FOCUS ARTICLES

The first three articles are speeches delivered at the 1997 National Administrative Law Forum – *Administrative Law under the Coalition Government* – held at Canberra on 1 - 2 May 1997. The Forum was co-sponsored by the Australian Institute of Administrative Law Inc and the Institute of Public Administration Australia. The speeches are reproduced with the kind permission of the AIAL and IPAA.

All three articles refer to the Government's decision to implement the Administrative Review Council's recommendation – in its report, *Better Decisions: review of Commonwealth Merits Review Tribunals* – to amalgamate the 5 major merits review tribunals into a new Administrative Review Tribunal.

On 20 March 1997 the Attorney-General and Minister for Justice, the Hon Daryl Williams AM QC MP, announced the Cabinet's in-principle agreement to amalgamate the Administrative Appeals Tribunal, the Social Security Appeals Tribunal, the Veterans' Review Board, the Immigration Review Tribunal and the Refugee Review Tribunal into a single tribunal, the Administrative Review Tribunal.

The Attorney-General did not say when the amalgamation is to occur but has indicated that an interdepartmental committee comprising senior Commonwealth officers is to devise a strategy for implementing the amalgamation. The Attorney-General also said that the "basis and scope of administrative review, designed to reduce the number of applications, the overall costs of merits review and excessive legalism" would be looked at.

The full text of the Attorney-General's Press Release appears in TRIBUNAL WATCH (below). The text of Press Releases from the Minister for Immigration and Multicultural Affairs concerning changes in administrative decision-making and review in his portfolio, which are also discussed in the following articles, appears in ADMINISTRATIVE LAW WATCH (below).

The Broad Implications for Administrative Law under the Coalition Government with Particular Reference to Migration Matters

The Hon Philip Ruddock MP, Minister for Immigration and Multicultural Affairs*

Introduction

I thank the Australian Institute of Administrative Law and the Institute of Public Administration Australia for the invitation to give this opening address to the 1997 National Administrative Law Forum.

I warmly welcome the opportunity to speak to the conference's theme of the implications for administrative law of the election of a Coalition Government. Having the conference now with a focus on the broader implications for administrative law of the change in government, is very timely.

In our Law and Justice policy statement in February 1996, the Coalition affirmed its commitment to the principles of administrative law. That statement said:

*This is the prepared text of the speech given by the Minister at the opening of the joint AIAL/IPAA National Administrative Law Forum, Canberra, 1 May 1997.

Administrative law exists to enhance administrative justice. It is a crucial means by which the government and the bureaucracy are directly accountable to individuals affected by their actions.

It is often not acknowledged, even forgotten, that it was the Liberal and National Party Government's initiatives that led to the freedom of information legislation, the *Administrative Decisions (Judicial Review) Act 1977* and the establishment of the Administrative Appeals Tribunal and the Ombudsman.

As stated in our law and justice policy of February 1996, the Government is determined to review and improve the administrative law system. To do that effectively and fairly, requires a critical appraisal of what Australia now has as its administrative law system, what Australia now needs and what Australia can afford.

This needs a holistic approach with effort to avoid the trap of limiting that critical appraisal merely to issues of the review of administrative decisions. Administrative law must be seen in the wider context of Government policy making and implementation. This is particularly important in my portfolio where the majority of the direct beneficiaries of the administrative law system are not members of the Australian community.

I intend to outline the significant broader initiatives of the Government, but to concentrate on the administrative law related changes I plan to bring to the migration program which falls within my area of ministerial responsibility.

The broader initiatives

Government's administrative law policy

Looking at the broader initiatives, the Government does not envisage a contraction of the administrative law system. At the same time, the Government is interested in on-going reform of the system in the public interest.

The notion of 'public interest' extends to embrace a concern to ensure high quality primary administrative decisions are made, and continue to be made, as a matter of routine in a cost-effective and timely manner and ensuring aggrieved persons have access to low cost and speedy external review mechanisms, by both tribunals and courts.

The intended introduction of a privative clause for the *Migration Act 1958* (*'Migration Act'*) – about which I will talk later – should be seen as a mechanism to reduce the cost to the Australian community of successive appeals by non-citizens seeking to delay their lawful removal from Australia.

