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ENFORCEMENT DISCRETION AND THE US ENVIRONMENTAL PROTECTION AGENCY: USE, ABUSE AND CONTROL

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Introduction

For four years - from 1979 until 1983 - I served as a lawyer, a defensive litigator, with the US Environmental Protection Agency. During that period, a new president took office, a president who as a candidate for that office had favoured the easing of stringent environmental legislation, had repeatedly attacked the Clean Air Act, and had blamed environmental regulation for slowing the rate of industrial expansion. Given the antipathy of Ronald Reagan and his administration toward environmental protection, one might have expected the White House and EPA to mount a frontal assault upon the statutory culprits, including the Clean Air Act which was, fortuitously for the administration, slated for reauthorisation and amendment. For a while, in fact, the attack seemed imminent as the political leadership at EPA began to work on a weaker version of the Clean Air Act. That strategy, however, was soon abandoned apparently for want of political support.

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Despite his electoral success, Ronald Reagan simply never possessed a popular mandate to reverse the environmental progress of the previous decade. Public support for strong environmental protection had not wavered, and Congress, perhaps as a consequence, could not be relied upon as an ally in the fight against existing environmental legislation. It seems clear that a radically revised Clean Air Act would have been 'dead on arrival' in the Democratic House of Representatives and that it would have had a most difficult time in the Republican controlled Senate - where I suspect a number of independently-minded Republicans would have opposed the president.

Unable to muster public support for legislative reform and seemingly unlikely to obtain congressional approval, the Reagan administration adopted a different strategy for weakening EPA - a strategy that avoided the necessity of seeking congressional support for basic statutory change. This alternative strategy involved the use of unilateral, low visibility actions to reshape and dilute environmental regulation - a long series of crippling reorganisations, personnel cuts, the appointment of loyal ideologues unfamiliar with environmental affairs, and a clear, but unstated, policy against vigorous federal enforcement of environmental standards and limitations.

Such a low-profile administrative approach succeeded in reducing environmental enforcement efforts for a considerable period of time. During 1981-1983, the number of administrative and civil enforcement actions plunged dramatically from previous levels. Enforcement lawyers at EPA seemed to have little to do but solve crossword puzzles and speculate about their rather uncertain future.

This neglect of the agency's obligation to faithfully execute its statutory mission has prompted me to reconsider the wisdom of the traditional view that government agencies should possess unfettered enforcement discretion. After considerable reflection, I submit that the discretion to enforce or not to enforce the law is a form of governmental power that should be structured and controlled to the extent possible. Such control would lessen the likelihood that future administrations could engage in administrative sabotage of statutory law. Such control, moreover, would also discourage enforcement personnel from being influenced by any other sort of illegitimate political or personal bias.

The task of creating a system which effectively limits and controls enforcement discretion, without destroying the kind of administrative flexibility that good enforcement programs need, is no easy matter. The field of US environmental law, however, is a logical place to examine the question since Congress has attempted for two decades to check and guide the discretion that it gives EPA.

The advent of modern environmental law

Many commentators have described American federal legislation of the late 20th century as predominantly intransitive in nature - legislation which gives administrative agencies broad discretion to implement congressional goals. This observation is linked to the fact that Congress lacks the time and requisite technical ability to draft

detailed legislation in areas of great complexity. Not all modern legislation, however, is intransitive. The environmental legislation of the seventies, eighties, and nineties has bucked that trend.

If perceived as necessary, Congress certainly has had the staff capability, the committee structure, and the political desire to craft enormously detailed statutes. And Congress certainly felt the need to do so when it came to modern environmental legislation.

Federal efforts to regulate water and air pollution date back to the l940s and 1950s. The original legislation, even though repeatedly amended during the 1960s, proved completely ineffective. All of that early legislation suffered from the fact that Congress relied too heavily upon state governments to establish and then enforce air and water quality standards. The states simply were not up to the challenge.

Many states never adopted the necessary standards because they lacked the scientific expertise or the political will. Even when standards were adopted, they tended toward the lowest common denominator since our states are in perpetual competition for new industry and development. Enforcement of those standards, not surprisingly, was almost non-existent - even at the federal level because state governments possessed a de facto veto power over most federal enforcement actions. A strong federal presence was clearly required if the United States was ever going to successfully tackle the continued degradation of its air and water resources.

That strong federal presence was provided by the innovative environmental legislation of the 1970s - the first environmental decade. In both the 1970 Clean Air Act and the 1972 Clean Water Act, Congress placed the primary responsibility for the establishment and implementation of the new regulatory schemes in the hands of the recently created US EPA.

Both statutes, however, did more than transfer most basic decision making to the federal level. Both Acts were extremely detailed pieces of legislation that limited the exercise of administrative discretion by imposing, inter alia, a long series of regulatory duties, mandatory schedules, and deadlines on EPA. The statutes, furthermore, created judicial mechanisms that could compel EPA to meet those duties and deadlines.

Why did this legislation evince such a preoccupation with executive discretion? It resulted, in part, from the conjunction of Democratic Congresses and Republican presidents - a situation which prompted Congress to reassert its power as it has from time to time during the course of American history. Congress, moreover, was extremely leery about the ability or even the willingness of the federal bureaucracy to fulfil its statutory mandates. After all, the faith of the American Progressive movement and the New Deal in neutral, scientific administration had tarnished badly over the years. The perception had grown that tired old agencies were likely candidates for regulatory 'capture'. And the experts themselves had fallen from grace - after bringing the country to the brink of nuclear annihilation and ecological devastation.

Congress was more cautious, however, about imposing mandatory enforcement duties to remedy the lack of enforcement under the prior legislation. Consequently, it utilised a broad-gauged strategy to facilitate and encourage vigorous government enforcement action. At times, Congress included the use of mandatory enforcement provisions, but not always. What then were the common ingredients of this approach?

First, Congress eliminated the pre-existing procedural impediments to federal enforcement and also created a wide array of sanctions. Under the Clean Water Act, for example, EPA was authorised (1) to issue administrative orders compelling compliance, (2) to go directly to court to obtain injunctive relief and civil penalties, and (3) to seek criminal penalties. Today - by the way - EPA has the additional option of seeking to impose substantial administrative penalties.

Second, in order to supplement as well as induce government enforcement, Congress empowered private citizens to obtain injunctive relief against violations of the Clean Air and Clean Water Acts. Congress, moreover, gave citizens the right to seek civil penalties under the Clean Water Act.

These citizen suit provisions - as they are commonly known - also authorised citizens to sue EPA for any failure to perform a non-discretionary duty under the respective statute. A major issue, therefore, was whether or not to mandate EPA enforcement action and thereby subject enforcement inaction to judicial scrutiny.

Please note that Congress does not encounter a constitutional - separation of powers - problem by mandating civil or administrative enforcement. Although some may contend that the decision to seek a criminal indictment, involving traditional prosecutorial discretion, implicates a core executive function, American courts have clearly recognised that Congress may compel administrative or civil enforcement of the regulatory programs it has created.

