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ADMINISTRATIVE LAW AND PRACTICE

Justice D F O'Connor, President, Administrative Appeals Tribunal

[Address to the Annual General Meeting of the Institute, September 1990]

The whole area of administrative law and practice as it has developed since the 70s is characterised by rapid change in both ideology and practice.

The Administrative Appeals Tribunal and the other elements of the 'new administrative law' grew out of the recommendations of the Kerr and Bland Committees in the 1970s. I do not propose to detail those recommendations which no doubt are well known to you, but will identify some elements in the philosophical approach, particularly of the Kerr Committee, which led to the establishment of the Administrative Appeals Tribunal. Having done that, I will examine aspects of the Tribunal's operations to see whether it has measured up to the expectations which were placed on it in 1975 when the Administrative Appeals Tribunal Act was passed. We can then perhaps look at the Tribunal for the 1990s - what is its future in an arguably different political and administrative culture to that which existed at its inception?

The Tribunal arose out of the ideology of the late 1960s and early 1970s in the era of the welfare state. The Kerr Committee noted the expansion in the number of activities regulated by government, in the volume and range of services provided for the benefit of the public. This expansion was accompanied by a substantial increase in the powers and discretions con-

ferred on Ministers and public servants. The exercise of these powers and discretions involved the making of a vast range of decisions which affected individuals in many aspects of daily life.

The dominant administrative and political perspective of that era was that of collective provision and consumption of goods and services in the welfare state. The term 'collective consumption' was first used by Castello, a French urban sociologist. It means 'those consumption processes whose organisation and management cannot be other than collective, given the nature and size of the problems'. Some obvious examples are education and health care services, social welfare services, highways and public housing. These services are organised and managed on a collective public basis by government as they are consumed collectively. The criteria for access to the services depend on factors other than market ones and the management of the services is based on non-market considerations.

The expansion of services provided by government was accompanied by an increase in centralised decision-making. The growth of the public sector during the post war period is well known. As the impact of government upon the citizen grew, so did awareness on the part of the citizen of the possible abuses and excesses of power by administrators. This led to demands for access to government information and greater participation by citizens in government decision-making. The community view was that it needed, as a protection against arbitrariness, avenues in which to challenge governmental decisions.

The predominance of the Diceyan rule of law notion in Australia had meant that the courts were ill equipped to deal with disputes between government and the governed. In addition, the concepts of the separation of powers and ministerial responsibility hampered scrutiny of governmental decisions. Reform was needed in this area but, as the Kerr Committee observed, a solution would not be arrived at easily. In its report, the Committee stated:

> The objective fact, in the modern world, is that administrators have great power to affect the rights and liberties of citizens and, as well, important duties to perform in the public interest. When an attempt is made to reconcile the exercise of these powers and the performance of these duties with traditional ideas of justice there is a risk that the proposals which emerge will be criticised as unnecessary in a democracy which enjoys a parliamentary system and responsible government or as barriers to efficiency. We have been well aware of this risk but in a country with the political, intellectual and legal heritage which we enjoy in Australia, a satisfactory reconciliation is inevitable if tensions between the individual citizen and the administration are to be minimised.

Part of the solution in a package designed to redress the imbalance between citizen and state was the Administrative Appeals Tribunal. In an era of open government where access and equity were the champions, the Tribunal was to provide, as stated in the Second Reading Speech, 'machinery to ensure that persons are dealt with fairly and properly in their relationships with the government'. Of fundamental concern was the accountability of administrators exercising broad discretionary powers.

The distinguishing feature of the Tribunal is, of course, that it reviews decisions on the merits as well as the law. The Tribunal is not a court, although a number of its presidential members are judges. The Tribunal is charged with reaching the correct and preferable decision on the material before it. It is true to say that the Tribunal stands in the shoes of the decision maker and makes an administrative decision. The Tribunal on review exercises all the powers and discretions which were exercised by the primary decision maker. The Tribunal, of course, is bound by the law and sometimes may need to rule upon a point of law in making its decision. The Tribunal must act within its own jurisdiction and abide by the rules of natural justice.

The Tribunal was part of an administrative law package designed, in the words of the Kerr Committee, 'to reconcile the requirements of efficiency of administration and justice to the citizen'. The Tribunal is now almost 15 years old and in recent years has been criticised for failing to live up to the expectations which were placed upon it in the early years. The Tribunal was given powers to operate as informally and flexibly as possible. Much criticism has been levelled at the Tribunal for adopting legal procedures and a legalistic approach to many matters. There is concern about delay in dealing with matters. The Tribunal should perhaps avail itself more often of the power to make oral decisions than it presently does. In many cases, this would be the most effective course to follow in allowing applicants to the Tribunal to get on with their lives. The counter position is, of course, that the Federal Court's approach to Tribunal decision making has created an environment where detailed written decisions are sometimes required. The other effect of Federal Court supervision has been to imbue some Tribunal members with a sense of caution in giving reasons for decision.

It is, of course, the applicants to the Tribunal who should be given first priority in the operation of the Tribunal. In one sense, these people are the consumers of the Tribunal's services. Without them of course the Tribunal would not exist. They have been assured that the Tribunal is there to provide an alternative to the courts. Many are probably surprised therefore at the degree of formality which can exist in the Tribunal.

Yet, we only need to look at some examples of the Tribunal's jurisdiction to see that the consumers of the Tribunal's services are the ordinary people in the Australian community. They may want governmental decisions reviewed about social security entitlements and benefits, about veterans' pensions, about their income tax, about student assistance, about workers' compensation, about licences to engage in various occupations regulated by the Commonwealth or about access to government information. It is therefore important that the Tribunal has available to it appropriate procedures which facilitate access by the Tribunal's consumers to its services and which they understand.

Alongside of this criticism of Tribunal procedures, which still has as its focus the responsiveness of the Tribunal to the needs of the consumer, there is running a debate which has come to be known by the phrase 'the cost of justice'. In my view, this debate has grown out of a fundamental shift in political thought which has occurred since the Tribunal's inception. That shift has been away from collective consumption towards principles which embrace the efficacy of the market as a way of distributing public services. The latest style is corporate management which is phrased in terms of achieving outputs which are measured as if they were products in the market place. The Tribunal itself has at this stage a Corporate Plan, the goal of which is:

> To achieve efficient resolution of applications for review by proven dispute resolution methods, including conciliation and arbitration, on a timely basis with a high quality dispute resolution input and/or decision making and in a manner that effectively uses the available resources.

The key term is, of course, 'the available resources'. For some years now, cost effectiveness and efficiency have been the guiding principles in public administration. And in fact efficiency has been equated with cost effectiveness - an approach which itself may be open to question or at least debate. The concern to reduce levels of public expenditure so that finite resources are expended efficiently and economically, has focussed attention on the cost of providing administrative review.

There can be no question that the Tribunal must be accountable for the resources that it spends and for the effectiveness of its operations in providing review which meets the criteria set down at the time the legislation creating the administrative law system was passed. What we must question however, is whether in a desire to achieve fiscal restraint some other principles are being neglected or being given a lower priority

than they deserve. Decisions about the provision of administrative review must take into account the benefits which are achieved as well as the costs of the systems. Those benefits, however, may be impossible to quantify in monetary terms, but that should not make them any less significant.

On 1 November 1990, a general review of the Tribunal commenced. The review is designed to focus on the needs of that institution for the next few years. It has been set up as a result of the separation of the Tribunal from the Attorney-General's Department for financial and management purposes. As part of that review, we will be examining the functional aspects and the philosophy of the Tribunal.

