THE ADMINISTRATIVE DECISIONS TRIBUNAL - A LENGTHY GESTATION

*JW Shaw QC, MLC**

For the NSW Chapter of the Australian Institute of Administrative Law 1998 Seminar Series: Tribunals and their Relationship with Government, 20 July 1998.

Thank you for the opportunity to speak to you tonight on the topic of the Administrative Decisions Tribunal: A Lengthy Gestation.

It has indeed been a lengthy gestation and not without its fair share of obstacles along the way, however the Tribunal is about to come to term, with the legislation which conceived it (namely the *Administrative Decisions Tribunal Act 1997*) and give it form (namely the *Administrative Decisions Legislation Amendment Act 1997* and the *Administrative Decisions Tribunal Amendment Act 1998*) to be proclaimed to commence in stages starting on 6 October 1998 and its doors to open for business in a practical sense from that date. How have we got to this point in NSW?

I underestimated the weight of bureaucratic opposition which would be brought to bear against the proposal. I wrote (as a practising barrister) to then Attorney-General Terry Sheahan suggesting administrative law reform in 1987. I gather a discussion paper was generated as a result. But there was little evidence of subsequent activity. I should have then taken a lesson from the chronology of the (Commonwealth) *Administrative Decision (Judicial Review) Act 1977*. Mr Ellicott QC, the then Commonwealth Attorney-General, presented his second reading speech in April 1977. The Bill was assented to on 16 June 1977, but there was no proclamation for over 3 years, and the legislation did not commence until 1 October 1980.

There has been the will to bring to fruition a process which will provide for both rationalising the proliferation of tribunals in this State and extend existing rights for persons aggrieved by the decisions of government administrators as well as create new rights in this area.

The notion of good public administration requires acceptance of the following matters:

- lawfully made decisions;
- reasons to be given for decisions;
- available and accessible remedies and relief to correct wrong decisions: and
- a decision and review process which adheres to the principles of natural justice.

What can the ADT (Administrative Decisions Tribunal) do to assist in the achievement of this style of government? This evening I want to dwell on a specific feature of the Administrative Decisions Tribunal Act which I believe will propel the concepts of good government I have referred to from the theoretical into reality.

In considering the development of the Administrative Decisions Tribunal it is

* *JW Shaw QC, MLC is NSW Attorney-General, Minister for Industrial Relations and Minister for Fair Trading.*

interesting to consider differences between the ADT as established and some of the early proposals to establish a public administration tribunal. In particular it is apposite to note that the NSW Law Reform Commission, in its 1973 Report, *Appeals in Administration,* recommended against the introduction of a general statutory duty of administrators to give reasons because to do so "must so add to work loads and so interfere with the efficiency of public authorities that the disadvantages of adopting such a course of action must outweigh the advantages".[1]

Some of the early recommendations concerning administrative law reform have now been implemented, for example NSW has had an effective Ombudsman since 1975. Closer to home, the ADT will have a varied membership. It will be comprised not only of judicial officers and legally qualified persons but includes persons with expertise in particular areas of the ADT's jurisdiction.[2] However, in the case of merit review, it is notable that the attitudes towards decision-making in government have changed.

These changes are reflected in the *Administrative Decisions Tribunal Act 1997 (NSW),* which has also benefited from reviewing the experiences of the Commonwealth Administrative Appeals Tribunal, the Federal Court and the work of the Administrative Review Council.

For example, in the context of merit review, a key element of the ADT Act is the requirement for administrators to give reasons. These provisions overcome the common law in NSW as enunciated in *Public Service Board of New South Wales v Osmond* by then Chief Justice, Gibbs CJ, who stated that, contrary to the view of the NSW Court of Appeal and in particular the view of its then President, Kirby P:

> There is no general rule of the common law, or principle of natural justice, that requires reasons to be given for administrative decisions, even decisions which have been made in the exercise of a statutory discretion and which may adversely affect the interests, or defeat the legitimate or reasonable expectations, of other persons.[3]

In particular, section 49 of the *Administrative Decisions Tribunal Act 1997* (NSW) provides that if an administrator makes a reviewable decision, an interested person may make a written request to the administrator for the reasons for the decision and that the administrator is obliged to provide the same within 28 days of receiving such a request.

