REVIEWING GOVERNMENT DECISIONS: COURTS AND TRIBUNALS

There are many public tribunals and government bodies making decisions which affect us in our education and work lives, in the safety of our vehicles, in our use of resources such as land, in setting standards for the communications we receive in our homes, and so on. When Adrian Robbins set about examining the roles of administrative tribunals in Victoria he estimated that there were between 200 and 300 boards, committees and tribunals making administrative decisions which affected the private rights of citizens, such as the right to practice a profession *(Administrative Tribunals in Victoria,* Victoria Law Foundation, Melbourne, 1982). The functions of many of these tribunals have been rationalised since that report was written.

The expansion of bureaucratic and technocratic decision making is often explained simply as the growth of Big Brother and blamed on the welfare state. However, the expansion of administrative decision making into wider areas of life has been well under way since the middle of the 19th century in all western industrial societies. Generally, 'big government' has grown to stabilise the economy, maintain standards and respond to the destructive aspects of industrial production, such as work accidents and pollution. When governments make decisions about these matters they usually affect someone's private rights. In such cases it is considered fair that the people directly affected should have an opportunity to present their points of view to the decision maker and to have mistakes in the decision making process corrected through appeal or review. In Australia the expansion of administrative action into ever more areas of life appears even greater than in some other western countries because the construction of the Australian state, from penal colony to independent nation, has been basically a government project.

While the difference between *judicial decision making* and *administrative decision making* is fundamental, it is very difficult to define how a judge makes a decision in a court on the one hand, and the way an administrator makes a decision in an office or tribunal on the other. Often, the key factors of each style are identified. A judicial decision is usually a decision about an event in the past and the rights and obligations which followed from it, for example, the damages to be paid to restore a car after a crash. An administrator, on the other hand, is generally making a decision to be implemented; such as whether a planning permit should be issued for a future project and what conditions should be attached to it. A judicial decision is made by a judge concerning distinct parties in dispute. This can also be the case with respect to an administrator, but often an administrator might disagree with a party and then make the decision. A judicial decision is made on the highest standards of proof ascertained within the rules of evidence and conducted within formal rules of procedure. An administrator can use discretion about the weight to be given to evidence and adopt a procedure suited to a particular task. While a court conducting a trial would be regarded as a pure form of judicial decision-making, there are so many styles of administration, that any particular decision-making process will display a combination of factors. For this reason a category known as a 'quasi-judicial decision' was current for some time, but this term has fallen from use with the progressive extension of the rules of administrative law to virtually all styles of decisions made in public administration which directly affect private rights regardless of further categorisation.

Administrative appeals

Since Robbins' report was published, an Administrative Appeals Tribunal (AAT) has been established for Victoria *(Administrative Appeals Tribunal Act* 1984 (Vic.)) — indeed that was the key recommendation. The creation of the Victorian AAT followed the lead set by the establishment of the Federal AAT in 1975 *(Administrative Appeals Tribunal Act* 1975 (Cth)). The Federal reform had implemented the recommendation of the 1971 Commonwealth Administrative Review Committee (the Kerr Report).

Administrative appeals generally are relatively straightforward matters. People who are dissatisfied with the decisions made concerning their affairs in the specialist tribunals can, if legislation so provides, appeal to the AAT. The matter will then be considered by the appeal tribunal either *de novo*, or by way of appeal. In a *de novo* hearing the entire question is reconsidered from the start and the whole decision will be made again by the appeal body on the basis of facts which it finds. The Federal Administrative Appeals Tribunal generally remakes the decision in this way.

A hearing in the nature of an appeal concentrates on the point at which the dissatisfied party considers the lower tribunal went wrong. When that point has been re-examined, and if necessary corrected, the case could well be returned to the lower tribunal. Whether an Appeals Tribunal is to conduct a *de novo* rehearing or to consider only the point on appeal is set out in the legislation which establishes the avenue of appeal.

Often the appeal tribunal is composed of experts. For example, an appeal to consider a planning and environment matter might be composed of a physical scientist, a social scientist and a legal member with expertise in the issues at the heart of the dispute. The tribunal will consider expert evidence brought forward by the parties supplementary to its own expertise. In New South Wales there is a Land and Environment Court which proceeds judicially and hears expert opinions by way of evidence in the way that other courts do when making a judicial decision. This is another illustration of the difficulty of applying key factors to classify a decision-making style.

