FAIRNESS IN ADMINISTRATIVE DECISION-MAKING: THE IMMIGRATION REVIEW TRIBUNAL MODEL

*Sue Tongue**

Text of an address to AIAL seminar, Adelaide, 21 May 1996.

Introduction

The purpose of my presentation is to give a brief introduction to the Immigration Review Tribunal (IRT), discuss how it goes about achieving fairness in administrative decision-making and talk about some current issues in administrative law and policy. I am sure most of you are familiar with the work of the Tribunal and its method of operation but I will briefly recap before addressing current issues facing the Tribunal.

The IRT

The Tribunal has been in existence for six years. It was established as part of the package of changes to the *Migration Act 1958* passed by Parliament in 1989. The creation of a mechanism for independent review of migration decision-making consistent with the requirements of administrative law was recommended by the Committee to advise on Australia's Immigration Policies (Fitzgerald). Earlier reports to the Government by the Administrative Review Council (ARC) and Human Rights Commission (HRC) had also proposed a system of review. Prior to the establishment of the IRT, decision-making was primarily policy based with individual decision-makers exercising a degree of discretion. Non-statutory, non-determinative review was available through the Immigration Review Panels.

The 1989 package established two tier review. The first tier is a discrete and independent Migration Internal Review Office (MIRO) within the Department of Immigration and Multicultural Affairs (DIMA). The second tier is independent review by the IRT. The IRT's jurisdiction covers:

- all decisions refusing or cancelling visas in Australia other than decisions:
  - on people who have not been cleared by Immigration on arrival in Australia
  - on refugee status (reviewable by the Refugee Review Tribunal (RRT))
  - to refuse or cancel visas to people overseas on character grounds and to cancel business visas (reviewable by the Administrative Appeals Tribunal (AAT))
- reviewing decisions refusing visas to people overseas where there is an Australian sponsor or nominator or (in relation to return resident visas and close family visitor visas) a close relative in Australia who may pursue review of the matter.

Most decisions refusing visas must first be reviewed by MIRO but visa cancellations and decisions refusing visas which result in people being held in immigration detention (bridging visas) come directly to the IRT. At present about 38% of those

* *Sue Tongue is Principal Member, Immigration Review Tribunal.*

eligible to apply for review of a MIRO decision do so. The Tribunal makes over 2000 decisions a year and this year is setting aside the department's decision in about 54% of cases. The Tribunal may set aside the Department's decision because new evidence has emerged and this often occurs when the Tribunal talks to the applicant and their family. Also the Tribunal is not bound by departmental policy in making its decision.

The present rate of appeal from Tribunal decisions is about 4% which is an increase on the usual rate of around 2.5%. The increase is directly attributable to the appeals in relation to class 816 visas. The Department has only appealed in two cases.

The Tribunal's principal registry is in Canberra but it has registries in Adelaide, Brisbane, Melbourne, Perth and Sydney. The Northern Territory is serviced by the Adelaide registry and Tasmania is serviced by the Melbourne registry. The Tribunal has 17 full-time Members and 17 part-time Members who are independent statutory office holders. It has about 50 staff. To date it has made 6870 decisions.

The Tribunal is required by subsection 353(1) of the Migration Act to "pursue the objective of providing a mechanism of review which is fair, just, economical, informal and quick". It has been given a clear mandate to adopt non-adversarial methods. The legislation reflects the response of Parliament to the costs of justice and fears about increasing legalism and formality in administrative review.

In *Tordo*[1] Keely J said:

> In my opinion the provisions in the Act demonstrate an intention by Parliament to confer upon the Tribunal extremely wide powers to decide what method of conducting the hearing will provide "a mechanism of review that is fair, just, economical, informal and quick" (s 123(1)), and to do so in its discretion although it must act "according to substantial justice and the merits of the case": s.123(2)(b).