If the administrator is of the view that the person (being a person who is entitled under an enactment to make an application to the Tribunal for an original decision or a review of a reviewable decision (as the case may be))[4] is not entitled to a statement of reasons either because they:

- were not entitled to it[5] or,
- did not make the request within 28 days of receiving written notice of the decision[6] or,
- in other cases, did not make the request within a reasonable time of being notified of the decision,[7]

then they must notify the applicant within 28 days of the request of their refusal to provide reasons and the reasons for the refusal.

A person who is refused a statement of reasons by an administrator pursuant to section 50(1)(a) or (c) may apply to the Administrative Decisions Tribunal for an order that the person was or was not entitled to make the request or that they did make the request within a reasonable time, as the case may be.[8]

If an administrator does not provide a statement of reasons within 28 days then the Tribunal may be applied to for an

order that the administrator do so within a set time frame.[9]

I anticipate that the Tribunal will be mindful of the federal case law concerning like provisions in the federal jurisdiction when asked to adjudicate on these provisions.

As you will have noticed, section 49 of the *Administrative Decisions Tribunal Act 1997* diverges from its federal counterpart[10] with respect to the contents of the statement of reasons. It provides that the statement of reasons must set out:

- the findings on material questions of fact, referring to the evidence or other material on which those findings were based,
- the administrator's understanding of the applicable law, and
- the reasoning processes that led the administrator to the conclusions the administrator made.[11]

Given the similarity of sections 28 and 37 of the Commonwealth *Administrative Appeals Tribunal Act 1975* and section 13 of the *Administrative Decisions (Judicial Review) Act 1977* with sections 49 and 58 of the *Administrative Decision Tribunal Act 1997*, I do not think it is unreasonable to examine the case law concerning the like Commonwealth provisions for some clues as to what might be expected from a statement of reasons under the NSW *Administrative Decisions Tribunal Act 1997*.

In this context I draw to your attention to *Re Palmer and the Minister for the Capital Territory*.[12] In that case, in interpreting sections 28 and 37 of the *Administrative Appeal Tribunal Act 1975*, three members of the Administrative Appeals Tribunal found that sections 28 and 37 of the Commonwealth Administrative Appeals Tribunal Act 1975 arise out of the Commonwealth Parliament's intention that the citizen be fully informed of a decision maker's reasons for making a decision which

> is a right consequent upon the decision being made which is capable of being reviewed, and the reasons, when properly given, ensure that the citizen is sufficiently informed to determine whether he wishes to take the matter further, and if so whether to make representations to the Minister, proceed in the appropriate court of law or to seek a review by this Tribunal.[13]

It follows that to achieve this end the reasons must, in the words of Megaw J

> be reasons which will not only be intelligible but which will deal with the substantial points that have been raised.[14]

This interpretation of the federal provisions requiring reasons to be given in exercises of administrative decision making was extended by Woodward J in the Federal Court of Australia in *Ansett Transport Industries (Operations) Pty Ltd and another v Wraith and Others,*[15] where he cites with approval the decision in *Re Palmer* and continues:

> ...s 13(1) of the Judicial Review Act (Cth)[16] requires the decision-maker to explain his decision in a way which will enable a person aggrieved to say in effect: 'Even though I may not agree with it, I now understand why the decision went against me. I am now in a position to decide whether that decision has involved an unwarranted finding of fact, or an error of law, which is worth challenging.' (and) This requires that the decision maker should set out his understanding of the relevant law, any findings of fact on which his conclusions depend (especially) if those facts have been in dispute, and the reasoning processes which led him to those conclusions. He should do so in clear and unambiguous language, not in vague generalities or the formal language of legislation.[17]

These principles have most recently been developed in the context of the federal

judicial review legislation. In *Soldatow v Australia Council*[18] Justice Davies held:

> Section 13(1) requires proper and adequate reasons which are intelligible, which deal with the substantial issues raised for determination and which expose the reasoning process adopted. The reasons need not be lengthy unless the subject matter requires but they should be sufficient to enable it to be determined whether the decision was made for proper purpose, whether the decision involved an error of law, whether the decision-maker acted only on relevant considerations and whether the decision makers left any such consideration out of account.[19]

As you can see the NSW provision requiring reasons to be given has incorporated the decision in *Wraith* and developed in *Soldatow* and the cases cited therein.

