

REGULAR REPORTS

Administrative Review Council

Reports, submissions and letters of advice

Since the last issue of *Admin Review*, the Council has provided letters of advice or made submissions to:

- the Corporations Law Simplification Task Force within the Treasury, on that part of the Task Force's consultation paper, *Takeovers: Proposal for Simplification*, dealing with review by the AAT of decisions of the Australian Securities Commission;
- the Office of Indigenous Affairs within the Department of the Prime Minister and Cabinet in respect of the discussion paper, *Towards a more Workable Native Title Act*, which sets out the Government's proposals for the amendment of the *Native Title Act 1993* (the Council's submission responded to that part of the paper dealing with decisions by the Registrar to register claims);
- the Senate Standing Committee for the Scrutiny of Bills concerning the time period for parliamentary disallowance of a ministerial instrument under the *Wool International Act 1993* proposed by the Primary Industries and Energy Legislation Amendment Bill (No 1) 1996;
- the Attorney-General on merits review of decisions under the Corporations Law;
- the Federal Bureau of Consumer Affairs within the Attorney-General's Department in response to the paper, *Government Service Charter Initiative: Principles and Guidelines for Developing a Service Charter*;
- the parliamentary inquiry by the Senate Legal and Constitutional Legislation Committee into the role and function of the Council (discussed separately below);

- the Attorney-General's Department in response to the discussion paper, *Privacy Protection in the Private Sector*, concerning the extension of an information privacy regime to the private sector; and
- the Attorney-General's Department in response to an invitation to comment on Report 78 of the Australian Law Reform Commission, *Beyond the door-keeper: Standing to sue for public remedies*.

Current work program – developments

Contracting out of government services

Competitive tendering and contracting is a major response to the need for greater efficiency in the way governments operate. While contracting out has been an integral part of government service delivery for some time in certain areas, the extent to which it is being used by governments is increasing and more and more areas of service delivery are being examined for their suitability for contracting out. Some governments have even set statutory targets for the percentage of business that is to be subjected to competitive tendering and contracting.

The Council's decision to undertake a project on contracting out was brought about by the need to examine the new directions administrative law may need to take in light of these changes if it is to remain responsive to the needs of the community and of government.

The Council is examining in what circumstances federal administrative law and/or other safeguards should exist to preserve appropriate government accountability where services are provided to the community on behalf of government by private sector contractors. It is also examining whether federal administrative law remedies (and/or other safeguards) should be available to members of the public to seek redress from private sector contractors providing services on behalf of the Commonwealth Government. In considering what safeguards and remedies should be available, the Council

will take into account the potential costs and benefits that might result from the provision of these remedies and safeguards and the ways in which those remedies and safeguards should be provided, such as through legislation, contractual arrangements or by other means.

The Council has identified two major questions:

- whether the concepts and objectives of Australian administrative law can appropriately be applied where government services are not delivered directly but are contracted out for delivery by the private sector; and
- to the extent that the objective underlying administrative law concepts remain appropriate, should they be achieved by:
 - expanding or varying the coverage of existing administrative law;
 - relying on the normal disciplines of the market place; or
 - developing new processes, concepts or arrangements.

The Council will shortly be releasing an issues paper for consultation purposes. Anyone who would like a copy of the issues paper should contact Mary Roberson by phone on (06) 257 6113. For further information on the project, please contact Sue Bromley by phone on (06) 257 6144 or Gabrielle Mackey by phone on (06) 257 6114.

The Council notes that the Senate Finance and Public Administration References Committee has recently announced that it is undertaking an inquiry into contracting out of government services. The Committee is looking at public accountability of all government services provided by private contractors and has a different focus than the Council's project. The Council will be maintaining contact with the Committee to ensure that the inquiries complement one another.

The Committee has released its terms of reference and invited written submissions on those terms by 8 January 1997. The Committee

Secretary, Derek Abbott, can be contacted by phone on (06) 277 3530. For more detail on this inquiry, see Admin Law Watch.

Internal Review

The Council has an interest in promoting better administrative decision making generally. It considers that internal review as well as external review of government decisions can affect primary decision making and has resolved to undertake a project on internal review.