The federal courts, however, labour under a presumption that such enforcement decisions are normally committed to the absolute discretion of the executive branch and hence are unreviewable. In order to rebut the presumption, Congress must indicate an intention to limit agency enforcement discretion and provide standards for defining the limits of that discretion - in other words, Congress must provide some law to apply.

So, although Congress possessed the power, it still had to decide whether to limit EPA's discretion and authorise judicial review for enforcement inaction. The question was not easy to resolve. On the one hand, the courts certainly are not the most desirable forum in which to review decisions about enforcement priorities, agency resources, and so on. On the other hand, Congress was angry about the prior lack of enforcement and quite sceptical about the agency's ability to maintain a strong enforcement program.

The Clean Air Act experience

The Senate, accordingly, tried to mandate EPA enforcement in the 1970 Clean Air Act. Its bill provided that upon

a finding of violation EPA had to issue an administrative order. If a polluter did not comply with the order, EPA was directed to seek its enforcement in a federal court. The Senate bill also provided that a citizen suit against EPA would lie wherever EPA failed to execute these enforcement duties.

The House version of the bill, by contrast, contained none of these innovations - not even a citizen suit provision. Thus a showdown came during the deliberations of the conference committee. There Senator Muskie, the primary author of the Senate bill, succeeded in obtaining agreement to permit citizen suits against polluters and against EPA in order to enforce its mandatory duties. EPA's enforcement duties, however, were made discretionary. The contours of this compromise may have been shaped by an unusual step taken by the Nixon administration.

It had sent a letter to the conference praising the citizen suit provision in general, but criticising the provision that allowed citizens to challenge enforcement inaction. The administration argued that such suits would reduce the overall effectiveness of the air pollution program by distorting the agency's enforcement priorities. And the administration carried the day.

The Clean Water Act experience

Senator Muskie apparently did not want to experience such a defeat again for his version of the Clean Water Act, introduced in 1971, contained discretionary language relating to federal enforcement. Both Muskie's bill and the bill introduced for the Nixon administration, however, were attacked during the public hearings for that precise reason. The Sierra Club, for example, stated that:

> [T]he time has long passed . . . when the Federal Government should have the choice of acting or not acting in the courts or through other means to curb [water] pollution. These enforcement sections need to be tightened up by substituting the word 'shall', whenever the word 'may' now occurs.

This onslaught did not go unheeded. When the Senate subcommittee released its marked-up bill, it was replete with mandatory enforcement directives. Essentially, EPA was required to institute administrative or civil enforcement proceedings in the case of any violation where a state had not already acted.

The full Senate committee accepted this language, but added a twist in its report. After indicating that enforcement was mandatory, thus subjecting inaction to judicial review, the report stated that EPA, nevertheless, should husband its resources for the most serious cases. While that may seem like a contradiction, I don't think it is. In my opinion, the Senate bill gave EPA some discretion to determine the seriousness of a violation and to set priorities, but also gave district courts jurisdiction to determine whether EPA had, in specific cases, abused that limited discretion.

After the Senate version was merged with the House version, however, the situation became even more confused. The resulting law provides that, upon finding a violation, EPA must issue an

administrative order or file a civil suit. Nevertheless, it later states that the filing of a civil action is merely authorised - in other words, discretionary. What in the world was the intent of Congress? The Senate conferees told the Senate that the differences between the two chambers had been resolved in the following fashion: while the issuance of administrative enforcement orders remained mandatory, the filing of civil actions was made discretionary.

The federal courts have really struggled with this language. At least five district courts have held that the issuance of administrative orders is mandatory, while four have found it discretionary. But the matter has been largely settled by two courts of appeal which have held that EPA enforcement is completely discretionary. I believe that those two decisions were mistaken - neither court read the legislative history completely or sympathetically, both were too keen to conclude that the legislative history was ambiguous, and both seemed too hostile to the notion that Congress can validly and appropriately limit the exercise of enforcement discretion.

Congress, nevertheless, had left the statutory language and its legislative history in a bit of a muddle. Perhaps this problem was caused by the fact that Congress and the courts tend to speak and think in terms of absolute mandatory enforcement, on the one hand, or complete discretion, on the other. One extreme or the other. I believe, rather, that they ought to think in terms of limited enforcement discretion - giving an agency enough discretion to order its priorities while providing safeguards against the abuse of that discretion.

The contemporary situation

Since 1972, Congress - when it has tried to limit enforcement discretion - has done so in exceedingly simplistic fashion. The Safe Drinking Water Act amendments of 1986 provide a good example. Upset by the general fall in enforcement during the early 1980s and dismayed about the nearly total lack of drinking water enforcement, Congress enacted a rather harsh remedy. In the absence of state action, each and every violation of drinking water standards will trigger a mandatory federal duty to issue a compliance order or to commence a civil action.

The problem with such an approach quickly becomes obvious. In 1987, 37,000 public drinking water systems committed over 100,000 violations. Neither EPA nor the states, of course, possess the resources to act against such a large number of violations. And not all such violations really merit formal action since many are relatively minor infractions.

Has this approach - this overbroad approach - encouraged EPA to be more vigorous? Well, the Act is so clear and the anger so palpable that Congress did catch EPA's attention. Federal enforcement efforts under the Safe Drinking Water Act have expanded fivefold since 1987. The National Wildlife Federation, however, has not been satisfied. It wants more and has filed suit to get it.

Such lawsuits, while exposing some possible problems at EPA, may create new ones. Attempts to push the agency

toward full enforcement in one program area could well siphon enforcement personnel from other programs where their work is more valuable. And even if one stops short of demanding full enforcement, private litigants could conceivably force the agency to act against minor violations while leaving more serious ones unattended. The possibility that judicial action could cause such distortions at EPA might even prompt a reviewing court to nullify the mandatory nature of this provision by holding that the finding of violation is a discretionary condition precedent to the mandatory duty. That is a lot of rubbish, but the courts have used such devices in the past to avoid distasteful results.

So what should Congress do? Should it abandon the search for a legislative solution and simply increase its oversight of EPA's enforcement program, using public criticism to encourage vigorous action?

Well, more congressional oversight certainly would be a fine thing, but I seriously doubt whether Congress could consistently summon enough interest in the tedious details of EPA enforcement to be a really effective monitor. And the experience with congressional oversight during the early 1980s appears to support my point.

During 1981 and 1982, it was fairly clear that the EPA enforcement program was being destroyed. The enforcement division had been abolished, its personnel were being shunted continually from one office to another, the number of enforcement actions had fallen precipitously, and thousands of young dedicated civil servants were leaving the agency. While individual members of Congress decried these developments, the subject apparently was not 'chic' enough to warrant a major congressional inquiry.

