ADMINISTRATIVE DECISION-MAKING — AN INSIDER TELLS

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You should be aware from the outset that I approach this subject and this occasion with a great deal of trepidation. My initial reaction was what is there, what can there be, that I can say that is new about administrative decision-making? But it got worse – 'An Insider Tells' – it suggests a titillating exposé of that which was previously hidden and is bound to have given rise to expectations I cannot hope to fulfil. I suppose it could have been worse – it could have been 'An Insider Tells All'. However, in thinking about it, I found there were some things I wanted to say from the perspective of an 'ex-insider'.

At this point I must make it clear that the views I express and reflect on are my own: I am not speaking for or on behalf of the Australian Public Service (APS) or the current management of any department or agency.

I am not going to define what is meant by 'administrative decision'. For the main part, but not exclusively, I relate it to program delivery decisions as distinct from decisions made in the policy making processes. Obviously, however, many administrative decisions are dependent upon decisions made in developing policy.

Most of the departments in which I spent my public service career were responsible for delivering very large programs. As a result one way or another I was involved in the introduction of the administrative law changes in the mid 1970s which I believe really did revolutionise decision-making in the APS. Indeed, the significance of those changes were emphasised to me by no less than my then Minister, one RJ Ellicott QC, so to say I was receptive to the changes hardly does justice to his powers of persuasion or my good sense.

Much of the history of that revolution has been canvassed fairly recently in celebrating the 20th anniversary of the Administrative Appeals Tribunal (AAT),[1] and more recently the 25 years of administrative review generally.[2] The only thing I would wish to add is that from my point of view, as even administrative revolutions go, it was a fairly bloodless affair: most of us knew change was both desirable and inevitable. Certainly we had concerns: we were moving out of our comfort zones,

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could we manage the task? Would we get the resources? Where would it all end? Well – we coped – the sky did not fall on us. There will be different views as to how well we coped but in my opinion, and to borrow from my very favourite Minister, Jim Hacker, we did 'alright' and decision-making in the APS, and therefore the AFP itself, is more professional as a consequence.

It is worth noting that review of administrative decisions did not spring out of nothing. Even in the APS some of the changes were anticipated. In the Social Security portfolio the Social Security Appeals Tribunal has been established. My own Department at the time, Capital Territory, which, as a federal department, had responsibility for a wide range of local and state government type functions, had done a considerable amount of work on reviewing decisions, particularly in the area of rating appeals.

In part, those anticipatory moves were responses to the development of increasingly effective and well resourced 'lobby' groups able and willing to debate aggressively with government both about policy and program delivery. Not surprisingly, there was an accompanying enthusiasm for challenging the role and authority of public servants. The result was a demand for better mechanisms both to air and resolve the issues and this is what the reform package delivered, but it also had other consequences.

It is now hard to believe that, generally speaking, until quite recently there was little demand within the executive government for any real measurement of the effectiveness of program delivery and therefore of the policy those programs delivered. In my opinion, this was a failing critical to better administrative decision-making, amongst other things. I think that it stemmed, at least in part, from a class distinction within the APS between 'policy officers' and 'program officers'. The policy advising role was, and to some extent still is, seen to be the important work of the APS. Once the policy was decided the real work was done: the delivery processes were a matter of mechanics and it could be left to the technicians to fill in the details. The technicians, basically those who make the bulk of the administrative decisions, were generally speaking less highly regarded and that was reflected in their pay and conditions, including their career prospects.

Over fairly recent times that too has changed, although there are some vestiges of the old traditions and attitudes, particularly within the so-called central policy departments of Prime Minister and Cabinet, the Treasury and the Department of Finance. The truth is, of course, that the roles are interdependent and equally important in terms of outcomes.

The focus on administrative decisions brought about by the reforms was significant in focussing the demand for measurement of the effectiveness of programs which in turn shone the spotlight on policy formulation.

Almost certainly, because I was involved in it, I think one of the more interesting developments in the area of the management of the policy, program development and delivery continuum has been the creation of Centrelink, principally out of the program delivery roles of the old departments of Social Security and Employment, Training and Youth Affairs.

On the surface, the creation of Centrelink as a specialised delivery agency could be seen as a deliberate separation of the responsibility for policy development, which remained with Departments, and program delivery. Indeed sadly, and contrary to the original intention it does appear at least to an outsider that it has developed somewhat along those lines. What was intended was that the Department would remain ultimately responsible for both policy development and implementation: that is they would remain accountable to government for the effective delivery of the policy whatever the delivery mechanism; in this case delivery was in effect 'contracted out' to Centrelink.

From my point of view, what is important about the Centrelink model is the opportunity it presented by providing, within the structure of government, a common delivery mechanism to achieve a partnership through greater cooperation, initially between two departments often serving common clients in overlapping programs and often without appropriate regard for the impacts of their policies on those clients.

It also promised some economies of scale, provided opportunities for the development of staff in cross-program and an experimental alternative to contracting out to the private sector with its attendant difficulties – an issue fairly recently considered by the Administrative Review Council (ARC).

As a program delivery model, Centrelink provides a useful focus for some general observations about the decision-making process.

