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AUSTRALIAN INSTITUTE OF ADMINISTRATIVE LAW

Newsletter No 3 1990

QUEENSLAND SEMINAR HIGHLY SUCCESSFUL

Largely due to the efforts of Mr Maurice Swan of the Australian Government Solicitor's Office in Brisbane and his office, on 18 May the Institute held a one day seminar on "Administrative Law in Queensland - a New Beginning". The venue was the Hilton Hotel and the occasion attracted a full house of 110 participants. An impressive program of topics and speakers, each of whom presented a paper, virtually assured a successful seminar and interest did not flag during the proceedings. The fledgling Institute should be much encouraged by the favourable consensus at the end of the day.

Following the opening of the Seminar by the President of the Institute, Professor Jack Richardson, the speakers and their papers were:

Mr Tom Sherman - The Fitzgerald Report Its recommendations on administrative law re form and the program for implementing them;

Mr Matt Foley - Parliamentary democracy and administrative law: The role of the Parliamentary Committee for Electoral and Administrative Review;

Mr Bob Cotterson QC - Administrative Law in the Queensland jurisdiction prior to 1989;

Mr Greg Vickery -The same topic as the last but from the perspective of the Queensland Law Society;

Mr Greg Sorensen - Overview and Highlights of the EARC Issues Paper on Judicial Review;

Dr John Griffiths - Reform of Judicial Review of administrative action in Queensland;

Judge David Jones - Review on the merits - The Victorian experience;

Mr John McMillan -Shedding the Veil of Secrecy: A Queensland Freedom of Information Act;

Mr Stephen Keim - Whistleblower Protection legislation.

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FROM THE PRESIDENT

BRISBANE SEMINAR

There is a report in this issue about our first major venture interstate which was the holding of a seminar in Brisbane on 28 May on the development of administrative law in Queensland in the wake of the Fitzgerald Report. Speakers included Mr Matt Foley, MLA, Chairman of the Parliamentary Committeefor Electoral and Administrative Review and Mr Tom Sherman, Chairman of the Commission of the similar name, the two bodies charged with the implementation of administrative law reform in Queensland. Meanwhile I should like to thank Maurice Swan for his sterling efforts on our behalf in organising a highly successful seminar. I would also like to thank for their assistance EARC, the Queensland Law Society, Blake Dawson Waldron and the ANU Law School.

SEMINAR

Resources permitting, we hope fairly soon to introduce a monograph series containing some of the papers given at various seminars in Canberra and elsewhere. Unfortunately, the volume of material potentially at our disposal following the Brisbane seminar is too much for us to handle, but Maurice Swan has said that he has the odd copy of some of the papers which he is willing to make available to individual members upon request to him. His telephone number is (07) 226 5558.

MEMBERSHIP

Membership now stands at 184, including 21 institutional members. This augurs well for the future.

ESTABLISHMENT OF CHAPTERS

Tthe Institute has now engaged in several public activities and has established the Newsletter as the organ by which we are publicising our activities. We are also considering the establishment of chapters of the Institute in the States and Territories as we wish to operate on an Australia -wide basis, but much work remains to be done by the Executive committee before we are in a position to decide what are the most appropriate institutional structures.

EXECUTIVE

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IMMIGRATION REVIEW TRIBUNAL

The issue of legal representation has aroused some discussion. The Act does not entitle applicants to be represented by another person, legally qualified or not, nor to cross-examine witnesses [s.132(6)]. The Tribunal has a duty to inform itself and will assist the applicant to present a case. Members in a non-adversarial system cannot maintain a judicial or magisterial aloofness, relying only on argument and evidence presented to them by disputing parties.

A lawyer or other person is not precluded from providing an applicant with assistance, advice or support. There may be occasionally applications which raise complex legal issues where the Tribunal will find legal submissions of assistance, but most matters will not be legally complex. Where legal issues do arise, written submissions by lawyers may be of great assistance to the Tribunal, but the clash of barristers is clearly not envisaged in the legislation.