Although the administrator of EPA, Anne Gorsuch, and 20 of her top aides were fired or resigned in 1983, it was not due to their attempts to subvert law enforcement at EPA. Rather it was because a really spicy political scandal had emerged. In late 1982, a congressional inquiry uncovered the possibility that the administration had manipulated the superfund program for political ends, that agency officials may have lied under oath about it, and that relevant documents may have been shredded. It was the kind of scandal that Congress seems to relish, and I doubt whether diminishing enforcement efforts alone would have led to such a speedy departure of Reagan's first appointee as EPA administrator.

In order to recover from the public relations debacle emanating from the scandal, the administration eventually appointed Bill Ruckelshaus as administrator of EPA. Soon, EPA's enforcement program returned to an even keel. Today, under the leadership of Bill Riley, the former president of the Conservation Foundation, EPA enforcement is at or near record levels. In 1989, for example, EPA issued over 4,000 administrative orders, referred over 350 civil cases, obtained 72 criminal convictions, and received over $36 million in civil and criminal penalties.

I am afraid, however, that not all political appointees are as well-intentioned or as devoted to the rule of

law as Bill Ruckelshaus and Bill Riley. I am also not confident that major political scandals will always coincide with periods of depressed agency enforcement. Private enforcement efforts, moreover, are not an adequate substitute for a concerted and consistent government program.

Most importantly, EPA simply cannot afford to endure another serious hiatus in enforcement. The success of its regulatory schemes and its credibility as an agency depend upon vigorous enforcement. The fiasco of the early 1980s so damaged EPA's reputation, in fact, that the agency still suffers today from a lingering sense of public distrust.

A possible approach to the structuring of enforcement discretion

Perhaps Congress should take some legislative action that would help ensure that EPA maintains the motivation necessary for a credible and vigorous enforcement program. Such action would involve the creation of enforcement duties the breach of which could be challenged in court. Such duties need not mandate enforcement against every single technical violation. In fact, the duty to act may be tied to cases that satisfy a set of predetermined criteria.

Congress could, for instance, authorise enforcement against all violations of the Clean Water Act, but mandate it for any 'significant violation'. Congress could then order EPA to promulgate an informal rule to implement that scheme. I suggest, furthermore, that Congress guide that rulemaking by setting forth a number of statutory criteria to be considered when EPA defines 'significant violation'. Such criteria might well include the extent and magnitude of the violation, whether toxic substances were involved, the strength of the evidence, and so on. The agency, in turn, could turn to its accumulated enforcement experience and existing staff guidance to fashion specific regulations along the lines established by Congress.

I suggest that this be done by administrative rulemaking for three reasons. First, informal notice-and-comment rulemaking would enhance the rationality of the decision making process by providing EPA with a broader range of information and opinion. Second, the utilisation of rulemaking procedures would create a barrier against hasty, ill-informed, or politically motivated changes in enforcement policy. The process would give citizens the time and knowledge they need to seek help from Congress should another administration decide to repeal legislation by simply failing to enforce it. And third, the existence of regulatory criteria would give career civil servants a tool to use against their political superiors - cases satisfying the criteria must proceed as a matter of law, at least until a new rulemaking alters the criteria.

There is at least one major problem with this approach. Industry and environmental groups could drag each rulemaking through an exhaustive judicial challenge. And there could be many such challenges since enforcement priorities are bound to change in response to newly perceived problems, redefined priorities, and budgetary expansions or contractions. Since these rulemakings need to proceed fairly expeditiously to keep

enforcement policy current, Congress should preclude judicial review for these particular rulemakings. I personally don't care for preclusion as a general matter, but in this instance it seems absolutely necessary for the maintenance of an effective enforcement program. Furthermore, public notice, public scrutiny, and possible congressional oversight should serve to dissuade the agency, in most instances, from the promulgation of substantively poor criteria.

Under this scheme, a citizen could judicially challenge EPA inaction in the face of an alleged 'significant violation'. In such a case, a federal district court would have to determine, after examining the decision document and any other relevant portions of the administrative record, whether the agency had applied its regulatory criteria in an arbitrary or capricious manner. Such decisions implicate agency expertise and are entitled to some deference. But no deference should shield an irrational refusal to enforce because inaction in that instance would clearly breach EPA's statutory duty to act. Hopefully, such cases will be few in number - since the existence of transparent, publicly available, and legally binding enforcement guidance should encourage the prudent exercise of enforcement discretion.

Conclusion

In the absence of a scandal or serious difficulties with EPA enforcement, I am afraid that Congress is unlikely to turn to such remedial measures. When enforcement problems arise, however, it will be too late. Perhaps, therefore, Congress should consider some new agency-forcing approaches that seek to ensure that EPA will continue to faithfully enforce the law.

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REPORT ON LOCAL GOVERNMENT LEGAL SERVICES IN NSW

Andrew Kelly*

Readers may be interested in the findings and recommendations of the NSW Parliament's Public Accounts Committee's recent inquiry into legal services provided to local government. The report, published in May, was tabled shortly before the former Parliament was prorogued. It is believed to be the first report of its kind.

The committee's terms of reference focussed on the use and costs of external legal services to NSW councils:

1 To examine the use of external legal consulting and practitioner services by local government, their terms of engagement and the extent of the use of legal services and of the Land and Environment Court in resolving local planning matters;

2 To review the costs of legal services undertaken throughout local government and

recommend methods of accountability for the costs of legal services;

3 To review the impact of statutory legal requirements of state and federal government departments on local government's legal costs;

4 To consider any other matters relating to the use of legal services within local government.

Investigations coincided with a number of other inquiries throughout Australia into various aspects of legal services and costs. Examples include the Australian Senate Standing Committee on Legal and Constitutional Affairs' inquiry into the cost of justice and the Law Reform Commission of Victoria's study of the cost of litigation. These inquiries reflect growing concern with the escalating costs of legal services and justice.

The report was also timely in view of local government legislative reform which is sweeping the country. In NSW, the archaic Local Government Act 1919 is being totally rewritten.

It is undisputed that local government is a great consumer of legal services. NSW would not be unique in that the annual expenditure on legal costs by some of its councils runs into hundreds of thousands of dollars of ratepayers' funds.

Despite the scale of costs involved, the committee experienced considerable difficulty in obtaining simple breakdowns of legal expenditure on different areas of council activities and various types of court action. The main problem was not a reluctance on the part of councils to divulge details. Many councils were simply unable to provide readily the information sought. I understand that some authorities resorted to asking their own solicitors how much they had spent. I am told that others even contacted the Land and Environment Court for information on the classes of cases which they had fought during the past three years. The committee concluded that many councils have clearly lost control over their burgeoning legal costs.

The report recommends methods for increased accountability to both elected representatives and the community on legal expenditure. It also goes much further. New internal administrative arrangements are suggested, with a view to ensuring adequate and periodic reviews of legal services, in addition to minimising excess reliance on legal advice and representation. It is also recommended that those councils experiencing high legal costs should consider the potential benefits of appointing in-house legal personnel and the establishment of panels of key external legal advisers.