Internal review issues arose and generated interest in the context of the Council's review of Commonwealth merits review tribunals. However, the Council was unable to undertake a comprehensive examination of internal review within the context of that review. While the Council was aware that many of the issues dealt with by the Council in its *Better Decisions* report may also be relevant to internal review of decisions, that report dealt with internal review issues in a peripheral way only. The Council concluded that it is generally a matter for agencies to determine what internal review processes are appropriate, having regard to any factors that are specific to their decision-making environment.

The Council is now considering how best to approach this subject and would be interested in receiving informal comments. Further information on this project can be obtained from Charles Beltz by phone on (06) 257 6115.

AAT review of decisions under the Corporations Law

The Council has finalised its examination of the appropriateness of administrative review of decisions made under the Corporations Law.

All decisions taken under the Corporations Law by the Minister, the Australian Securities Commission and the Companies Auditors and Liquidators Disciplinary Board are subject to review by the AAT unless specifically exempted. This general conferral of a right of review has caused some confusion and generated some criticism.

The Council has considered whether some decisions or classes of decisions should be exempt from merits review. The Council has forwarded a letter of advice to the Attorney-General on this subject rather than producing a project report. Letters of advice are generally published in the Council's annual reports.

Appeals from the AAT to the Federal Court

In May 1995 the Council published a discussion paper to consider whether the provision that governs appeals to the Federal Court from the AAT (section 44 of the *Administrative Appeals Tribunal Act 1975*) should be changed. The concerns that led to the preparation of the discussion paper arose initially in the tax and subsequently the patents areas of the AAT, although any change to the provision governing appeals from the AAT to the Federal Court could cut across all review jurisdictions of the AAT. While the paper was directed to all persons interested in the AAT's activities, there may be reasons why tax, patents or other types of decisions should be treated separately from the remainder. In a nutshell, the discussion paper asked:

- whether the ground of appeal from the AAT to the Federal Court should be broadened;
- whether the Federal Court should be given a discretion to determine questions of fact where it finds on appeal that the AAT has made an error of law;
- whether the President of the AAT should be given a discretion to refer whole cases to the Federal Court for determination; and
- whether any change to AAT appeals or referrals should be general or be limited to particular AAT review jurisdictions.

The Council received some 30 submissions in response to the discussion paper.

As advised in the last edition of *Admin Review*, the Council is awaiting a High Court decision in a case which involves, in part, what constitutes a 'question of law' for the purposes of section 44. Further information on this

project can be obtained from Charles Beltz by phone on (06) 257 6115.

Administrative review of patents decisions

In January 1994 the Council published an issues paper, *Administrative Review and Patents Decisions*. The central issue raised in the issues paper was the appropriateness of the current arrangements for the review of decisions made by the Commissioner of Patents. Some of these decisions are currently reviewable by the AAT, others by the Federal Court and there are decisions that are currently not subject to review at all.

Many issues raised in this project overlap with issues raised in the Council's project on the review of appeals from the AAT to the Federal Court. The project will be finalised with the section 44 project. Further information on this project can be obtained from Gabrielle Mackey by phone on (06) 257 6114.

Senate Committee review of the ARC

Background

Since the last issue of *Admin Review* a parliamentary review of the Council has commenced. The review was initiated by a reference on 18 September 1996 from the Senate to the Senate Legal and Constitutional Legislation Committee (the Senate Committee). The matters for inquiry and report by the Senate Committee are:

"The optimal role and function of the ARC and the relationship between the ARC and other relevant bodies including, but not limited to, the Attorney-General's Department, other Commonwealth departments, Commonwealth merits review tribunals, the Australian Law Reform Commission, tertiary institutions, the private sector, and territory and state agencies, with particular reference to:

- (a) the benefit of a separate and permanent administrative law advisory body;

(b) the membership structure of the ARC;

(c) the functions and powers of the ARC;

(d) the effectiveness of the ARC in performing its functions and any obstacles to that effectiveness; and

(e) the need for any amendment to Part V of the Administrative Appeals Tribunal Act.”

A number of people and organisations have made submissions to the inquiry. The original reporting date was the last day of 1996, but this has now been extended until the last parliamentary sitting day in June, 1997. As a result the deadline for submissions is now 20 February 1997. Anyone wishing to make a submission should send it to the Secretary, Senate Legal and Constitutional Committee, Parliament House, Canberra ACT 2600.

