THE ART—AN ALP VIEW

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The issues we are looking at are very significant issues. In 1975, for instance, this was said during the second reading debate on the Administrative Appeals Tribunal Bill:

> This legislation and the companion legislation to establish the office of an Australian ombudsman are both extremely significant phases in the development within Australia not only of our administrative law; they are also momentous events in the evolution of our system of government.

They were the words of John Winston Howard in responding to the bill on 14 May 1975 on behalf of the Opposition. The creation of the tribunal was no doubt a momentous event—unquestionably so.

We do not have in Australia a bill of rights, and it is fair to say that the greatest infringements of individual rights can be by the executive. While we have a parliament elected by the majority of Australians, that mere fact in itself does not mean that individual rights are guaranteed. A government elected by a majority can be equally oppressive of the rights of individuals and minority groups as any totalitarian regime. Having a system of effectively working administrative law is vitally important, as John Howard indicated, in the evolution of our system of government. We take these proposals very seriously indeed.

In June the primary bill was tabled; just a few weeks ago the consequential bill was tabled with more amendments proposed than any other bill in Australian history. The position of the Labor Party is that we accept the justification for a review of the present system. Indeed, it was the former government that called for a review in 1993. Administrative review has been operating for a quarter of a century and, since the creation of the Administrative Appeals Tribunal, there is no doubt that other specialist tribunals, justified as they are, have been established on more of an *ad hoc* basis, and so there is justification for looking at bringing all these tribunals together under one umbrella. It makes sense to look at common systems—electronic information systems, library systems, training procedures. To what extent those efficiencies are achieved at the cost of independence is a substantial question. In our view, neither that independence nor the quality of the decision making process should be compromised.

The scope of administrative decisions in relation to ordinary Australians needs to be appreciated. Each year there are over 50 million decisions made by the executive arm of government that affect ordinary Australians. Only a small percentage of those are challenged but, to put it in context, more than 36 million are made in the social security area. Between 1997 and 1998 there were 43,074 internal reviews by Centrelink offices; 9,214 applications for external review by the Social Security Appeals Tribunal; 1,735 applications concerning social welfare decisions in the AAT; and some 33 related applications to the Federal Court. In that same year the Australian Taxation Office made more than 10 million decisions involving the amount of tax individuals and companies should pay. There were 76,229 objections to assessment, 1,604 matters were lodged for review by the AAT and 19 taxation appeals were filed in the Federal Court.

Clearly, below the Federal Court the role of the Administrative Appeals Tribunal is vital to a great many Australians. There are decisions made not only in the areas of social security and taxation but also in the areas of workers compensation, war veterans and widows entitlements, residence, business, temporary entry visas, customs matters and business

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licensing. Literally, these decisions impact on the daily lives of a great many ordinary Australians. It is important to realise that these decisions and the need to seek review quite frequently happen at crucial times of people's lives or at times of great vulnerability—a child may become ill, the breadwinner may suffer an accident or one of the members of a family may become disabled and issues of carers are involved. These people are affected by decisions in times of greatest need.

As I keep emphasising, the ability to seek review of administrative decisions is such a vital check to the role played by the executive that structures that are working well should not be changed just for the sake of change or indeed for the sake of the budget bottom line. We do have one of the best systems of administrative review in the world and that is because it is based on genuine merits review, where the tribunal stands in the shoes of the decision maker and makes the decision afresh, thus offering the best prospects for a logical, sensible and fair outcome. Before we had the AAT, Australians were limited to the more complex, costly and difficult procedures of judicial review in the courts. While we say there is always room for improvement, it is incumbent on those proposing change to demonstrate how their change will be to the benefit of ordinary Australians and to justify the cost savings. We are not convinced, quite frankly, that that has been done.

