Finding in the Tribunal", by AH Slater QC February/March 1994 *CCH Journal of Australian Taxation* 35.

Appeals from AAT to Federal Court: question of law/question of fact

An unsatisfactory area arising from the AAT involvement in tax disputes is that subsection 44(1) of the *Administrative Appeals Tribunal Act 1975* (Cth) ("AAT Act") gives a party to a proceeding before the AAT the right to appeal to the Federal Court but restricts the right of appeal to one that is on a question of law.

By contrast, under the previous system an appeal to a court from a Board of Review decision was competent if the Board's decision involved a question of law. Once such a question was involved in the decision, the whole matter (ie fact and law) was open to appeal by way of re-hearing.

This has led to interminable disputes in the Federal Court as to whether a decision of the AAT is in error on a question of law or on a question of fact.

A related practical difficulty is that, by virtue of the Federal Court being denied a fact-finding role when there is an appeal from the AAT, if the Federal Court holds that the case requires the finding of further facts to enable it to be properly decided, the Court cannot itself find those facts but must remit the case to the AAT for the AAT to find those facts.

The matter has been the subject of expressions of judicial dissatisfaction by French J, Hill J and Burchett J.

In *Commissioner of Taxation (Cth) v Roberts and Smith* (1992) 92 ATC 4380 Hill J said at 4385:

> There will be occasions when there will be great difficulty in determining whether a question of law is raised in an appeal, so as to make the appeal competent. A jurisdictional debate in the matters of this kind is often a sterile exercise. There is unfortunate truth to be found in the criticism of French J in *Nizich* (at 4752 of 91 ATC 4747) that the categories of fact and law could well be included in the class of "categories of meaningless reference" described by Professor Stone in *Legal System and Lawyer's Reasoning* (1968) at 340. Consideration should be given to amending the law either to eliminate the distinction and thereby to create a full right of appeal to this court on both matters of fact and law or at least to minimise the importance of the distinction by permitting the court with leave to entertain an appeal, notwithstanding that no question of law appears to arise, so that in difficult, but nevertheless important, cases the parties might be given permission to litigate the issues, without the necessity of a jurisdictional challenge. In the meantime, valuable court time and the resources of parties continue to be poured into debating the distinction in a jurisdictional challenge.

The matter was also dealt with by Burchett J in *Cowell Electric Supply Co*

Ltd v Collector of Customs (1995) 127 ALR 257.

Hill J further expressed his concern in his paper "What Do We Expect From Judges in Tax Cases?" presented at the 12th National Convention of the Taxation Institute of Australia, May 1995, published in (1995-96) 30 *Taxation in Australia* 22 at 23. He said:

> It is true that appellate jurisdiction has long been expressed by reference to the distinction, but this does not make the distinction easier to apply in difficult cases. Considerable time is taken in a quite large percentage of cases to argue whether there is a question of law and thus a right of appeal.

I reviewed some of the earlier cases which discussed this problem in a paper titled "Recent Tax Cases: John; Citibank; Allen Allen & Hemsley; Appeals on Questions of Law", published in (1988-90) 23 *Taxation in Australia* 726.

In May 1995 the Administrative Review Council issued an excellent Discussion Paper, *Appeals from the Administrative Appeals Tribunal to the Federal Court.* The 28-page paper addresses issues related to whether the ground of appeal from the AAT to the Federal Court, and the manner in which the Federal Court deals with appeals from the AAT, should be reformed. The questions relate, of course, not only to tax cases but any matters going on appeal from the AAT to the Federal Court.

The preliminary view of the Council is that the present system should remain unchanged, so as to maintain the integrity of Australia's federal administrative law system under which an administrative body reviews on the merits and has the primary fact-finding role and the courts are restricted to judicial review and not fact-finding (see Chapter 6 of the Discussion Paper).

Administrative Decisions (Judicial Review) Act 1977 (Cth)

As discussed above, objection decisions can be appealed to either the AAT or the Federal Court. In the case of non-objection decisions, judicial review under the ADJR Act is available. (Review "on the merits" of non-objection decisions is only available where expressly provided by a statute, eg Income Tax Assessment Act, or Schedule 1 of the AAT Act.)

In this section I will deal with some cases decided under the ADJR Act in the past three years. These cases give a good indication of the very wide range of matters which were previously not able to be contested satisfactorily, but are now directly open to challenge by taxpayers, and even by the Commissioner as evidenced by the Commissioner contesting decisions taken by the AAT. (For a more extensive list of the types of non-objection taxation decisions which are reviewable under the ADJR Act, see my abovementioned article at (1989-90) 24 *Taxation in Australia* 302 at 308.)

Hutchins v Deputy Commissioner of Taxation (1994) 94 ATC 4442

The *Hutchins* case deals with the scope of jurisdiction under the ADJR Act.

The taxpayer had authorised a registered trustee to call a meeting of this creditors under Part X of the *Bankruptcy Act 1966* (Cth). The taxpayer was indebted to the Commonwealth for income tax. The Commonwealth vote was cast against a motion for a special resolution that the creditors accept a composition of the taxpayer's debts. The taxpayer applied for review of the decision of the Commonwealth to cast a vote against the motion. The Deputy Commissioner lodged an objection to the competency of the taxpayer's application. The taxpayer argued that the decision on how to vote was "a decision of an administrative character made ... under an enactment"

and therefore subject to review under the ADJR Act. The taxpayer said the decision was made under sections 8 and 209 of the Income Tax Assessment Act. Section 8 provides that the Commissioner shall have the general administration of the Act, and section 209 provides that the Commissioner may sue to recover unpaid tax.

Jenkinson J in the Federal Court upheld the Commissioner's objection to competency. He said that section 8 might be the enactment under which the Commissioner would make a decision on voting at a creditors' meeting, but it is questionable whether Parliament intended to make that general power of management or administration susceptible of review, bringing a "vast array" of decisions under review. Section 8 cannot be understood as "making provision" for any of the many decisions which would be made in exercising the authority which that section confers on the Commissioner. The function of section 8 is merely to nominate the person by whom decisions of the character described by section 8 were to be made.

Even if the decisions of the Commissioner and his deputies for which the only authority is section 8R were "made under an enactment", the decision to vote against the resolution in this case lacked a characteristic of a decision of a substantive character. It could not be seen to confer any benefit or to impose any disadvantage when it was made. The disadvantageous consequences of the decision arose only when the votes of all the creditors were case, and the cumulative effect of all the negative votes occurred. Accordingly, the decision to vote against the resolution was not subject to review under the ADJR Act.

Smiles v Commissioner of Taxation (Cth) (1992) 92 ATC 4203 and (1992) 92 ATC 4475

The *Smiles* case also deals with the extent of jurisdiction under the ADJR Act.

Mr Smiles was a member of the New South Wales Parliament who also conducted a consultancy practice, and he made applications for judicial review of the decision to prosecute him for certain alleged tax-related offences.

Mr Smiles submitted that the prosecutions had not been brought for their own sake but to achieve an improper or collateral advantage, that of obtaining the publicity which would flow from the prosecution of a high-profile person. He argued that it was an abuse of power to prosecute him when, had he been an ordinary taxpayer and not a member of parliament, he would not have been prosecuted. Among other remedies sought, he sought relief under the ADJR Act and section 39B of the *Judiciary Act 1903* (Cth).

Davies J of the Federal Court held that section 5 of the ADJR Act and section 39B of the Judiciary Act were not appropriate vehicles for the general control of abuse of process in the court of a state. Since the prosecutions against Mr Smiles had been brought in a state court, it was a matter for the courts of the state. The applications under section 5 and section 39B therefore failed.

For present purposes, it is not necessary to consider the other matters considered in the case. The decision of Davies J was upheld by the Full Court of the Federal Court (Morling, Beaumont and Gummow JJ) (1992) 92 ATC 4475.

Independent Holdings Ltd v Commissioner of Taxation (1992) 92 ATC 4595

Another decision in the Federal Court which considered whether the decision was one which was open to review under

the ADJR Act was in *Independent Holdings Ltd v Deputy Commissioner of Taxation* (1992) 92 ATC 4595.

Before Independent Holdings was incorporated, two co-operatives were involved in the wholesale grocery business. The first of the co-operatives, Australian Grocers Co-operative Limited, supplied plant, equipment and staff to the second, Independent Grocers Co-operative Limited. Next year, following a request by Australian Grocers to the Corporate Affairs Commission, its undertaking was transferred to Independent Holdings pursuant to subsection 60(2) of the *Co-operatives Act 1993 (SA)* and, by virtue of paragraph 60(3)(a), Australian Grocers was dissolved.

Subsequently, the Deputy Commissioner undertook an audit of Australian Grocers' taxation affairs and determined that inter-company service fees between Australian Grocers and Independent Grocers had the effect of a break even result for Australian Grocers and did not reflect the level of actual costs so that it would be necessary to make adjustments to Australian Grocers' returns for five earlier tax years. The Deputy Commissioner wrote to Independent Holdings stating that he intended to raise assessments or amended assessments against Independent Holdings on the basis that, pursuant to paragraph 60(3)(c) of the Co-operatives Act, Independent Holdings had assumed the tax liability of Australian Grocers.

Independent Holdings sought judicial review under section 5 of the ADJR Act and section 39B of the Judiciary Act of the Deputy Commissioner's decision. Independent Holdings submitted that the Deputy Commissioner had no power or authority by virtue of the ITAA to issue assessments against a non-existent entity, and that the Deputy Commissioner was in error in asserting that Independent Holdings had assumed the tax liability of Australian Grocers. It submitted that if the Deputy Commissioner wished to issue assessments in relation to the income of Australian Grocers, he must apply for reinstatement of Australian Grocers under section 61 of the Co-operatives Act.

The Deputy Commissioner objected to the jurisdiction of the Court to entertain the application under the ADJR Act, submitting that the decision was a decision "making, or leading up to the making of, assessments or calculations of tax on" and therefore fell within the exclusion in paragraph (e) of Schedule 1 of the ADJR Act.

Spender J of the Federal Court dismissed the applications by Independent Holdings. He held that the decision the subject of the applications was "a decision made under an enactment", as required by the ADJR Act. The making of an assessment by the Commissioner is expressly provided for by section 166 of the ITAA.

He further held that it was not competent for Independent Holdings to seek the relief claimed, either under the ADJR Act or under the general law. The decision that Independent Holdings sought to restrain was "a decision leading up to the making of an assessment" and therefore fell within the exclusion in paragraph (e) of Schedule 1 of the ADJR Act. The threatened assessments were not merely tentative, nor ones which did not reflect a rational assessment of the liability of Independent Holdings, or made with reckless indifference as to whether the assessments did or did not reflect any such liability. Rather, the claim was that the Deputy Commissioner had no power to issue to Independent Holdings an assessment based on the tax liability of Australian Grocers.

In relation to the claim based on the Judiciary Act, Independent Holdings' submission was that the threatened assessments would be made in a purported but not justifiable exercise of a

statutory power. As such, Independent Holdings assailed its validity as an assessment and, accordingly, the assessments could only be challenged under Part V of the Tax Act.

Coco v Deputy Commissioner of Taxation (No 1) (1993) 93 ATC 4330

Schedule 1 paragraph (e) of the ADJR Act lists a number of classes of decision which are not decisions to which the ADJR applies. They include decisions making, or forming part of the process of making, or leading up to the making of, assessments or calculations of tax, charge or duty or decisions amending, or refusing to amend, assessments or calculations of tax, charge or duty, under the Income Tax Assessment Act. The reason for that exclusion is that there are already full rights available to a taxpayer to challenge those decisions under the provisions of the Income Tax Assessment Act or the *Taxation Administration Act 1953* (Cth).