Administrators may gain some solace from *Ansett Transport Industries (Operations) Ltd v Secretary, Department of Aviation*[20] (in the context of a statement of reasons pursuant to the Judicial Review Act), which provides that what amounts to a sufficient statement of the relevant law will depend on the circumstances, including the familiarity of the applicant with the legislative framework of the decision.

Like its federal counterpart, the *Administrative Decisions Tribunal Act 1997* also provides that, if an administrator gives an inadequate statement of reasons then the Tribunal may be applied to for an order that an adequate statement of reasons be given within a set time frame.[21] A statement of reasons is only adequate if it contains the matters set out in section 49(3) of the Act.[22]

Although it appears to be generally accepted that the quality of reasons statements required by the Commonwealth legislation has improved over the last 10 years, partly because of senior administrators becoming more aware of the legal context within which they make decisions,[23] I am concerned about the issue of motivating administrators to give reasons as required by section 49 of the *Administrative Decision Tribunal Act 1997* that will result in an interested person understanding how the decision was arrived at.

A further important element of the review jurisdiction of the Administrative Decisions Tribunal is that it expressly provides that the Administrative Decisions Tribunal is to give effect to government policy.

The experience in this area in the Commonwealth AAT demonstrates that there need not be any inherent conflict arising from an independent review body considering government policy.

It is accepted that the powers of the Commonwealth AAT extend not only to consideration of whether any government policy has been improperly applied but also to refusal to apply a policy in a particular case.

The Commonwealth AAT distinguishes between "core or political policies" and more general government policies and while it is required to make an independent assessment, it accepts the importance of consistency in administrative decision making, lending further weight to the application of an existing lawful policy.

This position was articulated by former Chief Justice Brennan when he was President of the AAT. In *Drake and the Minister for Immigration and Ethnic Affairs (no 2)*[24] he stated that generally the AAT should apply government policy.

He said:

> when the Tribunal is reviewing the exercise of a discretionary power and the minister has adopted a general policy to guide him in the exercise of the power, the tribunal will ordinarily apply the policy in reviewing the decision, unless the policy is unlawful or unless its application

> tends to produce an unjust decision in the circumstances of the particular case.[25]

However, he went on to say that to argue against the application of a policy in a particular case, "cogent reasons will have to be shown against its application, especially if the policy is shown to have been exposed to Parliamentary scrutiny".[26]

In preparing the Administrative Decisions Tribunal legislation the decision was made to specifically include a requirement for the Administrative Decisions Tribunal to have regard to government policy for two reasons.

First, for a decision-maker to rely upon the application of a policy to justify a decision it will be necessary that the policy is set down and available. Having the policies which inform decision making clearly identified and available will assist in ensuring the transparency of the decision-making process which is a key objective of the legislation.

Second, in the circumstances where a decision results from the application of a government policy it will in effect allow that policy to be tested in the Administrative Decisions Tribunal for its lawfulness and for the boundaries of its application so that its limits may be determined. A by-product of this is that decisions of the Administrative Decisions Tribunal will be taken into account when developing government policy and legislation. This will also work to improve the quality and consistency of government decision making.

The Administrative Decisions Tribunal will need access to all relevant documentation in order to reach the correct or preferable decision about the matter before it. Evidence of government policies may be provided by ministerial certificate. However the Act provides for the protection of the confidentiality of Cabinet documents and other exempt documents under the Freedom of Information Act and for the application of those parts of the evidence act which relate to privilege.

The interaction between the tribunal and the government can be expected to have a positive impact upon the way in which decisions are made in government. In this context it is worth bringing to your attention the objects of the Act as set out in section 3, and in particular 3(f) and (g) which provide that objects of the Act include

- fostering an atmosphere in which administrative review is viewed positively as a means of enhancing the delivery of services and programs and
- promoting and effecting compliance by administrators with legislation enacted by Parliament for the benefit of the citizens of NSW.

