ACCESS TO ADMINISTRATIVE JUSTICE

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The overarching theme in this year's AIAL National Administrative Law Conference is the important topic of access to administrative law justice. The topic has many facets. I will focus on a selected few:

- enhancing access to justice by using online processes in administrative tribunals and courts;
- legitimacy and certainty as core values in judicial review;
- the importance of tribunal independence; and
- the need for the Administrative Review Council (ARC) to be revived.

Enhancing access to justice by using online processes in administrative tribunals and courts

Greater use could be made of online and digital technology to enhance access to administrative justice. That should also produce cost savings when governments are understandably concerned about expenditure.

The use of digital technology in dispute resolution is not confined to tribunals and courts. As will be discussed in this conference, government departments and agencies are themselves embracing online technology, including in automated decision-making using coded logic and data-matching to make, or assist in making, decisions. This has given rise to some widely publicised concerns.[1]

eBay has demonstrated the attractions of such technology to resolve civil disputes quickly and economically. Each year 60 million disagreements among traders on eBay are resolved using online dispute resolution (ODR). There are two stages. The first involves parties being encouraged to resolve non-payment or product quality disputes by online negotiation. The second stage is available when the first fails to produce a resolution. After the parties present their respective positions in a discussion area, an eBay staff member makes a binding determination under eBay's Money Back Guarantee. The process operates under strict time frames.

Professor Richard Susskind, IT advisor to the Lord Chief Justice of England and Wales, says that there are four problems with the current system for resolving disputes in courts, which highlight why courts should explore emerging digital possibilities:

- it is costly for users;
- it takes a long time to resolve disputes;

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- it is largely unintelligible to the public; and
- it is out of step with the internet society.

Speaking in Melbourne in May 2016, Professor Susskind said that the expense, anxiety and time taken in traditional court proceedings are often disproportionate to the value of the disputes in issue. There is a massive unmet legal need because people are not entering the system in view of its expense, their lack of understanding of it and also because it is out of step with contemporary internet society.

Key features of our judicial system are open justice and procedural fairness. But we need to think about how these core values can be met without the cost and formality of traditional court hearings. We need to explore how transparency and public accountability can be achieved by greater use of technology in suitable cases, including by electronic court files and court portals which can be accessed by parties and, in the case of some of the material, interested persons.

Of course, not all disputes are suitable for processing, let alone resolution, by digital technology. There is a need, for example, to accommodate the many people who are not able, for whatever reason, to take advantage of digital technology. But administrative law disputes appear to me to be a leading candidate for using online processes and for determination more often by hearings on the papers. That is because, at the judicial review level at least, there are frequently no significant disputed facts, there is no need to cross-examine witnesses and legal arguments can usually be presented as, or more, efficiently in writing than orally. That is so, for example, where issues of statutory construction are prominent, which is normally the case in an administrative law dispute. And in an era where there is an increasing number of litigants in person, who often seem overwhelmed by a formal court setting, many may prefer to have their cases conducted by online technology. This would more closely reflect the way in which many people now conduct their daily lives with extensive use of the internet. It is premature to impose these procedures on an unwilling party, but the option ought to be available for the parties to consider and agree upon. Naturally, effective data protection and security of information procedures must be in place.

The ability to initiate complaints about public administrative action by online application is now available at some tiers in Australia. For several years now, complaints to the Commonwealth Ombudsman can be lodged online. This option is obviously attractive in the age of the internet. In 2015–2016, 38 per cent of complaints were lodged electronically, compared with 23 per cent in 2011–2012. It remains the case, however, that the majority of complaints to the Ombudsman are still made by telephone (58 per cent in 2015–2016 compared with 70 per cent in 2011–2012).

The extent to which digital technology can be used varies widely across federal and state administrative review mechanisms. For example, in the New South Wales Civil and Administrative Tribunal (NCAT), some but not all applications can be made online. It is not possible, for example, to use that technology to lodge appeal applications. Also, there is no capacity to submit attachments online even where an application for review has been lodged online. NCAT is apparently working on changes to its systems to enable this to occur.