In the *Coco (No 1)* case, the taxpayer had applied under section 221D of the ITAA for a variation of the amount of PAYE instalments deducted from his wages on the basis that interest deductions on a loan to purchase dividend-paying shares will exceed total assessable income. The Deputy Commissioner wrote to the taxpayer advising that his application could not be considered until all outstanding tax debts had been paid. The taxpayer applied under the ADJR Act for review of that decision or, in the alternative, for review of the Commissioner's failure or refusal to give due consideration to the section 221D application.

In these proceedings, the Deputy Commissioner filed a notice of objection to competency on the basis that the decision was excluded from review by paragraph (c) of Schedule 1 of the ADJR Act as a decision forming part of the process of making, or leading up to the making of, assessments or calculations of tax under the ITAA. The taxpayer submitted that the PAYE scheme was directed at the collection and payment of income tax, and not its ascertainment or calculation.

Spender J of the Federal Court overruled the Commissioner's objection to competency.

Spender J said that the calculation of PAYE instalments should not be regarded as "calculation of tax" or the "assessment of tax" under the ITAA. It therefore followed that paragraph (e) of Schedule 1 did not apply.

The procedure outlined in subsection 221H(2) of the ITAA (namely, the determination of the amount that a taxpayer has to pay or be paid, after reconciling the amount of tax payable with the amounts of the tax stamps or deductions shown in group certificates), was not an assessment of tax or calculation of tax. The assessment of tax had been made before that arithmetical process.

Coco v Deputy Commissioner of Taxation (No 2) (1993) 93 ATC 4450

In the *Coco (No 2)* case, as noted earlier, the taxpayer applied under section 221D for a variation of the amount of PAYE instalments deducted from his wages on the basis that his taxable income would be nil. He claimed that certain interest deductions on the loan used to purchase dividend-paying shares would exceed his total assessable income. A tax officer wrote to the taxpayer advising that his application could not be considered until all outstanding tax debts had been paid. At that time, the taxpayer owed income tax of $667,000 from assessments of earlier years of income. Subsequently, a second tax officer advised the taxpayer that it had again been decided to refuse his section 221D application.

In this hearing, the taxpayer sought review of the two decisions under the provisions

of the ADJR Act. He submitted that the first tax officer failed or refused to consider the section 221D application because of the outstanding tax. Further, the taxpayer submitted that the second tax officer took into account an irrelevant consideration, namely the outstanding income tax debts of earlier years, or alternatively, failed to take into account relevant considerations, namely two letters sent by the debt recovery section of the Tax Office which stated that proceedings would not be instituted for recovery of tax for earlier years until the determination of the objections against the assessment giving rise to the liability.

The taxpayer failed when the matter was decided in the Federal Court by Lockhart J.

The judge said that the first tax officer did consider the section 221D application, but decided that, in view of the outstanding tax, it should be refused. Accordingly, the attack on the first decision failed. In any event, the first decision had been superseded by the decision of the second tax officer.

The second tax officer was entitled, by virtue of paragraphs 221H(2)(b) and (c), to take into account all income tax likely to be payable by the taxpayer as an employee at that time, including that payable under earlier assessments. In addition, the second tax officer took into account the objections lodged by the taxpayer against the earlier assessments, as well as the taxpayer's prospects of success in those objections.

The Court held that whether recovery proceedings had been instituted was not a matter which the second tax officer was bound to take into account. No such requirement could be discerned from the subject matter, scope or purpose of the ITAA. Accordingly, the application for review was dismissed.

Szajntop v Gerber & Commissioner of Taxation (1992) 92 ATC 4392

The *Szajntop* case is somewhat unusual in that it was an application under the ADJR Act for judicial review of, and an appeal from, a decision of the AAT.

The taxpayer had purported to object to default assessments in a letter which stated that the asset betterment statements relied upon by the Commissioner in making the assessments were based on completely erroneous information and that absolute proof of this was being gathered. However, the taxpayer never provided any such further information to the Commissioner.

The Commissioner disallowed the so-called objection and the taxpayer sought a review of the objection decisions by the AAT. When the matter came on for hearing, the solicitor for the taxpayer sought an adjournment on the ground that he had mistakenly believed that the matter was listed for hearing three days later and was therefore unprepared. The Commissioner submitted that the taxpayer's letter was not a valid objection as it did not state fully and in detail the grounds on which the taxpayer relied, nor had there been any attempt on behalf of the taxpayer to add any grounds to the notice of objection.

The AAT, constituted by Deputy President Gerber, refused the adjournment and, in the absence of any evidence that the Commissioner acted on erroneous information in arriving at the assessments, affirmed the objection decisions.

The taxpayer then sought judicial review of the Deputy President's decision refusing the adjournment, and also appealed under section 44 of the AAT Act against the Deputy President's review decisions.

Hill J of the Federal Court of Australia dismissed the application for judicial review and dismissed the appeals.

Hill J held that a decision to refuse an adjournment is not a reviewable "decision" within the meaning of that word in the ADJR Act.

However, the Tribunal's review decisions were reviewable. They were not "decisions disallowing objections to assessments" within the meaning of the exclusion in paragraph (e) of Schedule 1 of the ADJR Act. Where the Tribunal affirms the decision under review, the tribunal does not itself make a decision to disallow an objection to an assessment.

As the questions of law arising on appeal under section 44 of the AAT Act were identical to the questions to be argued under the ADJR Act, the appropriate course was to dismiss the application for judicial review and proceed to determine the substantive appeal under section 44 of the AAT Act.

Hill J said that the level of detail required in a valid letter of objection will vary with the circumstances of each particular case. The amount of detail required in an objection to a default assessment will vary in proportion to the detail and intelligibility of the information which the Commissioner has supplied to the taxpayer detailing the basis on which the assessment was made. Where the taxpayer has been supplied with an assessment betterment statement, it will ordinarily be encumbered upon the taxpayer to attack in detail such part of the asset betterment statement as the taxpayer disputes.

The Court held that the taxpayer's letter was not a valid objection. It was no more than a general complaint that the asset betterment statement was wrong. It did not direct the Commissioner's attention to the particular respects in which the taxpayer contended that the assessment was erroneous or the taxpayer's reasons for that contention. Accordingly, the AAT lacked jurisdiction to deal with the matter and should have dismissed the application for review on that basis.

Commissioner of Taxation (Cth) v Grbich and Shen (1993) 93 ATC 4564

The *Grbich and Shen* case involves quite unusual facts and shows the extent to which recourse can be had to the provisions of the ADJR Act. Here the Commissioner sought to make use of the remedies provided by the Act.

The Commissioner had issued default assessments to the taxpayer, on the ground that he had derived income from alleged criminal activities in Australia. The tax and penalties totalled $1.6m. The taxpayer objected. Subsequently, the taxpayer left Australia and made an application to the AAT to be allowed to give evidence at the formal hearing of his case by way of video conference facility from Hong Kong where he then lived.

The tribunal (Dr Grbich, the First Respondent in the ADJR proceedings) delivered a decision on preliminary arguments about the admissibility of video conference evidence. Dr Grbich held that video conference evidence should be permitted, as the taxpayer had a reasonable apprehension that he would be "victimised" if he returned to Australia to give evidence in person.

At a later directions hearing before Dr Grbich to establish the ground rules for the formal hearing, the Commissioner submitted that -

(a) since it was alleged that the taxpayer had left Australia illegally, the Tribunal's "indulgence" in granting a video conference hearing should be reviewed; and

(b) the evidence to be admitted by video conference should be evidence to which no issue of credit arises.

Dr Grbich held that conclusions about the right to present video conference evidence were reached in his earlier decision after the Commissioner had been given adequate opportunity to make submissions on the matter, and there was no basis or reason to vary his earlier decision.

It was then that the Commissioner instituted proceedings under the ADJR Act, seeking an order from the Federal Court restraining Dr Grbich from receiving evidence from the taxpayer by video on matters in which the taxpayer's credit was an issue. The Commissioner submitted that the use of video would effectively deprive him of the benefit of cross-examination and, therefore procedural fairness, because -

(a) no oath could be effectively administered in Hong Kong; and

(b) the AAT would not be able to observe closely the demeanour of the taxpayer; and

(c) there would be practical difficulties for the Commissioner's Counsel in Australia in cross-examination in attempting to show documents to the taxpayer in Hong Kong; and

(d) the courtroom formality would be absent from the conference room in Hong Kong.

The taxpayer filed an objection to the Commissioner's competency, arguing that -

(a) the Commissioner's application was out of time since the relevant "decision" was made at the time of the decision on the preliminary arguments; and

(b) there was no "decision" for the purposes of the ADJR Act.

First, Beaumont J of the Federal Court overruled the taxpayer's objection to the Commissioner's competency.

However, Beaumont J then went on to dismiss the Commissioner's application for judicial review, ie, the taxpayer succeeded.

Beaumont J said that the taxpayer's objection to the Commissioner's competency was without substance and should be rejected. He said that it was clear that the Commissioner put his case on the basis that it was Dr Grbich's conduct, and not his "decision", which was sought to be judicially reviewed. It was also clear that this conduct occurred as late as the time when Dr Grbich took his most recent decisions and was continuing; accordingly, the application was within time.

However, Beaumont J held that there were strong discretionary reasons why the Court should not intervene in the manner proposed by the Commissioner, as follows -

(a) The AAT did not lack power, as a matter of legal capacity, to take video evidence and there were strong policy considerations against the court intervening under the ADJR Act in other proceedings on evidentiary questions.

(b) The Commissioner failed to demonstrate that the use of video would be a denial of procedural fairness by infringing his right to present his case. The Commission had adduced no evidence of any specific prejudice that might flow. It is accepted that if documents were to be shown to the taxpayer in the course of his cross-examination, advance arrangements would need to be made. But it did not follow from

that that it was likely that the Commissioner would be effectively deprived of the benefit of cross-examination.

(c) The mere fact that a tribunal has the power to require the giving of evidence on oath or affirmation does not mean that it is precluded from receiving and acting on unsworn testimony. though it may well take the view that unsworn evidence deserves less weight than sworn testimony. Therefore the Court should not intervene on a matter of weight to be given by the AAT to evidence yet to be adduced.

Rollo v Morrow (1992) 92 ATC 4364

In *Rollo's* case, the ADJR Act was sought to be used against a tax body of which little is heard, the Taxation Relief Board.

The taxpayer, Mr Rollo, a prominent tax consultant, sought relief from liability to pay $1.7m in tax by relying on the "hardship provisions" of section 265 of the ITAA. First, Mr Rollo made a declaration in support of his application. Then later he was examined on oath by a "designated person" and a written report was sent to the Taxation Relief Board. The Board decided not to grant relief.

Mr Rollo applied under the ADJR Act for an order of review of the Board's decision. However, the matter was settled. Consent orders were made setting aside the Board's decision and remitting the relief application for reconsideration. A differently constituted board handed down a decision, with the Board considering that the payment of the full amount of tax would cause serious hardship, but the Board nevertheless decided to exercise its discretion against the grant of relief.

The taxpayer again sought judicial review of the Board's decision, arguing as follows -

(a) There was a breach of the rules of natural justice or procedural fairness by failing to give an opportunity to give further evidence on oath;

(b) the Board took into account irrelevant considerations;

(c) it lacked evidence to justify the making of the decision;

(d) it failed to take into account relevant considerations, such as the accrual of additional tax for late payment and the taxpayer's offer of settlement;

(e) in deciding against relief, the Board made a decision which no reasonable person exercising the power could have reached (*cf. Wednesbury Corporation v Ministry of Housing and Local Government (No 2)* [1966] 2 QB 275);

(f) the Board failed to observe certain procedural requirements laid down in section 265.