Hard decisions will have to be made and they will have to be made at a high level. Questions of economy were less prominent in 1975 than an ideal of providing effective administrative review to aggrieved citizens. In 1990 we must be careful that that ideal is not completely overwhelmed by the desire to create a suitably sized budget surplus. The system of review is by no means perfect and there is room for improvement in the quality and range of services delivered by the Tribunal. It will be important to develop appropriate performance indicators in the course of the Review. But we must look at the Tribunal in a broader context than that of economic rationalism.

Speaking here in Canberra in 1987, Mr Justice Brennan said that as a result of the administrative review system:

> ... it may not be possible to say that this society is fairer, or more egalitarian, or more compassionate than it was before. But it is possible to say that this society is one which now accords to the individual an opportunity to meet on more equal terms the institutions of the state. The structures of administrative review now offer an opportunity for individuals to meet the anonymous and sometimes remote agencies of the state on more equal terms. The interests of individuals are more fully acknowledged, and the repositories of power are constrained to treat the individual both fairly and according to law, even if the substance of the law is defective. A Society which truly accords that opportunity to the citizen is a free and fair society, and there can be no doubt that the object of the new administrative law was intended to accord that opportunity.

It is these sorts of considerations which we must bear in mind in the 1990s.

LEGISLATIVE KNOWLEDGE BASE SYSTEMS FOR PUBLIC ADMINISTRATION - SOME PRACTICAL ISSUES

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[Peter Johnson and David Mead gave a computer demonstration to a meeting of the Institute in Canberra in March 1991 of a knowledge base system for the administration of veterans affairs legislation. This article explains that approach in more detail]

Abstract

This paper looks at three aspects of the use of knowledge base systems which model provisions of legislation:

The first part of the paper suggests that knowledge base systems can be viewed simply as a means of changing the medium in which legislation is presented to administrative decision-makers for their consideration. When viewed as a delivery vehicle for a body of rules, rather than as a reasoning decision-making tool, knowledge base systems which reliably model legislation offer major benefits in the administration of complex legislation.

The second part of the paper looks at some of the practical issues which arise when building a production version of a large-scale knowledge base which models legislation. We suggest a methodology, which we use in constructing and maintaining large-scale systems. The issues discussed in this section have profound implications for the selection of the tools used to build large knowledge bases from legislation: the tool must provide facilities which allow reliable methods of construction, verification and maintenance.

Finally, we suggest that generalist shells are usually structurally inappropriate for the development of large expert system applications in the legal domain. As has happened in other domains, the legal domain must develop domain-specific tools for the creation of large knowledge base systems.

Introduction

This paper is intended as a practical paper, summarising several of our conclusions from building and implementing legal knowledge base systems in Australian government departments.

Systems which we have build are now operational in the Australian Taxation Office, the Department of Social Security and the Department of Veterans' Affairs. Each of these systems is substantial, using at least 500 rules involving several thousand decision points. The largest of the systems, in the Department of Social Security, has over 2500 rules.

These applications have been built using STATUTE, a knowledge base management system which we designed specifically for expert system applications based on legislation or systems of administrative rules.

This paper does not deal with the crucial issue of knowledge representation. STATUTE uses an English language knowledge representation scheme. [Johnson and Mead]

PART 1: THE PLACE OF KNOWLEDGE BASE SYSTEMS IN THE PUBLIC ADMINISTRATION OF LEGISLATION

The significance of poor administration of legislation

Problems with widely dispersed public administration of legislation are well-known: inconsistent, arbitrary and otherwise poor decisions. Primary decision-makers in a large government department may at different times lack the training, the experience, the talent or the will to properly apply the legislation which that department administers.[1]

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1 Other factors would include the complexity and scale of the legislation, and the difficulties with access to, interpretation and use of case law. [Taylor and Browne], p.2.

These problems, which are essentially managerial rather than legal, nevertheless lead to a breakdown in the rule of law. There may not be a calculated flouting of the rule of law, such as would raise cries about public corruption. Rather, there is a sad resignation concerning the difficulties of administering legislation in a large bureaucracy.

The people who are directly affected by that legislation may well have recourse to elaborate systems of administrative review. However, the truth of the matter, at least in Australia, is that the vast majority of people adversely affected by poor decisions do not seek review of these decisions. The more marginalised and less articulate is the person affected by the decision, the less likely he or she is to have recourse to tribunals, courts or systems of internal review. Needless to say, where a member of the public is incorrectly favoured by a poor decision, he or she is very unlikely to seek review.

In these situations, the rule of law has broken down. Rights are not regulated according to law but according to a mix of caprice, prejudice, ignorance and office lore. The problem is not one which should be viewed as purely managerial. Where the administration of legislation is unreliable, there is a substantial legal problem.

Basic problems in the administration of legislation

There is a range of factors which can lead to the incorrect application of legislation. Problems of malice and prejudice are largely beyond the scope of this paper. We wish to concentrate on problems of interpretation of legislation. These problems are more likely to be endemic in a large bureaucracy than are problems of malice, and we suggest, can be substantially overcome with the use of knowledge base technology.

We suggest that there are three common interpretative problems which confront a public servant administering complex legislation.

1. The first of these problems is the fragmented nature of legislation. Lawyers are familiar with legislative organisation and structure. The following set of statements discusses only legislative structure (rather than content) yet it should be coherent to a lawyer:

> The primary provision is section 117, which draws on interlinking definitions from subsection 3(1). One such definition is qualified by subsection 3(10). Section 117 is also qualified by subsection 118(5) and section 122, while sections 126 and 136 contain exceptions to the general application of section 117.

While such a complex set of interlinking provisions may be mother's milk to a lawyer, it presents problems to a non-lawyer. The truth of the matter, for both lawyer and non-lawyer, is that the legislation cannot be properly applied unless the whole of the legislation is understood. If only a portion of the legislation is understood, a crucial but hidden provision may go unnoticed.

2. The second problem is the internal logical complexity of particular provisions. Long provisions frequently use nested paragraphs and sub-paragraphs linked by a network of words such as "and", "either", "or", "notwithstanding", "unless", "other than" and "subject to".

It is often difficult to discern the correct logical structure of such a provision at first glance.[2] This is particularly true for non-lawyers, who may be unused to the format and conventions of legislation. A small mistake in this process of structural interpretation, such as treating a disjunction as a conjunction, misinterpreting the order of evaluation of logical expressions or failing to recognize a double negative, can have dire consequences, as is shown in [Allen and Saxon].

3. The third problem of statutory interpretation is that of interpreting particular words or phrases. This is the province of judgement. Because of its re-

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2 This is shown vividly in [Allen and Saxon], pp.96–102.

liance on judgement, this area is less susceptible to clear-cut answers than are the previous two problems.

The last problem is too easily thought of as the sole or major problem in the application of legislation. Questions of the correct interlinking of fragmented legislation and of the internal logic of a provision will often be unambiguous and present no difficulty to an expert. While this may be true for lawyers, our experience has been that those first two types of problems are at least as common in an administrative context as the last problem.

The traditional administrative solution to these three problems of interpretation is to develop policy manuals, which re-organize, paraphrase and expand on the legislation. These manuals are designed to assist the primary decision-makers in administering the legislation. In practice, the manuals frequently become the first and only reference point of the decision-makers.