While the Australian Labor Party supports, as I said at the outset, the notion of bringing the various specialist tribunals together under an umbrella body, we fear that the government's real motivation is the budget bottom line. The government openly say that they propose to save about $13 million over four years from the amalgamation. We question those figures. But, even then, to have that as the primary objective is to misapply the priorities. The top priorities have to be the independence of the tribunal and the quality of the decisions.

In terms of the suspicions that arise, we look at the situation in respect of veterans. When the proposals for amalgamation were initially put forward in 1977, it was proposed to bring the Veterans' Review Board under the umbrella. But, as a result of significant pressure from veterans bodies, the government has abandoned that proposal, which is a significant departure from the Administrative Review Council's recommendations in the *Better Decisions* report.

Veterans themselves are concerned about the current proposals because they are not satisfied that the quality of review in the proposed Veterans' Appeals Division will be equal to that of the current Veterans' Review Tribunal. But the question must be asked: if the decision to exempt veterans was made on the basis that the new system would not improve their circumstances, why then is this system good enough for the rest of Australia? The veterans, in our view, were more than justified in saying that they were not prepared to accept the proposed system. Australians are justified in saying that they are not prepared to accept the proposals—which will, we believe, diminish the quality of review and the independence of review.

The ALP has a number of specific problems with the model. Decisions must be of the highest quality and we are not convinced that is going to be the case, given the proposed structure of the tribunal.

Others have spoken of the numbers involved, but there are restrictions. For instance, senior members will account for no more than 10 per cent of total members and no more than 15 per cent of members of a division. Currently, senior members constitute about 30 per cent of the Administrative Appeals Tribunal. So, while reducing the number of senior members will result in some cost savings, it will diminish the ability of the tribunal to deal with more complex matters. It will reduce the ability of these senior members to lead and train more junior members. We also are concerned with the lack of tenure for full-time members. We think that is of concern, as is the fact that even though appointments of up to seven years

are proposed, no minimum period of appointment is prescribed. That is also of concern in the sense that short-term appointments make the tribunal member more vulnerable to pressure to do the bidding of the government.

That leads to a more meaty subject: the issue of funding. Questions are raised immediately when it is understood that funding is to be by the portfolio agency that will have its decisions reviewed by the particular proposed division of the Administrative Review Tribunal.

That, in itself, is going to be cumbersome, because the President and executive members are going to have to negotiate each year with the various departments, which will put them in an invidious position in terms of not only time but also the extent to which they have to plead and beg for additional funding or maintenance of funding levels if the minister is not happy with the decisions that have come forward. This will be the case whatever the calibre of the government of the day. Such pressure would not come only from a conservative government. Clearly, there are many instances where dissatisfaction was expressed by ministers of the previous Labor government about many decisions of the Administrative Appeals Tribunal and the Federal Court of Australia. That is why there must be structures in place which guarantee independence.

The proposed funding model is directly contrary to the recommendations in the *Better Decisions* report. While we have to concede that the Social Security Appeals Tribunal, the Refugee Review Tribunal and the Migration Review Tribunal are funded on that basis, we do not want to see the worst aspects of these specialist tribunals being incorporated into the new model of the Administrative Review Tribunal. We want the best aspects of all models to be applied to the new tribunal.

The other significant concern we have is with the appointment and removal of members of the tribunal. This is proposed to occur on the recommendation of the Minister whose department is going to be the subject of review by the particular division. While that was a recommendation of the *Better Decisions* report, it was also a recommendation of the *Better Decisions* report that either the Attorney-General's Department, the Special Minister of State or the Department of the Prime Minister and Cabinet be responsible for this amalgamated body, all being at arm's length from the decisions that are likely to be reviewed in these other areas. So it is misleading to suggest that that recommendation for ministerial involvement in the appointment process was a recommendation of the *Better Decisions* report. That is vitally important. We recognise that ministerial recommendation is currently the case in respect of the social security, migration and refugee areas but again why import the worst aspects of these specialist tribunals into the new body? We have got a particular concern about that.