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The method of the IRT invites some comparison with that of the Ombudsman. Both undertake administrative review through inquiry although, unlike the Ombudsman, the Tribunal is required to take oral evidence in public and has determinative, as opposed to recommendatory powers. Of all the creations of the new administrative law the Ombudsman is the most popular among members of the public, who do not see the advocacy of barristers as a necessary pre-requisite to administrative justice.

legal imperialists... will resist the development of procedures in which the lawyer does not have the leading role

The Tribunal will be preparing a description of its procedures which I hope will help members of the legal profession and others seeking to assist clients in reviews before the Tribunal. It would be foolish, however, to imagine that there will not be some legal imperialists who will resist the development of procedures in which the lawyer does not have the leading role. To them I commend the words of Canadian Justice Davis:

> An administrative tribunal must act to a certain extent in a judicial manner, but that does not mean that it must act in every detail in its procedure as a court of law adjudicating upon a "lis inter partes" ...
>
> It is natural, as Lord Shaw said in the Arlidge case, that lawyers should favour lawyer-like methods but it is not for the judiciary to impose its own methods on administrative or executive officers.

Generally speaking, the right to review under the new system is tied to Australian residency. If the person eeking the visa or entry permit is in Australia, she or he may seek review of an unfavourable decision. Otherwise the Australian resident sponsor may apply for review of the decision.

Identification of reviewable decisions follows from the above premise. Decisions on return visas for non-citizen permanent residents of Australia are reviewable, as are applications for visas or entry permits. where an Australian resident or organisation has a direct interest - as in family reunions, employer nominations and the like.

The establishment of the IRT is an indication of the Government's continuing commitment to the principle of administrative review. This is not withstanding the concerns expressed about the financial costs to the administration of the review process and the perceived insensitivity of some reviewers to the primacy of the democratically elected government in determining policy.

IMMIGRATION REVIEW TRIBUNAL

Some have been concerned that the establishment of a specialist immigration tribunal to provide final merits review breaks with the intent of the formulators of the administrative law package that the AAT should be the main body of its type, gradually accumulating jurisdictions over time. While the government has not formally explained the reasons for its departure from that practice, it is fair to speculate that the financial and policy concerns of the Government, mentioned above, had some bearing.

The clear intention implicit in the legislation and explicit in the extrinsic materials that the IRT should employ non-adversarial methods and refrain from legal formalism, may provide another clue to the Government's motivation in establishing it. If that is so, the intention in this respect is to return more closely to the expectations of the founders of the "new" administrative law.

consistency of Tribunal decisions is critical to this objective of improved administrative decision-making

The particular needs of its clients, many of whom will be people of non-English speaking background, with different fears and expectations of a Tribunal derived from their diverse cultural experiences, may provide futher argument for a separate Tribunal.

Regardless of the extent to which any of the above factors had on the creation of the IRT, it is probably fair to say that the sensitivity of immigration policy, and the bearing it has on other key national economic and social policies is sufficient to justify the establishment of a specialist tribunal.

The long-term measure of success of the new legislative provisions for review of migration decisions, in which the IRT is a key player, will not be the number of applications received, the number of Departmental decisions set aside or the number of appeals to the Federal Court. Professor Ross Cranston reminded us that the real issue in administrative law is "whether the officials are affected in their everyday practice" by its concerns. Thus the objective is not only justice for individuals, but also improvement in primary decision-making.

Consistency of Tribunal decisions is critical to this objective of improved administrative decision-making. Brennan J., when President of the Administrative Appeals Tribunal said that

> "Inconsistency is not merely inelegant: it brings the process of deciding into disrepute, suggesting an arbitrariness which is incompatible with commonly accepted notions of justice."

The Tribunal must make consistent decisions if it is to provide guidance to primary decision-makers. It must always be borne in mind that the Act imposes on Members a duty to conduct a review using non-adversarial methods. The applicant is the only party; the Tribunal itself will assist the applicant to present a case; it cannot rely only on evidence and argument put to it by disputing parties.