A substantial portion of the report is devoted to the NSW planning system. From the very beginning of the investigation, almost all evidence pointed to the planning legislation - the Environmental Planning and Assessment Act 1979 (EPAA) - as particularly complex, costly and litigious. The committee remarks that '... it might be said that the system has passed from the hands of the planners to the palms of the lawyers'.[1]

Actions in the NSW Land and Environment Court can be costly. It is

not unusual to find councils represented by barristers in appeal cases which fall on planning merit issues rather than points of law. It should also be noted that in NSW, councils are well exposed to judicial review actions. Section 123 EPAA dispenses with the common law rules of locus standi to enable any person to 'bring proceedings in the Court for an order to remedy or restrain a breach' of that Act. Good legal representation in such cases is essential.

The committee does not recommend any narrowing of opportunities or challenges against council decisions and actions. Instead, it recommends demystification of the legislation and the myriad of plans made under it. Practical suggestions are made to help promote the prevention and resolution of disputes early in the environmental decision making process, with an emphasis on councils fostering a more client-oriented approach. More attention to alternative dispute resolution is encouraged. In this regard, it is interesting to note that the Land and Environment Court recently introduced mediation and issues conferences prior to full hearings. An expanded role for the NSW Office of the Commissioners of Inquiry is also recommended. This office already provides an alternative mechanism for the resolution of some planning and environmental disputes in a non-adversarial setting unfettered by judicial inflexibility.

The report touches upon many issues related to administrative law. Copies are available from the committee's office at the NSW Parliament House for $30.00 each. Anyone interested in promoting more responsible and cost effective local government may find the report a very beneficial resource. Many of the issues indeed have implications beyond the local level.

Footnote

1 Public Accounts Committee of the Forty-Ninth Parliament of New South Wales, Report on Legal Services Provided to Local Government, May 1991, p 20.

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AAT - NEW PRACTICE DIRECTIONS

John Bundock*

Three new practice directions were issued by the AAT on 26 April 1991, effective from 6 May 1991. They deal with evidence, preliminary conferences, provision of documents and medical evidence, the latter applying to only New South Wales cases during a trial period. The previous practice directions, other than that relating to FOI, have been revoked.

General practice direction

A general practice direction seeks to restrict the number of preliminary conferences to a maximum of two, but will not require a conference in all cases. Parties are required to provide

to each other statements of the facts and contentions and, not later than 14 days prior to a hearing, statements of the prospective evidence of witnesses and other documents to be relied on. Copies are to be lodged with the AAT. The use of statements without the need to call the witnesses where there is no conflict between the parties as to the witness's evidence will be encouraged.

Parties are required to lodge a certificate of readiness no later than seven days after the last conference or before a callover. Parties will be able to make submissions to the AAT to depart from the practice direction where appropriate.

Comment

Where the parties reach a settlement without a conference the AAT will still need to list a conference. This is because the AAT can only make orders by consent under s34 of the AAT Act following a conference.

The maximum of two conferences will generally cause no problems in jurisdictions like FOI, social security and compensation, but veterans are used to leisurely decision making. A scenario not unusual is that the veteran is unrepresented at the first conference and is advised to seek legal assistance. By the next conference he or she has been to legal aid or the RSL's solicitors who have looked at the papers and arranged medical examinations but the medical reports have not yet been received. The new practice direction should discourage AAT members from listing numerous conferences while suggesting that veterans' representatives shop around for medical reports until they obtain reports supportive of their clients' cases.

Encouragement by the AAT of reliance on documentary evidence, where such evidence is unchallenged, is refreshing from a tribunal which is often more court-like than many courts in insisting on persons who have made statements giving their evidence orally, on oath, before it is admissible. However, the AAT returns to the court-like procedure by insisting on a certificate of readiness. If the AAT has enquired of the parties at a conference whether they are ready to proceed, it is difficult to see what purpose will be served by a certificate of readiness within seven days of that conference. The direction does not specify what happens if a (possibly unrepresented) party fails to return the certificate.

Permitting the AAT to depart from a practice direction where appropriate will more fully enable issues to be dealt with on the merits. There will be cases where good decision making will be best served by permitting surprise in cross-examination. For example, where the Commonwealth has film of a compensation claimant, it generally assists the AAT to arrive at the truth by having the claimant give evidence of his disability and then showing the film, rather than having the film shown first and the claimant tailor his evidence accordingly: see Australian Postal Commission v Hayes and Another (1989) 87 ALR 283. Another circumstance is where a witness is likely to be intimidated prior to a hearing if identified to the other party in advance, for example, a neighbour or relative who is to give evidence that the person is working, living at a certain address, known by another name etc.

The new direction will place a greater emphasis on members chairing conferences taking an active part in the case rather than allowing progress to be dictated by the parties.

Section 37 statements

The new direction maintains similar requirements for the provision of documentation from decision makers. (In practice, the documentation may set out reasons which may or may not have occurred to the decision maker but which reflect the policy of the decision maker's department and help to clarify issues before the AAT.) The AAT no longer requires six copies of documents, two being required initially with further copies to be lodged if requested by the AAT. Where six copies are required to be lodged under regulation 11 this has, in the past, been departed from by local arrangements between departments and AAT registries.

Medical evidence

The new practice direction regarding medical evidence is being trialled in the Sydney and Parramatta registries. If a matter can be finished in five hours it is to be set down for only one day with preference being given, where oral evidence is required by the parties, to the ability of the treating specialist to attend. Where more than three months notice of a hearing date is given, it is expected that no adjournment will be granted on the grounds of non-availability of a doctor. The lodging and serving of a report will make it admissible in evidence whether or not the maker of that report gives oral evidence. The party who requires the attendance of a medical practitioner for cross-examination must secure that attendance and inform the other parties of the fact.

The practitioner does not become that party's witness except for determining liability for the witness's expenses for the attendance.

Comment

It is regrettable that the AAT has moved away from its former flexibility in accommodating the needs of medical specialists who may be unavailable on particular days because of operating or visiting commitments etc. The matter could be better overcome if the AAT stuck less rigidly to a 10.15 am start and was prepared to list a medical matter in the morning and adjourn it part-heard to another day while using the afternoon to commence a second matter. The ACT Magistrates Court, which hears personal injuries damages claims (up to $50,000) and workers compensation matters, frequently hears parts of more than one case on the same day.

The situation regarding the three months notice to doctors is curious. It is much easier to know a doctor's likely availability on a particular day when the notice is relatively short than when a long period of notice is given. The longer the notice the greater the chance that other factors may intervene in the meantime to affect the doctor's availability. A short period, say one month, should be reasonable notice so the AAT could list another matter if a doctor was unavailable.

The AAT is to be praised for accepting medical reports, once served, as admissible evidence without the

necessity for the author of the report to give oral evidence. It has been farcical where presidential members have presided over 'test case' hearings of several days, at which top experts have been called to discuss hypotheses or the aetiology of various conditions, only to have the same issue crop up time and time again with doctors whom the AAT has previously discredited being accepted by it when the other party cannot produce (at great expense to itself) the specialists whose evidence has previously found favour with the AAT.