For further information about this inquiry, contact the Senate Committee’s Research Officer, Steve Curran by phone on (06) 277 3562.

Council submission

The Council has provided a detailed submission to the Senate Committee and is interested in further assisting the Committee by promoting discussion of the Council’s role and functions. To this end, the Senate Committee has advised the Council that it may reproduce in *Admin Review* the Executive Summary of its submission.

The Executive Summary reads as follows:

The Administrative Review Council as Part of the Administrative Law System

The Administrative Review Council is an integral part of Australia’s federal administrative law system. This system, regarded as a model by many overseas commentators, is integrated, comprehensive, efficient and harmonised, but it can be made even better.

The Council welcomes the opportunity offered by this review to seek the Committee’s

endorsement of the new direction the Council charted for itself earlier this year. Following the appointment of Professor Marcia Neave as President of the Council and the appointment of a new Attorney-General, the Council saw that the moment was opportune to reflect upon its achievements and to develop priorities for the future.

Commonwealth administrative law has two fundamental roles to play:

- improving the quality, efficiency and effectiveness of government decision-making generally; and
- enabling people to test the lawfulness and the merits of decisions that affect them.

As a result of a two-day ‘Retreat’ held in May, the Council concluded that although the first of these roles has always been recognised, it has not always been given as much attention by the players in the administrative law system as it warrants.

The Council believes that it has an important role to play in implementing this shift in focus. It has therefore developed a number of strategies to that end, and the Council looks forward to playing a positive role in implementing these strategies.

Every day Ministers and other public officials make decisions which have a direct impact on hundreds of thousands of people. In the 20 years since its establishment, the administrative law system has increased government accountability and significantly improved the quality of government decision making, by requiring reasons to be given for decisions, by allowing unlawful, procedurally unfair or inappropriate decisions to be challenged without technicality and by giving the public access to government information. The administrative law system has been accepted by the government and citizens alike as an integral part of this country’s democratic system. The key elements of the administrative law system are:

- judicial review by the High Court under the Constitution and by the Federal Court under the *Judiciary Act 1903*;

- codified and simplified judicial review of the lawfulness of most statutory administrative decisions through the *Administrative Decisions (Judicial Review) Act 1977* (the AD(JR) Act);
- a requirement that reasons be given for administrative decisions covered by the AD(JR) Act;
- merits review by an independent tribunal of many statutory administrative decisions;
- an Ombudsman to investigate government maladministration;
- broad rights of access to government-held documents, and a right for an individual to update or correct government-held personal information, under the *Freedom of Information Act 1982* (the FOI Act);
- regulation of the use and storage of information about individuals through the *Privacy Act 1988* and the *Archives Act 1983*;
- obligations of a substantive and procedural kind to ensure there is accountability for subordinate law making which will be substantially enhanced with the passage of the *Legislative Instruments Act*; and
- the Administrative Review Council which oversees and monitors the whole system.

The Commonwealth administrative law system balances the provision of justice for the individual citizen against the need of government to implement the programs and policies for which it has been elected. The administrative law system feeds useful information back into government decision making. For example, the Ombudsman can point out systemic problems in administration which should be addressed by government. The decisions of administrative tribunals and the reports and general work of the Ombudsman can provide guidance to administrators as to good administrative practices and promote awareness of legal requirements. Such feedback promotes better decision making as well as better decisions in the individual cases involved. Information about what are correct and preferable decisions, how those decisions are best arrived

at and what pitfalls administrators should avoid are all part of what is sometimes described as the normative effect of administrative law. This process results in better decisions at an earlier time in future cases, with benefits to the individuals concerned at that point. In this way, government policy can be implemented in an improved and more efficient and effective fashion.

From its inception, the Council has played an important role in the administrative law system. In its early years the Council oversaw the introduction and bedding-down of the system. It examined Commonwealth legislation to determine which government decisions should be subject to review.

Today the administrative law system responds to more complex and more extensive needs. Changing demands on government have profoundly affected how government carries out its functions. A number of government institutions have been commercialised, corporatised or privatised over the last decade or so. Increasingly government services are delivered through new, innovative means.