This is an onerous duty, but it is necessary if the objective of administrative review, to arrive at "the correct or preferable decision", is to be met. It is difficult to see how this purpose can be surely achieved if in all cases the reviewer considers only the evidence, however inadequate, presented to it by the parties.

The challenge before the Tribunal is therefore a significant one, but if it is successful then it will provide some new directions for administrative review in Australia.

THE IMMIGRATION REVIEW TRIBUNAL - A NEW MODEL FOR ADMINISTRATIVE REVIEW

by Pamela O'Neil
Principal Member
Immigration Review Tribunal

(This is an edited version of a talk given by Ms O'Neil to AIAL earlier this year.)

The establishment of the Immigration Review Tribunal (IRT) followed years of discussion about the need for a system for administrative review of migration decisions.

The Administrative review Council (ARC) and The Human Rights Commission(HRC) both provided reports in 1985 which recommended the establishment of such a system. The ARC report proposed a two-tier system, the first tier consisting of Immigration Adjudicators, with the Administrative Appeals Tribunal (AAT) as the second tier. I have heard the ARC proposal described as a Rolls-Royce model and the IRT, by contrast, as a T-model Ford. This comparison was not meant by any means to flatter the Tribunal, but it is a description which I am nonetheless happy to embrace.

A Rolls-Royce is a symbol of luxury - extraordinarily expensive, extravagantly comfortable for its occupants, over-engineered for its task, and outside the reach of all but a privileged few. Bearing in mind the criticisms of the cost of administrative law to the public purse voiced by Senator Peter Walsh, the former Minister for Finance, among others, and the increasing concern that access to the law is already beyond the reach of the average citizen, to aspire to be a "Rolls-Royce" Tribunal would be foolhardy indeed.

By contrast the T-model Ford was the vehicle which , by using modern production techniques, made motor trnsport accessible to the ordinary citizen. It was inexpensive, efficient, reliable and durable. As the objective of the IRT is to provide a mechanism of review that is "fair, just, economical and quick" [s.123(1)] the analogy with a T-model Ford is apt.

The Migration Legislation Amendment Act 1989 established what is referred to as a two-tier review system, the first tier being a discrete and independent Migration Internal Review Office (MIRO) within the Department of Immigration, Local Government and Ethnic Affairs. The second tier, the Immigration Review Tribunal, is an independent statutory authority.

> the IRT is to provide a mechanism of review that is "fair, just, economical and quick"

Its membership consists of the Principal Member, who is the executive officer of the Tribunal, a number of Senior Members and both full and part-time members. The Principal Registry is in Canberra. The Tribunal has Registries in Brisbane, Sydney, Melbourne, Adelaide and Perth each with a Senior Member. It is anticipated that the Tribunal will conduct hearings in other centres around Australia as the need arises.

The Act allows 1,2 or 3 Member Tribunals. As part of our T-model Ford image, when the Tribunal has a full load of cases I would expect one Member Tribunals to be the norm in routine cases.

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IMMIGRATION REVIEW TRIBUNAL

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The planning model for the IRT anticipates between 3,000 and 6,000 cases per year. This estimate is based on the number of immigration decisions made each year and in the light of the number of applications to the Immigration Review Panels (IRPs) under the previous system. The IRPs were panels of community members with recommendatory powers only, first established by the decision of the then Minister for Immigration and Ethnic Affairs, Mr Ian McPhee, in 1982.

