THE STRUCTURE OF THE COMMONWEALTH MERITS REVIEW TRIBUNAL SYSTEM

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There is a good deal that I could say about the Administrative Review Council's report *Better Decisions: review of Commonwealth Merits Review Tribunals* (Report No 39 of the Administrative Council) ("ARC report"), much of it complimentary in relation to matters of detail, but in other respects, which unfortunately go to vital recommendations contained in it, condemnatory.

I hope that nobody thinks that the model set out in Chapter 8 of this report is a reflection of any of the three models that are set out as Appendix C to the ARC's Discussion Paper, *Review of Commonwealth Merits Review Tribunals*, in the evolution of which I played a major role. The internal mechanics of the Chapter 8 proposal are such that, while I agree with some of the premises on which it is based, in particular the concept of leave being required to have a matter reviewed at a higher level, I disagree so strongly with others that I consider that the Chapter 8 model is fatally flawed.

To appreciate why I feel so strongly about Chapter 8, and about some other parts of the report that are necessarily linked to it, I need to go back to certain proposals that I made, initially as a result of an idea put to me by Ms Jocelyn McGirr, then a Senior Member of the AAT, during the Review of the AAT which was conducted during 1991. These proposals were put before a seminar conducted by John McMillan, a senior lecturer in law at the ANU Law School and myself, under the auspices of the AIAL in April 1994. The seminar, "Towards a Tribunals Non-Proliferation Treaty" was attended by an invited audience of user groups, agency representatives and representatives of tribunals. The proposals were then revised in a paper presented jointly by John McMillan and myself to the Forum of the AIAL held in Brisbane in July 1994. The models that we there put forward appear as the second page of Appendix C of the ARC Discussion Paper, and I urge everyone interested to read Appendix C, and the whole of the ARC report.

I would have wished that the ARC's proposals could have been resubmitted to the broad-based group that came to the AIAL's 1991 seminar so that a proper debate could have occurred. The ARC did conduct, on 27 October 1995, what was described as an "information session" to which a large number of persons had obviously been invited, but it was made clear that it was essentially that, a session at which, after a number of explanations and commentaries, questions could be asked in elucidation of the Report. When I asked, in open session, whether it was intended to hold an open debate about the proposals, at which all interests would be involved, we were told that it was "not intended to re-invent the wheel". I found this statement rather ominous, and I have to say that my thesis is that, unless

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several spokes of this report's wheel are re-invented, the whole cart will go off the road and over the cliff.

The models that John McMillan and I proposed were based on the premise that the present system of "proliferated" tribunals cannot continue, a proposition that is, I suggest, likely to be accepted almost universally. There may be one area which is, it would seem, unprepared to let go the apron strings of review tribunals falling within its portfolio responsibilities because "mother knows best". Subject to that, I believe that we can go forward on the assumption that proliferation is wrong, and that some form of ordered integration must be restored to the system, both for its own good, and on the ground of efficient use of resources.

The underlying concept of models A, B and C was that the first level of review would continue to be based on an ethos of speed and informality, but that the second level would offer the kind of review found in the AAT, a format that is proper, requisite and indeed, wanted for the most legally and factually complex cases, but is unnecessary for those cases that are essentially lacking in such complexity. The philosophy underlying this concept was that while there are less complex cases that should not by their nature be entitled as of right to two levels of review, there are also cases that should not have to make their way automatically through two levels but should have the opportunity to proceed, if possible immediately, but at least on later identification, to a more quasi-judicial form of review at the second level. Both should be catered for properly, recognising that each has specific needs.

Fundamental to each of our models was the proposition that it should no longer be possible to appeal from a first level tribunal to the second level, presently the AAT. There is no quarrel with the ARC on that point.

At this point, however, the trouble starts. Unfortunately the Chapter 8 model so confuses the two levels that the undoubted merits of a properly constructed and integrated two-level system are quite lost. The Chapter 8 model is at first glance a two-level system, but I submit that the two-level concept embodied in it is thoroughly muddied, or muddled, by the concept of "Review Panels" which appear not to be a true second level of review, but are rather constituted by ad hoc assembly of members from across the tribunal. Quite apart from that, there is further erosion of the system, through propositions, to which I refer below, contained in earlier sections of the report that are apparently intended to stand whether or not the Chapter 8 model is accepted. The criticism that follows applies to those propositions either on a "stand-alone" basis, or for their impact on, or for the light they throw on, the Chapter 8 proposal.