A range of problems arise from this administrative solution. Manuals are difficult and expensive to continually update in any rapidly changing environment. Over a period, the sheer volume of information makes the manuals unwieldy, and the updating process prone to error. Finally, management discovers that staff rarely actually use the manuals, relying more on their and their colleagues' accumulated wisdom to deal with virtually all situations.[3]

In our experience, much of the need for manuals derives from the first and second of the interpretative problems outlined above. We have worked with a range of Australian Government departments. Examination of the policy manuals of each of these departments generally discloses that the bulk of the interpretative material deals with problems of legislative layout and legislative logic, rather than with the micro-interpretative problem of the meaning of particular phrases.

Finally, we note a trend in the modern administration of legislation in Australia: the phenomenon of "returning to the legislation". In this process, government departments (or politicians) decide that good administration of legislation will only be possible when their staff are equipped to administer the provisions of the legislation directly, rather than through the use of some secondary source of the law.

This process of "returning to the legislation" may involve the rewriting of legislation in a more coherent form.[4] The Australian Department of Social Security has recently completed such a task, while the Australian Taxation Office and the Department of Veterans' Affairs are currently undertaking such "legislative simplification". The process may also involve training the staff in basic principles of statutory interpretation and encouraging confidence in the direct use of legislation.

Encouraging the use of primary legislative material does not overcome the essential difficulties in applying legislation. Legislation of any scale will inevitably contain the seeds of difficulty in interpretation: an elaborate and elegant structure which requires competent navigation; complex provisions or sets of provisions, which contain networks of exceptions, qualifications and extensions; and phrases which require careful consideration and the exercise of judgement.

The use of knowledge base systems in the application of legislation

Knowledge base systems can substantially overcome the first two of the problems identified in the previous section: the problems of legislative layout and the internal logic of provisions. They can also assist in very flexible ways with the administration of discretions and matters of

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3 These problems associated with manuals have also been recognised in England, see [Taylor and Browne], p.9.

4 This can significantly reduce the amount of statutory material, and remove the need for much of the interpretative rule base. See [Brown], Appendix III.

judgement, which legislation will inevitably contain.

Knowledge base systems are often looked at as a decision-making tool. We prefer to look on them more as an administrative tool, which can structure the process by which legislation is considered and decisions made. It is this function of decision support which we have pursued in our development of knowledge base systems for Australian government departments.[5]

This may appear a modest use of the technology. Certainly, it substantially avoids many of the theoretical problems of modelling legal knowledge. it does this by characterising the knowledge base system as an adjunct of a human decision-maker, rather than as a complete decision-making facility. In this way, the software is absolved of much of the responsibility for the application of law to facts. The provision of a decision support facility is also more palatable to the administrative workforce than is the creation of a decision-making facility.[6]

We change the medium of the legislation which primary decision-makers are to administer. The present medium is the hard-copy legislation. Working with this medium, the decision-maker is not competent to apply the legislation until he or she has fully comprehended the material - the structure, logic and meaning of the complete legislation.[7]

Knowledge base systems allow legislation to be presented to the decision-maker in a step-by-step format. A system can accurately model all of the structure and logic of many pieces of legislation.

The breakdown of legislation into discrete issues and the presentation of those issues to primary decision-makers in discrete steps highlights the extent to which problems of statutory interpretation for the non-lawyer are structural. In short, much legislation which appears intimidating and complex when presented as a whole is rendered straightforward when presented as discrete questions.

Our experience has been that the presentation of complex legislation in a step-by-step format, via knowledge base modelling of the legislation, has the following consequences:

- The decision-makers have little or no difficulty in dealing with the bulk of the provisions while directly applying the subject legislation;
- The process of consideration of issues is necessarily more thorough; and
- The process of consideration of issues is necessarily more consistent.

Modelling legislation, so that it is presented to the user in a step-by-step format, is not always possible. Some types of provisions present great difficulty. In addition, modelling of legislation does not overcome the problem of open texture issues which are contained in the legislation (such as discretions or matters clearly calling for judgement). Our approach to open texture issues is not discussed in this paper.

The modelling of legislation in knowledge bases does not solve all of the problems in the administration of legislation. However, the practical application of knowledge base technology has much to offer in the legal field, even if used modestly as a decision-structuring tool rather than as a decision-making tool. The immediate usefulness of the modelling process in simplifying legislation is apparent when such a knowledge base is viewed. Moreover, when the aim of the modelling process is simply to change the medium in which the legislation is presented, the

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5 For a fuller discussion of some of the ways in which knowledge based systems can be applied to legal practice, see [Greenleaf], [Greenleaf et al 1988].

6 See [Magnusson].

7 See [Sherman], for further issues in modelling the logic of legislation, see [Routen].

process can be demonstrated to be reliable.

Our experience in developing large knowledge bases on legislation has also led us to a range of conclusions concerning the appropriate method for rulebase development and some necessary elements of and design criteria for the shell which is used. These are discussed in the second and third parts of this paper.

PART 2: PRACTICAL ISSUES IN THE DEVELOPMENT OF LARGE LEGISLATIVE RULEBASES

This part of the paper is chiefly concerned with the practicalities of application design. We have built large legal knowledge bases which model legislation and have maintained one of these knowledge bases since late 1988. This work was founded on the prototyping of small and large knowledge bases between 1984 and 1988.

We learned that the development of large knowledge bases for production systems is not simply a matter of scaling up from small experimental knowledge bases. The construction and maintenance of large legislatively-based knowledge bases introduces a range of issues which are not immediately apparent when working with small knowledge bases.

The problems which we discovered in the process of scaling up concerned issues such as the richness of the knowledge representation scheme being used, difficulties in verifying and maintaining large systems and the generation of coherent reports from large systems. These issues are discussed in detail in [Johnson and Mead].

A large legislative rulebase, which is designed to be used in the field by a public body charged with the administration of legislation, must have several characteristics:

- The rulebase must be legally correct;
- The rulebase must be verifiable;
- The rulebase must be maintainable; and
- The rulebase must form part of an application which is practically useful and attractive to the people who have to use it.

The combination of these basic specifications has, for us, led to conclusions concerning the following:

- The appropriate form of knowledge representation for such systems;
- A desirable structure for the knowledge base;
- The relationship between the knowledge base and the application development environment;
- The features of the application in which such a knowledge base must reside; and
- The method by which the rulebase which models the legislation is constructed.

The issue of knowledge representation is discussed in [Johnson and Mead]. The other issues listed above are discussed in more detail in the following sections of this paper.

Rulebase method

We have developed and refined a method for constructing rulebases from legislation which satisfy the criteria listed above. Our experience has been that departure from this method leads to substantial difficulties. The method is nothing more than good legal method, transferred to software construction.

The method which we use is based upon the following principles:

1. As far as possible, verbatim modelling of the precise terms of the legislation;

2. Rejection of modelling any "overview" of the effect of a piece of legislation and of any shortcuts in the complete and verbatim modelling of the structure and content of the subject legislation.

3. Explicit modelling of each level of the structure of the legislation;

4. A strict separation of rules which explicitly model the terms of the legislation (legislative rules) from

those which model some interpretation of the effect of the legislation (interpretative rules) and again from those which model some wider body of general knowledge (common-sense rules);

5. A rigorous separation of the legislative rulebase from the machinery which drives the end application.

These principles of method allow the production of large legislative rulebases which are reliable, maintainable and verifiable. However, these methods are not able to be followed if the tool for construction of the rulebase does not allow them. These principles make substantial demands of that tool: the form of knowledge representation, the relationship between the rulebase and the procedural language which drives the application, and the structure of the question search and inferencing mechanisms.

