Background

Reform of the Merits Review Tribunals

In early March 1998 the Government released a report on the 'Reform of Merits Review Tribunals'. The Report states 'The Government is now seeking input from the Tribunals and relevant bodies on the amalgamation proposal'. All interested organisations should use the opportunity to comment, so the new Tribunal can benefit from a range of opinions. It is especially important that the views of those who represent the more disadvantaged client groups are put forward.

This is another phase in a review which started with the referral to the Administrative Review Council, in December 1993, of an inquiry into the Commonwealth Tribunal system. In September 1995 the ARC released its Report *'Better Decisions: A review of Commonwealth Merits Review Tribunals'*.

The Government has decided to proceed with the amalgamation of the Administrative Appeals Tribunal (the AAT), the Social Security Appeals Tribunal (the SSAT), the Immigration Review Tribunal (the IRT) and the Refugee Review Tribunal (the RRT). The Veterans Review Board (VRB) is specifically excluded from this amalgamation. The Administrative Review Tribunal (ART) will hear appeals from the VRB, as the AAT did. Otherwise, there will be appeal to a second tier within the ART by leave only.

The Tribunal will be headed by a President, an independent statutory appointee, appointed for up to five years, a person with professional and management expertise. There is no requirement that the President be a judge or former judge. The appointment of Federal Court judges as Presidents of the current AAT has given that body a standing in the community, both legal and other, that is unlikely to be matched by any other appointee, however well qualified he or she may be. It is only a person who has life tenure, who has nothing to fear, and little to gain, from the approval or disapproval of any Government, who can be relied on to make the sort of 'brave decisions' which may be necessary from time to time. Moreover, a Tribunal headed by such a person and protected by his or her mantle, can be seen as a better protector of the rights of the individual, than a body without that protective mantle. From the point of view of the Tribunals other than the AAT, one of the major benefits of amalgamation would have been that protection. The loss of it, for all the Tribunals, will make them more vulnerable, and they will be seen as more vulnerable.

This is not to denigrate the actual independence of current members of Tribunals, it is merely to point out what was pointed out by, among others, Mr Justice Kirby, that people whose tenure is uncertain will be perceived to be less independent than those whose tenure is certain. All members will never have life tenure, so the perceived independence of the Tribunal system is to some extent dependent on having a Judge at the apex of the system.

The ART will be established by legislation administered by the Attorney-General, but portfolio legislation will cover issues such as jurisdiction, specific processes and procedures, and possibly general directions to be followed in portfolio decisions. This should enable the specific features which make the SSAT so successful as a review body with a high caseload to be retained.

Each Division will be encouraged to adopt processes and procedures best suited to its client needs and case management requirements.

There is a 'presumption in favour of a non-adversarial approach', and an intention to 'reduce excessive legalism'. It is hoped that this is not a way of removing lawyers from their important role on Tribunals. The law applied by the Tribunals is complex. Multi-disciplinary panels, including lawyers and others, ensures that the SSAT can apply the correct law. An understanding of the facts is one aspect of decision making, an understanding of the law is another vital one.

The Report states the expectation is that representation would only be allowed in exceptional or prescribed circumstances, and where agreed by the Member. This is in line with the current situation for the IRT. A competent lawyer representing a party can be helpful to that party, and to the Tribunal. A competent lawyer can speed up the process, not slow it down.

There is a presumption in favour of single members, but the President can constitute a three-member panel on the recommendation of the relevant executive officer. There must be multi-member panels where that is provided by portfolio legislation. There seems no reason to fear that portfolio legislation in the social security area would change. The Department of Social Security seems to be satisfied with the current arrangements. It is not so clear if the other Departments which would have an input into the 'Income Support Division' would agree to multi-member panels.

If cases of significant precedential value are identified on receipt, they can be considered by a three-person Tribunal, as if on second tier review. It is not clear if it is assumed that once a case has been considered by a three-person panel there will be no further review. If that were the case, there will be no further review of social security decisions if the Income Support Division sits as a three-member panel as a matter of course.

As stated above, there would be limited second tier review where the case has major precedent value, where the case has major implications for significant numbers of other applicants, where there is a significant question of law to be resolved; or where both parties agree that there has been a manifest error of law of fact likely to have materially affected the decision.

The new ART has the potential to change Australia's system of merits review Tribunals in a fundamental way. The proposals deserve to be debated at length by all informed stakeholders.

[A.B.]