Reform of merits review tribunals

The Government has demonstrated its commitment to administrative law reform by recently responding to the report by the Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals* (Report no.39).

The Government has recently decided, in principle, to amalgamate the Administrative Appeals Tribunal, the Social Security Appeals Tribunal, the Veterans' Review Board, the Immigration Review Tribunal and the Refugee Review Tribunal, into a single body. The amalgamation would streamline administrative structures and enhance operations. It is envisaged that separate divisions of the proposed body would develop and maintain flexible, cost-effective and non-legalistic procedures relevant to their jurisdiction.

It is appropriate, when considering the implementation of a major restructure of the current merits review tribunal system, for the Government to explore ways in which the processes can be streamlined, improved and made more efficient and 'user friendly'.

The Government has established an Interdepartmental Committee ('IDC') to devise a strategy for implementing the decision. The IDC is canvassing extensively the views of other Departments and agencies on these issues in the course of its deliberations.

It would be wrong for observers to conclude from this that the Government has somehow abandoned or otherwise weakened its commitment to merits review. On the contrary, it wants a system that works better and is determined to achieve this objective.

Challenges for administrative law

Government policy has embraced the notion of 'downsizing' and contracting out where appropriate.

In a policy environment of contracting out, of some Government services and functions, the issue arises of the review and appeal rights which citizens would otherwise have if the service continued, in part or in full, to be provided by the Government sector.

This amongst other issues is being addressed by the Administrative Review Council. The Government welcomes the work of the Administrative Review Council ('ARC') in this area. The Government has noted the ARC Issues Paper, *The Contracting out of Government Services* (February 1997), and looks forward to receiving the Council's recommendations at the conclusion of its inquiry.

Migration – introduction

I would now like to turn to a major part of my area of ministerial responsibility, the policy implementation and management of the migration program.

Before I talk about the administrative law related changes in that area, it is important for a better understanding of those changes that I set out the bigger picture.

Since the election last March, the Government has made significant changes and improvements in the direction of the migration portfolio, and in particular the focus of the annual migration program. The rationale behind the major changes flows through to administrative review issues.

The Migration Program

We live in a world where the movement of people between and within countries is occurring on a scale never before witnessed in our history. With the globalization of world markets, increased tourism and a desire for people to live and work in different parts of the globe, the impact of human population movement is an issue governments and communities cannot afford to ignore.

In March last year the Government inherited an migration program that was seriously out of balance:

- the family stream had come to represent almost 70% of the program;
- entry standards had been reduced so far that a massive pipeline of applications had been allowed to build up in some categories;
- reports of abuses of the program and sham marriages had become commonplace reducing community confidence in the program and the former Government was unable or unwilling to act to curb the problem; and

- people with low skill levels and poor English language ability were allowed entry under skilled categories.

In July 1996, the Government moved to address these concerns and restore public confidence in the program.

We announced a non-humanitarian planning level of 74,000 compared with 83,000 the year before. This represented a reduction to the average level of the previous four years.

Decision-making reforms have significantly increased the rigour of testing the bona fides of spouse, fiancé and interdependent applications. Early figures show that rejection rates at a number of our overseas posts have increased and there are signs of a fall off in the number of applications suggesting a deterrent effect on non-genuine applicants.

The increased bona fides testing has been complemented by such measures as two year probationary visas for spouse, fiancé and interdependent entrants and limitations on serial sponsorships.

Skilled migration

The Government has consciously decided to give greater priority to business and skilled migration because of the contribution such migration can make to Australia's economic development.

Business migrants make a major contribution by introducing substantial capital to Australia and creating new jobs. Similarly, migrants who can fill key skill shortages can enable Australian businesses to grow, prosper and create jobs.

I have been consulting extensively around Australia in past months in relation to next years migration program. The program is soon to be considered by the Government and announced in due course.

Whilst not wanting to pre-empt the Government's decision on next years non-humanitarian program, I do not think any one is anticipating an increase in numbers and the Government has made it quite clear that it will continue to give emphasis to skilled migration while maintaining a commitment to bona fide family reunion.

Humanitarian Program

Australia has an outstanding record in fulfilling its international humanitarian obligations by bringing refugee and other humanitarian entrants to Australia and providing them with resettlement.