We developed the STATUTE Knowledge Base Management System (KBMS) to meet these and other demands. Other more general purpose shells may be capable of meeting the requirements of this method by adding additional tools to the development environment.

Each of the listed principles is explained, with examples, below.

1. Verbatim modelling of legislation

Verbatim modelling of legislation means including in the primary rulebase all of the subject legislation and only the subject legislation.

A rulebase developer may decide to leave out small portions of the legislative material for a number of reasons. The most common problem among people whom we have trained is the tendency to jump to modelling interpretative material without first creating the explicit legislative foundation for that material in the rulebase.

A second problem is the desire to paraphrase a piece of legislation, because the legislative material is seen as needlessly turgid or obscure.

A third problem is the tendency to leave out "machinery" - legislative phrases which internally connect one provision to another. This is discussed under the next point "No Overviews, No Shortcuts".

A large rulebase which models legislation but which does not model it verbatim introduces problems when the time comes for additional construction, verification and maintenance. These problems grow significantly as the rulebase grows and as it increasingly departs from the terms of the legislation.[8]

The problems of verification and construction may be manageable when modelling a small piece of legislation. In that case, the knowledge being modelled is really the knowledge which a human expert has of the effect of the legislation. It can be said, in a pure theoretical sense, that any construction of a rulebase based on legislation involves modelling human knowledge of that material. However, in the practical world of constructing a workable application, the verification and maintenance of that rulebase are demonstrably more reliable when each component in the rulebase is immediately and obviously referable to the fixed subject legislation, rather than to a less reliable human "overview" of the legislation.

The issue of verbatim modelling immediately raises the question of knowledge representation. It is impossible to comply with this principle of verbatim modelling if the knowledge representation scheme which is being used will not allow this.

When we commenced our work on rulebase legislative systems, we used a conventional symbolic form of knowledge representation:

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Example: elig_invalid_pension if
                yes age_requirement
         and    yes residence requirements
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8 For a discussion of the negative effect of having other than verbatim modelling, based on experience with Scandinavian systems, see [Schartum].

and yes health_requirement
and yes special requirements

After having build a large knowledge base using such a scheme of knowledge representation, our conclusion was that the scheme was dangerously crude, and that the rules would have to be written in complete English sentences. This conclusion was forced upon us by considerations such as the richness of the knowledge representation and problems with verification, maintenance and reporting. These issues are fully discussed in [Johnson and Mead].

The use of the English language as the scheme of knowledge representation allows verbatim modelling of the terms of legislation. This immediately enhances the capacity of the rulebase developer or any independent expert to verify the correctness of the rulebase visually.

Once the developer has the capacity to use full English sentences to represent facts and premises, there is a further issue of the rigour with which the legislation is modelled verbatim. This is discussed in the next point.

2. No Overviews, No Shortcuts

Overviews of the effect of legislation, and shortcuts in the modelling of legislation are inviting and usually reliable in small systems.

In large systems, failure to model the legislation verbatim has invariably led us into problems when it became necessary to add to a rulebase or to amend a rulebase. Our experience has been that only rigorous and verbatim modelling of the legislation allows ready verification and modification.

The rigour which we believe is prudent includes:

- Verbatim modelling of provisions such as "except in cases where section 32 applies" (rather than the shortcut of immediately modelling section 32);

- Verbatim modelling of the structure of provisions;

  Example: The claimant satisfies paragraph 54(a) if

  The claimant satisfies paragraph 54(a)
  and
  The claimant satisfies paragraph 54(b)
  and
  The claimant satisfies paragraph 54(c);

- Avoidance of overviews which restructure the content of legislation, replacing verbatim law with approximating lore;[9]

- Tedious incorporation of each step in a protracted legislative chain; these are particularly prevalent where series of nested definitions are used;

  Example: The claimant satisfies section 36
  IF The claimant was in an operational area

  The claimant was in an operational area
  If The claimant served in an area described in a scheduled item

  The claimant served in an area described in a scheduled item
  If the claimant served in and area described in Schedule 1.
  The claimant served in an area described in schedule 1 IF ...

In this last example of nested definitions, the incorporation of each step in the legislative path appears pointless and extremely tedious to the rulebase developer. However, such rigour is justified when the developer later finds an exception to one of the steps in the chain, or when the

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9 See [Schartum] for problems occurring if this happens even to a slight degree.

rulebase is submitted for independent evaluation, or when the legislature amends one of the nested definitions.

Once again, rigorous compliance with principle throughout the construction of a large rulebase not only renders it more transparent, reliable and verifiable,[10] it saves major headaches later.

3. Explicit modelling of the structure of legislation

Verbatim modelling of legislation is the modelling of the exact terms of the legislation. The extent to which and the manner in which the implicit structure of the legislation is modelled is a separate issue.

Much of the difficulty of interpreting legislation derives from the complexity of its structure. Elegant and well-drafted legislation reduces this difficulty by identifying discrete logical components through accepted organisational devices: paragraphs and sub-paragraphs, explicit references to discrete qualifying provisions, definitions etc.

These devices provide convenient handles, which are constantly used in statutory interpretation. The following mental processes are familiar to any lawyer, though no substance is discussed:

> Paragraph 117(1)(c) is an alternative to 117(1)(d).
> Subsection (1) is to apply in all cases, except those outlined in subsection (2).
> Paragraph 117(1)(e) is now subject to the exception introduced by section 117A.

A rulebase which simply models substance and which fails to explicitly model structural components will introduce several difficulties:

- Verbosity, where elegantly nested legislative alternatives are each expanded, modelling every permutation of the set of alternatives;
- Difficulty in verifying the rulebase, because permutations must be exhaustively assessed to check whether the structural logic has been given effect;
- Difficulty in maintaining the rulebase, where one or several legislative units (such as sub-paragraphs) have been amended and where these units do not each occupy a discrete place in the rulebase; and
- Reduced capacity to convey the source of a rulebase outcome, because of the failure to report the specific legislative provisions satisfied.

By modelling structural components of the legislation, the rulebase developer incorporates the organisational elegance of the draftsman into the knowledge base, which assists with construction, verification and maintenance. It often has the further effect of assisting the end-user to understand the manner in which the subject legislation has or has not been satisfied.

Example:	The claimant is eligible for age pension if
	The claimant satisfies paragraph 25(1)(a)
and	The claimant satisfies paragraph 25(1)(b)
and	Sub-section 25(2) does not apply to the claimant

The rule in the example above does not model the content of the relevant provision, but only structure. However, this ensures that the organisation of the rulebase will mirror that of the legislation. Amendments to the legislation – which are always expressed in terms of these structural components – are able to be incorporated easily into the knowledge base.

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10 That transparency and ease of verification are essential as discussed in [Bing], which also shows the value in having direct access to the actual words of the legislation.

4. Separation of Rule Types

Good statutory interpretation separates the function of considering the structure of legislation from the function of considering the meaning of particular words (except where those words relate to the structure), and from the function of considering judicial pronouncements on the meaning of those words. [Rissland and Skalak]. Good judicial interpretation of legislation rigorously ties argument to the terms of the subject legislation.

Our method is to develop a complete rulebase which models the legislation, and verify the correctness of that verbatim model, before we attempt to deal with the effect of any judicial material on the meaning and effect of particular provisions.

In order to allow this, the STATUTE KBMS recognises two major types of rules: legislative rules and interpretative rules.[11] This recognition not only allows the developer to neatly separate and examine the legislative modelling from the interpretative material, it also allows the end user to switch on or switch off the interpretative rules.[12] In this way, the same rulebases can be used in a variety of different ways by users with different levels of knowledge.