The confusion of the two levels is chiefly caused by what can only be described as an extraordinary concept of membership. What it concludes about membership is acceptable in relation to part-time membership at the "non-presiding" level, but is otherwise objectionable. Paragraph 4.12 contains a remarkable list of "criteria for skills and experience" that are said to be "essential or desirable" in tribunal members, but are "criteria" the same as qualifications? While selection criteria are referred to in paragraphs 4.8 to 4.20, and while recommendation 33 states that "All prospective tribunal members should be assessed against selection criteria that relate to the tribunal's review functions and statutory objectives", it seems to be contemplated that they will be determined by the relevant Minister after consultation with tribunals (paragraph 4.16). Apart from that, the only qualification for members seems to be that they need not be lawyers. Why criteria for appointment should "relate to ... statutory objectives" is beyond me, but the statement is certainly scary. Some suggested criteria are said in

paragraph 4.12 to have been "suggested during the inquiry as essential or desirable for tribunal members". It is not said that the report agrees that these attributes are necessary, but it is implied that they are. It is worthwhile to refer to them in the full report, since they indicate in dramatic form the qualities needed, not least in knowledge and experience of administrative law.

The reasoning in support of the proposition that tribunal members need not have legal qualifications is brief indeed. Paragraphs 4.13-14, speaking of tribunals generally, in effect say that some legal skills may be needed but that you can apparently be trained to be a "barefoot lawyer" if you have not got them. Paragraph 8.32 states of the proposed Administrative Review Tribunal ("ART"): "It is likely that some members of the ART would have legal qualifications. However, the Council considers that, save for the president, no member should be required to have legal qualifications in order to be eligible for appointment to the tribunal."

So we have now come to the diminution, if not the belittling, of the need for qualified legal skills in the proposed ART, and for that matter in the existing tribunals if the Chapter 8 proposal does not go ahead. It is no doubt politically correct nowadays to dismiss or belittle lawyers and their legal skills. But it is simply no good pretending that heavy cases, and believe it or not they do exist, do not need legal skills and experience to cope with the very real problems of statutory interpretation; of elucidation of complex facts; and of determination of the credibility of witnesses. If you do not know that, you have not been involved in cases before the AAT. Nor have you much familiarity with the reasons for decision which have been published over the past 19 years. Unfortunately this report betrays little understanding of just how difficult and complex these cases are. To ignore these considerations is to live in cloud cuckoo land.

It would be easy to pretend that administrative law can be simple, and that review processes can always be short, informal and simple. It would, of course, be nice if they were all simple. It would be nice if bringing up children were simple too, but it is not. I sometimes think that critics of lawyers in this field think that layers make up the difficulties for their own amusement. Why can't they just make it all simple? Do the critics forget that it is, pre-eminently, the Parliament through its enactments that has created the enormous complexities that confront decision-makers in administrative law? Yes, why not just make it all simple by applying what we all "know" what the Parliament meant, or, better still, what the Government "knows" that it meant? This is not fanciful. A Secretary to a Commonwealth Department, addressing a Forum conducted by the AIAL, said with disarming candour that it was terribly difficult to have an Act of Parliament amended, and that it was therefore necessary to apply what you knew was the government's policy! The way to go to make administrative law simple? Yes, and to take us back to the dark ages.

The AAT did not get to where it did by having as presiding members people with no legal training. I marvel when I hear people in high places speak of the AAT is if its success has been in spite of, not because of, its legal members. Especially in the earlier years of the AAT, there was an almost total absence of judicial decisions over large areas, a good example being in relation to customs classification. Indeed in many areas, the AAT had to work out carefully the construction of the relevant legislation and try to put it into a coherent framework. This sometimes involved comparing legislative concepts across a number of enactments, a good example being that of "capacity for work". Could this have been done by barefoot lawyers?

Let me now just mention three of a number of areas where lawyers have transformed administration:

> **Social Security**: Who was it who established that the Government had been wrong in the way in which the provisions of the Social Security Act in relation to invalid pensions had been administered? And who reasoned out the argument so persuasively in the decision that it was accepted by the Department of Social Security without appeal?
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> Do those who work in the interests of the poor and disabled want the lawyers outed?
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> **Veterans' Entitlements:** Who was it who, after the *Veterans' Entitlements Act 1986* had come into force, dealt with veterans' cases according to law, when the departmental representatives were coming up to the AAT reciting, very pleasantly, the governmental mantra in the form of the Minister's speech in the House in 1922? That was when he said that the purpose of pensions for repatriated soldiers was to look after those who were lying in repatriation hospitals, broken in body and in mind, or words to that effect. I had one case in which the Department brought to the hearing the 1922 speech, and the 1986 second reading speech and the explanatory memorandum, but not the Act.
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> Do those who work in the interests of veterans want the lawyers outed?
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> **Freedom of information:** Who was it that had the ability to put paid to the efforts of certain government representatives to have the pre-historic law about candour and frankness, surely much-beloved of Sir Humphrey Appleby, applied despite decisions of the High Court of Australia and of English courts?
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> Do those who believe in open government want the lawyers outed?