And, in the context of these objectives I believe it is worth considering Recommendations 71, 72 and 73 made in the 1994 Report (No 39) of the Administrative Review Council entitled *Better Decisions: review of Commonwealth Merits Review Tribunals* at Chapter 6, Improving Agency Decision Making. Primarily, this Chapter of the Report emphasises the importance of cultural acceptance of the benefits of merit review throughout an agency, as there is great potential for decisions of review tribunals to assist with better management and administration within agencies. The importance of the recommendations renders them worth repeating verbatim.

Firstly, Recommendation 71 says:

> All agencies should actively promote the potential beneficial effect of review tribunal decisions on the general quality of the agencies' decision making. As an important aspect of this, agencies should make a visible, formal and

real commitment to promoting that effect.

Recommendation 72 says:

> Agencies should ensure that their organisational structures are such as to maximise the potential beneficial effect of review tribunal decisions on the quality of agency decision making. Those structures should provide for:
>
> - appropriate levels of independence of legal policy and review staff;
> - effective communications systems; and
> - appropriate training for primary decision makers on the function and role of merits review in the decision-making process.

Recommendation 73 says:

> Agencies should be encouraged to respond to a review tribunal decision that has potential implications for future agency decision-making and where they consider the decision to be incorrect. They should:
>
> - amend their policy and guidelines, or seek to amend the law, to clarify the policy intention;
> - seek further review of the decision or appeal against it to a court; or
> - make a public statement of their position in relation to the review tribunal decision

I understand that some administrators may resist the need for a improving their decision-making in the face of the pressures of economic rationalism and organisational change within their own agencies. To these concerns I can do no worse than reiterate the views expressed in *Better Decisions* that:

> the objective of more cost-effective decision making is seen by some as being incompatible with the objective of improved quality of decisions, and improved client focus. To foster appropriate cultural change, it is important for agencies and their officers to accept that the two objectives are not incompatible and that they must be reconciled.

That administrative decisions should become qualitatively better (in terms of fairness, objectivity and reasonableness) is after all the classic task of administrative law. The NSW reform is a step in that direction.

Endnotes

1 New South Wales Law Reform Commission Report No 16 *Appeals in Administration*, Rec. 176 at p 75, although it did anticipate a requirement to give reasons in special cases, such as a licence needed for livelihood purposes.
2 Ibid, recommendation 150. The *Administrative Decisions Tribunal Act 1997 (NSW)* partially implements the recommendation.
3 (1986) 159 CLR 656 at 662
4 section 4(1) *ADT Act 1997 (NSW)*
5 section 50(1)(a)
6 section 50(1)(b)
7 section 50(1)(c)
8 section 51(1)&(2)
9 section 52(1)
10 Section 28 of the *Administrative Appeals Tribunal Act 1975 (Cth)*
11 Section 49 (3)
12 (1978) 23 ALR 196
13 Ibid. Fisher J (President), A N Hall (Senior Member) and C A Woodley (Member) at 206
14 *Re Poyser & Mills' Arbitration* (1964) 2 QB 467 at 478,
15 (1983) 48 ALR 500 at 507
16 Section 13(1) of the *Administrative Decisions (Judicial Review) Act 1977* substantially mirrors the requirement on administrators to give reasons for decisions
17 underlining added for emphasis
18 (1991) 28 FCR 1
19 Ibid. at 1. Justice Davies cited the following as authorities Re Palmer (1978) 23 ALR 196, Ansett Transport Industries (Operations) Pty Ltd V Wraith (1983) 48 ALR 500; ARM Constructions Pty Ltd v Commissioner of Taxation (1986) 10 FCR 197; Ansett Transport

Industries (Operations) Pty Ltd V Taylor (19870 18 FCR 498; Hatfield v Health Insurance commission (1987) 15 FCR 487; Dornan v Riordan (1990) 24 FCR 564 are cited as authority.

20 (1987) 73 ALR 193

21 section 52(2)

22 section 52(3)

23 Bayne P, Reasons, evidence and internal review, (1991) ALJ 65 101

24 (1979) 2 ALD 634

25 Ibid. at 645

26 Ibid.