Mr Rollo's application was dismissed by Gummow J, at that time a judge of the Federal Court. The Court held that written submissions were sufficient and there was no requirement for oral representations or evidence. Copies of materials which were before the Board, together with papers subsequently referred by the Tax Office to the differently constituted Board were made available to the taxpayer. The taxpayer took advantage of the opportunity to make written submissions and the Board also sought further information from the taxpayer by letter.

His Honour held that it was relevant for the Board to take into account that:

(a) Mr Rollo, as a tax consultant, might be expected to have a sound knowledge of income tax laws and obligations and to make provision for payment of the tax liability; and

(b) the taxpayer had not made any payments towards his tax liability; and

(c) he had made substantial borrowings from associated entities and had not repaid the loans.

The judge also said that there was evidence and material before the Board which would justify the view that Mr Rollo had the demonstrated ability to earn a high salary in his chosen field, irrespective of any action by the Commissioner to institute bankruptcy proceedings. However, the Board did not make a finding on whether the taxpayer had assets; it had merely indicated that it had difficulty accepting that Mr Rollo had no assets, given that he had borrowed substantial sums from associated entities without making repayments.

Gummow J said that it was plain from the material before the Board that there was additional tax accruing, the amount of it, and it would be wrong to attribute to the Board ignorance of the continuing accrual of additional tax. In addition, the Board did not have to take into account attempts by the taxpayer to reach a settlement of his debt and, in any event, details of the offers of settlement were in the documents before the Board.

Although the Board said that it was satisfied that the payment of the full amount of tax would cause serious hardship, that did not mean that the exercise of its discretion against the grant of relief was unreasonable under the principle in the *Wednesbury* case. The materials before the Court indicated that the Board took into account a large range of matters, including the present income of the taxpayer and his wife and their net family assets.

Finally, the Court held that the Board had fulfilled the procedural requirements of section 265. There was no requirement for further examination before the AAT, report by a designated person, and repetition of the steps taken in compliance with section 265.

Edelsten v Deputy Commissioner of Taxation (1992) 92 ATC 4285

In December 1986 the Commissioner issued a departure prohibition order ("DPO") under section 14S of the Taxation Administration Act against Dr Edelsten, a high-profile medical entrepreneur, who had a tax liability of over $1.5m, thus preventing him from leaving Australia. In March 1988, Dr Edelsten became bankrupt and a sequestration order was made against his estate. Subsequently, he was discharged from his bankruptcy as from March 1991. In August 1991 he requested that the Commissioner exercise the power granted under section 14T of the Tax Administration Act to revoke the DPO. He argued that, as he had been discharged from bankruptcy, the tax liabilities on which the DPO had been based had been wholly discharged.

In refusing to revoke the DPO, the Commissioner stated that the taxpayer still had tax liabilities of over $1m which had not been discharged following the bankruptcy, and that no satisfactory arrangements had been made for their discharge. The Commissioner also stated that he was not satisfied that it was likely that arrangements would be made to wholly discharge tax liabilities arising from assessments for the next three years which were yet to be issued.

Dr Edelsten applied for an order of review under the ADJR Act and an order of mandamus directing the Commissioner to perform the duty, or to exercise the power to revoke the DPO under section 39B of the Judiciary Act.

Northrop J of the Federal Court found in favour of Dr Edelsten to the extent that he set aside the Commissioner's decision and remitted it for further consideration; however, he dismissed Dr Edelsten's mandamus application under section 39B.

His Honour said that Dr Edelsten had not clearly stated which duty or power he was requesting the Commissioner to exercise, and in giving reasons for decision, the Commissioner compounded the confusion by not stating the source of the duty or power which he was performing or exercising.

It was not clear that the Commissioner understood the nature of and the differences between the duties and powers conferred upon him by the different limbs of section 14T of the Taxation Administration Act. Where such extreme and almost draconian powers as those conferred by sections 14S and 14T of the Taxation Administration Act are conferred upon an administrative officer to restrict the freedom of a person in Australia for an indefinite period, it is important that the administrative officer should not only understand but refer to the relevant statutory provisions when considering an application to revoke a DPO.

The effect of section 153 of the *Bankruptcy Act* was that Dr Edelsten's discharge from bankruptcy from March 1991 operated to release him from the tax liability to which he was subject at the time when the sequestration order was made. The Commissioner should have acted upon that discharge.

Although the Commissioner implied in his reasons for decision that he was relying on tax liabilities arising from assessments yet to be issued, there were no findings of fact upon which it could be said that the Commissioner was satisfied that it was likely the tax liabilities to which Dr Edelsten may become subject will be wholly discharged or completely irrecoverable.

Northrop J held that the error of law resulting from the misunderstanding of the effect of the Bankruptcy Act, when added to the absence of any clear statement of the relevant provisions of the Taxation Administration Act relied upon and the confusion arising under section 14T, were sufficient to support Dr Edelsten's case under the ADJR Act. For the same reasons, Dr Edelsten had also made out a case under section 39B of the Judiciary Act.

Although provision is made under section 14Y of the Taxation Administration Act for a review by the AAT, the real issue in this case was the proper construction of section 14T. Accordingly, Northrop J decided that he would not exercise the discretion under section 10 of the ADJR Act to refuse to grant the application under that Act.

As the order for mandamus, he considered that it was completely inappropriate to make such an order, because many facts needed to be investigated.

Accordingly, the Commissioner's decision was set aside and the matter remitted to him for further consideration according to law.

Consolidated Fertilizers Ltd v Deputy Commissioner of Taxation (1992) 92 ATC 4260

The taxpayer applied under section 5 of the ADJR Act for judicial review of the decision of a Deputy Commissioner to calculate interest payable under the *Taxation (Interest on Overpayments) Act 1983* (Cth) as simple interest.

The taxpayer had paid $377,500 in December 1987 in respect of an amended assessment issued by the Deputy Commissioner. Following a successful appeal, an amount of $360,541 was refunded to the taxpayer in September 1991. The taxpayer claimed that the interest payable on the refund, under sections 9 and 10 of the Taxation (Interest on Overpayments) Act, should be calculated on a compound basis. The Commissioner argued that the scheme of

the act only permitted the calculation of interest on a simple interest basis.

Cooper J of the Federal Court dismissed the taxpayer's application. His Honour held that the interest contemplated by subsection 9(1) and section 10 of the Act in the calculation of interest on a refund of overpaid tax is simple interest. No provision is made for interest to be calculated on interest. To construe the relevant provisions in the manner contended for by the company was clearly beyond the scope of the language employed in the Act.

Bryant v Deputy Commissioner of Taxation (1993) 93 ATC 4439

In the *Bryant* case, the taxpayer was a director of six companies and made an application under the ADJR Act for judicial review of the Commissioner's decision to prosecute him for the companies' failure to remit PAYE tax under the provisions of paragraph 221F(5)(a) of the Income Tax Assessment Act.

The Commissioner had had the director charged under section 8Y of the Taxation Administration Act which renders directors liable for tax offences committed by a company; reparation orders under section 21B of the *Crimes Act 1914* (Cth) were also sought against the director for the unremitted amounts.

The director sought an order of review under the ADJR Act. He submitted that the decision to prosecute him contravened the ATO Prosecution Policy contained in Commissioner's Ruling IT2246 that section 8Y was only to be used in certain limited circumstances. The director also submitted that section 10 of the Freedom of Information Act, which provides that unpublished guidelines are not to prejudice the public, meant that published guidelines could be regarded as laying down procedures required by law to be observed.

In addition, the directors submitted that the Commissioner took into account irrelevant considerations in his decision to prosecute, and that the Federal Court should grant a permanent stay of the prosecution proceedings as the Local Court's power to grant a stay for abuse of process was confined to cases of delay and did not extend to the non-observance of prosecution guidelines.

The taxpayer was completely unsuccessful. Whitlam J of the Federal Court held that it was clear that the prosecution guidelines were non-binding in character and that section 10 of the FOI Act did not elevate such guidelines to the status of law. He said that the guidelines, properly understood, in no way confined the use of section 8Y in the way suggested.

The judge also said that the concerns that the Commissioner's officers had for the protection of the revenue were not irrelevant considerations. Rather, the number of offences and the amount of money seemed to be most relevant considerations.

The director had not suggested any "exceptional circumstances" why the Court should intervene in the criminal proceedings pending in the Local Court, and there was nothing to suggest that the Local Court's power to grant a permanent stay of proceedings was confined to cases of delay.

The taxpayer lodged an appeal to the Full Federal Court, but the Court dismissed his appeal in very short reasons for judgment.

Webb v Deputy Commissioner of Taxation (1993) 93 ATC 4672

In the *Webb* case, Cooper J of the Federal Court of Australia conducted judicial review of a decision of the Commissioner to refuse to remit additional tax for late payment. The case concerned the availability of legal professional

privilege in respect of documents considered by the Commissioner. The taxpayer's application was made under the provisions of the ADJR Act. The Commissioner succeeded in maintaining that legal professional privilege applied to the documents.

Conclusion

Law reform in the area of administrative law over the past 20 years has greatly enhanced the availability of justice to taxpayers in their tax affairs. Since the 1920s taxpayers have been able to have a review on the merits and judicial review of objections decisions. If any other decision adversely affecting a taxpayer's position has been taken in the Tax Office, it is likely that the taxpayer can seek judicial review under section 5 of the ADJR Act.

Tax administrators are now more accountable for their decisions. No doubt this has also resulted in the making of far better quality decisions in the normal day-to-day administration of the Tax Office.

COMPENSATION FOR DEFECTIVE GOVERNMENT ACTION AFTER MENGEL

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The *Beaudesert* case

In order to appreciate fully the impact of the *Mengel* decision, one has to step back thirty years or thereabouts, to revisit the *Beaudesert* decision. In that case the High Court held the Beaudesert Shire Council liable for the economic loss it had caused to Mr Smith when it removed gravel without first obtaining a certificate of authority under the Queensland Water Act. The removal of the gravel had diverted the flow of water from the river bed, thereby rendering Smith's pump useless. Smith himself had a licence to pump water for irrigation purposes from the river to his adjoining property.

Smith faced several difficulties in establishing a right of action. He did not possess any riparian rights in relation to the river; and his licence did not confer on him any right to an undiminished flow of water to his pump. Counsel for Smith had not raised the issue of negligence at the trial and the High Court considered that the Council had not committed actionable nuisance. And the statutory regulations were interpreted as not having been intended to confer a private remedy on someone injured by their infraction, so that Smith had no claim for breach of statutory duty. Not daunted, the High Court developed a new cause of action whereby:

> independently of trespass, negligence or nuisance but by an action for damages upon the case, a person who suffers harm or loss as the inevitable consequence of the unlawful, intentional and positive act of another is entitled to recover damages from that other.

Given the potential scope of the *Beaudesert* ruling, when it was applied by the Northern Territory Court of Appeal in *Mengel*, it is fair to say that alarm bells were sounded in government circles.

Although *Beaudesert* had been considered on a number of occasions, the *Mengel* decision was the first time that it had actually been applied, but the way in which it was applied, if anything, demonstrated just how much scope there was for holding public officers liable for defective acts or decisions.

Mengel - the facts

The Mengels, who owned two cattle stations in the Northern Territory, sought to sell 4,400 head of cattle at the end of the 1988 season. Both the Mengels and two inspectors from the Northern Territory Department of Primary Industry and Fisheries mistakenly believed that the cattle had first to be tested for brucellosis, but in fact there was no approved programme for the eradication of

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brucellosis applicable to the Mengels' property, so that there was no statutory or other authority for the actions of the inspectors.