The New South Wales Government has introduced an online service which enables legal practitioners and registrars to manage and process call-overs online and without any physical attendance in the courtroom. The Online Registry website is accessible by registered legal practitioners and enables them to access case management services in the Local, District and Supreme Courts, as well as in the Land and Environment Court. Practitioners have the capacity to send messages to a registrar. All such contacts are

transparent to other parties. Each participating court has published a practice note relating to the Online Court. Lawyers who are registered can make interlocutory applications online, such as for an adjournment or for case directions, rather than having to appear in person. Subpoenaed documents can also be produced electronically in civil cases.

Earlier this month, the Chief Justice of the Supreme Court of New South Wales commented on how allowing documents to be filed online had helped drive down the cost of litigation in New South Wales courts. Chief Justice Bathurst forecast that there will be an increasing emphasis on harnessing technology, but he added that, while there may be fewer appearances in court, he strongly doubted that cases would ever be determined by a mathematical algorithm. That is because 'law always involves the human element' (an element which is often lost or at least marginalised in administrative decision-making processes).

Online applications can be made in the Administrative Appeals Tribunal (AAT). AAT hearings are normally held in person, but telephones and video-conferencing are frequently used. In 2015–2016, hearings by telephone or video-link were used in 2 300 directions hearings, 435 interlocutory hearings and almost 10 000 final hearings, primarily in the Social Services and Child Support Division.[2] Video-links are commonly used in many Australian courts, usually to conduct interlocutory hearings and to take evidence in appropriate cases. For several years now, some special leave applications in the High Court are conducted by video-link.

Greater use of electronic communications seems to be occurring in the new Immigration Assessment Authority (IAA), which, from 1 July 2015, has become a separate office within the AAT's Migration and Refugee Division (see pt 7AA of the *Migration Act 1958* (Cth)). Its role is to conduct speedy reviews of fast-track reviewable decisions (that is, 'asylum legacy cases', involving adverse protection visa decisions of the Minister or a delegate to a fast-track applicant, being applicants who are unauthorised maritime arrivals who entered Australia between 13 August 2012 and 31 December 2013, have not been taken to an offshore processing country and have been permitted by the Minister to make a protection visa application). Apparently there are 24 000 such people.[3]

The Department of Immigration automatically refers fast-track reviewable decisions to the IAA. The referrals are made electronically and are accompanied by certain materials which are relevant to the review. The IAA undertakes a limited form of merits review which is different from that normally conducted by the AAT, with decisions in most cases being made on the papers. The IAA does not conduct hearings, and only in exceptional circumstances does the IAA request or accept new information that was not before the primary decision-maker. The IAA review process is expected to take six weeks to complete, or longer if new material is considered. Of the 130 referrals finalised during 2015–2016 (admittedly a small sample), the decision under review was affirmed by the IAA in 94 cases and remitted for reconsideration in 36 cases. Judicial review applications were made in 35 per cent of those IAA cases, which portends a heavy case load for both the Federal Circuit Court and the Federal Court.[4]

The AAT has come under some pressure as a result of the enactment of the *Tribunals Amalgamation Act 2015* (Cth), which merged the AAT with the Social Security Appeals Tribunal, Migration Review Tribunal and Refugee Review Tribunal. It was estimated that the amalgamation would produce savings of $7.2 million through reductions in back-office and property expenses.[5] The legislation does not seek to make significant changes to procedures which already applied in those tribunals but permits flexibility in the selection and use of appropriate procedures. Reference was made in the second reading speech to the 'heart of a strong merits review system [being] an independent generalist tribunal boasting a

range of specialist expertise'. I will return to that subject shortly in the context of the important topic of tribunal independence. Amalgamation saw a surge in review applications in the AAT, which rose from approximately 6 500 in 2014–2015 (AAT alone) to exceed 41 000 in 2015–2016 (post-amalgamation). This represents a 3 per cent increase in the number of applications lodged in the three pre-amalgamation tribunals. The AAT finalised more than 38 000 applications in 2015–2016.[6]

While there have been positive developments in Australia involving use of online technology, overseas experience should also be noted. For example, Turkey now has a national electronic service across all its judicial functions. This means that lawyers and litigants in person can examine files, pay application fees, submit their documents and claims and file cases electronically in any court in the country. The progress of a case can be monitored by accessing information, such as when a matter is fixed for trial, without having to contact registry staff by telephone or post. The Turkish system has nearly two million users and has led to estimated savings of $100 million.