An interpretative rule has, as its goal, a particular line of the legislative rulebase. In this way, the connection between the interpretative material and the subject legislation is clear and accurate. The process of maintaining and verifying the interpretative rulebase is made more reliable because of this explicit reference to a particular portion of the legislation.

In addition, this method encourages good practice by the rulebase developer. The different portions of a reasoned judicial argument on legislation must be separated and correctly attributed to the appropriate legislative provisions.

The STATUTE KBMS also allows a third type of rule - the common sense rule. These rules merely carry out background inferences which are based on accepted general knowledge.[13]

Large rulebases require very good organisation if they are to be verifiable and well-maintained. The separation of different functional types of rules assists in the organisation of a large rulebase. We suggest that the three-fold separation which we use is appropriate to the legislative domain and the very least that is required for a large system.

5. Separation of the Rulebase from the Application Machinery

Different types of expert system shells offer the application developer different means of control over the performance of the knowledge base and of the application as a whole.

Crude shells require the rulebase and the procedural instructions which drive that rulebase to reside in one structure. In this case, rulebase components and procedural instructions are mixed throughout a single application program.

Some shells allow limited external control of the rulebase by an application language and external control of the performance of the application as a whole. Many of these have only limited capacity to separate the rulebase structure from the machinery for investigation of that rulebase. So, for example, the order in which lines in the rulebase are investigated depends strictly

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11 For another system which incorporates both these sort of rules, especially where the interpretative rules are case based, see [Rissland and Skalak].

12 For the system to be acceptable to the end user, both are required to be separated in this way. See for example [Magnusson].

13 Gardner has also recognised common sense rules as important, and incorporated them into her doctoral work. [Gardner 1984], [Gardner 1985].

upon the order in which they occur in the rulebase.

These types of systems, which require the rulebase investigation to follow the rulebase structure, have substantial drawbacks for large-scale systems. They invite a structuring of the rulebase which does not follow the organisation of the subject legislation, but which is organised according to the desired question path.

We believe that it is desirable to use a knowledge base environment which allows the form of the rulebase to be independent from the investigation of that rulebase. The ideal is to be able to structure a rulebase completely on the basis of ease of verification, maintenance and further construction, while having the capacity to investigate the contents of that rulebase according to any desired path.

This requires certain links and facilities to be built into the expert system shell. The question search and inferencing mechanisms must be designed to allow for this level of control of the knowledge base. In addition, the procedural language which is used to build the final application must have appropriate facilities to assist in that control of the knowledge base.

The STATUTE KBMS allows issues of rulebase construction to be completely independent from issues of rulebase investigation. The rulebase is built with an eye to legal integrity, verification and maintenance. The rulebase should mirror the legislation in its terms, its structure, its order and organisation. An additional and separate range of facilities in the question search and procedural components of the KBMS allow the application developer to nominate the ways in which this rulebase is to be investigated - entry points, order of investigation, order in which different legislative alternatives are investigated, tangential investigations to be carried out under certain conditions, side-tracks, short-cuts and stopping points.

Any application developer building a large system is going to need and demand the sort of procedural control outlined above. Where that procedural control is embedded in the rulebase itself, the legal integrity of a large rulebase will be questionable, while maintenance and verification will be difficult. Where that procedural control is spread between an external facility and some ordering of rulebase components, there are serious dangers for the maintenance and verification of the system.

These problems become more substantial as the application grows, and particularly as the application needs to be amended. Limited capacity to separate control of the application from construction of the rulebase leads to a higher level of compromise in the method of rulebase construction.

PART 3: INTEGRATION OF A LEGAL KNOWLEDGE BASE IN A PRACTICAL ADMINISTRATIVE APPLICATION

A rounded administrative application could seldom contain a knowledge base in isolation.

If the application is to be useful and acceptable to users and management in a government department, a legal knowledge base application would typically contain the following types of facilities:

- Dynamic linking to powerful text retrieval;
- The capacity to generate coherent reports, in a variety of forms acceptable to users and clients;14
- The capacity to build flexibility into the application, to allow for different skill levels of end-users;
- The capacity to link to third-party software, such as word processors, databases and spread-sheets.

Integration capabilities of the primary expert system shell with text generators, screen generators, text retrieval facilities, word processors, databases and similar software are crucial. The more dynamic and flexible is this linking capability, the

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14 For the importance of this in the content of legal research, and computer applications to Law in general, see introduction to [Sprowl].

more imaginative is the administrative solution which you can develop.

These issues of integration capability, user interface, linking to text retrieval and linking to third party software are often looked at as cosmetic add-ons. In practice, the extent to which these facilities can be incorporated into an application is often determined by the structure of the expert system shell used. The fundamental design of the knowledge representation scheme, rule creation scheme, inferencing mechanism and relationship between the knowledge base and the application language all have a major effect on the capacity to build a practical, maintainable application.

In our experience, these "cosmetic issues" significantly contributed to our complete abandonment of one prototype of the expert system shell, including the knowledge representation scheme, the rulebase design and inferencing structure. These "cosmetic" criteria were fundamental considerations in the final design of the core expert system components of the STATUTE KBMS.

A STATUTE-based application will typically contain the following components, within a unique user-created application environment:

- A rulebase which directly models the subject legislation, known as the legislative rulebase;
- A rulebase which overlays the legislative rulebase, and which models appropriate secondary material, such as judicial interpretation of particular legislative provisions (the interpretative rulebase);
- A rulebase which co-exists with the legislative and interpretative rules, and which drives background common sense inferences (common sense rules) and knowledge-base instructions to the application language to perform some special tangential function (daemons);
- Annotations which link appropriate provisions in the rulebase to portions of textual research materials (legislation, policy manuals, cases, administrative instructions etc) for retrieval during a knowledge base investigation;
- Reports which model output, combining rulebase-generated explanation of facts and conclusions, text from secondary sources and free-form text input by the user during the course of the consultation;
- Substantial files written in the application language, driving the application;
- Access to advanced text retrieval facilities such as hypertext and free-text retrieval; and
- Links to the corporate database.

We believe that the legal domain requires specialist shells and methodology which are suited to the domain and the target users. These specialist shells must be developed with an eye to integration of practical tools for administrative or legal solutions, rather than have pure knowledge base creation tools developed in isolation from application creation tools.

References

[Allen and Saxon]
Layman Allen and Charles Saxon, "Some Problems in Designing Expert Systems to Aid Legal Reasoning", Proceedings of the First International Conference on Artificial Intelligence and the Law, Boston, May 1987 ACM Press, 94.

[Bench-Capon et al]
Bench-Capon, Robinson Routen and Sergot, "Logic Programming for Large Scale Applications in Law: A Formalisation of Supplementing Benefit Legislation." In Proceedings of the First International Conference on Artificial Intelligence and the Law, Boston, May 1987, 190.

[Bing]
Jon Bing, "Three Generations of Computerized Systems for Public Administration and some Implications for Legal Decision Making", (1990) Vol. 3 No. 2 Ratio Juris, 219.

[Brown]
Brown, "Shibboleths of Law: Reification, Plain-English and Popular Legal Symbolism", Legal Research Foundation Enc., Publication No. 27 (1987).

[de Bessonet]
Gary de Bessonet, "An Automated Intelligent System Based on a Model of a Legal System." (1984) 10, Rutgers Computer and Technology Law Journal.

[Gardner, 1984]
Anne Gardner, "An Artificial Intelligence Approach to Legal Reasoning", Bradford Books/MIT Press 1984.