When some of the initial tests proved positive, the inspectors informed the Mengels that there were restrictions on the movement of the cattle and, by the time they were finally declared free of the disease, the Mengels had missed the sales and incurred financial loss.

Issues before the High Court

Although various causes of action, including negligence, had been relied on before the Northern Territory Supreme Court, Asche J found in the Mengels' favour only on the basis of the *Beaudesert* principle.

Liability on this ground was confirmed by the Court of Appeal which, in addition, found that the action should succeed on a cause of action based on the decision in *James v Commonwealth* and also 'under the constitutional principle of the rule of law'.

These three issues, plus arguments by the Mengels based on misfeasance in public office, were considered by the High Court.

The High Court on *Beaudesert*

The Court was unanimous in its decision that the *Beaudesert* principle be overruled. It would be erroneous, however, to suggest that in so doing, the Court was motivated primarily by the desire to let public officials off the liability hook. And, in so far as they have done so, this is to be regarded as an incidental consequence only.

The decision to overrule *Beaudesert* should rather be viewed as another manifestation of the trend within the High Court in recent years to make liability in tort dependent upon either negligence or an intention to inflict harm on the plaintiff. This trend was expressly recognised by the Court in the joint majority judgment. The decision in *Burnie Port Authority v General Jones Pty Ltd* was cited by the Court as the previous most recent example of this trend. In that case it was held that, subject to one exception, the special rule in *Rylands v Fletcher*, which had stood for well over a hundred years, and which had imposed strict liability for the escape of dangerous substances involved in the non-natural use of land, had been absorbed into the general law of negligence.

Another example of this trend is the decision in *Australian Safeway Stores v Zaluzna* in which the High Court held that it could no longer justify the continued recognition of the 'special duty of care owed by occupiers' of property, and that the time had come to simplify the law in this area. The decision to integrate the law of occupiers liability into the mainstream law of negligence was not sudden but the culmination of a move towards reform begun thirty-five years previously.

Lack of intention

In the *Beaudesert* context, the intentional element of the tort, which is satisfied merely by the doing of an intentional act, but which does not depend on an intention to harm the plaintiff, is clearly inconsistent with the judicial trend. In this regard the Court accepted that the *Beaudesert* principle was out of step with the development of other so-called 'economic' torts, such as the tort of intentional interference with contractual relations (although the constructive knowledge of the terms of a contract is sufficient, so that a person will be liable if he or she recklessly disregards the means of ascertaining the meaning of the contractual terms).

In the same way, the torts of intimidation and conspiracy also require an intention to cause economic harm. And the emerging

tort of interference with trade and business interests also requires that the unlawful act be directed at the person injured, although not necessarily done in order to injure the interests of the plaintiff.

Inevitable consequences

Another difficulty with the *Beaudesert* principle is that liability thereunder is imposed for all inevitable consequences of the unlawful act, whether or not foreseeable. Foreseeability of harm is, of course, one of the fundamental elements of the action in negligence. While it may be arguable that most foreseeable harm will also be inevitable or, put another way, bound to happen, this is not always the case. And simply because the loss turns out in a particular case to be an inevitable consequence does not necessarily mean that it was foreseeable at the time of doing the act that led ultimately to that loss. *Beaudesert* is a case in point. There is nothing in the facts as reported to indicate that the Shire Council could or should have foreseen that removal of the gravel would alter the flow of the river or cause damage to those licensed to pump water from it.

Indeed, there is nothing in the facts of *Beaudesert* to indicate that the Council even knew or should have known of the existence of the defendant and his licence to pump water. The *Beaudesert* principle consequently has the potential to impose unlimited liability for harm which has not been foreseen, in circumstances where no duty of care was necessarily owing, and where the act in question was not negligent nor calculated to harm the plaintiff.

Unlawful acts

The Court in *Beaudesert* in formulating the grounds for liability, had required that the act complained of should be unlawful. In that case the Council's action in removing the gravel was unlawful in the sense of being against the law. The gravel was removed in the face of a statutory prohibition on the taking of gravel except with a permit, which the Council did not have.

The nature of the acts in the *Mengel* case were somewhat different. In so far as the acts of the inspectors consisted of informing the Mengels that their cattle were subject to quarantine restrictions and could not be moved from the stations, these acts were in no sense against the law - at most they were unauthorised and lacked legal efficacy. There was no statutory programme relating to the cattle or the Mengels' properties.

After examining the *Beaudesert* case more closely, the High Court had no hesitation in holding that these acts were not 'unlawful' in the sense required by *Beaudesert*. According to the majority judgment, this meant that the acts had to be forbidden by law. Deane J in his separate judgment agreed that the word 'unlawful' had been used by Taylor, Menzies and Owen JJ in the critical passage in *Beaudesert* in the sense of 'contrary to the law' as distinct from either invalid or unauthorised.

But, as Justice Deane went on to say, this finding only goes part of the way towards resolution of the ambiguity arising from the use of the word 'unlawful' in *Beaudesert*. There are several possible interpretations of the word. It can refer to acts which are forbidden either by the criminal law or by some specific and direct statutory prohibition. But what if it were argued that the act was intimidatory or had induced a breach of contract or was simply a breach of a contractual term?

Given the Court's findings on unlawfulness, one course of action open to it would have been to distinguish the facts of *Mengel* from those of *Beaudesert*. In deciding to overrule *Beaudesert* altogether the High Court was sending a distinct signal that this cause of action was no longer appropriate (if it ever had

been) in a modern torts context. It is a seminal decision in so far as it means that public officials are no longer at risk of being singled out for liability for defective acts which, although unauthorised, are not negligent nor carried out in bad faith nor intended to cause harm to the plaintiff.

Misfeasance in public office

It was also argued by counsel for the Mengels that the Northern Territory inspectors were liable for misfeasance in public office. This argument was rejected on the facts but the existence of the tort itself was left firmly intact.

The tort of misfeasance in public office is sometimes regarded as the counterpart to the tort imposing liability on private individuals for the intentional infliction of harm. Liability under this tort arises where a public official abuses his or her public office.

The notions of public officer and public office are expansive and are not limited to salaried government employees nor to an abuse of office by exercise of statutory power. It can also, for example, include the exercise of common law powers. In *Henly v The Mayor of Lyme* the allegation was of a failure by a corporation to repair a sea wall, the maintenance of which was a condition of the grant to the corporation. There was no statutory power involved. The court, by way of example, noted that church officers may be regarded as public officers so that a member of the clergy who neglected to register a person brought to be baptised, in consequence of which the person loses an estate, could be liable to the action for this tort. In an era of increasing government privatisation of public services which used to be the preserve of government departments and agencies, there seems to be no reason in principle to exclude such persons from the ranks of public officers.

The tort is limited to the invalid exercise of power, either because there is no power to be exercised or because the exercise of the power has miscarried by reason of some matter which warrants judicial review and a setting aside of the administrative action. However, valid exercises of power which cause loss do not give rise to liability for misfeance. As was explained by Brennan J, in this case the conduct of the public officer does not infringe an interest which the common law protects.

The element of abuse is central to the cause of action. This relates to the state of mind of the officer and means that the officer must have acted either maliciously, that is, with an intention of causing injury to the defendant, or with actual knowledge that there is no power to engage in the conduct complained of. Brennan J was also prepared to accept that the tort could be committed where the officer acted with 'reckless indifference as to the availability of power to support the impugned conduct'. In this regard he went a little further than the majority judgment in which it was held that 'there is much to be said for the view that, just as with the tort of inducing breach of contract, misfeasance in public office ... extends to the situation in which a public officer recklessly disregards the means of ascertaining the extent of his or her power'.

But neither Brennan J nor the other justices were prepared to accept the argument put forward by counsel for the Mengels that liability would be incurred when the officer concerned ought to have known that he or she lacked power. That is to say, it will not suffice to prove constructive knowledge of the lack of power. The tort of misfeasance in public office is not concerned with negligent conduct. It follows from this that foreseeability of injury to the plaintiff is also not relevant. Something more is required.

Justice Brennan summed up the policy issue as follows:

> A public officer is appointed to his or her office in order to perform functions in the public interest. If liability were imposed upon public officers who, though honestly assuming the availability of powers to perform their functions, were found to fall short of curial standards of reasonable care in ascertaining the existence of those powers, there would be a chilling effect on the performance of their functions by public officers.

The *James* principle

As mentioned earlier, the Court of Appeal in Mengel had also found for the Mengels on the basis of the principle in *James v Commonwealth*, and this issue was subsequently argued before the High Court.

The *James* principle is based on a statement in *Salmond's Law of Torts* that:

> Although there seems to be no authority on the point, it cannot be doubted that it is an actionable wrong intentionally to compel a person, by means of a threat of an illegal act, to do some act whereby loss accrues to him: for example, an action will doubtless lie at the suit of a trader who has been compelled to discontinue his business by means of threats of personal violence against him by the defendant with that intention.

In the *James* case, the basis of the claim was that the Commonwealth or its officers had compelled the plaintiff to discontinue his trade by unlawful threats that his goods would be seized. Dixon J ultimately found against the plaintiff on the basis that, on the facts he had not been influenced by the fear of seizure and it had not been the supposed threat that had operated to restrain his trading.

This statement of principle, as formulated by Salmond and as applied by Dixon J, is not confined to threats made by public officials. But in the *Mengel* case, in the Court of Appeal, Priestley J in effect reformulated the rule specifically to apply to public officers. In his view the plaintiff would have an action for damage suffered where:

> In face of an express or implied threat by governmental authority of unlawful prosecution of the plaintiff, the plaintiff felt compelled to refrain, and has refrained, to the plaintiff's loss, from dealing with the plaintiff's goods.

While the *James* principle was endorsed by the High Court in *Mengel*, its reformulation and application by Priestley J was not endorsed. The Priestley reformulation was criticised, in particular, on two grounds. The first was that it involved no intentional element and, to that extent, was clearly contrary to the principle adopted by Dixon J in the *James* case. That is to say, while the Dixon formulation required the existence of an intention to compel a person to do an act whereby loss would accrue to that person, the Priestley formulation is silent on the issue of intention and would allow a person to recover damages where loss had been suffered irrespective of whether the public officer intended to cause the loss.

The High Court also had misgivings about the idea expressed by Priestley J that a government officer might incur liability by virtue of an express or implied threat of 'unlawful prosecution', at least where that extends beyond malicious prosecution or abuse of process. As Deane J held, the threat of prosecution is not, without more, a threat of an illegal act even if the prosecution would be doomed to fail. There is nothing illegal about a prosecution which is brought bona fide but which fails, and in the absence of malice or of some ulterior or improper motive, a threat to institute a prosecution is not a threat of an 'illegal act' for the purposes of applying the principle in *James v Commonwealth*. In this regard, Dixon J in *James* had made the point that a public officer would not be liable if, under a bona fide mistake as to the state of the law, that officer proposes to proceed by judicial process. As he said, 'to treat a proposal or threat to institute proceedings as a wrongful procurement of a breach of duty

is to ignore the fact that, assuming bona fides, the law always countenances resort to the courts, whether by criminal or civil process, as the proper means of determining any assertion of right'.

The High Court also noted that there was a difference between a threat and the giving of advice. In this regard it upheld the statement of Dixon J that the intimation that the claims of government might be enforced by resort to legal process did not amount to procurement or inducement for the purposes of applying the *James* principle. Nor did the mistaken assertion by government officers that, as a matter of law, certain consequences would or might attend a particular course of action constitute a threat for the purposes of the *James* principle, at least where the assertion was made in good faith.

Accordingly, when applied to the facts in *Mengel*, there could be no liability under the *James* principle.

