F O C U S

On 7 June 1989 the Chief Justice of the High Court, Sir Anthony Mason, presented the ACT Law Society Blackburn Lecture on matters of current interest in the Commonwealth administrative review system. Sir Anthony was involved in the development of the administrative review package as a member of the Commonwealth Administrative Review Committee ('the Kerr Committee') during the period 1968-71. With the Chief Justice's permission, an edited version of his lecture is provided here.

Administrative Review - the experience of the first twelve years

The federal system (of administrative review) incorporates features of the review structures of the United Kingdom and the United States. The four elements in the federal system are: (1) the Administrative Review Council ('the ARC'); (2) review by the Ombudsman; (3) judicial review under the Administrative Decisions (Judicial Review) Act 1977 (Cth) ('the ADJR Act'); and (4) review on the merits by the Administrative Appeals Tribunal ('the AAT').

There is also a fifth element - the creation of an obligation by s.13 of the ADJR Act and s.28 of the Administrative Appeals Tribunal Act 1975 (Cth) on the part of the decision-maker to furnish, on request by a party affected by a decision, a statement setting out findings of fact, referring to the material on which those findings were based and the reasons for the decision. The creation of this obligation, along with the subsequent enactment of the Freedom of Information Act 1982, was a dramatic advance in arming the individual with effective remedies in the overall scheme to ensure administrative justice. Previously, the absence of a general duty to give reasons meant that the administrator could, and sometimes did, frustrate judicial review of a decision by refusing to give reasons.

The obligation to give reasons enabled the issues to be defined and opened the way to the remedy of discovery, giving access to information available to the decision-maker. The imposition of the obligation has another and wider importance. It leads to more reasoned and principled decision-making. Yet bureaucratic objections to the requirement were, so it is said, the reason for delay in the coming into operation of the ADJR Act. Although those objections may linger on, it is tempting to think that reasoned and principled administrative decisions are an indispensable element in a modern democracy.

The AAT was established with a general jurisdiction because it was thought the exercise of jurisdiction by such a tribunal, instead of a miscellany of specialist tribunals, would standardise principles and procedure, thereby enhancing the administrative process and the knowledge and understanding of professionals and laymen alike. That object has been largely achieved. Unfortunately, as the AAT is not a court, it has not

always followed its own decisions. Likewise, its decisions have not always been treated as precedents to be followed by decision-makers at lower levels. Inconsistency is a legitimate ground of criticism of any system of justice.

As was to be expected, the new system has generated criticism. The most fundamental criticism is the claim that it is undemocratic. Other objections are that the system is too favourable to the individual and too insensitive to policy or government interests, that it is too expensive and inefficient and that it has made administrative decision-making inefficient and more complex.

The anti-democratic objection

In its widest form the anti-democratic objection questions the legitimacy of any form of review of administrative action. But in its strongest form the attack on legitimacy is directed to review by the AAT, particularly of Ministerial decisions. The objection is important and requires an answer.

Administrative review owes its place in a modern democracy to the vast expansion of the administrative decision-making process. New techniques in regulatory control and participation constitute a marked departure from the nineteenth century model which looked to government enforcement of legislative policy through court adjudication. Administrative action began to replace legislative enactment and judicial adjudication in creating legal rules and also in resolving legal disputes.

The standard response to this problem is that the electorate, through its elected representatives, controls the Executive and the actions of administrators. This is a gross overstatement. Although Parliament has the capacity to control the Executive and administrative action, that capacity is exercised to a limited extent only. Indeed, there are those who assert that the Executive controls Parliament. There is a very large measure of truth in that claim, as is implicit in the practice of legislation by Ministerial pronouncement - the legislation when enacted being backdated to the Ministerial pronouncement - and explicit in the growing tendency in legislation to leave matters to be prescribed by regulation or by Ministerial guidelines. Although the federal government cannot always count on majority support in the Senate, the Executive can generally rely on Parliamentary support and approval, and this no doubt encourages politicians and administrators to believe that their decisions have electoral backing and authority.

But the blunt fact is that the scale and complexity of administrative decision-making is such that Parliament simply cannot maintain a comprehensive overview of particular administrative decisions. Parliament's concentration on broad issues and political point-scoring leaves little scope for oversight of the vast field of administrative action. And in Australia the doctrine of individual ministerial responsibility, which was once a valuable sanction compelling sound administrative action, is in decline. Inefficient, even incompetent, action or inaction by a government department or statutory authority is no longer regarded as a matter for ministerial resignation. The decay of the doctrine of

ministerial responsibility appears to be the consequence of a perception that it is beyond the capacity of ministers to oversee all that is done by their departments or the statutory authorities for which they are responsible. What is beyond the capacity of the minister is certainly beyond the capacity of Parliament.

The fact that Parliament has vested the decision-making process in an administrator does not mean that review of his decision is anti-democratic. After all, Parliament has provided for review by the various means available under federal law. Moreover, Parliament can, as it sometimes does, incorporate a statement of policy or criteria in the statute; it can provide for the giving of a Ministerial direction binding on the decision-maker and on the AAT; and it can exclude review by the AAT. Quite apart from these arguments, which rest on legislative power and exercise of that power, there is the paramount consideration that review is essential to ensure that the individual obtains administrative justice. Administrative justice is now as important to the citizen as traditional justice at the hands of the orthodox court system. Viewed in this way, judicial and Tribunal review of administrative decisions is simply one of the checks and balances indispensable to our democratic constitutional structure.