[Gardner, 1985]
Anne Gardner, "Overview of an Artificial Intelligence Approach to Legal Reasoning", "In Computing Power and Legal Reasoning" (Walter Ed.), West Publishing Co., St. Paul, Minnesota 1985, 247.

[Greenleaf]
Graham Greenleaf, "Legal Expert Systems - Robot Lawyers?", Paper presented at the Australian Legal Convention, Darling Harbour, Sydney, August 1989.

[Greenleaf, et al, 1988]
Graham Greenleaf, Andrew Mowbray and Alan Tyree, "Communications Aspects of Legal Expert Systems - Incorporating them in Shells for Lawyers", National Conference on Law, Computers and Artificial Intelligence, University of Exeter, United Kingdom 17-18 November 1988.

[Greenleaf, et al, 1987]
Graham Greenleaf, Andrew Mowbray and Alan Tyree, "Legal Expert Systems: Words, Words, Words". (1987) 3 Yearbook of Law Computers and Technology, 119.

[Johnson and Mead]
Peter Johnson and David Mead, "Natural Language - An Appropriate Knowledge Representation Scheme for Legislative Expert Systems", Unpublished paper, Canberra 1991.

[Kuopus]
Jonna Kuopus, Hallinnon Lainalaisuus ja Automatisoitu verohallinto, "The Rule of Law and Computerised Administration of Taxation, Finnish Lawyers", Publishing Company, Jyvaskyla 1988, with an English Summary.

[Magnusson]
Cecilia Magnusson, "Introducing Knowledge Based Systems in the Swedish Social Insurance Organisation", (1988) Volume II No. 2 Information Age 103.

[Rissland and Skalak]
Edwina Rissland and David Skalak, "Interpreting Statutory Predicates", In Proceedings of the Second International Conference on Artificial Intelligence and the Law, Vancouver, June 1989, 46.

[Routen]
Tom Routen, "Heirarchically Organised Formalisations", In Proceeding of the Second International Conference on Artificial Intelligence and the Law, Vancouver, June 1989, 242.

[Schartum]
Dag Wiese Schartum, "Representation of Legal Rules in Computer Programs - some Implications on Legal Protection and Service to Citizens", Norwegian Research Centre for Computers and Law.

[Sherman]
David Sherman, "A Prolog Model of the Income Tax Act of Canada", In Proceedings of the First International Conference on Artificial Intelligence and the Law, Boston, May 1987, 127.

[Sprowl]
James Sprowl, "A Manual for Computer Assisted Legal Research", American Bar Foundation, Chicago 1976.

[Taylor and Browne]
Andrew Taylor and Julie Browne, "Supporting Local Office Adjudication: The Plurality of Requirements, the Multiplicity of Options and the Problems of Organisations". Presented at BILETA Third Annual Conference, Warwick, 1988.

NEW POLICY DIRECTIONS FOR ADMINISTRATIVE LAW IN THE AUSTRALIAN CAPITAL TERRITORY

Chris Hunt, Secretary of the ACT Department of Justice and Community Services

[An address to a meeting of the Australian Institute of Administrative Law, in Canberra, in December 1990.]

Prior to self-government, public administration in the ACT was fully subject to the well-known Commonwealth administrative law package, which centred on three pieces of legislation, creating an Ombudsman and an Administrative Appeals Tribunal, and codifying judicial review of administrative action. In anticipation of self-government, three Ordinances were passed which largely replicated the Commonwealth scheme. Those ordinances were deemed to be ACT enactments on the occurrence of self-government on 11 May 1989. Thus, self-government commenced with:

- An *Ombudsman Act* 1989, which created an office of ACT Ombudsman; provisions in the *ACT Self-Government (Consequential Provisions Act* 1988 (Cth) deemed that that office would be held ex officio by the Commonwealth Ombudsman until such time as the ACT appointed its own Ombudsman;

- An *Administrative Appeals Tribunal Act* 1989, which created an ACT Administrative Appeals Tribunal; complementary amendments to the equivalent Commonwealth Act enabled members of the Commonwealth Tribunal to hold office on the ACT body. The Canberra-based Deputy President of the Commonwealth Tribunal, Mr Robert Todd, was appointed as first President of the ACT Tribunal;

- An *Administrative Decisions (Judicial Review) Act* 1989, modelled on the Commonwealth equivalent, but vesting jurisdiction in the ACT Supreme Court rather than the Federal Court;

- A *Freedom of Information Act* 1989, again along the lines of the Commonwealth equivalent.

The ACT fully funds the Ombudsman and AAT arrangements undertaken on its behalf by the Commonwealth. In 1989-90, this involved $367,900 for the Ombudsman and $139,200 for the AAT.

As part of this scene-setting, I should also say that there has not to date been a high-level of usage of these mechanisms within the ACT. During 1989/90, the ACT Ombudsman received 130 written complaints and 237 oral complaints; the ACT AAT has some 62 heads of jurisdiction in various enactments, but most of these are rarely utilised, and in total the Tribunal received some 44 appeals during 1989/90. The figures on judicial review applications would also be comparatively few in number.

It would be fair to say, then, that the administrative law structure did not initially figure very highly in our list of priorities when developing a law reform agenda for the Territory. However, several factors are causing this to change:

- The development of a comprehensive statutory planning and land management package for the Territory will undoubtedly impact very heavily on the work of the ACT AAT. This reform has also led to a review of standing arrangements for the AAT and under the ADJR Act;

- A major review of ACT court and Tribunal structures is presently being undertaken, with the objective of designing a purpose-built system that meets the Territory's needs.

Other factors may in any event lead to a questioning of how long it will be sensible to maintain the present 'agency' arrangements for the AAT and the Ombudsman. Some significant new jurisdictions, for example in revenue and licensing areas, are being conferred on the AAT, which might in their own right create a workload that would justify, or even necessitate, a separate tribunal.

Whilst there is no reason to expect the ACT Ombudsman's jurisdiction or workload to change, there are a number of current or proposed initiatives in marginally related areas - for example, there are proposals to adapt the Commonwealth human rights framework for the ACT, to establish various community advocacy functions, and a privacy commissioner is also a possibility. As a matter of economy of scale, it may be that some or all of these functions could be administratively combined, and I don't discount the possibility that the Ombudsman function would be reviewed as part of this process.

There will also be some financial considerations as to the pros and cons of varying the present arrangements. For example, there would seem to be logical economies in the present Ombudsman arrangements, although I note that the current arrangement works out at about $1,000 per complaint, which is considerably more than the overall figure.

Nor can we overlook the possibility that pressure for change to the agency arrangements may come from the Commonwealth, but there has not to date been any suggestion of that.

I turn now to a more detailed look at the two major catalysts for change - the planning and land management package, and the courts review.

Planning and land management

One of the Acts passed by the Commonwealth relating to self-government - the *Australian Capital Territory (Planning and Land Management) Act* 1988 - provides for the planning and management of land in the territory. Section 25 of that Act requires the legislative assembly to make laws for the Territory plan and related matters. Paragraph 25(1)(c) requires that procedures for just and timely review, without unnecessary formality, be available for appropriate classes of decisions relating to planning, design and development of land.

The legislative package that is being developed pursuant to this requirement provides for a wide range of merits appeals to the ACT AAT, and for appeals on matters of law to the Supreme Court.

The general approach in the legislation is that administrative decisions directly affecting individuals should be subject to merits appeal, except that there would be no such right of appeal for decisions subject to disallowance in the Assembly, or in some way carrying the authority of the Assembly, or where there had been an extensive inquiry or assessment process.