The constitutional principle of the rule of law

In the Court of Appeal, Angel J had been of the view that 'liability attached to the inspectors and the Northern Territory Government as a consequence of the constitutional principle of the rule of law rather than any private tort'.

It is not entirely clear what His Honour meant by this notion, but it seemed to involve the view that, if harm results, there is liability for any unauthorised acts by government and government officers. Alternatively, where harm results there is liability for unauthorised acts which prevent the individual from doing what he or she would otherwise be free to do where not prevented by a statutory provision.

This principle was rejected by the High Court as not being supported by either authority or by principle. In this regard it was noted that the so-called principle might well be contrary to s64 of the *Judiciary Act 1903* (Cth). Section 64 provides that in matters of federal jurisdiction 'in any suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same ... as in a suit between subject and subject'. All Australian jurisdictions except Western Australia have similar statutory provisions.

It was accepted by the Court that, in line with both s64 and with general principles of liability as developed through the common law, it would not be acceptable to hold public officers liable merely for acting in an unauthorised way, when they were not acting negligently nor in bad faith. The High Court in this regard noted that the formulation of principle espoused by Angel J suffered from the same defects as did Priestley J's formulation of the *Beaudesert* principle.

Breach of statutory duty

The action for breach of statutory duty was not discussed in any detail in the High Court, which is not surprising, given the particular facts of the case. Nevertheless, to the extent that this action was discussed, it was clear that the High Court had difficulty in reconciling the *Beaudesert* principle with the accepted formulation of the tort of breach of statutory duty.

On the one hand, there is an obvious similarity between the cause of action recognised in *Beaudesert* and the action for breach of statutory duty. Both actions dispense with the need to prove negligence or the need to prove an intention to injure the plaintiff and in this sense both may be regarded as torts of strict liability.

But there are also important differences between the two causes of action, the main difference being that, with the action for breach of statutory duty, in the absence of a statutory provision which

confers a right of action on the plaintiff, the plaintiff has no right to sue for any breach by the public officer of that duty. In other words, the action for breach of statutory duty recognises that no right of action accrues to the injured individual simply because a legislative provision has been breached; this right only arises if, in addition, the legislative provision shows an intention to protect the plaintiff by granting the plaintiff a right of action in tort. Often the statutory provision will only confer an alternative remedy, for example, of an administrative nature.

The *Beaudesert* principle goes far beyond this. If upheld, it would impose liability on public officers even in situations where the statute envisaged no private right of action. In so doing, it would introduce standards of liability for public officers much stricter than those imposed on ordinary members of the public and in circumstances where even the special remedies of misfeasance and breach of statutory duty are not applicable. While not on its face expressly confined to liability for defective acts of public officers, in practice the *Beaudesert* principle has been sought to be applied only in cases involving defective government actions. It was argued by counsel representing the various governments that, when negligence was not relied on, liability in these cases should be confined to actions for misfeasance of public office and breach of statutory duty, and that, to allow actions to succeed on the basis of the *Beaudesert* principle would expose public officers to unwarranted and insupportable liability. Fortunately for public officers the High Court agreed.

PRIVATISATION OF GOVERNMENT LEGAL SERVICES

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Text of an address to AIAL seminar, Privatisation of government legal services, Canberra, 17 October 1995.

Introduction

In this paper I am speaking in my private capacity, not on behalf of the Department of Social Security (DSS), although my work for DSS must influence my views to an extent.

A short history

I first became aware of plans for the privatisation of Commonwealth legal services in 1989-90. A draft cabinet submission arrived at DSS and our views were sought. The draft came from the Attorney-General's Department (AG's). In essence the proposal was for agencies such as DSS to pay AG's on a user-pays basis for legal work done for us in certain categories.

Part of the rationale for the proposal was to stem the apparent exodus of AG's legal officers to private law firms where they were being offered much higher salaries.

The submission therefore favoured the introduction of a special award for legal officers giving them access to performance pay in an effort to close the gap between public service and private law firm salaries. It contemplated that legal officers could exist in agencies outside AG's.

DSS's attitude to the first cabinet submission

The attitude within DSS to the draft submission was lukewarm at best. In that it suggested that we would pay for services previously provided free of charge, it was not appealing.

DSS was not attracted by the idea that it might have its own legal officers. Our own lawyers do legal work within the clerical stream. Our experience had been that many clerical staff members without legal qualifications had been equally useful as those with law degrees in the work we did. The introduction of a distinction of this type would be discriminatory and counter-productive.

It was the official DSS view that we would like the freedom to pay more to certain other professional groups whom we had trouble retaining. These included computer staff and accountancy experts.

Some of us were also somewhat concerned by sentiments in the first submission that were critical of the talents of the agencies' in-house lawyers.

It then seemed that AG's went back to square one and rethought much of the proposal.

What emerged

Subsequent versions of the submission allowed for the contracting out of some legal services to the private legal profession. They also accepted in-house lawyers as an established and enduring

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element in the provision of legal services to Commonwealth agencies.

There was a substantial view among agencies that, if an agency was to pay AG's for its legal services, it should have the option to choose a provider other than AG's. The emphasis then moved to defining what work would remain exclusive to AG's, what could go to external providers, and when the changes would occur.

Attention was given also to the respective roles of AG's and agency lawyers in providing legal services to agencies. AG's was to provide leadership to in-house lawyers.

The financial arrangements also became clearer. Agencies were to be given additional funds which, in broad terms, were to suffice for payment for their legal services. The quantum was based on historical usage of AG's.

Immediate impact on AG's/DSS relationship

Once the AG's submission was accepted by cabinet there were immediate improvements in the way AG's operated with the agencies. There was an immediate improvement in service. Timeliness improved. DSS was regularly surveyed by consultants providing feedback to AG's about AG's performance. AG's staff would visit us, in Tuggeranong, to discuss service issues or to provide on-the-spot advice.

AG's took seriously its obligation to provide leadership and assistance to in-house lawyers by offering seminars and conferences, some free, to agency lawyers. This has continued unabated.

DSS/AG's Memorandum of Arrangements

In 1992 DSS and AG's signed the first of the memoranda of arrangements that have existed between them. This has proved extremely beneficial to DSS in a number of ways. It helps to educate the DSS network in the proper operation of the Department's legal services arrangements.

Role of in-house lawyers

It has also encouraged DSS and AG's to define the proper interaction between the legal services area in DSS, the rest of DSS and AG's. It has clarified and codified the appropriate role of the DSS in-house legal service. This is described as follows:

> 14.1 AGD [Attorney-General's Department] acknowledges the following role of the Client's legal and paralegal staff, operating consistently with the Guidelines:
>
> (a) representing the Secretary to the Client [Department] at AAT hearings and conferences;
>
> (b) providing instructions to AGS [Australian Government Solicitor] officers and, indirectly, to counsel representing the Secretary in AAT matters and court cases;
>
> (c) providing urgent or routine legal advice to the Minister and the Secretary on practical problems and policy proposals where advice on social security law or other areas of law is required;
>
> (d) arranging legal advice by AGD in matters where expertise does not exist within DSS or where it is essential that the legal advice is authoritative;
>
> (e) explaining to DSS staff, with the cooperation of AGD staff where necessary, what may or may not be possible as a matter of law and how, if possible, they might legally achieve their aims; and
>
> (f) maintaining an efficient and responsive link with AGD so that DSS staff requiring AGD assistance are assisted to the greatest degree possible.

Indications available of value of legal services

The arrangements have also served to clarify the money value of the legal services consumed by the Department. This accords with accountability theories in current public administration and assists management to make cost-effective decisions about legal services.

This has been as true of the agency's own legal infrastructure. It has shown that the Legal Services Division within DSS is very cost-effective when compared to alternatives.

The next and current step

Like other Commonwealth agencies, DSS is in the process of selecting its external legal providers for the next few years. One of these will be AG's if only because of the legal work that AG's *must* continue to receive from agencies under the Attorney-General's ***Directions for the Provision of Legal Services to Government Departments and Agencies*** (1 July 1995). Examples are:

- advice on matters where AG's has control of the policy;
- treaty services;
- drafting of subordinate legislation;
- constitutional advice;
- litigation;
- major legal agreements;
- government to government work;
- statutory interpretation involving more than one agency.

DSS, while pleased in general with the work AG's does for us, and with AG's improved service in recent years, is looking forward to experimenting with alternative providers. We therefore hope to have a panel of about three firms, one of which could be AG's, which will take our work.

We see value in fresh sources of input into our work. It will be stimulating to see where the private firms are coming from and where they think they can take us! At the same time, no doubt there will be extra effort required on our part to educate the private firms in what may be possible from our point of view.

The introduction of competition should ensure improved value for the money we spend on external legal services. The stress may, however, be on improved quality in service delivery and content. This can only be good for all parties, the public, DSS and AG's.

The Attorney-General's Directions

I intimated earlier that DSS was not strident in demanding access to the private profession. However, noting that the Government has decided to permit agencies to have recourse to private law firms, the Attorney-General's ***Directions*** have certain surprising aspects.

The AG's continuing monopoly in respect of litigation is surprising from a practical perspective. It is justified on grounds that have a foundation in the Judiciary Act through which the Attorney-General is responsible for Commonwealth litigation. Subsidiary, but consistent, justifications are based on the Commonwealth as model litigant and on the desire for consistency in how the Commonwealth puts its case in litigated matters. These are good arguments but need not require the AG's monopoly in all courts and subject matter. It is noteworthy that private firms can appear for the Commonwealth in a tribunal where, in a practical sense, similar sensitivities might be thought to apply.

At the same time I find it a surprise that the Attorney-General has permitted general legal advising on such matters as statutory interpretation and the meaning of secrecy provisions to be provided by the private profession. Until now it has been possible to obtain a definitive Commonwealth interpretation or view on these matters from AG's. From now on it will be possible, admittedly within limits, to shop for the advice that an agency finds convenient. I see a danger in this in that it will generate uncertainty and possible inter-agency conflict where these have in the past been avoidable.

In certain respects there may be a steep learning curve for private law firms in discovering the relevant authorities that are an integral part of the tools of trade of lawyers in AG's. They will not necessarily have access to the AG's opinions data base. The work involved in understanding and applying notions of the Commonwealth as a model litigant or model contractor may be difficult to learn and apply, especially where an agency, in a particular case, is tempted to be not the model litigant or contractor. Will the private firm do as the agency, its client, is requesting, or will it question the agency's instructions? What is ethical in instructions from a private client might not be ethical in instructions from a Commonwealth agency. The instructions from the Commonwealth agency could emanate from a relatively junior officer in a particular matter.

These problems, when they arise at present between DSS and AG's, tend to be resolved by discussion between senior officers. In the new environment it may be necessary for the private firm to develop a sensitivity to these types of issues and to foster the necessary working relationship with senior management in the Commonwealth agency.

Some challenges

There are some interesting challenges for Commonwealth agencies in the new arrangements.

The greatest will be to try to maximise the potential benefits that might flow from harnessing the synergies between AG's and private legal providers. Where AG's is a member of an agency's panel of external legal providers there will be situations where AG's and a private firm could each contribute in its own way to a large project. This is an issue that needs to be on the agenda in the selection process with both AG's and the private contenders tested on their experience and ideas in these areas. The different histories and backgrounds of AG's and the other provider should generate, in an appropriate case, a useful and creative outcome. Of course, if this is to occur a certain generosity of spirit will be required by both legal providers.

