[1992]
Admin
Review

The last issue of *Admin Review* attempted to upgrade the regular reports section of the publication. This issue continues this trend by adding to its case notes some comment, where appropriate, on the possible legal or policy implications of the decisions. The comments endeavour both to place the decision into a broader context and to encourage discussion of the issues concerned. It should be stressed that, although *Admin Review* is produced under the auspices of the Administrative Review Council, the comments made within are those of the editor and do not necessarily represent the views of the Council, its members or the members of any of its committees.

FOCUS ARTICLE

Judicial Review Of Commonwealth Administrative Action: Some Recent Developments

by Denis O'Brien, Minter Ellison, Solicitors

Scope of the ADJR Act

The decision of the High Court in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 is a landmark decision concerning the scope for seeking judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('ADJR Act') of a decision made by a Commonwealth agency. Until the High Court handed down its judgment it could be said that every decision of an administrative character made under a Commonwealth enactment (apart from decisions within the classes specifically excluded from the scope of the ADJR Act) was both amenable to review under the Act and attracted the entitlement to a statement of reasons under section 13 of the Act. That result flowed from the decision of the Full Court of the Federal Court in *Lamb v Moss* (1983) 49 ALR 533. In that case the Federal Court had said:

> 'In our opinion, there is no limitation, implied or otherwise, which restricts the class of decision which may be reviewed to decisions which finally determine rights or obligations or which may be said to have an ultimate and operative effect.' (p.556)

The nexus in the ADJR Act between the reviewability of decisions and their amenability to the statements of reasons requirement meant that what the Federal Court said in that case about the kinds of decisions which could be reviewed under the Act applied equally to the kinds of decisions for which aggrieved persons could get a statement of reasons from the decision-maker.

In *ABT v Bond*, however, the High Court interpreted 'decision' in the ADJR Act in a narrower way. Chief Justice Mason said that a decision:

> '... will generally, but not always, entail a decision which is final or operative and determinative, at least in a practical sense, of the issue of fact falling for consideration. A conclusion reached as a step along the way in a course of reasoning leading to an ultimate decision would not ordinarily amount to a reviewable decision, unless the statute provided for the making of a finding or ruling on that point so that the decision, though an intermediate decision, might accurately be described as a decision under an enactment.' ((1990) 170 CLR 321, 337)

The Chief Justice said that another essential quality of a reviewable decision is that it be a substantive (that is not a procedural) determination.

His Honour went on to examine the distinction between a reviewable decision and conduct engaged in for the purpose of making such a decision (ADJR Act, section 6). He emphasised that conduct was essentially procedural; the concept looked to the process of decision-making. A step in a process of reasoning was not to be regarded as 'conduct' within the meaning of the Act.

This aspect of *ABT v Bond* alters the way the Act had been interpreted in some earlier cases. Less than a year earlier a majority of the High Court had suggested in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 that a decision of a delegate of the Minister concerning the refugee status of the applicant made in accordance with the recommendation of the Determination of Refugee Status Committee was reviewable conduct for the purposes of the ADJR Act. In *ABT v Bond*, however, Chief Justice Mason said:

'... it was not precise in that case to describe the decision of the delegate as reviewable conduct, because the decision was not a matter of procedure.' (p.342)

ABT v Bond has therefore undoubtedly narrowed the ambit of the ADJR Act in relation to both decisions and conduct which may be reviewed under the Act. This narrowing of the ambit of the Act has brought with it a degree of uncertainty about the application of the Act to certain kinds of decision-making. The uncertainty will remain until opportunities arise, through subsequent cases, for the principles laid down by the High Court to be clarified.

One such opportunity arose in the appeals to the Full Court of the Federal Court in *Edelsten v Health Insurance Commission* (1990) 96 ALR 673. Those appeals involved two decisions taken in the process of a reference to a Medical Services Committee of Inquiry ('MSCI') of suspected excessive servicing by Dr Edelsten. For both decisions a statutory basis could be found. The first decision was a decision of a senior medical officer within the Health Insurance Commission to refer information disclosed in an investigation by it to a delegate of the Minister. The second decision was the decision of the delegate to refer the matter to the MSCI. The MSCI is given the task under the *Health Insurance Act 1973* of determining whether or not excessive servicing has occurred. The Act contains provisions ensuring that, in an inquiry by the Committee, natural justice is accorded to the practitioner concerned. The Act also contains provisions enabling review to be sought of a determination of the Minister made under section 106 of the Act following a report of the Committee.

