THE STRUCTURE OF THE COMMONWEALTH MERITS REVIEW TRIBUNAL SYSTEM

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Introduction

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

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

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

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

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

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

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

ARC report

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Endnote

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