Conclusion

Securing the services of the private profession, operating smoothly with various providers of legal services, becoming acquainted with and adapting to new working arrangements - these are unusual challenges for Commonwealth departments of state, although a number of government business enterprises have been in this mode for some years. What is more, I expect that this is the start of a trend. Once these arrangements are in place it is difficult to imagine that there will not be further relaxation of the reins by the Attorney-General. More work will, in all likelihood, be available to the private profession.

It is perhaps ironic that something that was not a feature at all in the first cabinet submission on provision of Commonwealth legal services has become a virtual driving force.

THE STRUCTURE OF THE COMMONWEALTH MERITS REVIEW TRIBUNAL SYSTEM

*Chris Conybeare**

Text of an address to AIAL Seminar, The structure of the Commonwealth Merits Review Tribunal System, Canberra, 16 November 1995

Introduction

Thank you for the invitation to speak today, and for those pleasant and reassuring comments about my objectivity on our subject for discussion. The fact is that I do straddle two planes of experience:

- a general public service interest in administrative review, as reflected in the six years I spent on the Administrative Review Council ("ARC"); and
- the particular experience of nearly six years managing the Department of Immigration and Ethnic Affairs ("DIEA").

Unashamedly I'll come at the issue from an immigration point of view. Perhaps this is not just fortuitous because it has been in the immigration and refugee areas that the greatest challenge to the Kerr process[1] has come in the past 7 years.

Independent external review of decisions is a relatively recent phenomenon in the immigration portfolio. Prior to 1989 when the Immigration Review Tribunal (IRT) and the Migration Internal Review Office (MIRO) were established, the only statutorily-based external review in the Migration Act area was the AAT's recommendatory powers in respect of criminal deportations. In 1993, the Refugee Review Tribunal (RRT) replaced a recommendatory review mechanism for refugee status applications with an independent and external review process. The IRT and RRT were established to provide fair, just, economical, informal and quick merits review of migration decisions.

In 1989, it was believed in some quarters, including the ARC, that the establishment of separate immigration tribunals was undesirable and that the review of immigration decisions should be conducted by the Administrative Appeals Tribunal (AAT). The Government, however, decided to establish separate tribunals primarily because of the perception of the unique nature of the immigration client base and the desire to avoid the perceived excessive legalism and formality of the AAT (with the consequential costs and delays). These considerations are, I believe, still extant and are relevant to the ARC's current proposal to merge the review tribunals with the AAT. In his second reading speech introducing the IRT the then Minister said

> Informality and the absence of legalism will be the key to the Tribunal's operations. [The arrangements are] designed to permit claimants to put the merits of their case in a factual and straightforward way, without the need for formal representation. The means of achieving this is the non-adversarial structure for case determination.

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I believe that both the immigration tribunals, have been, and continue to be, well able to meet the unique needs of their client base due to the cross-cultural awareness of their members, their use of interpreters and their non-adversarial approach.

ARC report

Against this background, I have some reservations about some aspects of the ARC's report, *Better Decisions: The structure of the Commonwealth Merits Review Tribunal System*. While there are many recommendations in the early chapters which are un-exceptionable and quite a few which reflect existing practice in the immigration tribunals, there are others which, I believe, require more thought before their implementation.

At the outset I should emphasise that it is for Government to make decisions on the recommendations and I do not want to make any judgments which may reside outside my arena as an adviser. However, there are some issues raised by the report to which I consider important context needs to be given.

The report expresses concern as to whether tribunals have been truly independent of the agencies whose decisions they review. In my view, the report does not fully acknowledge the independence which the immigration tribunals display and which is sustained, for instance, by their funding by a single allocation of money, and by the absence of secondments between the Department and the tribunals. Nor is the report's concern with independence reflected in client surveys conducted recently by the IRT and the RRT, and it has not been voiced strongly by other community groups. For example:

- the Committee for Review of Migration Decisions (CROSROMD) in its report of December 1992 generally endorsed the IRT and found that it had earned the reputation as a credible, fair and independent review body, and that applicants and their advisers appeared generally satisfied with the quality of decision-making and the level of their participation in the process;

- the most recent IRT 'Applicants and Client Survey' (August 1995) reveals that the majority of respondents (68%) agreed that the IRT process was fair and just;

- the RRT's 'Report on Client Satisfaction Research' (May 1995) reveals that the overwhelming majority of respondents commented positively on the fairness of the whole review process and 83% of respondents felt that the hearing was fair. This finding is particularly notable in view of the relatively low number of applicants to the RRT who gain a more favourable decision.

An entire chapter of the ARC's report is dedicated to the theme of improving the quality and consistency of agency decision-making and expressing the view that the normative effect of tribunal decisions needs to be increased. Perhaps their very presence in the immigration portfolio has this effect.

Despite a widening of the jurisdiction of the review bodies resulting from the implementation of the Migration Reform Act in September 1994, and despite an increasing number of primary decisions by the Department, there has been little growth, if any, in appeal rates.

Decisions reviewed by the immigration review tribunals represent only a minuscule proportion of all decisions made. This reflects positively on the quality of decision-making at other levels within the portfolio.

The IRT and the RRT have made significant contributions to the immigration portfolio, most specifically in their provision of a basic "safety net" for

applicants who, for various reasons, may not have received the preferable/correct decision at the primary level. The value of the tribunals has also been particularly important in identifying where clarification or change is required to legislation or policy, and sometimes providing guidance on how existing policy should be applied to future similar cases. For example:

- 'profiles' had been used by primary decision makers to determine that visitor visa applicants were likely to overstay their visas, without taking into consideration the particular circumstances of the individual involved. The legislation has since been amended to provide that while a 'risk factor' may apply to an applicant falling within a particular profile, the individual's personal circumstances must also be taken into account;

- a number of IRT decisions on the "balance of family test" revealed unintended consequences of the relevant legislation. This legislation has since been amended to exclude adult step-children from consideration in certain circumstances.

The Department lives comfortably with the tribunals' high set-aside rates in some areas, for instance, where a subjective judgment or an alternative interpretation of the facts is to be expected. A good example of this is the assessment of the genuineness of a relationship. In such cases, an additional factor may be the passage of time which can confirm claims under dispute at earlier stages in the process.

The IRT's current set-aside rate is 59% and the RRT's cumulative rate since its establishment to the end of August 1995 is 16.6%.

I believe we have come a long way in a short time in realising that the tribunals can help the Department to do its job better, in terms of "getting it right the first time".

In some places, the report makes generalisations about the review process which are not true of, or relevant to, immigration review. For instance, the report suggests, on internal review, that payment of fees be abolished because they are only a token payment. However, in the migration area, internal review fees contribute about 60% of the cost of internal review. This is hardly a token amount.

The report talks about awarding costs in some cases. This would, I believe, encourage the unnecessary engagement of advocates, thereby impacting on the non-adversarial nature of review hearings. It also ignores the fact that DIEA has largely been unable to take advantage of costs awarded to it in the courts, because the next step for unsuccessful applicants is to be removed from the country. Such a provision could easily result in protracted arguments on costs and not on substantive issues.

Generalisations such as these, which do not appear to take account of the particular features of existing tribunals, are convenient, but not sufficient support for what I would suggest is the purist view that review of all Commonwealth decisions could and should be made by a single review body.

On some of the other issues raised in the report, the feedback to the Department from community-based agencies with which it consults on a regular basis does not reflect the alleged concerns. For example:

- the report expresses concern about the limitation on the role assistants to applicants can play. It is interesting to note here that the IRT Annual Report for 1993/94 includes figures which demonstrate that people have

decisions overturned at the same rate whether they have an assistant or not;

- there is high regard among the community for the non-adversarial role of the tribunals. Many critics fail to understand the responsibilities of the members of the tribunals who have to look at both sides of the case being put before them, given that neither the applicant nor the agency is legally represented.

This leads me to a discussion of the ARC's recommendations in Chapter 8 of its report concerning the amalgamation of the immigration and other review bodies with the AAT to form the Administrative Review Tribunal (ART). As is clear, these are very much matters for the Government not for public servants like me to determine. But in relation to these recommendations, I would raise the following points:

- In my view, a deficiency of the report is that it doesn't look in any detailed way at why the Government chose not to accept the earlier advice of the ARC which was in favour of the AAT providing a second tier of review in the migration jurisdiction.

- Another concern with the ART proposal is that there is the potential for it to become simply a larger and more bureaucratic version of the existing AAT. Those in this group here this afternoon who attended the recent information sessions on the report conducted by the ARC will be aware that, as I am informed, two of the independent speakers at these sessions (Professor Dennis Pearce, and Professor Margaret Allars, Professors of Law at the Australian National University and University of Sydney respectively) noted that the proposed ART appears to be more of an expansion of the existing AAT than the creation of a new review tribunal. Professor Pearce used, I believe, the analogy of a large supermarket (the AAT) taking over a small corner shop (specialist tribunals) and talked very cogently about the sorts of risks that are inherent in such an exercise.

- As I mentioned or implied in my earlier remarks, the report could be criticised for adopting a "mainstream" view of all tribunals without appreciating the need in some cases for important differences. In looking at the important issues which the Government needs to address, the report does not consider these issues in the unique immigration review context but tries to make the existing arrangements uniform. Is this uniformity for uniformity's sake, perhaps? I suspect that few in this group have attended one of the IRT's hearings, which are public, to see how the tribunal actually works in practice. I urge you to do so. I doubt you would need to attend an AAT hearing as most of you will have seen courts at work.

- One of my main concerns with the proposed ART structure is the potential for a departure from the current non-adversarial approach to merits review which is, I believe, the linchpin of tribunal operations in the immigration area. Any departure from this approach could lead to the need for departmental representation at hearings, which I oppose as it could be contrary to the objectives of the IRT and RRT, notably that the review process be fair, just, economical, informal and quick - objectives overwhelmingly supported by all our stakeholders.

While the AAT may strive to be less adversarial in its approach, in my view it still has a long way to go before we can feel confident that the immigration tribunals can join it secure in the knowledge that their inquisitorial style can be preserved in the proposed new environment.

There are without doubt some important improvements that can be made in the way merits review tribunals go about their functions. The IRT and the RRT, in terms of their non-adversarial approach and their accessibility, the cross-cultural awareness of their members and their experience in the use of interpreters - which they are statutorily required to provide - are in the vanguard of organisations in the way they respond to their clients' needs in a truly client-focussed way. Other tribunals, and indeed the courts, as noted in the Government's Justice Statement, have a way to go to become as user-friendly to their NESB clients.

Endnote

1 The Commonwealth Administrative Review Committee, chaired by the then Justice JR Kerr, led to wide-ranging reforms in Commonwealth administrative law.

THE STRUCTURE OF THE COMMONWEALTH MERITS REVIEW TRIBUNAL SYSTEM

*Robert Todd AM**

Text of an address to AIAL seminar, The structure of the Commonwealth Merits Review Tribunal System, Canberra, 16 November 1995.

There is a good deal that I could say about the Administrative Review Council's report *Better Decisions: review of Commonwealth Merits Review Tribunals* (Report No 39 of the Administrative Council) ("ARC report"), much of it complimentary in relation to matters of detail, but in other respects, which unfortunately go to vital recommendations contained in it, condemnatory.

I hope that nobody thinks that the model set out in Chapter 8 of this report is a reflection of any of the three models that are set out as Appendix C to the ARC's Discussion Paper, *Review of Commonwealth Merits Review Tribunals*, in the evolution of which I played a major role. The internal mechanics of the Chapter 8 proposal are such that, while I agree with some of the premises on which it is based, in particular the concept of leave being required to have a matter reviewed at a higher level, I disagree so strongly with others that I consider that the Chapter 8 model is fatally flawed.