And so on. There are other examples.

Next, all members are to be appointed for terms of between three and five years (see recommendation 41, page 83): "The Council considers that a range of from three to five years would be generally appropriate, across all tribunals". With all respect, I find this proposition absurd in terms of the independence of the tribunal and its members at senior levels, and in terms of attracting to membership people possessing the necessary skills at those levels. I note that in former days a term of seven years was regarded as unsatisfactory in the case of Senior Members. I also note that the ARC report ignored the report of the Joint Select Committee of the Federal Parliament on Tenure of Appointees to Commonwealth Tribunals (November 1989) on this point, a report which the government affected to approve but which it honoured more in the breach than in the observance. How on earth will people of quality be attracted to full-time appointment to the higher levels in this tribunal? Certainly no-one who wishes to put his or her heart and soul into it, make a career of it, and really contribute to its intellectual development. Perhaps the truth is that that sort of dedication and independence is not wanted on voyage any more. Certainly, dedication and independence can be awkward, if not fatal, to government getting its own way whatever the legislation says. I suggest that this treatment of membership is, again, the road back, with a vengeance.

Appointment of Deputy Presidents and Senior Members is discussed, in the report, but, apart from stating that some Deputy Presidents would act as division heads, no attention is given to the relative qualifications and roles of Deputy Presidents and Senior Members. The present AAT has been bedevilled by the problems encapsulated in the question "What is the difference between a Deputy President and a Senior Member?" This proposal sends the answer into even deeper fog than at present.

The question of independence is indeed vital, but it is not discussed in any detail in this report, although it involves a major change in the ARC's previous stance, which called for non-renewable appointments (see recommendation 43). I dealt with this in some detail in a dissenting opinion in the Report of the Review of the AAT in 1991, and I will not go over what I said there again. Judging by what has happened in the immigration area, my worst fears have been justified. But let me just give you an understanding of how it can work on the ground. In 1987 there was an extraordinary attack by the then Minister for Finance, Senator Peter Walsh, repeated in various forms in various places, but enough of it said in Parliament to attract privilege. How secure, how independent would the AAT members have been at that time if they had been appointed for the ARC's three or five year terms, which are apparently now to be renewable?

The Chapter 8 models is in my submission a confusion, in which either the first level will lose the "informality virtues" presently obtaining at that level, or in which the second level will lose its quality skills, its experience, and its independence. It would in that event severely diminish the scope presently offered by the AAT for quality determination of the more difficult cases.

I wish to say that my complaints about terms of appointment and membership qualifications have much less application at the first level, at least in relation to part-time membership. When a right of review is open at the second level, as it should in my opinion be in all cases, including immigration, a degree of compromise at the first level is acceptable. And that first level would, with no cases going to the second level except by leave, hear probably the majority of cases to the point of finality. I have great respect for the work done by first level tribunals. It is because they succeed, under great pressure and without physical participation by the relevant agencies in the hearings, and because they deliver written reasons, that I place great store on cases not going beyond them without leave. But the Chapter 8 model, despite what the report says, does not in the format offered by the Report of "Review Panels", offer the framework, or the surety, of a different kind of hearing, and of review process generally, for the heavier cases. The presence of a quality second level, with a properly qualified membership, with secure tenure and unquestioned independence should cure any problems arising at the first level.

Finally, do we really want a review system in which the only way to obtain acceptable rulings about the construction of relevant enactments will be to appeal to the Federal Court? Do we really want a system in which the number of Federal Court appeals blows out because of mistakes in the application of the law?

The report envisages the possibility that the Chapter 8 proposal may not find favour. I trust that it does not. If it does not find favour, I submit that decisions of all first level tribunals should in that event be susceptible of review by the AAT, by leave and with a power of removal, as provided for in Models B and C referred to above. One option not acceptable is complete retention of the present system, which is seriously flawed. It is not, however, as seriously flawed as what has been offered in Chapter 8 of this report, given the

recommendations as to membership. And even if Chapter 8 is not accepted, the recommendations as to membership of present tribunals set out earlier in the report are again seriously flawed.

I am sorry to say that in my submission the proposed changes, for the reasons stated, would, if put into place, represent a deadly attack on the independence, and on the quality, of the Commonwealth system of review of administration decisions on the merits. I do not believe that this is wanted by the large number of intelligent and hard-working public servants who have worked at the coal-face, and who have done so much to help to make the system work. I fear that it may be wanted by the high-level policy-makers, and maybe by the government itself.