The Full Court of the Federal Court found that neither decision in respect of which Dr Edelsten had sought an order of review was a reviewable decision for the purposes of the ADJR Act. Justices Northrop and Lockhart said:

'*Bond* is authority for the principle that generally, for a decision to be reviewable under the *Judicial Review Act* it must have a quality of finality, not being merely a step taken on the way to the possible making of an ultimate decision; and it must have the essential quality of being a substantive, as distinct from a procedural, determination.

'The rationale underlying *Bond* is that Parliament could not have intended the *Judicial Review Act* to be a vehicle for judicial review of every decision of a decision-maker under a Commonwealth enactment. Some decisions will have real impact upon a person's rights, privileges or obligations; some will have no such impact, whilst others are mere stepping stones which may lead ultimately to the making of a decision which does affect the person's position.' ((1990) 96 ALR 673, 682-3)

Their Honours found that neither the decision of the senior medical officer nor the decision of the delegate of the Minister to refer the case to the MSCI satisfied the test established by *ABT v Bond* as to what constituted a reviewable decision.

Justice Davies, who concurred in the orders made by Justices Northrop and Lockhart, agreed that the senior medical officer had not made a decision. He also agreed that the delegate of the Minister had not made a decision but considered that he had engaged in conduct for the purpose of the making (by the Minister) of a decision under section 106 of the Health Insurance Act. Thus, in the view of Justice Davies, the action of the delegate of the Minister in referring the case to the Committee was reviewable under section 6 of the ADJR Act. He concluded, however, that Dr Edelsten had not established any grounds upon which an order of review might be granted.

In the light of the emphasis placed by Chief Justice Mason in *ABT v Bond* on the procedural character of 'conduct', a question arises whether in *Edelsten* Justice Davies was correct in characterising the referral of the case to the MSCI as conduct. Again, further cases will be needed to clarify in the light of *ABT v Bond* the notion of reviewable conduct for the purposes of the ADJR Act.

The effect of the view taken by Justices Northrop and Lockhart in *Edelsten* of the principle in *ABT v Bond* is that many investigative-type decisions will not be decisions that attract either judicial review or an entitlement to reasons. So far as concerns the entitlement to reasons, the same result flows from the approach taken by Justice Davies, since the right to reasons is not attracted when conduct, as opposed to a decision, is in issue.

Natural Justice

Edelsten involved a claim by Dr Edelsten that the 'decisions' concerned ought to be set aside

on the ground that there had been a failure to accord him procedural fairness in the making of those decisions. One interesting aspect of the case is that, had the High Court not handed down its decision in *ABT v Bond* before the appeals were heard, the decision of the Full Federal Court might have rested on the basis that the decisions concerned were not such as required the according of procedural fairness to Dr Edelsten because they were preliminary steps only, not in themselves having an effect on Dr Edelsten's rights; the Health Insurance Act makes provision for the according of natural justice once the matter comes before the MSCI for inquiry and report.

Of course, the rules of natural justice now apply to inquiries whose findings cannot of their own force affect a person's legal rights or entitlements: *Annetts v McCann* (1990) 170 CLR 596. (*Cf Testro Bros Pty Ltd v Tait* (1963) 109 CLR 353 which was overruled by the High Court in *Annetts*.) Furthermore, it may be true, as Justice Deane said in *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648, that the law seems:

> '... to be moving towards a conceptually more satisfying position where common law requirements of procedural fairness will, in the absence of a clear contrary legislative intent, be recognised as applying generally to governmental executive decision making.' (p.653)

However, in the *Edelsten* circumstances, the scheme of the Health Insurance Act was such that there could be no effect upon rights until the matter got to the MSCI and, at that point, the Act made provision for the according of procedural fairness. It is submitted, therefore, that the decisions under attack were truly preliminary and not such as to attract natural justice obligations.

Review of findings of fact

Paragraph 5(1)(f) of the ADJR Act specifies error of law as one of the grounds upon which a decision may be reviewed under the Act. Paragraph 5(1)(h) specifies no evidence or other material to justify the making of the decision as another ground upon which review may be sought. Subsection 5(3) says that the ground in paragraph 5(1)(h) will not be made out unless:

(a) the person who made the decision was required by law to reach that decision only if a particular matter was established and there was no evidence or other material from which the person could be reasonably satisfied that the matter was established; or
(b) the person based the decision on the existence of a particular fact and that fact did not exist.