In early 2017, the province of British Colombia launched Canada's first online Civil Resolution Tribunal. It allows citizens to resolve small claims disputes of $5 000 and under and strata property of any amount. It has several familiar stages, none of which requires legal professional involvement:

(a) the parties are encouraged to try to negotiate a resolution, including by using the Tribunal's online negotiation platform, which is subject to short timelines and supported by templates for statements and arguments;
(b) under the next stage, a Tribunal case manager is appointed to oversee a mediation process which is conducted online or over the telephone; and
(c) if required, a final and binding adjudication process is available, which involves extensive use of online technology and video-conferencing.

An online dispute resolution system called the Rechtwijzer was introduced in the Netherlands in 2014. It was available for landlord–tenant disputes, debt and divorce proceedings. In March this year, however, the project's private backers announced that the system would close in July, as it had proved to be 'financially unsustainable'.[7] Different imperatives would drive government-funded ODRs as part of the State's obligation in a liberal democratic society to provide effective dispute resolution processes, including in the context of public administrative action.

In delivering the Lord Slynn Memorial Lecture in London last month, the Master of the Rolls (Sir Terence Etherton) said that the failure of the Rechtwijzer should not inhibit development of a proposed Online Solutions Court in England and Wales for small claim civil cases. That proposal has three broadly familiar elements:

(a) individuals will be assisted to find the right sources of legal advice and help in order to enable them to consider whether they have a viable legal dispute and be able to submit relevant documents online, including a claim form;
(b) case officers and court administrators exercising judicial functions under judicial supervision will assist parties to manage their claims and engage in online dispute resolution by way of mediation and conciliation processes; and
(c) where alternative dispute resolution fails, a claim will be adjudicated by a judge. This may not take place in a traditional courtroom but instead be carried out online by video-link, telephone or be heard on the papers.[8]

This brave new world created by digital technology should come as no surprise to those of you who practise in the Federal Court, which over the last three years has rolled out an Electronic Court File (ECF) technology system.

The first Federal Court file to be wholly created, managed and stored electronically was produced in Adelaide just over three years ago, on 14 July 2014. The ECF is an eLodgment system by which documents can be placed on an electronic Court file. Although the Federal Court does not yet provide a means for disputes to be resolved online as do the countries just discussed, the ECF has benefits for both Court users and the Court itself. For users, the benefits include:

- automatic acceptance of supporting documents, with such documents that are eLodged generally being stamped with the seal of the Court and returned to the eLodger within minutes;
- expanding the range of documents available for view by authorised users on the Commonwealth Courts portal; and
- documents that are eLodged are uploaded to the Commonwealth Courts portal twice each business day, while stamped orders are generally available instantly.

For the Court, the benefits include:

- immediate access to the Court file and the documents on it;
- increased efficiency in case management, as time spent retrieving files and documents is greatly reduced;
- reducing the risk of files being lost or incomplete; and
- reducing storage and archiving costs.

The rollout of the ECF has coincided with the introduction of the Court's National Court Framework (NCF). The key purpose of the NCF is to reinvigorate the Court's approach to case management by further modernising its operations to better accommodate the needs of litigants. Nine National Practice Areas (NPAs) have been created, the most relevant of which for this audience is likely to be the Administrative and Constitutional Law and Human Rights NPA. A new practice note has been published for that NPA.[9] One of the key objectives is to have a nationally consistent and simplified practice and procedure, which should speed up litigation and make it less expensive. There is a strong focus on active case management, with early case management hearings to ensure that cases are managed efficiently and are ready for trial at the earliest appropriate time.