These changes challenge the administrative law system to remain effective and coherent, while maintaining its dual purposes, namely, to improve the quality, efficiency and effectiveness of government decision-making generally and to enable people to test the lawfulness and the merits of decisions that affect them. The Council has responded by changing its focus while continuing to maintain and promote the values and benefits of the administrative law system. Its recent work has dealt with such topical issues as government business enterprises, contracting out, the provision of services through funding grants and the reassessment of the processes and structure of the merits review system.

The Role Of the Council

The Committee's Terms of Reference are primarily concerned with the role and function of the Council and the relationship between the Council and other relevant bodies.

In this submission we contend that the Council plays a leadership role in maintaining and fine-tuning the operation of the administrative law system. The Council's ability to deal with all parts of the Government is particularly important in carrying out these leadership responsibilities. Because it is able to review the system as a whole it can come to grips quickly with changes in government administration which present new challenges to administrative law and develop practical and pragmatic solutions.

The Council reports to the Attorney-General on administrative law practices and policies, and oversees the effective operations of merits review tribunals and other aspects and institutions of the administrative law system. The Council also has a significant systemic role ensuring that decisions made in the administration of Commonwealth Government policies and programs are of consistently high quality.

The Council sees itself as having a special role in promoting the values of administrative law to government agencies. The community expects administrators to act lawfully, fairly, rationally, openly and efficiently. Administrative law and administrative law mechanisms provide one of the essential means of ensuring that these expectations are met.

The Council works both proactively and reactively. In its proactive role the Council prepares major reports on emerging issues in administrative law, such as its current project on contracting out of government service delivery. In its reactive role the Council provides comments on the administrative law implications of proposed law reforms in letters of advice and in submissions to parliamentary committees and other bodies. The Council also acts as a resource for departments and tribunals and for universities which use Council reports as part of their syllabus in teaching administrative law.

In exercising its leadership role, the Council liaises with those involved in the administrative law system. It monitors the work of

departments, agencies and tribunals and works to improve primary decision making. The administrative law system provides the opportunity for decision makers to learn from the outcomes of the review process and to use the outcomes of the process to improve their own methods and procedures. The Council can support this by ensuring that the information goes to the right places and that there is a continuity in that information flow to ensure that future, not just current, decision makers will benefit. Our twenty years evolution has produced a well-rounded institution with a sensible and pragmatic approach which enables us to work constructively and co-operatively with a number of other bodies.

The various backgrounds from which members of the Council are drawn and the mix and balance of membership is a significant strength of the Council. The membership mix also promotes a particularly close relationship with a number of bodies, in particular the five major merits review tribunals, the Ombudsman, the Attorney-General's Department and the Australian Law Reform Commission.

The Statutory Functions of the Council

The Committee's Terms of Reference also ask about the Council's statutory charter, as outlined in section 51 of the *Administrative Appeals Tribunal Act 1975* (the AAT Act).

The primary means of achieving the Council's mission will continue to be the provision of advice to the Attorney-General. However, the Council has also decided that to fulfil its mission it should continue and expand its:

- consultation with primary decision makers and community agencies;
- monitoring of the work and activities of other Ministers, agencies and tribunals;
- monitoring of the work of primary decision makers;
- advocacy of the values of administrative law to agencies and primary decision makers; and

- contribution to the training of primary decision makers.

This submission makes some recommendations for changes to section 51. The intention in doing so is to make it clearer than is currently the case that the Council has a role to provide general oversight of administrative law policy. A major purpose of the proposed change is to place greater emphasis on the Council's role in advising the Attorney-General on ways and means of improving the processes of primary decision making, and on actively promoting better administrative decision making by providing advice and assistance to decision makers throughout the system of decision making and review.

The Council's Relationship with Other Bodies

The Committee's Terms of Reference ask about the Council's relationships with a number of bodies.