The Government's commitment to assisting those in need is demonstrated by the fact that we have one of the highest settlement intakes of humanitarian entrants per capita of any country in the world.

We set aside specific funding in the budget each year to assist humanitarian entrants and that funding is for a limited number of places, covering both offshore and onshore applicants. It is essential that the places go to those who are genuinely in need of our protection.

I am particularly concerned about abuse of the onshore refugee/asylum application process. But at the same time, let me make it very clear that I expect any officer of my Department and any member of the Refugee Review Tribunal to grant refugee status to a person who has met the accepted definition of 'refugee' under the Refugees Convention.

We are determined to address problems of abuse but such determination is not code for denying genuine refugees protection. Unfortunately there are people who seek to abuse our generosity. I

have particular concerns in relation to those who travel to Australia on a visitor visa, with the necessary documents issued by their own government to travel here, and who seek to claim refugee status in Australia.

I am gravely concerned by reports I have received that people are using the onshore protection system to obtain work rights and access to Medicare. There are people who apply to my Department asking for the $30 work visa who appear not to be bona fide asylum seekers. These applicants seek to delay their departure as long as possible knowing full well they are not refugees.

This abuse costs tax payers millions of dollars, undermines public confidence in the system and causes processing delays, disadvantaging genuine applicants.

In part, to address these problems I have recently announced a series of changes to the merits and judicial review systems in the migration area. These changes will make our protection visa processing arrangements substantially more streamlined and cost-effective.

I consider this is the best way of ensuring that genuine applicants receive protection quickly and reducing the incentive for those seeking to abuse the system.

These tendencies to exploit every avenue of appeal and to push every aspect of flexibility to breaking point will in my view make the Government reluctant to provide mechanisms to address special circumstances so as to ensure the outcomes of its migration program. Accordingly, those who exploit the system do a disservice to those whose need is greater by forcing the Government to more restrictive approaches to ensure control of the program.

Changes to migration decision-making and review

To enable you to more fully understand the rationale behind the recently announced changes to migration decision-making and merits and judicial review of those decisions, I would like to outline my and the Government's concerns about the system we inherited.

Merits review

Our particular concerns with the merits review tribunal system (that is, the Immigration Review Tribunal and the Refugee Review Tribunal) are firstly the length of the determination process and secondly the potential for the Government's policy decisions to be distorted in the process.

The tribunals were established in 1989 (IRT) and 1993 (RRT) as merits review systems to ensure better decision-making and to minimise the time and resources used to challenge Departmental decisions.

The intention was that the tribunals would reduce the need for judicial review. But since the introduction of the tribunals the length of the determination process has increased appreciably. Furthermore, decisions are now frequently reviewed by the tribunals *and* by the courts. This situation needs to be addressed.

I acknowledge the positive contribution that the tribunals, their members and their work have made to migration in Australia. I am concerned, however, that there has been a shift away from the original framework of the tribunals, and I am concerned about certain developments that have occurred. In particular, I am concerned about the potential distortion of the Government's policy decisions as embodied in the migration legislation and in policy guidelines.

For those of you not familiar with the migration legislation, the *Migration Act* and the *Migration Regulations* together give a valid visa applicant the right to the grant of a visa provided that applicant meets the legal pre-conditions for the grant set out in the Act and the Regulations.

The migration legislation sets out in considerable detail those legal pre-conditions. Leaving aside some special public interest powers that I as the Minister can personally exercise, if the applicant does not meet the legal pre-conditions, then the visa must be refused.

As part of independent decision-making bodies, it is the role of the members of the tribunals to be impartial and free from bias, but it is not the role of the tribunals to determine migration policy. That is the role of the government of the day. It is the duty of all members of the tribunals to fully know and understand the parameters of migration policy and to work within the legal framework.

Responding to these concerns, and in line with its pre-election policy commitment, the Coalition has reviewed migration decision-making, with particular attention being paid to the membership, role and performance of the Immigration Review Tribunal ('IRT') and the Refugee Review Tribunal ('RRT').

The major change will be to merge the current three portfolio review bodies into two review tribunals with a view to further amalgamation at a later date.

As you may be aware, currently protection visa (refugee) applications are processed in a two-tier decision-making structure. A primary decision on an application is made by my Department. If unsuccessful, an applicant can seek review before the RRT.