I should perhaps observe at this point that, following a period of public consultation on the five Bills that comprise the package - initial versions of which were released between February and June 1990 - revised Bills have been prepared, and are currently being finalised. The present intention is that those Bills, after a further consultation, should be enacted in 1991.

Undoubtedly one of the most sensitive and controversial issues during the public comment phases to date has been the question of standing to appeal. The general nature of that debate, within Canberra, has been entirely predictable, based on similar debates in other Australian jurisdictions. In essence, the 'conflict' - if one can use that word - is between those who see wide third party appeal rights as fundamental to a community-oriented land management system, and those who are concerned that such rights will unreasonably constrain land development processes.

Faced with these very strong views, both in the community and within its own ranks, the Alliance Government opted for something of a middle course: third parties would have rights of appeal on the merits (I will comment in a moment on challenges to the legality of decisions), but only where they can establish sufficient interest in the subject matter of the decision.

In general terms, I anticipate the legislative structure will be along the following lines in relation to classes of decision where third party appeals are available:

- Persons affected by a publicly notified proposed decision may lodge

an objection, and are entitled to be notified of the outcome;

- An application to the AAT for review may be lodged by a dissatisfied objector, or by anyone else where the Tribunal has reasonable grounds for believing that the person was unable to lodge an objection;

- Where a decision making process has, by regulation, been excluded from the prior public notification requirement, any person whose interests are affected may apply to that AAT for review.

It remains a matter of intense speculation as to what will be the practical effect of these arrangements. Useful patterns and statistics may not emerge for some time, especially as there will be a need to see how the relevant authorities and Tribunals interpret, in this particular context, tests as to whether a person's interests are affected by a decision. It is of some significance, of course, that the overall legislation places a heavy emphasis on prior notification of decisions, and public participation in planning processes. This ought to lessen the need for subsequent usage of appeal rights.

I should mention too that, as part of the overall scheme, it is proposed to amend the AAT Act to enable the Tribunal to summarily dismiss a vexatious application, or to declare a person to be a vexatious applicant, whereupon they would require leave of the Tribunal to continue proceedings. I should imagine it would be important to review the operation of such provisions after a reasonable period, to ensure that they are operating equitably and effectively.

The opportunity is also being taken to simplify the documentation requirements for agencies that are parties to AAT appeals.

An important amendment in relation to standing is also being made to the ADJR Act. Standing under the present act is based on a person being 'aggrieved' by the decision in question. For decisions under all of the new planning Bills, standing will be completely open: any person who considers a decision to be contrary to law will be able to initiate proceedings. Once again, I think we will have to wait and see whether, in practice, this change has any significant effects. If not, then I should think the Government would at least wish to consider whether to completely remove the 'aggrieved person' limitation for all ADJR actions.

I should think that for the AAT, the workload and importance of this new jurisdiction would almost certainly require a stand-alone ACT AAT.

The courts review

In the early days of self-government, we were conscious that ACT review structures, unlike those of the Commonwealth, were not subject to constitutional constraints in relation to the separation of powers. We saw an opportunity to remove a procedural impediment that many parties must have found frustrating, and perhaps expensive, by securing greater integration of merits and judicial review processes.

This initially led us to look closely, and approvingly, at the possibility of a structure loosely based on the NSW Land and Environment Court. All the reports were that this was a Court which had, with great success in terms of both efficiency and equity, combined judicial and merits review, including decision-making points that ranged from a Judge of Supreme Court status to lay assessors. We had envisaged the possibility of an Administrative Law Division of the Supreme Court, that would coordinate all merits and legal review of administrative decisions.

For various reasons, principally the slightly different direction being taken by the present review of ACT court structures, we have moved away from that particular model. Interestingly, I have heard stories (but have seen nothing officially) that the NSW Government may be considering refining and expanding the Land and Environment Court in a manner that would be similar to the original ACT model.

Many of you may also be aware of the review of ACT court structures undertaken by Lindsay Curtis, which proposed an arrangement under which there would be a unified two-tier court system, with the present merits review functions of the AAT (and also the Credit Tribunal) incorporated into the lower court (which would have a jurisdiction and status similar to a State district court).

The following are the key features of the administrative review system proposed by Mr Curtis:

- Consistent with the Land and Environment Court model to which I have just referred, he stresses the desirability of merits and legal review being addressed by the one body;

- He accordingly suggests that an administrative division of either the Supreme Court or the lower court be established to consider merits appeals, expressing a preference for the latter, based on the decision-making levels within the Commonwealth AAT, as it presently originates;

- The proposed structure should allow persons to be appointed who do not necessarily have legal qualifications, and who are not styled judges;

- Nor would such persons be confined to an adviser or assessor role: in respect of defined matters, they could exercise the powers of decision of the Court;

- There would be a statutory imperative that formality and technicality be kept to the minimum necessary to ensure the proper conduct of proceedings where adjudication of a dispute is required (one dimension of this, which Mr Curtis stresses, is the design and layout of the hearing room itself; he also observes that judges of the NSW Land and Environment Court do not robe);

- Although the general administrative appeal work ought to be located in the lower court, the unified structure would enable work to be arranged without being concerned with rigid jurisdictional boundaries. Thus, the lower court ought also to have a judicial review jurisdiction, whilst provision could also be made for transfer of a matter from the administrative division of the lower court into the Supreme Court. There might also be some classes of decision which would justify a merits review jurisdiction being vested directly in the Supreme Court;

- On a balance of convenience basis, Mr Curtis suggests that appeals from the administrative division of the lower court, whether on merits review or judicial review, should be dealt with as ordinary appeals. Appeals from merits review should not be limited to appeals on questions of law;

- There would also be provision, within the merits review jurisdiction, for internal appeal within the lower court, and for reference of questions of law to a judge.

It is perhaps an implicit endorsement of the way in which the administrative tribunals presently work, that to date most of the concerns expressed about the Curtis proposals have been as to whether the 'user friendly' ethos of those tribunals, which permits and indeed encourages applicants to appear in person without any necessary disadvantage to the outcome of their case, would be maintained. Concern has also been expressed that the capacity to provide for a representative form of tribunal membership - which is central to the present successful operation of the Credit Tribunal - should be maintained.

My own view - and I am encouraged by the NSW experience with its Land and Environment Court in this regard - is that issues of composition, accessibility and informality are just the same whether we are talking about a division of a court or a stand-alone tribunal. It is also my view that you cannot ensure this by legislation

alone: much will depend on the presiding officers. Perhaps as an indication of this, in my own very limited experience as an advocate before the Commonwealth AAT, there seemed to be very considerable differences in formality and the like, which were not always predictable.

Other projects

Before concluding, there is one other development I would like to mention, even though it is very much in its infancy. This is that we have just commenced work on developing a set of legal principles for ACT legislation, dealing with such matters as rights of appeal, review forums, civil liberties and criminal law standards, and the like. Standards of this kind have been developed by legislative bodies such as the Senate Regulations and Ordinances Committee, but as far as I am aware it would be a novel thing for a government to promulgate its own standards and guidelines on such matters. Perhaps a future meeting of this Institute will present an opportunity to report on the success or otherwise of the exercise!

Finally, can I mention the importance of designing systems which are user-friendly and responsive to the community's needs. We believe we are heading in the right direction, and are taking our own initiatives with regard to consultation, but we are most anxious to receive suggestions or feed-back from any quarter.