The Council's submission discusses the constructive relationship which exists between it and the Australian Law Reform Commission (the ALRC) but argues that the two bodies have different roles. Although Council Reports often recommend changes to law and practice its activities are not confined to single issue law reform but involve the continuous monitoring and supervision of that part of the system which is public administration. They are more focussed on the Executive and extend to providing advice at Cabinet level on new proposals, to promotion of administrative law values, education, and liaising with tribunals and other bodies. A major difference in the roles of the two bodies is that the Council necessarily works both on major activities determined by itself or on request of the Minister and on a range of other activities such as providing advice and various forms of assistance to the Parliament, the Government, and non-government bodies. By contrast, the ALRC's work is centrally on major law reform activities across the whole area of federal legal policy in response to references provided to it by the Attorney-

General. In the past the Council has worked co-operatively with the ALRC and it will continue to do so in the future.

The Council's relationship with the Attorney-General's Department recognises the Council's role as the pre-eminent administrative law policy adviser to the Government. The Department supports the Attorney-General in his role of administering the major part of the administrative law legislation and feeds into the Council its experience on particular issues.

A different relationship exists between the Council and the merits review tribunals. In this role the Council is very much a reporter and facilitator. The Council conducts regular Heads of Tribunals meetings and promotes co-operation between the tribunals. In September, the Council held a Tribunals Conference which is a regular event for tribunal members and staff to get together and share information. This year the Conference was more workshop-based than previously. The Council has received enthusiastic feedback on the value of this approach for tribunal training and we propose to conduct more workshops in future.

From time to time the Council conducts major inquiries into tribunal procedures, operations and structures and the most recent of these resulted in Council Report No 39 – *Better Decisions: review of Commonwealth merits review tribunals*.

The President of the AAT and the Ombudsman are *ex officio* members of the Council.

The Effectiveness of the Council

At different times in its history the Council has been architect, advocate and guardian for the administrative law system. Many of its recommendations have been accepted and implemented. Its reports, particularly those of the last few years, have stimulated and fostered debate on the role and importance of administrative law.

The Council's work in promoting the values of administrative law and in monitoring the administrative law system has meant that,

notwithstanding the many developments that have occurred in administration and administrative law since the 1970s, the system still retains its integrity and cohesiveness.

Conclusion

The Council acknowledges that the values of administrative law have been widely accepted by Federal Government agencies in the last 20 years. The Council is of the view that the quality of public administration has been immeasurably improved by the administrative law system. The Council is pleased to be part of that system and to help it to remain dynamic and responsive to community and government demands for greater efficiencies and greater value for money from government administration and decision making.

Administrative Appeals Tribunal

New Jurisdiction

Since the last issue of *Admin Review*, jurisdiction has been conferred on the AAT, or existing AAT jurisdiction has been amended, by the following Commonwealth legislation:

Australian Postal Corporation Regulations

Customs Amendment Act 1996

Education and Training Legislation Amendment Act 1996

Export Market Development Grants Amendment Act (No 1) 1996

Hazardous Waste (Regulation of Exports and Imports) Amendment Act 1996

Health Insurance Commission Regulations (Amendment)

Therapeutic Goods Amendment Act (No 2) 1996

Therapeutic Goods Amendment Act 1996

AAT decisions

Employment Services Act decisions

Since the last issue of *Admin Review*, there have been several interesting decisions by the AAT concerning the *Employment Services Act 1994* (the Act), particularly regarding agreements between people seeking employment and 'case managers' charged with assisting these people to find employment.

The Act creates a new decision-making scheme in relation to people seeking jobs. It empowers the Minister to determine that certain people (such as long-term unemployed people) are to become participants in the case management system (CMS) established by the Act. This ministerial determination is done by way of a disallowable instrument and is therefore subject to parliamentary scrutiny. It is not subject to merits review, whereas most decisions of officers of the Department of Employment, Education, Training and Youth Affairs and of the Commonwealth Employment Service (CES) are subject to merits review.

The CES is required to notify and interview people who qualify to become participants in the CMS to assess their needs prior to referring them to case managers (both public and private) for assistance tailored to individual needs and capacities. Participants and case managers must negotiate agreements called case management activity agreements (CMAAs) to this end, the idea being that there are reciprocal obligations on people seeking jobs and on case managers alike. Wherever available, people seeking jobs are entitled to exercise choice as to which case manager they would like to be referred to, and this choice must be taken into account by the CES when referring the person to a case manager. Breaches of CMAAs by people seeking jobs may, subject to certain statutory conditions, result in deferral or cancellation of allowances payable to those people. Decisions about such breaches are subject to merits review.