Most migration applications have a three tier merits assessment process, with a primary decision by the Department, a Departmental review by the Migration Internal Review Office ('MIRO') and an independent review by the IRT.

The changes will bring all migration processing into line so that there is a two-tier merits assessment of applications. This will mean merging MIRO with the independent IRT, while the RRT will remain a separate body dealing exclusively with review of refugee applications.

A number of other legislative and administrative measures will be introduced to make my portfolio tribunals more flexible and to improve their performance, while reducing the scope for abuse.

To shorten overall processing times and to discourage frivolous applications there will be restrictions on work rights, review application periods and a change in the structure of the review application fee.

A significant measure will be to impose a post-decision application fee of $1,000 for the RRT. This will not impose a burden on bona fide refugees and will act as a deterrent for people intent on abusing the system. The $1,000 fee will only be payable if the RRT finds that the applicant is not a refugee. Applicants assessed as meeting refugee criteria will not pay an RRT fee. It is not a fine and will not affect bona fide refugees.

A number of other administrative measures will be introduced to achieve efficiencies in primary and review decision-making.

My Department will take a more strategic approach to protection visa applications, giving greater priority to straightforward applications and using more streamlined methods, such as reduced documentation where appropriate.

Other measures will include clearer articulation of my expectations through general policy directions to tribunal members under the *Migration Act* and improved utilisation and reduced duplication of resources.

The changes to the structure of review bodies will take effect after appropriate legislative changes.

Not only will people with bona fide applications be given a decision more quickly, but those intent on fraud, deception or delay will not have the benefits of a delayed decision.

The changes to the migration review process are consistent with the broader Government moves, to which I referred earlier, to amalgamate merits review tribunals across all portfolios into one tribunal. However, the revamped immigration and refugee review process would remain a discrete division within the new tribunal.

Judicial review

The Government's pre-election policy commitment was that given the extensive merits review rights in the migration legislation, we would restrict access to judicial review in all but exceptional circumstances.

That commitment arose from concerns about the growing cost and incidence of litigation of migration and refugee matters, as well as the delays associated with such litigation.

I recently announced that the Government is seeking to introduce a privative clause in relation to judicial review of many decisions under the migration legislation. The privative clause would replace the existing judicial review scheme at Part 8 of the *Migration Act*. Unlike that scheme it would also apply to the High Court and not just the Federal Court.

The current judicial review scheme in relation to visa decisions was introduced by the previous government on 1 September 1994. It brought and came with a package of changes, including:

- expanded access to merits review;
- a requirement that any review rights be exhausted prior to seeking judicial review;
- statutory codes for visa decision-making; and
- a restriction of the grounds of judicial review having regard to the access to merits review and, for example, statutory codes for visa decision-making replacing the judge-made law on natural justice.

The changes were intended to reduce Federal Court litigation and to provide greater certainty as to what was required from both decision-makers and visa applicants and visa holders.

That scheme has not reduced the volume of cases before the courts. In fact, recourse to the courts is trending upwards – 398 cases in 1994-95; 630 in 1995-96; and 640 so far in 1996-97.

The largest single group are persons who have had the refusal of their protection visa applications affirmed by the RRT.

In 1995-96 migration matters formed approximately 65% of the Federal Court's entire administrative law caseload. Based upon current litigation trends and the estimated output of the IRT and the RRT in 1997-98, it is anticipated that applications made to the courts may rise to an expected 780 odd applicants in 1996-97 and 910 odd in 1997-98.

Much of the growth in applications for judicial review has come from appeals brought from decisions of the RRT to the Federal Court.

The 1995-96 budget shows that litigation cost my Department $7.4 million and this does not include the cost of legal aid nor the cost of running the courts.

Migration and refugee applicants have access to a thorough merits assessment of their case and then if they are unhappy they are able to seek independent merits review of their case before a tribunal. Applicants have also been able to access the Federal and High Courts giving them in

effect up to 3 levels of review. As I have indicated we have seen significant growth in this practice in recent years.

There are now around 590 active litigation cases before the Federal and High Courts. Around 390 of the court cases relate to onshore refugee cases. From experience we know that a substantial proportion of these cases will be withdrawn by the applicants prior to hearing, around 40%, and of the cases that go on to substantive court hearings the Government currently wins 90%.