One new procedure in this NPA is that the parties may be directed to provide a three-page brief written outline of their case. The outline is not designed to supplant pleadings but aims to focus early attention on the essential issues, without the opaqueness which often plagues conventional pleadings. And, to help save costs and to speed things up, it is only in exceptional cases that there will be discovery or interrogatories in administrative law and constitutional cases. There is also likely to be greater use of lump sum and capped costs orders.

Legitimacy and certainty as core values in judicial review

In any constitutional system which is based on the doctrine of separation of powers there will at times be tension between the legislature, executive and judiciary. Our history reveals how the invalidation of legislation on constitutional grounds or other groundbreaking cases can produce a backlash from senior parliamentarians: witness the response to *Bank of New South Wales v Commonwealth*[10] (*Bank Nationalisation case*), *Australian Communist Party v*

Commonwealth[11] (*Communist Party case*), *Mabo v Queensland (No 2)*[12] (*Mabo*) and *Plaintiff M70/2011 v Minister for Immigration and Citizenship*[13] (*Malaysian Solutions case*).[14]

The High Court's decision in the *Malaysian Solutions case* drew strong criticism from the then Prime Minister, Julia Gillard. She described the Court's 6:1 majority decision as 'turning on its head' the previous understanding of the law, and she criticised the Chief Justice personally for his alleged inconsistent decision-making.

The High Court's decision in *Wik Peoples v Queensland*[15] incited the then Premier of Queensland, Rob Borbidge, to describe the High Court as an 'historic pack of dills' and 'an embarrassment'. He may have been encouraged by the Deputy Prime Minister's previous remarks following *Mabo* when he said:

> I'm not going to apologise for the 200 years of white progress in this country. I will take on and fight the guilt industry all the way …
>
> Mabo has the capacity to put a brake on Australian investment, break the economy and break up Australia — a brake, a break and a break-up we can well do without.[16]

The tension between the courts and the federal executive is most acutely felt in the area of administrative law, particularly in judicial review of migration decisions. This may partly reflect the fact that judicial review of migration decisions has assumed greater significance in recent decades and is seen by some to impede the exercise of what are sometimes referred to (misleadingly) as 'sovereign powers'. In the calendar year 2016 and the first quarter of this year almost 900 migration appellate-related applications were filed in the Federal Court (65 per cent were notices of appeal and the remaining 35 per cent were applications for leave to appeal or extension of time to appeal). And the number of migration cases arising in the Court's original jurisdiction is also growing. Many such proceedings involve judicial review challenges to ministerial decisions to cancel visas on character grounds under s 501 of the *Migration Act 1958* (Cth). In 2016, about 60 per cent of judicial review applications in the migration area in the Federal Court were of this kind. The area is, and always has been, particularly sensitive and is frequently at the forefront of the debate about the legitimacy of judicial review.

Few areas of Australian law have provoked greater friction with the federal government than judicial review of migration decisions. The then Minister for Immigration, Mr Philip Ruddock, wrote in an article in 2000 that courts ought not to be involved in review of migration matters at all because the judiciary is 'ill-suited' to deal with such matters.[17] He said that courts emphasised protection of individual rights and are not in the position to weigh the relative influence of other values in determining refugee cases. This view was reflected in amendments made to the Migration Act in 1998 which were designed to limit judicial review of migration decision-making.

When he was on the High Court, McHugh J gave a paper entitled 'Tensions between the Executive and the Judiciary'.[18] While he accepted that occasional conflict between the judiciary and the executive might do no harm, he believed that, if the tension persists, as has occurred in the migration area, it damages the public interest. The authority of courts is likely to be undermined and public confidence in the integrity and impartiality of the judges is likely to be diminished. While defending the right of the judiciary to speak publicly against any attempts by the legislature or the executive to undermine the rule of law, McHugh J also urged judges who exercise judicial review powers not to forget the words of Frankfurter J:

> All power is in Maddison's phrase, 'of an encroaching nature' … Judicial power is not immune against this human weakness. It must also be on guard against encroaching beyond its proper bounds, and not the less so since the only restraint upon it is self-restraint.[19]

The evolution of modern judicial review has largely been the work of judges, including in developing key concepts such as procedural fairness, unreasonableness and jurisdictional error. In a 1982 House of Lords decision, Lord Diplock said that progress towards a comprehensive system of administrative law was the greatest achievement of the English courts in his judicial lifetime.[20] Those comments are readily transportable to Australia.