Judicial review

In performing public administrative functions, decisions are necessarily made which affect the financial interests of individuals. In the early days of bureaucratic growth last century, rights

of appeal were not widely available. Nevertheless, the courts had very old powers for supervising decision makers, with powers to affect private rights, which they revitalised and adapted to the new public decisions of industrial society. The courts took the view that the administrative decisions were being made by the Crown; that is, the executive arm of the monarch. The courts emphasised their functions as the judicial arm of the monarch and rapidly revamped common law and equitable remedies which existed to control bodies exercising executive functions and discretions in control of the professions and other private activities. These remedies permitted the courts to: restrain unlawful activity by a public body; to make authoritative pronouncements about whether an official activity is lawful; to restrain public decision makers about to enter fields of inquiry outside their assigned responsibilities; to quash a decision made contrary to principles of good decision making; and to compel a public officer to perform a duty as required by law.

The courts use these remedies in a *supervisory* way to enforce their standards of decision making on public bodies which make decisions affecting the private affairs of individuals. In Victoria *(Administrative Law Act* 1978) and at the Federal level *(Administrative Decisions (Judicial Review) Act* 1977), besides the traditional remedies, an avenue has been established to seek one remedy, an Order for Review, which is adapted to the circumstances of the case.

In undertaking supervisory judicial review the courts do not set out to re-examine the merits of a decision. Their role, as they see it, is to ensure that the decision maker had jurisdiction under the empowering legislation to enter the inquiry at the outset, did not transcend that jurisdiction in the course of the inquiry by making an error which he or she had no jurisdiction to make, and conducted the inquiry with due regard to representations and submissions made by parties with interests at stake and without bias or conflict of interest. If the various, often complex, doctrines of law concerning regularity in decision making have not been offended, the courts are not, in principle, to be concerned about the outcome on the merits of the case unless the decision is so unreasonable that no reasonable decision maker could arrive at it.

Conclusion

The nature of supervisory judicial review is theoretically distinct from that of an appeal. The scope of judicial review grew rapidly when the courts saw a need to supervise the decision making of tribunals and bodies from which there was often no appeal. When a court quashed a decision in exercise of its supervisory jurisdiction, the matter was referred back to the original decision maker who was then able to make the same decision on different grounds. This problem, as well as the cost, delay and trouble of executive action being challenged in the superior courts was a significant factor in encouraging the establishment of a rational structure for administrative appeals in State and Federal jurisdictions.

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Activities and discussion

■ Draw up a display size chart listing as many State and Commonwealth tribunals as you can locate. Try contacting the members of one or two of them to arrange a visit to your class.

■ Explain the differences between and provide examples of general and specialist tribunals.

■ Many people are unaware of the existence of tribunals as a means of redress. Design a publicity brochure advertising the role and function of a particular tribunal. Select a particular audience for your brochure and indicate the possible scenarios for which that audience may seek redress with that body.

■ Consult a recent annual report of two different tribunals. You may get access to these by writing to the tribunal, purchasing them from the government bookshop in your State, or by going to a large library. From the reports, present an evaluation of the role and function of these tribunals by focusing on their fairness, speed and cost-effectiveness. Criteria to consider in that evaluation should include:

- time delay in hearings,
- statistics relating to outcomes of that tribunal,
- indication of ongoing training of members,
- background of members in terms of their suitability to membership of that tribunal,
- degree of independence from the government department whose decision is being reviewed,
- evaluation of that tribunal's performance and evidence of acting on that evaluation, and
- openness to the public.

■ Compare and contrast the tribunals' annual reports with an annual report of the judiciary (e.g. the Supreme Court in your State).

■ In groups, make inferences surrounding the notion of justice in regard to the different bodies as mechanisms for dispute resolution.

■ Discuss the following:

> It is an extraordinary feature of the way in which public business in this country has been conducted for generations that politicians of all political colours have been extremely anxious to establish decision-making tribunals and bodies which have some superficial resemblance to the Judiciary and which are represented as 'independent tribunals'. Very few people seem to have noticed that the only independence which some of these tribunals enjoy is the freedom to do whatever the government of the day wants them to do, and that they operate in practice as a method of distancing potentially unpopular decision-making from those who should take the responsibility for it . . .
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> (Gleeson CJ, quoted in Tracey, R., 'Administrative tribunals — some emerging issues', Victorian Bar News, Spring 1990.)

Further references

de Maria, William, 'Exposing the AAT's Private Parts', (1991) 16 *LSB* 10.

O'Connor, Deidre, 'Specialist Tribunals: General Problems', (1991) 16 *LSB* 221.

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