The Tribunal's procedures were developed recognising natural justice principles. The Tribunal is "not bound by technicalities, legal forms or rules of evidence". It acts "according to substantial justice and the merits of the case." The only party to the review is the applicant who, in addition to providing documentary evidence, may make written submissions to the Tribunal. The Secretary of DIMA is required to provide the Tribunal with a written statement of the Department's reasons for the decision under review. The Department can be called to give evidence or arrange for an investigation or examination at the Tribunal's request but is not a party to the review. One of my colleagues on the Tribunal says he has an empty chair at a hearing. After an application is lodged it is constituted to a Member for consideration. The Member does a review on the papers and can find for the applicant at this stage. However most matters proceed. In many cases the Member will hold a preliminary meeting with the applicant and their adviser to explain the Tribunal's processes, discuss the evidence that will be required and identify key issues. A hearing is usually held at which evidence is taken from the applicant and their witnesses then the Tribunal Member writes their decision.

The Tribunal's procedure is similar to, but different from, other Commonwealth tribunals. There are elements of Social Security Appeals Tribunal and Veterans' Review Board procedures and some similarity with the Administrative Appeals Tribunal (AAT). Tribunal members have a "hands on" approach to the conduct of the review. They have the ability to take evidence on oath or affirmation, the power to authorise another person to take evidence inside or outside Australia, the power to summon a person to give evidence or produce documents, to require the Secretary to arrange for an investigation and report on it and to obtain such other evidence as it thinks necessary.

The use of advisers by applicants to the Tribunal is steadily rising. In 1990-91 about 20% of applicants were assisted by advisers. By the end of 1991-92 this had increased to about 30%, by 1993-94 to 55% of applicants and by 1994-95 to 58%. In 1994-95 63% of decisions on applications in which an adviser was used were favourable compared to 58% the previous year. There are a number of possible reasons for the changes but there is, at present, no clear evidence available to support any particular reason. I understand one likely reason for the changes is the difference in the Tribunal's case mix as a consequence of the new legislative scheme introduced on 1 September 1994. Also applicants for bridging visas may be more likely to have an adviser. Another theory I have heard is that there has been an improvement in services offered by advisers. I have been told that advisers are now more likely to give a realistic indication of the prospects for success in overturning a departmental rejection of a visa application. Sometimes people choose to appear before the Tribunal alone if an adviser has told them their chance of success is low. The Tribunal is concerned to ensure that applicants without advisers are not disadvantaged by Tribunal procedures and will be examining the reasons for the 1994-95 changes in outcomes.

In August 1995 AGB McNair conducted a survey or IRT clients. 403 telephone interviews were conducted with applicants to the IRT. In addition there were 69 telephone interviews with law firms, immigration consultants and other community groups who have dealt with the IRT as part of a "community survey". The survey results showed 37% of applicants were aware of the correct role of the Tribunal and 55% of respondents in the community survey believed their clients know the correct role. Respondents to the community survey generally believed the IRT is sensitive to the language needs, ethnic background and lack of experience of their clients in appealing against government decisions. The majority of respondents (68%) believed that the Tribunal process is fair and just. However opinions were split on the speed of the process. These responses were echoed by respondents to the community survey.

There had been a previous client survey in 1992 and some differences between the two surveys emerged. More applicants in the 1995 survey sought assistance from law firms (30% in 1995 compared to 20% in 1992). More applicants in 1995 believed all aspects of their application were fully considered than the 1992 respondents (65% compared to 47% in 1992) and more applicants indicated they fully understood the reasons for the Tribunal's decision than the 1992 applicants (73% compared to 59% in 1992).

The Tribunal will take the results of the survey and other comments it receives into account in monitoring its policies and procedures. The increase in size of the membership of the Tribunal has led to the need to establish more structured processes for ongoing review of its operations and development of policies in response to legislative change, client and community feedback and other developments. Such processes should assist in improved service delivery by the Tribunal and are being actively pursued by the Tribunal.