In an article published in 2000, Sackville J said that he believed the courts had extended judicial review because they believed that they needed to fill a gap created by the failure of political forms of accountability to provide redress to individuals who are adversely affected by government decisions.[21] Similarly, Sir Gerard Brennan has remarked that the courts have been prompted to widen the boundaries of judicial review in response to a perceived diminution of legislative control over executive power. Sir Gerard is the author of probably the best known Australian statement of the critical need for judicial self-restraint. In *Attorney-General (NSW) v Quin*[22] (*Quin*) he said:

> Judicial review has undoubtedly been invoked, and invoked beneficially, to set aside administrative acts and decisions which are unjust or otherwise inappropriate, but only when the purported exercise of power is excessive or otherwise unlawful …
>
> The duty and the jurisdiction of the courts are expressed in the memorable words of Marshall CJ in *Marbury v Madison* (1803) 1 Cranch 137, at p 177 (5 US 87, at p 111):
>
> > It is, emphatically, the province and duty of the judicial department to say what the law is.
>
> The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. *The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone*.[23]

The distinction between legality and merits can be challenging, but that is not to say that it is meaningless. As Gleeson CJ has pointed out, the distinction is not always clear cut, 'but neither is the difference between night and day. Twilight does not invalidate the distinction between night and day'.[24]

The at times strained relationship between the three branches of the State is not confined to Australia. It was the subject of a recent paper by the Lord Chief Justice of England and Wales, Lord Thomas of Cwmgiedd.[25] Lord Thomas emphasised the importance of mutual respect and mutual support if the relationship between the three branches is to strengthen. On the importance of mutual respect and non-interference, Lord Thomas said:

> Judicial independence is one aspect of separation of the branches of the State. Public comment must equally consider the effect on the Executive and Parliament. It must respect their constitutional roles, as much as it must respect that of the judiciary as an institution. It is for that reason that judges must not comment on matters of political controversy or political policy which are for Parliament and the Executive alone. It is why judges cannot and do not explain their judgments; the judicial branch speaks through its judgments. That is how it explains and interprets the law. A public explanation by judges of one of their own judgments would call the law into question: what is authoritative - the judgment or the extra-curial statement? It would undermine certainty in the law. It would undermine public confidence in the law. And it would undermine the Executive and Parliament's confidence in the courts to explain and interpret the law. Judicial silence on such subjects is not just a proper aspect of non-interference. It is an aspect of the respect the judiciary owes the Executive and Parliament.[26]

The importance of mutual respect between the three branches of the State cannot be overemphasised. The starting point from the judicial arm's perspective is the need for the other branches of the State to have a sound appreciation of the fact that the administration

of justice is not merely a matter of machinery. Rather, it is a fundamental part of the proper functioning of a liberal democracy and goes to the root of a well-ordered society.[27]

In the context of judicial review of administrative action, mutual respect from the judicial arm to the executive is reflected in the emphasis in Australian administrative law on the need to maintain the elusive distinction between review of the legality as opposed to the merits of executive decision-making. That is reflected in Sir Gerard Brennan's remarks in *Quin* which were cited above. It is also captured in the following observations of Nolan LJ in *M v The Home Office*:

> The proper constitutional relationship of the executive with the courts is that courts will respect all acts of the executive within its lawful province, and that the executive will respect all decisions of the courts as to what its lawful province is.[28]

By definition, mutual respect is a two-way street. It is not difficult to find examples of the judiciary moulding judicial review principles to accommodate the need to recognise the different and important roles performed by members of the executive. A good illustration is the High Court's decision in *Minister for Immigration and Multicultural Affairs v Jia Legeng*.[29] The facts remind us that tension between immigration ministers and the AAT is not a new phenomenon. The AAT had set aside a ministerial delegate's decision to refuse a Chinese national a visa on the basis of bad character. The matter was remitted to the Minister with a direction that the applicant qualified for the visa because he was of good character. The then Minister made statements in a radio interview and wrote a letter to the President of the AAT expressing his concern at the Tribunal's decision and its approach in similar cases. The applicant contended that the Minister was biased when he later cancelled the applicant's visa.