Paragraph 5(1)(e), as expanded upon by subsection 5(2), provides for the review of decisions on the ground of improper exercise of power.

Several Federal Court cases had held that a decision could be attacked on the ground of improper exercise of power or error of law if the reasoning process leading to it involved the making of a finding of fact which was unreasonable or the taking into account of a fact that a reasonable decision-maker would not have taken into account (see, for example, *Minister for Immigration, Local Government and Ethnic Affairs v Pashmforoosh* (1989) 18 ALD 77). Furthermore, English cases have suggested that an error of law will be shown where there is no sufficient evidence to support a finding of fact (see, for example, *R v Governor of Brixton Prison; ex parte Armah* [1968] AC 192).

In *ABT v Bond* Chief Justice Mason expressed agreement with what the Federal Court had said in *Pashmforoosh* but only to the extent that a finding of fact properly constituted a reviewable 'decision'. He said that, if a finding did not constitute a decision, it was beyond review independently of such a decision ((1990) 170 CLR 321, 359). His Honour further expressed disapproval of the 'no sufficient evidence' test propounded in the English cases. He said:

> '... want of logic is not synonymous with error of law. So long as there is some basis for an inference - in other words, the inference is reasonably open - even if that inference appears to have been drawn as a result of illogical reasoning, there is no place for judicial review because no error of law has taken place.' (p.356)

Chief Justice Mason found support for this view in paragraph 5(1)(h) and subsection 5(3) of the Act. He considered that these provisions, in definitively setting out the 'no evidence' ground of review, told against an expansive interpretation of paragraph 5(1)(f).

It remains to be seen how *ABT v Bond* will be interpreted in cases where the decision-maker's

findings of fact are in issue. In *Detsongjarus v Minister for Immigration, Local Government and Ethnic Affairs* (1990) 21 ALD 139, in which the High Court's decision was closely examined, the Federal Court suggested that, where there was simply no basis for the particular inference to be drawn, an error of law will be shown. *Federal Commissioner of Taxation v McCabe* (1990) 21 ALD 740 reaches a similar conclusion.

Conclusion

ABT v Bond is clearly a leading decision concerning both the scope of the ADJR Act and the reach of certain of the grounds of review under the Act. Some may see the decision as a conscious restraining by the High Court of the trend of authority in the Federal Court. During a period of reduced judicial review activity brought on by the recession, it may take some time before the full effects of the decision can be gauged. It remains to be seen whether it represents a turning point in judicial review, shifting the balance more in favour of government administration.

REGULAR REPORTS

Administrative Review Council

Reports, submissions and letters of advice

Recently, the Council has spent much of its time dealing with a variety of government proposals that have implications for administrative review, including refugee processing, customs and excise matters, the establishment of the Australian Broadcasting Authority and the registration of migration agents.

Since the last edition of *Admin Review*, the Council has provided:

- the Attorney-General with the Council's Fifteenth Annual Report for the year 1990-91;
- a letter of advice to the Attorney-General on decisions under the *Child Care Act 1972*; and
- a letter of advice to the Attorney-General modifying one of the Council's recommendations in Report No 32, *Ambit of the AD(JR) Act*, in light of the recommendations in the forthcoming report on rule making.

Current work program - developments

Community services & health

This project has been delayed indefinitely due to a lack of resources.

Intellectual property

Dr Margaret Allars of the University of Sydney is preparing a consultant's paper on the review of patents decisions.

Rule making

The Rule Making Report has been approved by Council. It is currently in the printing stage and will be sent to the Attorney-General shortly. The Report will be available to the public once it has been tabled in Parliament.

Specialist tribunals

Work is continuing on a draft report on tribunal procedures. It is anticipated that there will be consultations on the draft report in the middle of the year, following which the Council will forward its final report to the Government.

Planning has also commenced for the 1992 conference of Commonwealth tribunals, which the Council hopes to hold during October. The Council has invited a senior member of the peak French administrative court, the Conseil d'Etat, to be the key speaker.

Government business enterprises

The Council is currently preparing a draft report to be published in May. It will set out the Council's tentative conclusions on the extent to which the Commonwealth administrative law package should apply to a range of government business enterprises. The Council will then undertake consultations before preparing a final report for the Government.

Environmental decisions

The *Report of the Review of the Administrative Appeals Tribunal* recommended that the Council examine the question of merits review of environmental decisions. The Council is cur-