There is also evidence that the delays associated with litigation are growing. Between 1993-94 and 1995-96 the average number of days from date of application for judicial review and handing down of a decision trebled for RRT decisions from 107 to 354 days and almost doubled for IRT decisions, from 259 to 488 days.

I view this high level of litigation, particularly by asylum seekers, as problematic given that increased litigation leads to increased costs and delays, and, for those in detention, to a significantly longer period of detention. I am also concerned that given that around 40% of applicants withdraw before hearing that there is a substantial number who are abusing the legal process in order to extend their stay in Australia.

The Government's pre-election policy commitment to restrict access to the courts in migration legislation matters to all but exceptional circumstances arose from two principal concerns with the litigation process – costs and delay. And I have just demonstrated that those concerns were clearly not unfounded.

Litigation can, in the migration area, be an end in itself. Given the importance attached to permanent residence of Australia, there is a high incentive for refused applicants to delay removal from Australia for as long as possible, particularly if they are enjoying privileges such as work rights and Medicare, while they establish ties within the community which they may hope will yield entitlement to a visa through another pathway.

I asked my Department to explore options, in conjunction with the Attorney-General's Department, the Department of Prime Minister and Cabinet and very eminent legal counsel, for best achieving the Government's policy objective of restricting access to judicial review.

The advice I received from legal counsel was that the only workable option was a privative clause.

As you are probably aware, because section 75 of the Commonwealth Constitution gives the High Court original jurisdiction to consider challenges to the actions and decisions of Commonwealth officers, *access* to the High Court cannot be legislatively restricted without a constitutional amendment.

While both access to, and the scope of judicial review by, the Federal Court can be changed by legislation, to simply restrict access to the Federal Court in migration legislation matters would in practice deflect many cases to the High Court under section 75 of the Constitution.

Legal counsels' advice was that a privative clause would have the effect of narrowing the scope of judicial review by the High Court, and of course the Federal Court. That advice was largely based on the High Court's own interpretation of such clauses in cases such as *Hickman's case*,[1] as long ago as 1945, but more recently in the *Richard Walter case*[2] in 1995, and the *Darling Casino case*[3] in April this year.

You may be aware that the effect of a privative clause such as that used in *Hickman's case* is to expand the legal validity of the acts done and the decisions made by decision-makers. In practi-

cal terms it narrows the scope of judicial review to that of narrow jurisdictional error and *male fides.*

The options available to the Government were very much shaped by the Constitution. And while I accept that the precise limits of privative clauses may need examination by the High Court, there was no other practical option open to the Government to achieve its policy objective.

Other measures

The Government is pursuing other measures, including working with the courts to achieve a more effective and efficient disposition of court cases.

For example, I applaud the efforts of the Federal Court to more effectively manage all cases, including migration cases. In Victoria the Federal Court has brought in additional judges to each registry to clear a backlog of cases. There will also be, in all Federal Court registries, the implementation of an individual docket system whereby cases are allocated to particular judges and managed by that judge from application to final disposition.

Conclusion

In conclusion, migration decision-making is integral to the whole migration and settlement process. As Minister, I am determined to ensure that the decision-making process is effective, and efficient in terms of cost, time and quality of outcomes.

I want the Australian community to feel confident that when Australia has accepted refugees, they are genuinely fleeing persecution.

I want the community to be confident that when skilled migrants or spouse migrants arrive, that those people have come to Australia for a bona fide reason or relationship and will contribute to the economic and social fabric of our nation.

The changes announced by the Government will re-establish credibility, integrity and confidence in the migration decision-making process.

The planned changes to merits and judicial review are an integral part of that process. But they do not stand alone. As I have indicated, they are part of a wide-range of measures in place, or to be put in place, to ensure the Government's effective management of the migration program.

In my view, the key challenge to the administrative law system, and its practitioners, is to not to focus on particular aspects of the system in isolation from the wider system of which they are a part. There needs to be an on-going process of properly balancing the interests of individuals with the interests of the wider community.

Notes

1 *R v Hickman; ex parte Fox and Clinton* (1945) 70 CLR 598

2 *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168

3 *Darling Casino Limited v New South Wales Casino Control* (unreported, 3 April 1997)