We are also concerned that there are no minimum qualifications specified for the President of the tribunal. The Attorney-General is on the record as saying that in all likelihood it would be someone with legal experience. But why not specify the essential qualifications in the Act? We are also concerned that there are no specified minimum criteria for other members. For instance, one aspect of the *Better Decisions* report which was impressive was the listing of the qualities that are needed by a tribunal member in terms of core skills. These are things such as understanding the concept of merits review; some experience with administrative review principles; analytical skills; personal skills and also communication skills. None of those things is specified in the bill.

That also leads on to the greater ease of removing tribunal members. While the President's position will remain pretty well as it is—being subject to removal on the recommendation of the Parliament—other tribunal members will be able to be dismissed for issues relating to their non-achievement of performance targets, the code of conduct or the directions of the President. That again has significant repercussions for the ability of individual tribunal members to make decisions independently of the hierarchy. Particularly if there is pressure

on them to make decisions in a too abbreviated manner, to rush them through or to meet unreasonable targets, independently minded tribunal members might be under threat and that would be regrettable.

Another area of significant concern is the restrictions on second-tier review. We are very concerned about that. We think only a handful of decisions will meet the two criteria for second tier review specified in the bill, namely that the review was heard by a single member and the case raises a principle or issue of general significance, or that the parties to the first review agree that the decision involved a manifest error. In my 15 years experience as a legal practitioner specialising in litigation I not once saw that occur and I do not think it would occur.

The other area of great concern is the restrictions on representation. It will no longer be a right but at the discretion of the tribunal. Being a lawyer, I suppose I cannot speak with objectivity, but I can sincerely say that if I as a lawyer had to represent a person against an unrepresented litigant I would always prefer the other side to have representation. Why? Because more often than not the job of a good lawyer is to throw their own client around the room a few times to talk sense into them so that they can see reality, rather than to just offer the advice the client wants to hear. More often than not good lawyers from both sides would do that. They would tell their clients the facts, show them the true light of day, rather than let them go off because they had some particular obsession to express in a tribunal.

I think the involvement of lawyers unquestionably contributes to matters being settled. If matters are not settled and they go to trial, there is no question—all the evidence suggests that the involvement of lawyers significantly reduces the length of trials. It is in many ways penny wise and pound foolish to propose removing lawyers. I think they make a real contribution to sensible outcomes and to assisting tribunal members. To portray lawyers as promoting entrepreneurial litigation to build up costs is, I think, a gross overstatement. That happens to a very minor extent. In more cases than not the role of a good lawyer, as I say, will really be to tell clients in very firm language what the reality of the world is. I have seen that time and time again in my experience as a practitioner.

The final point we have concern with is the ability of ministers to issue practice directions which will prevail over those of the President or the executive. I think to even state that in itself supports the argument. How can you have a truly independent body where the minister whose decisions are being reviewed is entitled to give directions regarding practices and procedure and even indeed regarding guidelines for the appearance of lawyers?

To conclude, the position of the Labor Party is that we do not oppose the amalgamation of specialist tribunals *per se*, but, to quote the words of Justice Jane Mathews in 1998 when this proposal was first floated, 'The proposed amalgamation constitutes such a downgrading of the merits review system as to fundamentally threaten the quality and independence of external merits review.' Having seen the actual proposals from June this year, after they were tabled in parliament, I think her concerns were well founded. I think it is probably even worse than initially portrayed. It will unquestionably affect the quality of decisions and most certainly affect the independence of the decision making process. As I said, we are concerned that it actually draws on the worst aspects of the current specialist tribunals and incorporates those worst aspects into the new tribunal.

While we have not formed a final position in terms of the relevant caucus and shadow ministry procedures, I have to say that in my personal view, the bill is so fundamentally flawed that it would be extremely difficult to amend it to make it a reasonable proposition. Quite frankly, I think the proposal needs to go back to the drawing board to address some of these fundamental points that I have made and, more importantly, to address the concerns that others who are experienced in the area have made.