Unsurprisingly, the High Court emphasised that the Minister's powers under provisions such as s 501 were subject to the rule of law. It was acknowledged, however, that such powers involved 'a complex pattern of administrative and judicial power, and differing forms of accountability', with the Minister being 'a Member of Parliament, with political accountability to the electorate, and a member of the Executive Government, with responsibility to Parliament'.[30] They approved French J's comments below that the Court should assess the Minister's conduct with an appreciation that he was 'an elected official, accountable to the public and the Parliament and entitled to be forthright and open about the administration of his portfolio which … is a matter of continuing public interest and debate'.[31]

In a robust democracy, there will invariably be some tension between the judiciary and executive. But Lord Bingham put it well when, in 2010, he wrote:

> There are countries in the world where all judicial decisions find favour with the powers that be, but they are probably not places where any of us would wish to live.[32]

A matter of particular concern to the executive seems to be the vagueness of some judicial review grounds and principles. This is said to obscure the boundaries of judicial review and undermines legitimacy. Procedural fairness, unreasonableness and jurisdictional error are concepts which attract particular attention.

Certainty is an important value in judicial review. Codification of the grounds of judicial review in the *Administrative Decisions (Judicial Review) Act 1977* (Cth) created a false sense of certainty. The difficulty lies not in identifying the heads of review but in their application. The complexities which are inherent in most public law cases are not avoided by treating the heads of review or other catchphrases as talismans. As Allsop CJ observed in *Minister for Immigration and Border Protection v Stretton*[33] (*Stretton*):

> The proper elucidation and explanation of the concepts of jurisdictional error and legal unreasonableness does not depend on definitional formulae or on one verbal description rather than another. Both concepts concern the lawful exercise of power. For that reason alone, any attempt to be comprehensive or exhaustive in defining when a decision will be sufficiently defective as to be legally unreasonable and display jurisdictional error is likely to be productive of complexity and confusion. One aspect of any such attempt can be seen in the over-categorisation of more general concepts and over-emphasis on the particular language of judicial expression of principle. Thus, it is unhelpful to approach the task by seeking to draw categorised differences between words and phrases such as arbitrary, capricious, illogical, irrational, unjust, and lacking evident or intelligent justification, as if each contained a definable body of meaning separate from the other.[34]

In separate reasons for judgment in *Stretton*, I emphasised the importance of paying close attention to the specific statutory framework within which the challenged decision has been made, with particular reference to indicators in the legislation which assist in determining whether an exercise of discretion is one which exceeds the authority of the decision-maker and is unreasonable in the legal sense. Pointers in the Act which inform the breadth of the nature and ambit of the Minister's authority to cancel a visa under s 501 included:

(a) the absence of an express list of considerations for the Minister to take into account;
(b) the breadth of the stated object of the legislation as regulating 'in the national interest' the movement in and out of Australia of non-citizens;
(c) the Minister's political office and personal accountability to the Parliament, as well as the absence of any right of review to the AAT if the Minister (as opposed to a delegate) makes the decision;
(d) the Minister's obligation to provide a statement of reasons from which it can be ascertained whether there is an evident and intelligible justification for the decision; and
(e) the Minister's power to either refuse to grant or to cancel a visa is a substantive power, as opposed to being a power of a procedural nature, such as the power to adjourn a tribunal hearing, as was the case in both *Li*[35] and *Singh.*[36]