To appreciate why I feel so strongly about Chapter 8, and about some other parts of the report that are necessarily linked to it, I need to go back to certain proposals that I made, initially as a result of an idea put to me by Ms Jocelyn McGirr, then a Senior Member of the AAT, during the Review of the AAT which was conducted during 1991. These proposals were put before a seminar conducted by John McMillan, a senior lecturer in law at the ANU Law School and myself, under the auspices of the AIAL in April 1994. The seminar, "Towards a Tribunals Non-Proliferation Treaty" was attended by an invited audience of user groups, agency representatives and representatives of tribunals. The proposals were then revised in a paper presented jointly by John McMillan and myself to the Forum of the AIAL held in Brisbane in July 1994. The models that we there put forward appear as the second page of Appendix C of the ARC Discussion Paper, and I urge everyone interested to read Appendix C, and the whole of the ARC report.

I would have wished that the ARC's proposals could have been resubmitted to the broad-based group that came to the AIAL's 1991 seminar so that a proper debate could have occurred. The ARC did conduct, on 27 October 1995, what was described as an "information session" to which a large number of persons had obviously been invited, but it was made clear that it was essentially that, a session at which, after a number of explanations and commentaries, questions could be asked in elucidation of the Report. When I asked, in open session, whether it was intended to hold an open debate about the proposals, at which all interests would be involved, we were told that it was "not intended to re-invent the wheel". I found this statement rather ominous, and I have to say that my thesis is that, unless

* *Robert Todd AM was formerly a Deputy President of the Commonwealth Administrative Appeals Tribunal.*

several spokes of this report's wheel are re-invented, the whole cart will go off the road and over the cliff.

The models that John McMillan and I proposed were based on the premise that the present system of "proliferated" tribunals cannot continue, a proposition that is, I suggest, likely to be accepted almost universally. There may be one area which is, it would seem, unprepared to let go the apron strings of review tribunals falling within its portfolio responsibilities because "mother knows best". Subject to that, I believe that we can go forward on the assumption that proliferation is wrong, and that some form of ordered integration must be restored to the system, both for its own good, and on the ground of efficient use of resources.

The underlying concept of models A, B and C was that the first level of review would continue to be based on an ethos of speed and informality, but that the second level would offer the kind of review found in the AAT, a format that is proper, requisite and indeed, wanted for the most legally and factually complex cases, but is unnecessary for those cases that are essentially lacking in such complexity. The philosophy underlying this concept was that while there are less complex cases that should not by their nature be entitled as of right to two levels of review, there are also cases that should not have to make their way automatically through two levels but should have the opportunity to proceed, if possible immediately, but at least on later identification, to a more quasi-judicial form of review at the second level. Both should be catered for properly, recognising that each has specific needs.

Fundamental to each of our models was the proposition that it should no longer be possible to appeal from a first level tribunal to the second level, presently the AAT. There is no quarrel with the ARC on that point.

At this point, however, the trouble starts. Unfortunately the Chapter 8 model so confuses the two levels that the undoubted merits of a properly constructed and integrated two-level system are quite lost. The Chapter 8 model is at first glance a two-level system, but I submit that the two-level concept embodied in it is thoroughly muddied, or muddled, by the concept of "Review Panels" which appear not to be a true second level of review, but are rather constituted by ad hoc assembly of members from across the tribunal. Quite apart from that, there is further erosion of the system, through propositions, to which I refer below, contained in earlier sections of the report that are apparently intended to stand whether or not the Chapter 8 model is accepted. The criticism that follows applies to those propositions either on a "stand-alone" basis, or for their impact on, or for the light they throw on, the Chapter 8 proposal.

The confusion of the two levels is chiefly caused by what can only be described as an extraordinary concept of membership. What it concludes about membership is acceptable in relation to part-time membership at the "non-presiding" level, but is otherwise objectionable. Paragraph 4.12 contains a remarkable list of "criteria for skills and experience" that are said to be "essential or desirable" in tribunal members, but are "criteria" the same as qualifications? While selection criteria are referred to in paragraphs 4.8 to 4.20, and while recommendation 33 states that "All prospective tribunal members should be assessed against selection criteria that relate to the tribunal's review functions and statutory objectives", it seems to be contemplated that they will be determined by the relevant Minister after consultation with tribunals (paragraph 4.16). Apart from that, the only qualification for members seems to be that they need not be lawyers. Why criteria for appointment should "relate to ... statutory objectives" is beyond me, but the statement is certainly scary. Some suggested criteria are said in

paragraph 4.12 to have been "suggested during the inquiry as essential or desirable for tribunal members". It is not said that the report agrees that these attributes are necessary, but it is implied that they are. It is worthwhile to refer to them in the full report, since they indicate in dramatic form the qualities needed, not least in knowledge and experience of administrative law.

The reasoning in support of the proposition that tribunal members need not have legal qualifications is brief indeed. Paragraphs 4.13-14, speaking of tribunals generally, in effect say that some legal skills may be needed but that you can apparently be trained to be a "barefoot lawyer" if you have not got them. Paragraph 8.32 states of the proposed Administrative Review Tribunal ("ART"): "It is likely that some members of the ART would have legal qualifications. However, the Council considers that, save for the president, no member should be required to have legal qualifications in order to be eligible for appointment to the tribunal."

So we have now come to the diminution, if not the belittling, of the need for qualified legal skills in the proposed ART, and for that matter in the existing tribunals if the Chapter 8 proposal does not go ahead. It is no doubt politically correct nowadays to dismiss or belittle lawyers and their legal skills. But it is simply no good pretending that heavy cases, and believe it or not they do exist, do not need legal skills and experience to cope with the very real problems of statutory interpretation; of elucidation of complex facts; and of determination of the credibility of witnesses. If you do not know that, you have not been involved in cases before the AAT. Nor have you much familiarity with the reasons for decision which have been published over the past 19 years. Unfortunately this report betrays little understanding of just how difficult and complex these cases are. To ignore these considerations is to live in cloud cuckoo land.

It would be easy to pretend that administrative law can be simple, and that review processes can always be short, informal and simple. It would, of course, be nice if they were all simple. It would be nice if bringing up children were simple too, but it is not. I sometimes think that critics of lawyers in this field think that layers make up the difficulties for their own amusement. Why can't they just make it all simple? Do the critics forget that it is, pre-eminently, the Parliament through its enactments that has created the enormous complexities that confront decision-makers in administrative law? Yes, why not just make it all simple by applying what we all "know" what the Parliament meant, or, better still, what the Government "knows" that it meant? This is not fanciful. A Secretary to a Commonwealth Department, addressing a Forum conducted by the AIAL, said with disarming candour that it was terribly difficult to have an Act of Parliament amended, and that it was therefore necessary to apply what you knew was the government's policy! The way to go to make administrative law simple? Yes, and to take us back to the dark ages.

The AAT did not get to where it did by having as presiding members people with no legal training. I marvel when I hear people in high places speak of the AAT is if its success has been in spite of, not because of, its legal members. Especially in the earlier years of the AAT, there was an almost total absence of judicial decisions over large areas, a good example being in relation to customs classification. Indeed in many areas, the AAT had to work out carefully the construction of the relevant legislation and try to put it into a coherent framework. This sometimes involved comparing legislative concepts across a number of enactments, a good example being that of "capacity for work". Could this have been done by barefoot lawyers?

Let me now just mention three of a number of areas where lawyers have transformed administration:

> **Social Security**: Who was it who established that the Government had been wrong in the way in which the provisions of the Social Security Act in relation to invalid pensions had been administered? And who reasoned out the argument so persuasively in the decision that it was accepted by the Department of Social Security without appeal?
>
> Do those who work in the interests of the poor and disabled want the lawyers outed?
>
> **Veterans' Entitlements:** Who was it who, after the *Veterans' Entitlements Act 1986* had come into force, dealt with veterans' cases according to law, when the departmental representatives were coming up to the AAT reciting, very pleasantly, the governmental mantra in the form of the Minister's speech in the House in 1922? That was when he said that the purpose of pensions for repatriated soldiers was to look after those who were lying in repatriation hospitals, broken in body and in mind, or words to that effect. I had one case in which the Department brought to the hearing the 1922 speech, and the 1986 second reading speech and the explanatory memorandum, but not the Act.
>
> Do those who work in the interests of veterans want the lawyers outed?
>
> **Freedom of information:** Who was it that had the ability to put paid to the efforts of certain government representatives to have the pre-historic law about candour and frankness, surely much-beloved of Sir Humphrey Appleby, applied despite decisions of the High Court of Australia and of English courts?
>
> Do those who believe in open government want the lawyers outed?

And so on. There are other examples.

Next, all members are to be appointed for terms of between three and five years (see recommendation 41, page 83): "The Council considers that a range of from three to five years would be generally appropriate, across all tribunals". With all respect, I find this proposition absurd in terms of the independence of the tribunal and its members at senior levels, and in terms of attracting to membership people possessing the necessary skills at those levels. I note that in former days a term of seven years was regarded as unsatisfactory in the case of Senior Members. I also note that the ARC report ignored the report of the Joint Select Committee of the Federal Parliament on Tenure of Appointees to Commonwealth Tribunals (November 1989) on this point, a report which the government affected to approve but which it honoured more in the breach than in the observance. How on earth will people of quality be attracted to full-time appointment to the higher levels in this tribunal? Certainly no-one who wishes to put his or her heart and soul into it, make a career of it, and really contribute to its intellectual development. Perhaps the truth is that that sort of dedication and independence is not wanted on voyage any more. Certainly, dedication and independence can be awkward, if not fatal, to government getting its own way whatever the legislation says. I suggest that this treatment of membership is, again, the road back, with a vengeance.

Appointment of Deputy Presidents and Senior Members is discussed, in the report, but, apart from stating that some Deputy Presidents would act as division heads, no attention is given to the relative qualifications and roles of Deputy Presidents and Senior Members. The present AAT has been bedevilled by the problems encapsulated in the question "What is the difference between a Deputy President and a Senior Member?" This proposal sends the answer into even deeper fog than at present.

The question of independence is indeed vital, but it is not discussed in any detail in this report, although it involves a major change in the ARC's previous stance, which called for non-renewable appointments (see recommendation 43). I dealt with this in some detail in a dissenting opinion in the Report of the Review of the AAT in 1991, and I will not go over what I said there again. Judging by what has happened in the immigration area, my worst fears have been justified. But let me just give you an understanding of how it can work on the ground. In 1987 there was an extraordinary attack by the then Minister for Finance, Senator Peter Walsh, repeated in various forms in various places, but enough of it said in Parliament to attract privilege. How secure, how independent would the AAT members have been at that time if they had been appointed for the ARC's three or five year terms, which are apparently now to be renewable?

The Chapter 8 models is in my submission a confusion, in which either the first level will lose the "informality virtues" presently obtaining at that level, or in which the second level will lose its quality skills, its experience, and its independence. It would in that event severely diminish the scope presently offered by the AAT for quality determination of the more difficult cases.

I wish to say that my complaints about terms of appointment and membership qualifications have much less application at the first level, at least in relation to part-time membership. When a right of review is open at the second level, as it should in my opinion be in all cases, including immigration, a degree of compromise at the first level is acceptable. And that first level would, with no cases going to the second level except by leave, hear probably the majority of cases to the point of finality. I have great respect for the work done by first level tribunals. It is because they succeed, under great pressure and without physical participation by the relevant agencies in the hearings, and because they deliver written reasons, that I place great store on cases not going beyond them without leave. But the Chapter 8 model, despite what the report says, does not in the format offered by the Report of "Review Panels", offer the framework, or the surety, of a different kind of hearing, and of review process generally, for the heavier cases. The presence of a quality second level, with a properly qualified membership, with secure tenure and unquestioned independence should cure any problems arising at the first level.