Current issues

Recent amendments

When the Tribunal was established the ARC, among others, had concerns about its methods and the Government undertook that a review would be conducted after two years of the Tribunal's operation. That review Committee, the Committee for the Review of the System of Review of Migration Decisions (CROSROMD), reported in 1993. It made a number of recommendations for legislative change designed to strengthen and clarify the non-adversarial process used by the Tribunal. The *Migration Legislation Amendment Act (No 1) 1995*[2]

introduced a number of changes to the Migration Act. The amendments were intended, among other things, to give effect to some recommendations of CROSROMD. The aim was to enhance the operation of the IRT and further strengthen its non-adversarial operation.[3] The amendments which will have the most impact on the operations of the Immigration Review Tribunal are the following:

- section 366A on the role of assistants when an applicant is appearing before the Tribunal
- section 366D stating that a person is not entitled to examine or cross examine any person
- section 362A which provides that applicants and their assistants may have access to any written material given or produced to the Tribunal
- section 366C requiring the Tribunal to provide an interpreter when requested unless a person is sufficiently proficient in English
- section 375A allowing for certification by the Minister that disclosure of a document would be contrary to the public interest and notification of that to the Tribunal by the Secretary.

Administrative Review Council Report on Tribunals

In September 1995 the ARC report, *Better Decisions: Review of Commonwealth Merits Review Tribunals* was released. Consultations have been held with groups affected by the report. The Government has not yet responded to that report.

The Council's report discusses adversarial and inquisitorial approaches to tribunal proceedings. It says that:

> specific features of practice in the specialist tribunals were the subject of criticism during the inquiry. For example, the general lack of agency presentation in cases before the tribunals other than the AAT means that in those tribunals, members take a much more active role in eliciting information from applicants at hearings. They are obliged to ask questions of applicants and to test their veracity where relevant, rather than leaving the more contentious aspects of this process to be performed by agency representatives.[4]

The Report suggests that, in some ways, the AAT is too formal. On the other hand it also suggests that the specialist tribunals can draw from the AAT's experience with alternative dispute resolution techniques and sometimes adopt a more legalistic and adversarial approach.

Australian Law Reform Commission inquiry

The Australian Law Reform Commission has been asked to inquire into the adversarial and inquisitorial processes. It is hoped that the IRT and RRT will be involved in that work as their non-adversarial methods provide an interesting Australian model.

Access to justice

In recent years a number of reports on the legal system have indicated that many in the community lack access to justice. The 1995 Sackville Committee report on Access to Justice showed evidence of lack of access to justice and suggested a number of improvements. At the Tribunal we are conscious that many applicants come from non-English speaking backgrounds. We use interpreters extensively and publish information in community languages. We are conscious we can do more and are considering improvements.

Review

Prior to the last federal election the Coalition announced that if elected they would conduct a review of the IRT and

RRT. Details of that review are expected to be announced shortly.

Achieving economical and quick decision-making

One of the criticisms of the IRT to emerge from the client survey was the delay in receiving a decision. Dean Roscoe Pound said that justice that has been delayed or is so formalistic that it is beyond the reach of the average person is a negation of justice. The Tribunal is required to do economical and quick reviews and is considering steps to improve its delivery of decisions. It is examining shortening the length of written reasons. It is also reviewing its current time standards and case management to see where improvements can be made.

Conclusion

The IRT is facing challenges in meeting its objective. However it has advantages. In particular, its Members and staff are committed to its objective and take pride in using non-adversarial processes that are "user-friendly" to applicants and their advisers. The Tribunal is working to improve its service delivery and in doing so is having regard to feedback from its users.