The practice direction does, however, pose a dilemma for parties with limited funds (and also probably for legal aid authorities). If, for example, the Commonwealth's expert in a Sydney case is located in Melbourne and the other party wishes to cross-examine that expert, it is the other party who must now pay the witness's fees, airfares, and any accommodation expenses incurred in attending the hearing.

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THE ROLE OF THE COMMONWEALTH OMBUDSMAN IN THE 1990s

Alan Cameron*

- talk given on Thursday 11 April 1991 to the New South Wales Chapter of the Australian Institute of Administrative Law

I feel a certain affinity with the Australian Institute of Administrative Law, since it appears to have been born, or conceived, on April Fool's Day 1989 and I assumed my office on April Fool's Day 1991. The press publicity which accompanied the announcement of my appointment was preoccupied with the metaphor of ombudsman as watchdog - an unattractive metaphor since it connotes 'yapping'. I found it hard to believe that the number plate of the Commonwealth car with which I was issued was YAP.

Interviewed recently on 2BL, I was surprised to perceive that the interviewer, who is a well-known and perceptive commentator on Australian affairs generally, was speaking as if he did not know that there was a Commonwealth ombudsman, far less what the role was. I detect from correspondence that I have seen in the office that there certainly is no general understanding that the ombudsman is an independent observer of government action, and not necessarily an advocate for the point of view taken by the complainant. Many complainants are disappointed that we do not always take their side.

There are changes going on in the federal bureaucracy which are having some impact on the operation of an ombudsman.

First, a lot of responsibility is being devolved to lower levels of the public service which causes more disparities in administration, rather than less. This

is accompanied by a process of regionalisation, with exactly the same result. Achieving consistency and reasonableness in government decision making is made far more difficult.

Secondly, there is the growing trend towards commercialisation, and sometimes privatisation, of government business entities. The business activities of government entities such as SFIT and Medibank are already in competition with the private sector, yet their activities remain within the purview of the ombudsman. My predecessors have taken the view that they would not normally involve themselves in complaints about activities which are commercial activities, and it is my intention to continue with that view. One of the major sources of complaints has been Telecom, and yet it is now in the process of being commercialised, and acquiring a competitor. The government will shortly need to make a decision on what is to happen about the review of Telecom's activities. Since it will effectively continue as a monopoly for some years to come, it seems difficult to see how an ombudsman-type supervision should not be continued.

Thirdly, there is the growing trend towards a commercial approach of risk management. This philosophy involves concentrating on efficiency and effectiveness of decision making, getting it right perhaps 95% of the time and taking the risk that the remaining 5% will not matter in some way, and that the risk of making those small mistakes is offset by the gains made by making decisions more quickly. The problem is, who runs the risk? Consistently with the philosophy, it is the decision maker who runs the risk, not the person who bears the brunt of the decision, and that is where the ombudsman comes in if government authorities are to take that approach. In this context, I believe that the appropriate metaphor is safety valve, rather than watchdog.

Fourthly, since the ombudsman's office was established, there has been what cynics might describe as a predictable increase in the number of other review bodies and processes. Apart from the obvious agencies, such as the Merit Protection and Review Agency, the Privacy Commissioner, the Human Rights and Equal Opportunity Commission, and the process called freedom of information, there is a host of other quasi-judicial bodies with review functions, such as the Social Security Appeals Tribunal, the Immigration Review Tribunal, the Student Assistance Review Tribunal, and internal review bodies within the Tax Office and the Immigration Department, in particular. These bodies are much more private in many ways, and their operations may not be as well-known even as the ombudsman. Frequently, where complaints are being dealt with by those review bodies, the ombudsman exercises his discretion not to investigate the complaint until there is some resolution of the internal process.

There have been some constant features of the office since it was established. I am not sure that they should necessarily remain the same. Two which have continued, and are likely to continue, are its informality and flexibility when dealing with complaints. One which requires some attention, however, is the tradition that the ombudsman has no decision making

power, and can merely recommend or cajole. The concept of ombudsman has recently been taken up enthusiastically in the private sector, with a banking ombudsman and a proposal, I believe, for an insurance ombudsman. Certainly the banking ombudsman has, and I believe the insurance ombudsman is intended to have, a limited decision making role as well as the role of investigating complaints. It would certainly be far more efficient, and might serve the bureaucratic processes quite well, if the ombudsman did have a decision making role on small complaints where the agency was reluctant to make a decision because of some fear of a precedent, or whatever, that the amount of financial compensation involved is so small that it is wasteful of resources for the ombudsman and the relevant agency to continue to argue for months and possibly years about the appropriate result. Frequently the ombudsman is involved in act of grace payments, and the present temporary regime with respect to act of grace payments has as one of its cornerstones a recommendation by the ombudsman, the existence of which enables a department to make an act of grace payment after notifying the Department of Finance, rather than having to obtain the concurrence of the Department of Finance.

Then there is the availability of the office to all whatever their station in life. I was quite pleased to discover the extent to which law firms and corporations are aware of the office, and use its facilities in appropriate cases. This is frequently linked to obtaining refunds or act of grace payments in various circumstances relating to different categories of taxation. Nevertheless, if the funding of the office remains as tight as it has been, a way may need to be found of giving priority to those whose resources do not permit them to contemplate any other form of relief. There is a review of the office of ombudsman, about to be commenced by a Senate committee, and it will be interesting to see what emerges from the first full review to take place for some years.

Since the main remedy presently available to the ombudsman is to report, I thought it might be interesting to summarise the position on these reports. There have been only two section 17 reports to the Parliament since the office was established. They were the subject of a Senate committee report to the Parliament, but no further action has been taken on them. The other reports are those under section 16, the reports to the Prime Minister. On 30 June 1990, there were three such cases which had been referred to the Prime Minister, and which remained unresolved. One concerned a delay in correcting an anomaly in defence force retirement benefits legislation which was submitted in 1986. Despite a mountain of correspondence, no resolution has yet been achieved. The second referred to difficulties arising from the administration of a contract for the completion of hospital renovations, and was submitted in October 1988. It has now been resolved, in the sense that no further action will be taken. A third, submitted in 1989, involves the allocation of catches under the southern blue fin tuna management scheme. The government does not propose to change its mind there either, and I am considering what to do about that. The inability to resolve the 1986 report is frustrating, and my

predecessor certainly contemplated reporting to the Parliament under section 17 with respect to that matter. A new case has recently been referred to the Prime Minister under section 16. Like one of the two section 17 reports to the Parliament some years ago, this new section 17 matter involves an agency whose decisions are, at least to some extent, independent of the government, so that they are not necessarily amenable to ministerial direction. If the agency involved continues to take the same view, then it will also be referred to the Parliament so that the matter at least acquires some notoriety. I am, however, doubtful that it will result in any change of view.