And, if further illustration be required of how the courts strive to provide greater certainty, I commend to you the recent judgment of Wigney J on procedural fairness in *El Ossman v Minister for Immigration and Border Protection*.[37] That judgment provides valuable guidance concerning the content of the fair hearing rule by focusing attention on two primary matters. First, it is critical to have regard to the statutory or legal framework within which the decision is made. Where the statutory power involves the conduct of an inquiry, considerations that might be relevant include the subject-matter, nature and purpose of the inquiry; whether the statute provides for a hearing or other particular procedures or rules; and whether the inquiry is investigative, inquisitorial, or adversarial. Secondly, consideration must be given to the particular facts and circumstances of the case, focusing attention on the question whether the procedures which have been adopted have produced a 'practical injustice'.[38]

Others have proposed more radical solutions to the issue of uncertainty in the judicial review context. In a dissenting report in the ARC's 2012 Report No 50 on *Federal Judicial Review in Australia*,[39] Mr Roger Wilkins proposed the repeal of the ADJR Act, with constitutional judicial review remaining but complemented by legislation which set out in general terms the jurisdictional limits on executive decision-makers. For example, the jurisdictional limits might require a decision-maker to accord procedural fairness or to follow any procedures required by law. Thus the focus would shift to a statute along the lines of the *Acts Interpretation Act 1901* (Cth), which would state in general terms jurisdictional limits or standards of good administration which could guide public servants in the exercise of their public powers. One attraction of this proposal is that such statements might assist the courts in identifying jurisdictional and non-jurisdictional errors, particularly if the general statute clearly identified the limits on the exercise of particular powers and stated what the consequences were for non-adherence to those limitations.[40]

The importance of tribunal independence

This year has seen attention focused on how the independence of tribunals can be affected by appointment and reappointment decisions. Recently, the Government announced that 50 members of the AAT, most of them from the Migration and Refugee Division, would not be reappointed. The Minister for Immigration and Border Protection was quoted as saying in a radio interview:

> When you look at some of the judgments that are made, the sentences [sic] that are handed down, it's always interesting to go back to have a look at the appointment of the particular Labor government of the day.[41]

The reference to 'sentences' in the context of an administrative tribunal is puzzling. The Minister was quoted as then adding that 'it's a frustration we live with'.

These remarks drew a prompt response from the President of the Law Council of Australia, Ms Fiona McLeod SC, who described them as 'unfortunate' and having the potential to undermine the standing and independence of the AAT. Ms McLeod added that:

> Any suggestion by government that Australian jurists are not acting with independence is dangerous and erosive to our justice system and lies outside Australia's democratic tradition. It undermines the public perception of the legitimate role of the judiciary and weakens the rule of law.[42]

In May this year, the Minister gave another radio interview in which he described some of the AAT's decisions as 'infuriating'. The Minister is quoted as saying:

> People who believe that they're above the law, above a scrutiny by the public – I think they should be the ones that shouldn't rest too well at night… if people are deciding matters and they aren't meeting community expectations then I don't see why people shouldn't face scrutiny over that.[43]

Of course, the AAT does face scrutiny, not the least because its decisions on questions of law may be challenged under s 44 of its enabling legislation or by judicial review.

The Minister's 'frustration' seems to have been influential in the proposed changes to Australia's citizenship laws which will empower the Minister to overrule some of the AAT's citizenship decisions. The Minister's decisions will remain amenable to judicial review. The Minister is quoted as saying:

> Judicial processes are very important. It [sic] still allows people to have their day in court. But it doesn't give rise to a silly situation we're seeing at the moment [from the AAT].[44]

Some of the issues raised by the Minister have been subject of detailed consideration by the Council of Australasian Tribunals.[45] The following key points are emphasised in that publication:

- Tribunals play an essential role in our justice system by providing a timely and accessible dispute resolution at a low cost. To maintain public confidence in them, their independence must be assured, including in the processes for appointing members.
- Selection on the basis of merit is the surest way to appoint the best members and ensure independence.
- To ensure tribunal independence and excellence, appointment processes should be open, merit-based and transparent and can include recommendations from an assessment panel.
- Where an assessment panel makes a report, the Minister should select one candidate and seek Cabinet approval, with merit being the dominant consideration in selection

(assuming good character). Gender balance and diversity are relevant considerations but political considerations are not.