The IRT has, more clearly than some other Tribunals, been given a non-adversarial charter. This was explicitly stated by the Minister in the Second Reading speech to the Migration (Amendment) Bill. Moreover, it is implicit in the legislation.

the Tribunal may make a decision in favour of the applicant without taking oral evidence

The only party to the review is the applicant who, in addition to providing documentary evidence, may make written submissions to the Tribunal. The Secretary to DILGEA is required to provide the Tribunal with a written statement of the Department's reasons for the decisions under review, and any relevant documents [s.122]. The Secretary may also give the Tribunal written argument relating to the decision under review [s.128(2)]. But the Department, although it may be called to give evidence or required to arrange for an investigation or examination (e.g. a medical examination) at the Tribunal's request, is not a party to the review [s.132(1)(d)].

a review by the Tribunal will ... be quite different from a court-like hearing

The Tribunal may make a decision in favour of the applicant without taking oral evidence, i.e. on the papers [s.129]. In other cases the applicant has the right to give oral evidence [s.130(1)(a)]. But no other person has the right to adress the Tribunal orally [s.130(2)].

A review by the Tribunal will in practice be quite different from a court-like hearing. The investigatory phase will be the responsibility of the Tribunal members, assisted by the Tribunal staff. It may be more or less complicated by the need to seek evidence from overseas or by the nature of the application. It will proceed from an examination of the papers through one or more preliminary meetings to a public hearing if oral evidence is to be taken.

It is possible that many matters will proceed to decision without a public hearing at all, either under s.129 or because the applicant does not choose to give oral evidence. Much of the evidence considered by the Tribunal is likely to be documentary and many matters are likely to revolve around persons not physically present in Australia.

When oral hearings do occur, they may well more resemble a dialogue between the Tribunal and the applicant, assisted by an interpreter or person supportive of the applicant, such as a relative or welfare worker.

QUEENSLAND SEMINAR

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The Attorney-General of Queensland, Mr Dean Wells, MLA, offered the closing remarks which were about new Cabinet procedures, before inviting the assembly, still almost completely intact, to join him in drinks.

The Seminar demonstrated the the determination of the EARC and its parliamentary counterpart to foster a much higher level of official accountability than hitherto in Queensland. It seems to be generally accepted that a Freedom of Information Act would be a lead measure and that more was to be expected not only by public interest advocates but also by administrators themselves. With the possible exception of Whistleblower Protection legislation, none of the the subjects adumbrated during the day engendered any noticeable degree of resistance from those in attendance most likely to be affected.

The Institute hopes to repeat the Queensland theme in other States and with this in mind expressions of interest are invited from members who can assist.

JACK RICHARDSON

DISCLAIMER

THE VIEWS EXPRESSED IN ARTICLES IN THIS NEWSLETTER ARE NOT NECESSARILY THOSE OF THE AUSTRALIAN INSTITUTE OF ADMINISTRATIVE LAW OR MEMBERS OF THE EXECUTIVE OF THE INSTITUTE.

FROM THE EDITOR

PRODUCTION OF THE NEWSLETTER

As anyone who has been associated with the production of a newsletter or magazine will be only too happy to inform you, there are necessary tradeoffs between the desirable and the practicable. These usually involve money. In seeking to achieve a reduction in the cost of the newsletter there has been some delay in the production. For this I must take full responsibility.

I am, however happy to announce that due to the acquisition of suitable computer software and access to computer time future editions of the newsletter will be forthcoming on a quarterly basis at a much reduced cost to the institute.

NEXT EDITION

Following on from the above is the requirement for articles for the next newsletter. Contributions will be grtefully accepted. While I would not like to cramp the style of potential contributors I would note that brevity is a virtue and excessive footnoting is not.

ACKNOWLEDGEMENTS

I would like to thank Tony Zanderigo and Peter Thomas for their assistance with the technology and the members of the executive for their patience.

GARY CORR

ANNUAL GENERAL MEETING

Wednesay 26 September 1990
Hyatt Hotel, Canberra
Conference Room
6.00 pm

GUEST SPEAKER:
JUSTICE DEIRDRE O'CONNOR
PRESIDENT OF THE ADMINISTRATIVE APPEALS TRIBUNAL

PLEASE NOTE: THERE WILL BE A DINNER FOLLOWING JUSTICE O'CONNOR'S SPEECH

contact Secretary on 06-2479356 for details