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RULE MAKING BY COMMONWEALTH AGENCIES

Stephen Argument*

Introduction

Since late 1989, the Administrative Review Council (ARC) has been engaged in an important project on rule making by Commonwealth agencies. The project was initiated in the light of issues raised at a conference on rule making which was held on 31 August 1989. Terms of reference were drawn up and an issues paper produced. The issues paper, dated 30 June 1990, was then sent to government agencies and interested members of the public for comment.

In April 1991, the ARC secretariat published a document entitled 'Rule making by Commonwealth agencies - Report on submissions from the issues paper "Rule making by Commonwealth agencies" June 1990 and preliminary proposals' (the preliminary proposals paper). The preliminary proposals paper was used as the basis of further public consultations in Sydney, Melbourne and Canberra, including a workshop session at the AIAL/RAIPA 1991 administrative law forum. The purpose of this article is to give a brief overview of the rule making project and to offer an analysis of the preliminary proposals.

Terms of reference

The terms of reference of the rule making project are:

(1) to examine the distinction between primary and other forms of legislation and what should form the prima facie division of content between them;

(2) to review the nature and forms of legislative instruments to produce uniformity of terminology and common content in the various forms of instruments;

(3) to review the Acts Interpretation Act 1901 and the Statutory Rules Publication Act 1903 to designate the different forms of subordinate legislation and the making and review processes appropriate to each;

(4) to review procedures for making subordinate legislation with

regard being paid to notice and consultation procedures and the impact that the (Victorian) Subordinate Legislation Act 1962 procedures have had; and

(5) to review the method of publication of subordinate legislation with attention being paid to the need for consolidation of instruments and their publication in accessible form, and to consider in this context, the possibility of the establishment of a Federal Register.

In addition to these terms of reference, the issues paper posed various specific questions (directed principally at agencies) about agencies' practices in relation to primary and subordinate legislation. Information was sought on the criteria used to determine what went into primary legislation and what went into subordinate legislation, as well as what was left to 'administrative guidelines'. Agencies were asked to provide information (including statistical information) on the types, numbers and names of instruments produced, as well as examples of the various types of instruments. Comments were sought on the role of parliamentary scrutiny and disallowance and on the possibility of an extended operation for the Statutory Rules Publication Act. Finally, the issues paper sought information from agencies about the publication of their instruments as well as their views on wider and enhanced publication.

The preliminary proposals paper

Although it does not indicate the actual number of submissions received in response to the issues paper, the preliminary proposals paper sets out to summarise the salient points made by what is presumably a not-inconsiderable number of submissions. The paper sets out against each term of reference a summary of the points made, followed by the ARC secretariat's 'preliminary proposals' in relation to those terms of reference.

Term of reference 1 - content of primary and subordinate legislation

On term of reference 1, which relates to the content of primary as opposed to subordinate legislation, the preliminary proposals paper acknowledges that the important distinction between primary and subordinate legislation is the extent to which the Parliament is afforded the opportunity to scrutinise the legislation. According to the paper, the submissions indicated that 'matters of substance and important procedural matters' should be in primary legislation and 'matters of detail or matters that require frequent amendment' should be in subordinate legislation. However, submissions also indicated that the relevant guidelines in the Legislation Handbook (issued by the Department of the Prime Minister and Cabinet) were difficult to apply in practice and that the distinction between the appropriate content of primary and subordinate legislation is 'often not governed by any rational criteria' and that '[o]n occasion, expedience and apprehension of disallowance become the governing factors'.

The preliminary proposal on this term of reference suggests that certain specified types of matters should be set out in primary legislation. They include:

- provisions involving significant policy questions, including changes to existing policies;
- provisions involving taxing or spending;
- provisions with a significant impact on individual rights and liberties;
- provisions setting out the essential structure of schemes; and
- provisions imposing significant criminal penalties.

This proposal is, of course, eminently sensible and difficult to disagree with. However, the criteria set out are not a great deal different to those appearing in the Cabinet Handbook (at paragraph 3.2), which the submissions apparently identified as being difficult to apply. In addition, the proposal offers no suggestion as to how the application of these criteria by legislation might be policed, or by whom. Given that the submissions apparently indicated a difficulty in agencies applying the existing criteria, a proposal which addressed this aspect of the problem would have been helpful.

Term of reference 2 - uniformity of terminology and content of instruments

The preliminary proposals paper makes an initial observation in relation to this term of reference acknowledging the great diversity in the range of legislative instruments, the standard of drafting evidenced by instruments and the extent to which instruments are accessible to the public. According to the paper, two different points of view emerged from submissions. On the one hand, 'users' found the diversity 'confusing' while, on the other hand, agencies found the 'flexibility' that this diversity provided useful.

In summarising the submissions, the preliminary proposals paper refers to the problems caused by poor drafting but also notes that submissions were less than happy with the drafting service provided by the Attorney-General's Department, which is said to be 'cumbersome and results in delays'. On the other hand, in-house drafting is said to be more efficient and responsive, drawing on a level of technical expertise that is not available in the Attorney-General's Department.

The ARC secretariat's preliminary proposals on this point are based on the initial application to an instrument of certain criteria, on the basis of which it can be determined whether or not the instrument is 'legislative in character'. Those criteria involve a decision as to whether the instrument:

- can be traced back to a delegation of legislative power;
- is of general application or application only in a particular case;
- creates legally enforceable rights and obligations;
- contains a binding rule rather than being a guideline for decision making or conduct;
- has any other features which suggest that it is either legislative or administrative, eg whether it is used as a precedent.

Once an instrument is determined to be legislative in character, important consequences arise, including requirements that the instrument be 'drafted to a standard expected of a legislative instrument', scrutinised by the Parliament, subject to a public consultation process and be easily accessible. The drafting requirement is enlarged upon in a further proposal relating to the use of the recently-created Office of Legislative Drafting within the Attorney-General's Department.

These preliminary proposals are, clearly, sensible and plausible, though there is no attempt made to reconcile the criteria set out in the proposals in relation to term of reference 1 and those by which 'legislative in character' is to be determined. The latter would appear to be the more relevant test and the criteria by which the content of primary as opposed to subordinate legislation is to be determined would appear to be superfluous.

Term of reference 3 - review of the Acts Interpretation Act and the Statutory Rules Publication Act

The preliminary proposals paper identifies four matters under this term of reference which were highlighted by the issues paper: the criteria for parliamentary disallowance; the nature of parliamentary scrutiny; the terms of reference of the Senate Standing Committee on Regulations and Ordinances; and 'the revival of the disallowance power'. According to the paper, the submissions were in agreement that guidelines should be developed for deciding whether or not an instrument should be subject to disallowance. The paper goes on to state that submissions suggested that 'substantive subordinate legislative instruments' should be subject to disallowance but 'instruments dealing with administrative matters' should not and that, when in doubt, the decision should be in favour of disallowance.

The paper notes that one agency stated that instruments with a regulatory impact should be subject to scrutiny but non-regulatory instruments should not. Other agencies were apparently opposed to any extension of parliamentary disallowance beyond those instruments currently covered.