- Independence requires that a member's tenure and remuneration during a fixed term of appointment is secure for that period. Reappointment could be by way of application in an open competitive process. It is consistent with best practice to reappoint on the recommendation of the head of a tribunal where the member's performance demonstrates that relevant assessment criteria are met.

The need for the Administrative Review Council to be revived

Many of the issues raised in this keynote address, plus other issues which will be discussed during this conference, highlight the desirability and need for the government to have access to sensible and informed advice on administrative law matters. Such advice was provided for almost 30 years by the ARC.[46] As contemplated by the Commonwealth Administrative Review Committee (Kerr Committee), the ARC had the role of overviewing and monitoring the operation of the new Commonwealth administrative law system. It was designed to assist the government in providing a review of administrative decisions in as many cases as possible, in setting up the appeals system in each case where review was provided, to supervise procedures, to minimise the number of privative clauses and generally to assist in the introduction of the new system of administrative law.[47]

In the parliamentary debate accompanying the Administrative Appeals Tribunal Bill 1975 (Cth), Mr Robert Ellicott QC said:

> Another basic and far sighted amendment which the opposition will press is to establish an administrative review council and so implement another recommendation of the Kerr Committee. This council would consist of officials, including the president, the ombudsman, the chair of the Law Reform Commission, a senior administrative official and a parliamentary draftsman. It would enable a permanent and informed consideration of the process of administrative and judicial review. It would review further discretions to see whether they were appropriate for review by the administrative appeals tribunal. It would have a small staff to assist it.[48]

Forty years later, in addressing the ceremonial sitting of the amalgamated AAT in mid-2015, Mr Ellicott said that the ARC should 'be seen as the fulcrum of the Administrative Appeals Tribunal and the other things that are happening in administrative law. They're an engine room, they're defenders of the faith, if you like, they're the ones who are driving this pursuit of excellence in review'.[49]

Some of the important work of the ARC has been described by Kerr J In lamenting the demise of the ARC, Kerr J said:

> The administrative law journey should not be forgotten. For more than four decades advice as to how best to achieve administrative law reform has been from the ARC. We too often take for granted our autochthonous administrative law which grants the citizen rights which should be celebrated as Malcolm Fraser did when he nominated 'reform of administrative law' and the AAT as among his great achievements.
>
> The ARC has ensured that the reforms initiated by the Kerr Committee had ongoing champions. It has provided advice to government that included input from an independent body of members with extensive academic and business experience and those directly affected by government decisions, as well as input from within the bureaucracy.[50]

The ARC has been effectively moribund since 2012. Yet, to date, no relevant amendments have been made to the *Administrative Appeals Tribunal Act 1975* (Cth), which underpins its existence and sets out its statutory duties and functions. Following the recommendation by the National Commission of Audit in 2014, the ARC was absorbed into the Attorney-General's Department. The ARC's most recent report, *Federal Judicial Review in*

Australia, was published five years ago. Since that time no appointments have been made to the ARC. It no longer has a separate secretariat. The ARC has been unable to discharge its statutory functions since 2012, including its duty to provide an annual report.

This is most regrettable. The ARC was an effective and economical source of independent advice to government on administrative law matters. Some of the controversy surrounding the appointment or reappointment of AAT members, as well as that relating to the AAT's role in reviewing citizenship decisions, could have been avoided or perhaps minimised if the ARC were involved. At the very least, the public debate would have been better informed.

Conclusion

These and other themes will be developed during this conference. Administrative law continues to be an area of considerable interest in Australia. Our systems of review of administrative action need to embrace new technology or they risk becoming inaccessible and obsolete in the eyes of many potential users. Access to administrative justice should be a primary concern of the state. Conferences like this provide a valuable forum in which important issues of public concern can be explored and debated. Long may that continue to be the case.

Endnotes

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36 *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437.
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