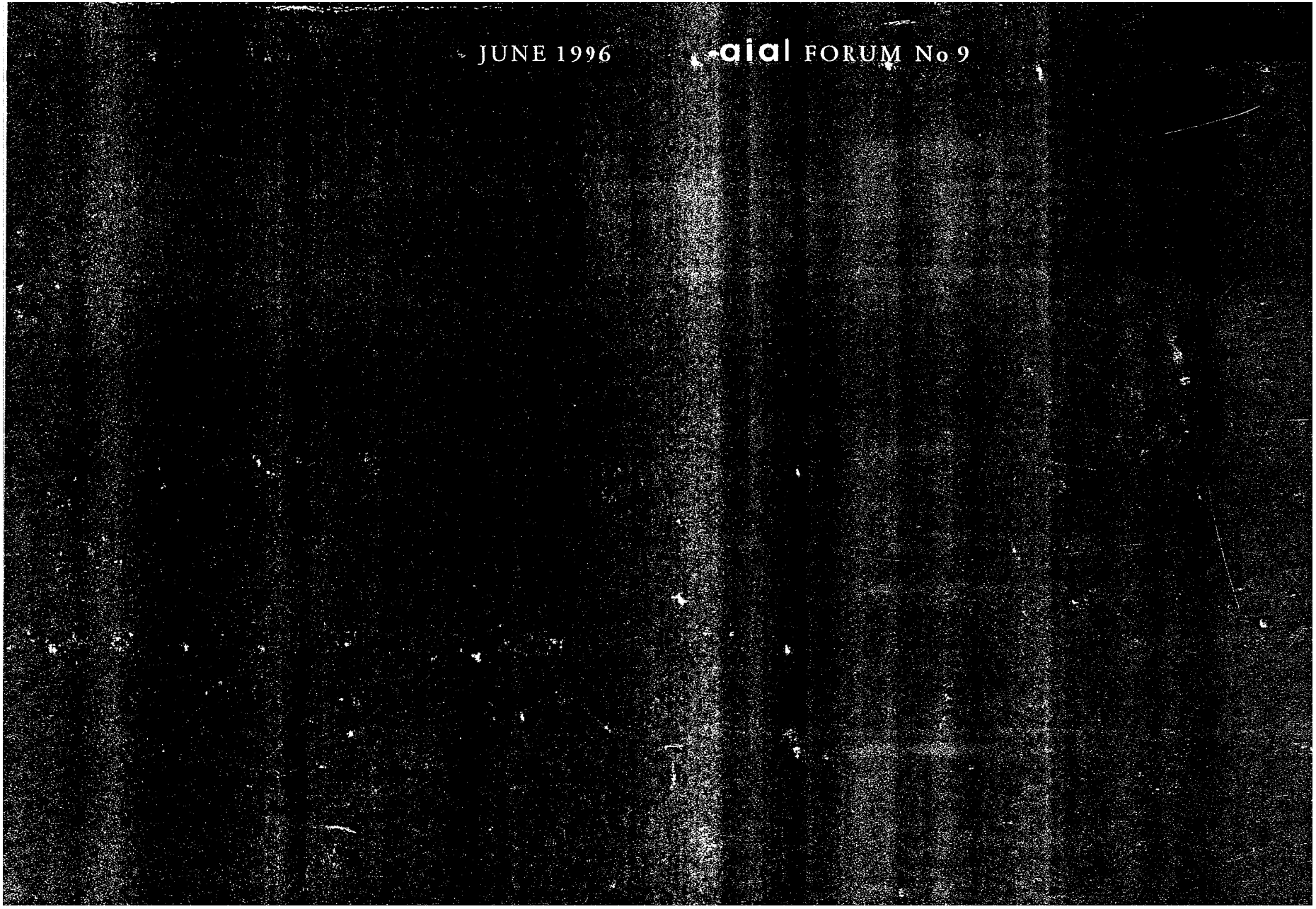
Endnotes

1 *Minister for Immigration, Local Government and Ethnic Affairs v Immigration Review Tribunal and Ors* (1993) 113 ALR 737.

2 This Act was known as the *Migration Legislation Amendment Bill (No 5) 1994* when it was going through Parliament and is sometimes referred to as "Bill 5".

3 House of Representatives *Hansard*, 9 February 1995, p 855.

4 Para 3.42.


JUNE 1996
aial FORUM No 9