Finally, the paper cites the curious suggestion that 'an increased scrutiny workload meant resource problems for already overworked scrutiny committees and the solution lay in better drafting'. Before proceeding to the preliminary proposals on this term of reference, it is useful to consider this statement further. Both of the Senate's legislative scrutiny committees (the Standing Committee on Regulations and Ordinances and the Standing Committee for the Scrutiny of Bills) made submissions to the ARC on the basis of the issues paper. Neither made any suggestion that they were overworked.

On this basis, representatives of the committees took this matter up with representatives of the ARC at the public seminar on the preliminary proposals paper which was held in Canberra on 2 May 1991. The ARC representatives conceded that the suggestion came from a solicitor in private practice! In addition to the dubious authority of the source, it is also difficult to comprehend any necessary correlation between the

workload of the legislative scrutiny committees and better drafting.

This matter aside, the ARC secretariat's preliminary proposals are that 'legislative' instruments (as determined by the criteria set out in relation to term of reference 2) should be subject to parliamentary disallowance. Negative resolution (which is the ordinary disallowance procedure in the Commonwealth Parliament) is proposed as the main scrutiny mechanism, though it is suggested that affirmative resolution and postponed commencement may be employed as the need arises.

The paper goes on to propose that '[a]s the dividing line between policy and administration is often blurred, review of matters of policy should not be expressly excluded by the terms of reference for the Standing Committee on Regulations and Ordinances'. Once again, this is a strange statement, as there currently is no express exclusion of such matters in the committee's terms of reference and the committee is unaware of there being any suggestion that there should!

The paper does not stop there, however. It goes on to propose that the terms of reference of the Regulations and Ordinances Committee 'should be expanded to provide more detail as to the matters that the Committee will have regard to in its scrutiny of legislative instruments'. Further, the paper asserts that '[t]his would not expand the role of the Committee but would serve an educational purpose for both agencies and members of the public'.

Several basic points should be made about the proposals concerning the Regulations and Ordinances Committee. The first is that the preliminary proposals paper manifests some fundamental misconceptions about the committee's terms of reference and their operation. Elsewhere in the paper, there is a statement that the terms of reference 'have not been altered in any significant way since the inception of the committee in 1932'. In fact, the terms of reference were amended in 1979, when a provision relating to the need in certain circumstances for merits review by a judicial or other independent tribunal was inserted, in recognition of the significant advances being made at that time in the field of administrative law.

It should also be noted that there is apparently no suggestion of the committee having sought to have its terms of reference amended. Further, the fact that they have not been amended (even if, in fact, they have) is not necessarily a defect. Indeed, some would suggest that it underlines the appropriateness of the terms of reference and/or the committee's ability to adapt its interpretation of them to suit changing circumstances.

Finally, it is trite to observe that it seems an extraordinary proposition to make assertions about such matters as the workload of the committee and the appropriateness of its terms of reference without reference to the committee or to submissions from it. The committee subsequently made this clear to the ARC in a written submission made by way of comment on the preliminary proposals paper.

The two remaining proposals in relation to term of reference 3 relate to the disallowance period and suggest that this period might be amended. Once again, the proposals were made without any suggestion from those most closely involved with the operation of the disallowance provisions that any problem existed.

Term of reference 4 - review of procedures for making subordinate legislation

This term of reference requires a review of the procedures by which subordinate legislation is made but with particular reference to consultation and the provisions of the (Victorian) Subordinate Legislation Act. According to the preliminary proposals paper, agencies indicated in submissions that while they currently consulted outside persons and bodies on the content of rules on an informal basis, many were opposed to any formal requirement to consult. It was suggested that such requirements would bring no perceived benefit over current practices and would involve significant resource implications for agencies. Non-government bodies, on the other hand, supported the formal consultation requirements of the Victorian legislation.

The ARC secretariat's preliminary proposals are that public consultation be mandatory before the making of any delegated legislative instrument. It is suggested that this consultation should include the publication of a proposal, together with an explanation of its goals, objectives, etc, and a period within which submissions to the agency could be made in relation to the proposal. Additional consultation could then be undertaken at the discretion of the agency.

Not surprisingly, this proposal has met with firm opposition from agencies. This opposition was evident at the seminar in Canberra on 2 August, at which representatives of numerous agencies spoke out against the proposal. On the other hand, a representative of the Business Council of Australia asserted that the private sector would embrace the proposal with great enthusiasm. In practical terms, this is probably the most controversial proposal contained in the paper and one which will be vigorously opposed by agencies. The fate of the proposal will be interesting to observe.

Term of reference 5 - review of publication procedures for subordinate legislation

This term of reference addresses the problem of inaccessibility, from which many instruments suffer. It is widely acknowledged that once an instrument falls outside the requirements of the Statutory Rules Publication Act, various problems seem to follow as a matter of course.

According to the preliminary proposals paper, submissions were generally supportive of the establishment of a Federal Register of instruments, as in the United States, which would contain all subordinate legislative instruments and would be properly indexed. In addition, such a register could be set up to allow electronic access and would be a definitive statement of the law contained in subordinate instruments.

The preliminary proposals on this term of reference are posed as alternatives. One alternative is to expand the current statutory rules series to include all instruments of a legislative character (as defined), with a separate series established for all non-legislative instruments tabled in the Parliament. The other alternative is to incorporate all such instruments in a single register, as is the case with the Federal Register in the United States. The preliminary proposals paper suggests that the responsibility for drafting all the instruments concerned should lie with the Office of Legislative Drafting. Finally, it is proposed that a failure to observe these publication requirements should mean that the rule 'would not be part of the law'.

At the Canberra seminar, these proposals were also opposed by representatives of agencies. Once again, it will be interesting to observe how the proposals stand up against this opposition.

Summary

Although the preliminary proposals paper is, in several respects, a disappointing document, it has put forward some options which will clearly cause agencies to focus their attention (and, more likely, their opposition) as the rule making project progresses to its conclusion. As this remains one of the most important projects that the ARC has taken on to date, it is to be hoped that the proposals and their proponents stand up to the difficulties which no doubt confront them.

* *Stephen Argument is secretary to the Senate Standing Committee for the Scrutiny of Bills. However, the views expressed in this article are not necessarily those of either that committee or the Senate Standing Committee on Regulations and Ordinances.*

THE CORPORATIONS LAW JURISDICTION OF THE AAT

John D Fitzgerald* and Chris Robson*

Readers of the AIAL Newsletter will probably already be aware that on 1 January 1991 a national scheme of corporations law started and that this scheme is administered by a new national agency: the Australian Securities Commission ('the ASC'). Readers might not be aware that the new national scheme of corporations law provides for an extensive range of decisions made by the ASC to be reviewed by the AAT: no fewer than 251 different sections of the Corporations Law ('the Law') authorise decisions that can be appealed to the AAT. This new jurisdiction is probably one of the most extensive ever granted to the AAT. This article will briefly discuss three salient features of the new AAT jurisdiction.