I hope it will not come across as a surprise that one thing that is drilled into decision-makers at all levels and across all functions in the APS is that they should act 'according to law': the rub is for them to know what is, and what is not, 'according to law'. Much time and effort is spent in trying to answer just that question. Staff involved in program delivery functions receive training and are also provided with guidance through a profusion of manuals and instructions. Help desks and other points of reference are available to provide assistance and answer queries. Before elaborating on those aspects, however, allow me to remind you of the context in which many of those decisions are made. I will again use Centrelink as my model.

Currently annually Centrelink spends about $54.5 billion on programs: it has some five million (plus) clients and processes about six and a half million new claims which result in some nine and a half million new entitlements. The day to day situations counter-staff deal with are often complicated both in terms of the application of the legislation in the circumstances presented and in ensuring that they observe all the other requirements necessary to achieve a valid decision, for example, that they observe the rules of natural justice. Their clients with whom they are face-to-face are often emotional, sometimes disturbed, usually, and not surprisingly, without much understanding of the issues but confident of their right to assistance. Although there is no 'darg', on average staff can only afford about 15 minutes with each client. These are not lawyers or senior officers making these decisions, they are usually junior to middle ranking public servants. Of course, they can in appropriate circumstances refer cases to more senior officers but that has to be the exception not the rule if the system is to work.

Those are facts, not excuses. It is not about numbers. The objective in terms of program delivery is to ensure that claimants receive what they are entitled to: with the corollary that persons who have no entitlements do not receive benefits. I suspect that the number of wrong decisions, on both sides of the ledger, is still too high.

This was demonstrated in the *2002 Review of Breaches and Penalties in the Social Security System* undertaken by Professor Dennis Pearce AO, Professor Julian Disney AO and Heather Ridout.[3] That review identified that while the existence of phrases such as 'reasonable steps', 'reasonable excuse', 'without sufficient reason' and 'special circumstances' in the relevant legislation indicates that the Parliament intended to guard against arbitrary and unfair imposition of penalties:

> in practice … insufficient investigation and consideration of reasons and surrounding circumstances have often prevented achievement of this intention.[4]

The Review arose following ACOSS research released in 2000 that showed that the number of breaches issued and penalties imposed as a result of those breaches had trebled over a 3 year period from 1998. The ACOSS research also indicated that a high proportion of decisions to impose a breach were overturned at all stages of review – ranging from 22% of decisions to impose administrative breaches being overturned on internal review to 47% of activity test appeals being overturned at the AAT.[5]

I would not wish my referring to this material which relates to one area of decision-making to be construed as an attack on the system, as a whole. But it does indicate that the need for an active and relevant review system remains (and the high overturn rates indicated to some extent that the system does work).

Already very considerable efforts are made across the APS to provide appropriate training in decision-making. Most of that training is conducted at agency level. Increasingly it is continuous, modular, and much of it computer based with satisfactory completion at various levels as a condition of advancement. Statistically sound systems are used to check decisions randomly and there are elaborate internal review processes for both decisions and complaints. The latter are due in no small part to the activities of the Commonwealth Ombudsman who has established their existence as one of his benchmarks for departments and agencies. The resultant drop in his case load has enabled him to initiate more 'own motion' reviews of systemic problems not least in the area of administrative decision-making. All of those mechanisms are in addition to the external reviews of decisions, including, of course, judicial review in appropriate cases.

All the training and manuals and guides are only effective in achieving the right results if they are sound. As I have already intimated, one of the problems is the sheer amount of material provided. Information overload is a real problem in many departments. However, I must say that does not stop people at all levels adding their views as to what is, what should be, and how it should be done. That said, in my opinion, proper instruction in decision-making is an area that should be further developed. Perhaps a guiding principle should be 'less not more'.

Getting decisions right does of course involve resource issues. I am fairly confident that a business case for more resources to avoid or recover wrongly paid benefits would have a good chance of success. I am less confident that support would be as forthcoming for more resources to achieve better decisions which would increase outlays.

In the context of improving guidance to decision-makers it has been very helpful where review bodies actually look at the materials relied upon in the decision-making processes and themselves offer guidance as to content or expression. However, I understand that that too involves resource issues.

In general, decisions which demonstrate some understanding of and sympathy to the original decision-making process are more useful in changing attitudes and establishing better approaches amongst decision-makers. The recent 'de-emphasising' of process has not improved decision-making. There can be no argument that the result is what is important and that process should seldom, if ever, be an end in itself: but process is both a guide and a way to achieve more disciplined and consistent results that are more likely to be right. It would be a mistake to regard 'proper processes' as antiquated bureaucratic concepts (it is after all the basis of much of the grounds of judicial review). But the drive for proper processes as well as increasing the support for decision-makers (avoiding information overload) has taken a modern twist with the development of expert systems to guide administrative decision-making. (Such systems seek to provide an automatic and logical process for identifying the relevant facts and law, and for the application to them to decision-making.) These systems are currently employed in a number of Commonwealth agencies.[6]

It is therefore timely that the ARC is conducting an investigation into such systems, which will consider issues such as:

- the desirable qualifications and subject knowledge for designers of rule-base systems;
- the appropriate procedures for testing the accuracy of the rule-base and how accuracy can be reasonably assured;
- who should audit the relevant computer programs?;
- whether there should be opportunities for independent scrutiny of the rule-base before it becomes operational and for regular on-going scrutiny, and who should undertake and fund such scrutiny?;
- how is the possibility of error or manipulation by officers minimised?;
- what is the best means of ensuring that the rule-base is kept up-to-date?