Finally, do we really want a review system in which the only way to obtain acceptable rulings about the construction of relevant enactments will be to appeal to the Federal Court? Do we really want a system in which the number of Federal Court appeals blows out because of mistakes in the application of the law?

The report envisages the possibility that the Chapter 8 proposal may not find favour. I trust that it does not. If it does not find favour, I submit that decisions of all first level tribunals should in that event be susceptible of review by the AAT, by leave and with a power of removal, as provided for in Models B and C referred to above. One option not acceptable is complete retention of the present system, which is seriously flawed. It is not, however, as seriously flawed as what has been offered in Chapter 8 of this report, given the

recommendations as to membership. And even if Chapter 8 is not accepted, the recommendations as to membership of present tribunals set out earlier in the report are again seriously flawed.

I am sorry to say that in my submission the proposed changes, for the reasons stated, would, if put into place, represent a deadly attack on the independence, and on the quality, of the Commonwealth system of review of administration decisions on the merits. I do not believe that this is wanted by the large number of intelligent and hard-working public servants who have worked at the coal-face, and who have done so much to help to make the system work. I fear that it may be wanted by the high-level policy-makers, and maybe by the government itself.

THE ONUS OF PROOF ON A DEFENDANT - A LEGISLATIVE SCRUTINY VIEW

*Peter Crawford**

Devotees of Rumpole of the Bailey will be aware of his much loved plea to the jury in which he emphasises the 'golden thread' of British justice that the accused is presumed innocent until proven guilty beyond reasonable doubt. The golden thread appears sometimes to be in danger of being severed when provisions in proposed legislation reverse the onus of proof in criminal prosecutions.

At common law, it is ordinarily incumbent on the prosecution to prove to the court all the elements of an offence beyond reasonable doubt and the accused is not required to prove anything. Provisions in some legislation, however, reverse this onus of proof and require the person charged with an offence to prove some matter to establish innocence.

The Senate Standing Committee for the Scrutiny of Bills generally considers the reversal of the onus of proof in criminal matters as breaching the first principle in its terms of reference because such a provision 'may trespass unduly on personal rights and liberties'[1].

The Committee over the years has developed its ideas with respect to the reversal of the onus of proof. Initially, the Committee endorsed the view expressed in *The burden of proof in criminal proceedings*, a report of the Senate Standing Committee on Constitutional and Legal Affairs published in 1982:

> The [Constitutional and Legal Affairs] Committee is of the opinion that no policy considerations have been advanced which warrant an erosion of what must surely be one of the most fundamental rights of a citizen: the right not to be convicted of a crime until he [or she] has been proved guilty beyond reasonable doubt. While society has the role by means of its laws to protect itself, its institutions and the individual, the Committee is not convinced that placing a persuasive burden of proof on defendants plays an essential or irreplaceable part in the role.[2]

In its *Annual Report 1986-87*, the Committee stated that it would regard as acceptable the imposition of a persuasive onus of proof on a defendant if:

- the matters to be raised by way of defence by the accused [are] peculiarly within the knowledge of the accused; and
- it would be extremely difficult and costly for the prosecution to be required to negative the defence.[3]

In the report, the Committee indicated that, while it was adopting a new policy in relation to reversals of the onus of proof, it would be no less vigilant in relation to clauses which imposed the persuasive onus of proof on the defendant in criminal proceedings. It indicated that it would continue to examine such provisions carefully to ensure that the onus was only reversed in the circumstances it had outlined and that it would continue to draw the attention of the Senate to any examples falling outside those guidelines.[4]

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Toward the end of 1992, the Committee became concerned about what it perceived to be an increasing tendency in Commonwealth legislation to reverse the onus of proof. In its *Nineteenth Report of 1992*, in the context of discussing certain provisions of the Tobacco Advertising Prohibition Bill 1992 which involved a reversal of the onus of proof, the Committee stated that it was concerned that:

> there is an increasing tendency to reverse the onus in relation to such provisions. While the justification given, in most cases, appears reasonable, the Committee notes that the same justification is equally applicable in relation to murder and other serious offences. The expanding use of the reversal of onus in legislation is, therefore, a matter of great concern to the Committee.[5]

At the First Australasian and Pacific Conference on the Scrutiny of Bills, in July 1993, Senator Amanda Vanstone, acting Chairman of the Scrutiny of Bills Committee, delivered a paper, titled *Innocent until proven guilty*.[6] She began by contrasting the theory of the presumption of innocence with the all too frequent practice in our society of prejudging people as guilty of crimes on the basis of newspaper or other stories or prejudices.

She commented on the increased use of reversal of the onus of proof provisions over the period since 1982[7]. She suggested, however, that there is some difficulty with accepting as a justification that the facts as to a particular matter are peculiarly within the knowledge of the defendant, as 'that is often true of murder or bank robbery'.

Instead she suggested that it is really a question of proportionality - a question of balancing the cost and difficulty of making the Crown take the burden of proof, the wrong that the law seeks to prevent and the penalty involved.

Since May 1993, the beginning of the 37th Parliament, the Scrutiny of Bills Committee has commented on 17 clauses containing a reversal of the onus of proof.

One in particular merits closer examination - the proposed changes[8] to the *Student Assistance Act 1973*. As the proposed offence was one of strict liability, the issue was not whether the facts were peculiarly within the knowledge of the accused. The Committee's reasoning can be seen as applying the principle of proportionality. This comparatively recent example shows the Committee's approach. The Committee examined the circumstances surrounding the provision to see whether the advantage to be gained by the provision outweighed the injury to personal rights. It was then able to form an opinion whether the harm to personal rights by reversing the onus of proof could be considered unduly to trespass on them.

In its *Alert Digest No. 6 of 1994* the Committee noted that the proposed amendments would have introduced a significant change in the system of criminal and civil sanctions which related to the payment of student assistance. The Committee was concerned that the new arrangement would be a retrograde step, imposing a more onerous level of obligation on recipients under the threat of what, in the circumstances appeared to be an inappropriate penalty - one year's imprisonment.

By way of background, the Committee pointed out that :

- Section 48 of the *Student Assistance Act 1973* imposes an obligation on a recipient of a student assistance payment to notify the Department of the happening of any event which has been prescribed by regulation. The student is not required to know the law in detail but is given a list of events to notify. Upon notification, the

Department adjusts or cancels payments.

- Section 49 provides for a series of five offences with a penalty of imprisonment for a year. Four of the offences require the person to act knowingly or recklessly in connection with obtaining a payment or deceiving an officer. Currently the fifth (which the Bill proposed to omit) forbids a person, without reasonable excuse, to fail to notify an event prescribed under section 48.

- The Bill proposed, in place of the failure-to-notify offence, to substitute an offence of strict liability of receiving a payment that is not payable (whether in whole or part) subject to certain statutory defences which, of course, reversed the onus of proof.

The Committee indicated that there were two elements in the proposed offence: the offence would have been 'committed' where, first, there had been an amount received in a person's bank account and, secondly, the amount had not been payable (whether in whole or part).

Whether or not an amount is payable under the student assistance scheme requires a detailed knowledge of the law and the regulations. In some cases, this question has taxed the finest legal minds in the land. The current scheme requires that the student be given a list of events with the relatively simple obligation to notify if any of those events occurred. The Committee was concerned that, under the proposed amendment, the student would not know if he or she had committed a crime unless he or she had a detailed knowledge of the law and the many regulations made under the law.

In respect of the defences, the Committee was equally concerned at the imposition of a new and onerous level of obligation.
The Committee noted that it would not be unusual for the decision to prosecute to be made many months after the discovery of an overpayment. The discovery itself may not occur for some months after the payment is received. At such a distance in time, it may be impossible for the student to prove any of the defences which the statute would offer.

The proposed defences were:

- the event was notified in accordance with section 48;

- a reasonable and timely effort was made to notify the Department of the receipt of the payment and of the fact that the payment was not payable or may not have been payable;

- because of circumstances beyond the person's control he or she has been unable to make a reasonable and timely effort to notify the Department as mentioned in the second defence.

The Committee made several points. It would not be prudent for a student to notify an event by telephone. The student would have no record of such a conversation and it is not unknown that either no record is made by the Department or that such a record is later not able to be found. It would be prudent to keep a certified copy of any notification sent to the Department and to send it by certified mail.

The second defence itself (by suggesting that recipients should notify the Department where there is doubt about a payment or the amount) underlined the inappropriateness of the scheme: perhaps the logical corollary would be that the prudent student ought to notify the Department of the receipt of every payment in case it may not have been payable in whole or in part - whether a payment is payable and what the correct rate is where an income test applies may require a knowledge of the system well beyond the competence of many students.

The Committee reiterated its view that the defences put too onerous a burden of proof on the recipient and that the proposal to make the bare receipt of an overpayment a criminal offence, and one of strict liability, was both unprecedented and unwarranted. Accordingly, the Committee sought the Minister's reconsideration of the scheme.

Following its usual practice, the Committee drew senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

In the event, the offending provisions were debated and deleted by the Senate[9] (with the Government's concurrence) but for other reasons the Bill was laid aside.

By way of conclusion, three points can be made. One is illustrated by Senator Robert Bell when he said during debate in the Senate on this Bill[10]:

> I think this a drastic case of overkill because the offences are likely to be in the order of a few dollars here and there, perhaps a couple of hundred in extreme cases; they are certainly not likely to be great crimes against humanity or things which will affect hundreds of other people. It is a particularly heavy sledgehammer which has been brought to bear on this walnut.

Clauses which breach the Committee's terms of reference often arise from convenient solutions to administrative problems. There is, however, often a healthy tension between the attractiveness of a convenient solution to a problem and the experience that resulted in the establishment of the Committee: the experience that attractive solutions sometimes have a downside of trespassing unduly on personal rights.

The second point has to do with the value of precedent. It was important that the Senate debated and rejected the provisions, even though the Bill was laid aside for other reasons. The Committee, on asking ministers why a clause trespassing on personal rights should not be considered to do so unduly, is frequently told that what is proposed is already in other legislation. It is not an argument that finds favour with the Committee, not least because the 'precedent' legislation frequently pre-dates the formation of the Committee in 1981 or arises through last minute government amendments too late to be examined by the Committee.

Thirdly, although in this instance the Committee's views were accepted by the Senate, it must be remembered that the Committee sees its role as one of alerting senators to possible breaches of its terms of reference: while the reversal of an onus of proof may be a trespass on personal rights and liberties, whether in a particular case it unduly trespasses is ultimately a political decision that is properly resolved by debate in the chamber.

Endnotes

1 The Committee's terms of reference are contained in the Senate's Standing Order 24. By that order, the Committee is required to report to the Senate on whether clauses of bills trespass unduly on personal rights and liberties; make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers; make rights liberties or obligations unduly dependent on non-reviewable decisions; inappropriately delegate legislative powers; or insufficiently subject the exercise of legislative power to parliamentary scrutiny.

2 Parliamentary Paper No. 319/1982, p 47.

3 Parliamentary Paper No. 443/1987, p 22.

4 ibid, p 22.

5 Senate Standing Committee for the Scrutiny of Bills, *First to Twentieth Reports of 1992* (Parliamentary Paper no. 546/1992), p 603.

6 Published in the *Proceedings of Fourth Australasian and Pacific Conference on Delegated Legislation and First Australasian and Pacific Conference on the Scrutiny of Bills.*

7 Scrutiny of Bills function commenced in the Senate in November 1981.

8 Items 48, 49, 50 and 53 of the Schedule to the Student Assistance Amendment Bill 1994.

9 Senate Hansard 11 May 1994 pp 586-591 and 673-674.

10 ibid, p 673.