The two most important statutes administered by the ASC are the Law and the Australian Securities Commission Act 1989 ('the ASC Act'). The Law is a mammoth statute, containing over 1300 sections. It prescribes the legal requirements for the administration of companies and

the conduct of capital markets and futures markets. However, it does not establish the ASC. This task is given to the ASC Act, a much slimmer statute of about 250 sections. The powers of the ASC are divided between the two statutes. The powers contained in the Law have a final or conclusive flavour eg to register a company (section 119). The powers contained in the ASC Act have a more procedural flavour eg to conduct investigations into suspected breaches of the Law (section 13).

Broad extent of corporations jurisdiction

The first striking feature about the corporations jurisdiction is its broad extent. The jurisdiction is conferred upon the AAT by Part 9.4A of the Law (sections 1317A, B, and C). Almost all decisions of the ASC, the minister, and the Companies Auditors and Liquidators Disciplinary Board('the Board') made under the Law can be appealed. Section 1317C makes some exceptions, but affecting about only ten sections. The main significant exception is that decisions of the Corporations and Securities Panel ('the Panel'), which decides whether takeover bids involve unacceptable conduct, are not subject to AAT review. Of course its decisions remain subject to challenge in the Federal Court under the ADJR Act.

Under the ASC Act the extent of AAT review is very narrow, occurring only in relation to four sections (sections 72-75). These provisions deal with some of the remedies at the ASC's disposal where a person does not co-operate with an ASC investigation. As a result of the division of powers between the Law and the ASC Act, very few of the ASC's procedural powers are appellable to the AAT yet most of the substantive decisions that are outcomes of the use of those procedural powers are appellable.

The significant exception to the dichotomy - substantive powers: appellable to the AAT; procedural powers: not appellable to the AAT - is the power of the ASC to make application to the courts, the Panel, or the Board. Within the Law there is a division of powers between, on the one hand, the courts, the Panel and the Board and, on the other hand, the ASC. The ASC is empowered to make many substantive decisions, but is not empowered to make others. In regard to this second category, the ASC is only empowered to make application to the court, the Panel, or the Board. It is the court, the Panel, and the Board that makes the substantive decision.

At first glance these decisions fall within the jurisdiction of the AAT. They are made by the ASC under the Law, and could be characterised as one or more of the acts described in the Administrative Appeals Tribunal Act's definition of a 'decision'. On second thought, however, they might not be 'decisions' since they do not have a conclusive or final effect upon people's rights. Since the decision of the High Court in Australian Broadcasting Tribunal v Bond (1990) 64 ALJR 462 there must be real doubts that such procedural decisions are 'decisions' for the purposes of the Administrative Appeals Tribunal Act.

In particular, the question whether the decision to make application to the Panel is reviewable by the AAT is likely to provoke some lively debate since the consequences of orders from the Panel are of serious consequence to the

takeover bid offeror. In the event that such a decision is found to be a 'decision' for the purposes of the AAT then a second jurisdictional issue arises. Under section 1317C(a) a decision that is otherwise reviewable is excluded from review if there is any provision in the nature of an appeal or review from the decision. Whether the Panel's hearing in respect of an application for orders constitutes a review of an application for orders is, at this stage, an unresolved issue.

Appellable decisions involve policy and have commercial significance

The second feature of the AAT's jurisdiction is that powers to modify the operation of the Law are appellable. Under a number of significant provisions of the Law, the ASC has quasi-legislative powers to modify the operation of the Law. Under section 728 the ASC may exempt a person or a class of persons from the provisions of chapter 6 (takeover bids); under section 1084 the ASC may exempt a person or class of persons from the provisions of Part 7.12 (offering securities for purchase). These powers, especially section 1084, are frequently used: twenty-one exemptions under section 1084 have been granted so far this year. These decisions are of great commercial significance to the applicants and involve a high policy content. It will be interesting to see how the AAT deals with appeals from these decisions, given that relatively few of its other jurisdictions involve decisions characterised by such commercial significance and high policy content.

It will take some time for corporate lawyers to become familiar with the availability and use of administrative review before the AAT. It will be a difficult decision for many corporate lawyers to advise clients to seek review of ASC decisions with a significant market sensitivity eg the decision of the ASC not to register a prospectus.

Licensing decisions

The third salient feature of the AAT's Corporations Law jurisdiction is the occupational licensing decisions and business licensing decisions. Investment advisers and traders in securities or futures, as well as auditors and liquidators of companies, must have licences in order to practise. These licences are granted under the Law, as is their revocation and suspension. Appeals from such decisions lie to the AAT. These appeals should be familiar ground to the AAT as it has a well established occupational licensing jurisdiction under the Air Navigation Regulations (for pilots) and under the Income Tax Assessment Act (for tax agents).

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THE NUMBERS

Bronwyn McNaughton*

Since mid-1990, the Senate has been following a new scheme of referring

bills to its standing committees for a consideration of the provisions of the bills. In fact, the orders of the Senate that establish the new scheme are very similar to orders that were already in existence, with one major difference. This difference is the Selection of Bills Committee, which recommends to the Senate which bills should be referred to committees, and when the committees should report back to the Senate on their examination of any bills referred. The Senate may adopt the report of the Selection of Bills Committee, and, if it does so, the bills are referred as recommended.

It was hoped that the new scheme would result in much more examination of bills by committees than had previously occurred. Although this kind of examination had been judged valuable in the past, it had not happened very often. In the main this had been because the referral of bills to committees had been considered to delay unduly the passage of the bills through the Parliament. But the Selection of Bills Committee, by nominating a reporting date that fits in with the proposed legislative time frame, is able to facilitate committee examination of bills within the constraints of the Senate's legislative program.

Certainly since the advent of the new procedures many more bills have been referred to committees. (Interestingly, however, many of these referrals have taken place under the old orders rather than the new!)

When a standing committee reports on a bill, it may make recommendations in relation to any amendments that have been put before it. Under the new procedures, the Senate has the option of adopting the report of the standing committee and, if it does so, amendments are made (or not) as recommended by the committee.

A problem with this arrangement is that the Senate's standing committees have a government majority although the Senate itself does not. This difference in the constitution of the committees and their parent body can place a particular burden on the standing committees when they are considering amendments and formulating their recommendations to the Senate. It is interesting to note how some committees have dealt with this situation.

A 'rule of thumb'

The Legal and Constitutional Affairs Committee has virtually adopted a practice of recognising the numbers in the chamber. When dealing with the Privacy Amendment Bill, for example, the committee accepted a long and complex set of amendments that had been negotiated by the spokespersons of the relevant parties, recognising the support each amendment would receive in the chamber and, in effect, ignoring the numbers in the committee room at the time. Similarly, the Committee explicitly acknowledged this 'rule of thumb' when dealing with the Crimes (Investigation of Commonwealth Offences) Amendment Bill and this was reflected in the recommendations it made in relation to that bill.

Other committees have had to deal with the same problem but it seems none of them have yet gone so far as to articulate a rule of thumb. Rather, they have relied on ad hoc circumstances,