THE GOVERNMENT'S RESPONSE TO SELECT COMMITTEE REPORT ON TENURE OF APPOINTEES TO COMMONWEALTH TRIBUNALS

Andrew Snedden

Introduction

Only occasionally is a Committee of the Parliament asked to address questions of direct constitutional relevance - as opposed to matters touching on the Australian Constitution - in which issues of importance to the scope of the doctrine of the separation of powers are raised.

Such an opportunity was presented to the Joint Select Committee of the Commonwealth Parliament on the Tenure of Appointees to Commonwealth Tribunals (the TACT Committee) in 1989.

The Committee was asked to address, inter alia, a number of questions on the role and tenure of appointees to the large number of Commonwealth tribunals that now exist in fields of administrative review (such as the AAT) in areas of responsibility previously the preserve of the executive (such as the Australian Broadcasting Tribunal) and in matters that have been the preserve of Commonwealth tribunals for a considerable time, such as industrial relations.

The TACT Committee's report, which was presented to Parliament on 30 November 1989, was reviewed in this journal (No 2 of 1990) by Stephen Argument.

The Government response

The Government's response to the TACT Committee's report was tabled in both Houses of the Parliament on 18 October 1990.

The TACT Committee paid particular attention in its report to setting out principles which properly should be applied in relation to appointees to Commonwealth tribunals. These specifically governed the tenure of appointees and how appointees should be treated on the abolition of tribunals.

The Government, whilst agreeing in principle with the Committee's conclusions, gave the Committee's recommendations on tenure qualified support. However the response is also expressed in non-committal language ('there should not be a general rule'; 'there is need to strike a balance') of the sort which might fairly be construed as acceptance of the thrust of the TACT Committee's recommendations.

Endorsement by the Committee of principles of tenure (including an adequate fixed term of office, protection from removal from office except for cause stated, an adequate procedure for removal of appointees and a proper legal process for removal) were 'noted' by the Government, but not accepted. The Government favoured a case-by-case approach in which provision is made for term and/or tenure appointments, depending on the tribunal in question.

In asserting that the tenure of members of individual tribunals should be considered on their 'merits' the Government response observes that there is a need for 'greater flexibility in staffing of tribunals, by allowing for short term (ie, temporary) appointments to assist in meeting workload requirements'.

This approach, according to the Government, 'widens the pool of potential appointees to include those who might not wish to accept a career appointment'.

A difficulty with this view - identified by the TACT Committee - is that it tends to disregard a central point of a number of submissions to the Committee (particularly by tribunal members): the need for government - and the Parliament - to recognise the importance of tenure in attracting appointees with the necessary experience and qualifications.

The idea that appointees may not wish to accept a 'career' appointment (as resignations from tribunals and, more rarely, from courts shows) doesn't recognise that, if anything, the 'balance' considered essential to ideally constituted tribunals can be reconciled with tenure security.

The second recommendation of the TACT Committee was that principles should be borne in mind by the Parliament when it considers legislation proposing abolition of Commonwealth tribunals of a quasi-judicial nature.

This is particularly important where a tribunal is to be abolished either solely or primarily for the purpose of ridding the Government of a troublesome, embarrassing appointee (the 'turbulent priest' situation).

The Government's response rejected the thrust of these recommendations. It endorsed the existing, and firmly held, view that, it would be 'undesirable' to abolish a tribunal if the predominant purpose was to remove a particular appointee from office, but went on to state that 'it must retain the capacity to abolish a tribunal where there are good grounds for doing so'.

'Good grounds' were described as 'grounds unrelated to any desire to remove a particular member'. Presumably, adherence to this criterion could in some way be demonstrated, especially where a tribunal was to be abolished for plausible reasons and a troublesome member of the tribunal was not removed or not reappointed.

Any examination of the history of Commonwealth administration of statutory bodies of all types - including courts and tribunals - shows that they can be, and are, abolished with Parliament's approval in the name of the need for reform and/or administrative efficiency.

As the Committee noted in its report, a government's administrative flexibility must be tempered by a recognition of accepted and proper principles protecting the tenure of existing tribunal appointees.

The reason for this approach is that suspicion can always arise that where a tribunal has been 'misbehaving' or 'misinterpreting' its legislation, government will eventually choose a wholesale reform of a tribunal rather than addressing faults in the legislation governing a tribunal's role and functions.

On the question of compensation to persons who have not been reappointed to a replacement tribunal, the firm Govern-

ment view was that no automatic right to compensation should exist, notwithstanding the very real financial and professional effect premature end to an appointment may have.

De facto suspension

In its report the TACT Committee addressed the question of *de facto* suspension of a tribunal member where a tribunal's principal member or president actively refused to allocate work to that member.

The Government endorsed the Committee's finding that *de facto* suspension by non-allocation of work was undesirable and expressed the view that the Committee's comment in this regard will no doubt be 'noted by chairpersons of tribunals'. The Government did not, however, indicate whether it had taken any steps to draw the Committee's finding to tribunal heads.

What of former Justice Staples?

The genesis of the TACT Committee's inquiry was the decision by the Government not to appoint Justice Jim Staples to the Industrial Relations Commission, as it appointed all other Presidential members of the former Conciliation and Arbitration Commission.

In response to the TACT Committee's recommendations that the Government establish an inquiry to determine the issue of compensation for former Justice Staples, in view of his non-reappointment to the IRC, the Government drew attention to the entitlement former Justice Staples had to a judicial pension provided for in the legislative package which set up the Industrial Relations Tribunal.

The Committee's recommendation that there be an inquiry into former Justice Staples' case was rejected.

Opposition Views

The Opposition's response to the TACT Committee's Report in the Senate was made by Senator Peter Durack, who was Deputy Chair of the TACT Committee.

Senator Durack acknowledged the Government's acceptance of the Committee's conclusions, particularly on the matters of principle raised by the Committee.

He noted, in a general comment, that

> It is important that there should be wide agreement within the Parliament and between the political parties about the status and the principles which should govern the status, terms of office, removal, et cetera, of the members of such tribunals. That is possible only if these people believe that they have protection from political interference and that they are looked at by the Parliament, though they are not judges, as performing work which is analogous to that of the judiciary.

Conclusions

The TACT Committee has given the Commonwealth Parliament a set of principles which it can apply on establishment of future Commonwealth tribunals.

The Government response to its report, while not accepting the Committee's recommendations for enactment of principles of tenure, acknowledged and accepted, in general, what those principles should be.

It will be an important test of the Parliament in the future, whether it applies the principles so clearly enunciated by the TACT Committee.

Review of the Administrative Appeals Tribunal

R.K. Todd, Deputy President AAT, Convenor of the Working Party

In consequence of the grant of its administrative and, to a degree, its financial, independence, a review of the AAT's operations is being conducted. For the same reason, there have been similar reviews of the Federal and Family Courts.

The review covers a very wide spectrum of the AAT's administrative, organisational, financial and conceptual operations. It is being supervised by a Steering Committee chaired by Deirdre O'Connor J, the President of the AAT with the help of a Working Party of which I am the Convenor. The President of the Administrative Review Council is a member of the Steering Committee. There is AAT Member and Registry participation in both bodies. The Attorney-General's Department and the Department of Finance are represented on both the Steering Committee and the Working Party. The review is being conducted in a positive and cooperative spirit.

The Working Party has now visited all State Capitals for meetings with user groups, Tribunal members and staff. In mid April it will meet in Canberra with representatives of Government agencies that have made submissions. Its principal consultative operations will then have ended and the work of preparing a draft report will then commence. The Final Report must be presented by 1 December 1991.