Insensitivity to government and policy interests

It is a natural reaction on the part of the administrator and the politician to think that the new system is too favourable to the individual. They are not attuned to review of their decisions by an impartial adjudicator. They are not independent and they view a case from the perspective of government. The attraction of judicial review and of Tribunal review on the merits is that they offer justice to the individual by means of independent adjudication. Politicians and administrators profess an enthusiasm for independent adjudication - but all too often their preference is for an outward form of independent adjudication which defers to government policies and attitudes. Sceptics regard government acceptance of independent adjudication as a concession to the esteem it enjoys in the public mind.

The extent to which particular tribunals act independently of government must vary considerably. One of the unresolved problems of administrative justice is that we have failed to evolve principles spelling out the circumstances in which a decision-maker must act independently of political direction or influence, as compared with those in which he is subject to such direction or influence.

But it is clear that the AAT is a Tribunal in the judicial mould; its independent character is reinforced by the absence of any statutory restriction on its capacity to review policy. Unquestionably there is a tension between the independent character of the Tribunal and an expectation or belief on the part of some administrators and politicians that the Tribunal should defer to government policies. This tension has been evident in deportation cases where the Tribunal and, on appeal, the Federal Court have set aside administrative decisions, including Ministerial decisions, based on government policy. As

the Tribunal determines the rights of individuals, there are strong reasons for not compromising its independence.

Executive policy is enunciated in various forms and at various levels of government. It is one thing to say that the Tribunal should respect policies determined at Cabinet or Ministerial level that relate to international affairs or the national economy. It is a very different thing to say that the Tribunal should respect a policy determined at departmental level or defer to a decision which is expressed to be based on a particular policy, when the connection between the facts of the case and the stated policy is tenuous. It is difficult to devise an immunity for decisions based on government policy which would apply across the board, yet conform to an acceptable standard of justice to the individual.

Expense and inefficiency

The adversary system of justice, as we know it, is a high cost system. The impact of high costs was not so noticeable in an era when the system made no pretence of catering for the needs of those who could not afford it. But this changed as the system extended with the object of servicing the community generally. And the impact has become even more noticeable as the costs of litigation soar beyond the reach of the ordinary citizen and as governments become reluctant to pick up the rising bill for legal aid as well as the increasing costs of financing the network of administrative tribunals as well as the orthodox court system.

In the context of administrative review, this reluctance is sharpened by a feeling that the adversary system has resulted in excessive formality and undue emphasis on lengthy technical and legalistic arguments, as well as the delays and problems caused by inadequate preparation of cases. There is a view that lawyers appearing before the Tribunal are not always equipped to handle the policy and administration issues which arise. If that criticism is well-founded - and my experience does not enable me to confirm or deny it - it is a reflection on the education and training of lawyers and an indication that the Tribunal is not obtaining the assistance which it deserves.

These perceptions, critical of the present system, need to be overcome. Otherwise there is the risk that an extreme reaction may prejudice the cause of independent review. Unfortunately, in the prevailing climate of economic rationalisation and managerial efficiency the intrinsic virtue of justice to the individual does not figure as the paramount goal. Complaint about high costs as a barrier to access to the courts and tribunals is entirely legitimate, but the remedial measures often suggested are primarily designed to reduce the cost to government, not the cost to the citizen who seeks a remedy in respect of an alleged injustice.

Concluding comment

I should make some final reference to the impact of the new system on the administrative process. Critics say that, as a result of the new system, the administrative process is more time-consuming and more costly than it was before. But it can

scarcely be a legitimate point of criticism that more attention is now given to the authority of the law, to the need to give the citizen an opportunity to put his side of the case and to the statement of reasons for a decision. If these innovations have a price in time and additional cost then, within proper limits, it is a price well worth paying, so long as we obtain a greater measure of administrative justice. Despite the criticism of inconsistency to which I have already referred, the new system has contributed to a greater measure of administrative justice in its insistence on compliance with the rules of natural justice, its careful scrutiny of the reasons for decision, its emphasis on the justice of the case and its success in making the principles and procedures of review more uniform. These are the enduring benefits of independent review. No other system has been suggested that could provide them in the same measure.

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R E G U L A R R E P O R T S

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Administrative Review Council

NEW ADDRESS AND TELEPHONE NUMBER

The Administrative Review Council has changed its telephone number and postal address. Please note the new telephone number and postal address shown on the front cover.

REPORTS

Report No. 32, The Administrative Decisions (Judicial Review) Act: the ambit of the Act, was tabled in Parliament on 8 June 1989. Copies are available from AGPS outlets for $11-95.

LETTERS OF ADVICE

Since the April 1989 issue of Admin Review the Council has provided the Attorney-General with letters of advice on the following issues:

- Proposed Commonwealth-State Agreement: Supported Accommodation Assistance Program
- Migration Legislation Amendment Bill 1989;
- review of decisions under the Therapeutic Goods Bill.

CURRENT WORK PROGRAM - DEVELOPMENTS

Access to administrative review. Work on the next stage of the access project, on the role of information and advisory services, has been temporarily put aside to allow the Council to examine further the issue of legal aid in administrative review. The Council previously considered some aspects of this