We now have what I would describe as a fairly robust jurisprudence in the area of administrative decision-making. However, to suggest that the issues are settled, that the task is done, seems to me to ignore the likely direction, growth and challenge of and to administration and therefore decision-making. It seems to me for example that

many of the administrative consequences of 'globalisation' have yet to be seriously felt in Australia, but based on experience in the areas of trade and the environment, to nominate but two, they are likely to be profound. Similarly, as the concepts of natural justice continue to be built upon there will be continuing consequences for administration and administrative decisions. The area of contracting out, although at last recognised as not the universal solution to everything, has its valuable place and despite the work done by the ARC[7] – or perhaps because of it – I think it is likely to give rise to more problem issues in the area of administrative decisions.

All that said, however, the area of most friction is still in my opinion the inherently different approaches adopted by tribunals and by agencies, including departments, to the weight to be given to policy in the decision-making process. Much has already been said elsewhere on this issue, and it has of course received its fair share of judicial attention, but this fundamental problem remains. It is rooted in the fact that from an agency point of view the task is to deliver the program to achieve the intention of the relevant policy. In developing that policy an agency is bound to 'act according to law' but otherwise it is duty bound to give effect to the intentions of the government and, unlike the experience of some tribunals, agencies do not have great difficulty in determining those intentions. That is of course in large part because they are involved in the formulation process and where, as is usually the case, the policy is legislated they are involved in the drafting of the law. They 'know' what was intended. Policy to them is not just one of a number of matters to which regard is to be had. It is the reason for the program and unless and until it, or the expression of it, is clearly declared unlawful they will give it effect.

Another factor which weighs heavily with delivery agencies is the ability to apply the policy across the target group, ie action the program with certainty across the relevant population. That too is usually an important policy objective.

That a perception of what constitutes justice in an individual case can and should override what is to them the clearly identifiable policy intent of a program, usually expressed through legislation, when the original decision can be supported in terms of the statute is a source of irritation and concern to administrators.

It is somewhat ironic that the mechanisms which were designed to enable decision-makers to avoid unconscionable results in particular cases, namely discretions, have been largely taken away. Perhaps that is what really irks administrators: that that need is now being met on review by someone's view of what is a 'preferable' decision, often it seems without much regard to the consequences or the policy. However, it is worse when justice in an individual case is achieved through imaginative interpretations of a statute, sometimes by reference to the general intent of the legislation, when quite obviously the legislation has a number of quite valid intentions, some quite inimical to the 'general intent' relied upon. The other aspect which I think raises some interesting issues is the distinction between and treatment of the facts of a case and appreciation of the law, as if they were separable in the decision-making process.

Of course, the usual response to criticisms of decisions of that sort by review bodies is that if the government does not like them, it can seek to change the law. If the decisions are of major consequence that is true but generally speaking it takes a

long time to change the law. Any suggestion that it can be done routinely is either naïve or suggests a cynical exploitation of the realities. Those concerns are heightened when the upset is caused after the law has been 'accepted' by relevant tribunals for some time.

It is perhaps interesting to speculate whether any Government will patiently sit by and watch bodies, which have at best very limited accountability when it comes to the expenditure of public moneys, exercise what are effectively discretions in ways which are not only inconsistent but at times inimical to the policy intention. The interests of government policy exercised in the common good is sometimes seen as being more important than the interests of the individual – and sometimes it is. Involved are absolutely fundamental but sometimes competing issues: effective Government, accountability and independence. None of those words, or the concepts they encapsulate, are free from ambiguities and as history shows they are not immutable.

In the final analysis it will be public acceptance that will determine within a society the shape and discretion of dispute resolution. In that regard I believe that we live in 'interesting times'. I look forward to the constructive role that courts and tribunal as well as expert bodies such as the ARC will play in the ongoing development of more effective, administrative decision-making in those times.

Endnotes

1 See, The AAT: Twenty Years Forward, ed John McMillan, AIAL, 1998; Administrative Appeals Tribunal, AAT Essays 1976-1996, ed Peter Bayne, AAT, 1996.
2 The Kerr Vision of Australian Administrative Law - At the Twenty-five Year Mark, ed Robin Creyke and John McMillan, Centre for International and Public Law, ANU, 1998.
3 Deputy Chief Executive, Australian Industry Group.
4 Report, para 1.51.
5 Australian Council of Social Service, press release, 23 March 2000.
6 The Departments of Veterans' Affairs, Defence, and Family and Community Services, Comcare, Environment Australia, ARC and Centrelink.
7 Report No. 42: 'The Contracting Out of Government Services', ARC, 1998.