

Australia – Indonesia
Legal Seminar Series

Aspects of
Administrative Review
in Australia and Indonesia

Edited by
Robin Creyke
Julian Disney
John McMillan

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Centre for
International and Public Law
Australian National University

Australia-Indonesia Legal Seminar Series

Aspects of Administrative Review in Australia and Indonesia

Edited by

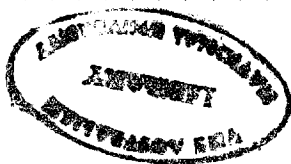
Robin Creyke
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Centre for International and Public Law
Faculty of Law
Australian National University
1996

Published in 1996 in Canberra by

The Centre for International and Public Law
Faculty of Law
Australian National University
Canberra ACT 0200
Phone: 61 6 249 0454
Fax: 61 6 249 0150

ISBN 0 7315 2309 1



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Cover design by brave design group, Canberra

Cover illustration: Detail of JS 205 *Bali* 1977 (etching 241 x 338 mm, ed 40) by Jörg Schmeisser

Printed by Robert Burton Printers, Sydney

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PREFACE

In 1994, the Centre for International and Public Law at the Australian National University decided to initiate a regular Australia-Indonesia Legal Seminar Series. The first in the series, which was on administrative review systems in the two countries, was held in 1995 in Jakarta. This book consists principally of papers which were delivered at that seminar.

The motivation for initiating the seminar series, and for publishing this book, was excellently captured in the opening words with which the Indonesian Minister for Justice, His Excellency Oetoyo Oesman SH, greeted seminar participants:

Australia and Indonesia have many interests in common.... Mutual understanding of each other's culture and legal system, therefore, is important to prevent or resolve disputes which may arise between the citizens of both states, and to improve co-operation between the two countries for the many activities and projects which lie ahead.

It was this co-operative and forward-looking spirit which led to the ready acceptance by the University of Indonesia, the University of Gadjah Mada and the University of Melbourne of our invitation to join with the Australian National University in organising the first seminar. It also led to the attendance at the seminar, among the sixty specially-invited participants, of many of the senior men and women who are most closely and influentially involved in the design and operation of the administrative review systems in the two countries.

The topic of administrative review was chosen for the first seminar because it is of great and growing importance in both countries and is likely to become of increasing significance to economic and social interaction between them. Moreover, the administrative review system in each country is innovative, ambitious and at an especially interesting stage in its development.

In Australia, major expansion and strengthening of the administrative review system at the national level began twenty years ago with improvements in the existing rights and processes as well as the establishment of an Administrative Appeals Tribunal, an Ombudsman, a Freedom of Information Act and an Administrative Review Council. The new system has attracted considerable interest in other countries and is now being re-appraised within Australia in the light of experience and changing circumstances.

In Indonesia, the development of an extensive network of administrative courts began in 1991. Eventually, it will include an Administrative Court in each province as well as an Administrative Appeal Court in a number of major cities. Some of the Courts' decisions have already attracted public interest and comment throughout Indonesia. As in Australia, the system is developing a substantial influence on attitudes and practices within government, and on the rights of individual citizens, businesses and organisations.

The seminar benefited greatly from the quality of papers prepared for it by Australian and Indonesian experts from the ranks of the judiciary, government officials, academia and legal practitioners. It also was honoured and enlightened by addresses from the

Attorney-General, Minister for Justice and Chief Justice of Indonesia. These contributions are included in this book, together with a paper by the then Chief Justice of Australia, Sir Anthony Mason which was prepared for delivery in Jakarta a few months before the seminar as the 1994 Australia Lecture. We have also included, for ease of reference, key provisions of relevant legislation in Australia and Indonesia.

The Centre for International and Public Law, and the editors of this book, owe thanks to many people in Australia and Indonesia. We are very grateful to Professor RM Girindro Pringgodigdo (Dean of the Faculty of Law at the University of Indonesia), Professor Cheryl Saunders (Director of the Centre for Comparative Constitutional Studies at the University of Melbourne) and Dr Maria Sumardjono (Dean of the Faculty of Law at Gadjah Mada University) for agreeing to be partners in the venture. The support of our own Dean, Professor Tom Campbell, is also much appreciated. His Excellency Mr Alan Taylor (Australian Ambassador to Indonesia) and His Excellency Mr Singgih (Attorney-General for Indonesia) generously hosted social functions for seminar participants and provided much other assistance through their staffs.

Special personal thanks for their expert, enthusiastic and unstinting assistance are due to Mr Suhadibroto (Deputy Attorney-General for Indonesia), Professor Dr Paulus Effendie Lotulung (Supreme Court of Indonesia), Mrs Martina Oscar (University of Indonesia), Mr Alastair Cox (Australian Embassy), Dr Tim Lindsey (Asian Law Centre, University of Melbourne) and Ms Karen Andrews. We also greatly appreciate the advice and encouragement provided by Mr Stephen Skehill (Secretary, Australian Attorney-General's Department), Emeritus Professor Jamie Mackie and Mr Denis O'Brien (Minter Ellison).

The seminar and this book would not have been possible without financial assistance from the principal sponsor—the Australian Department of Foreign Affairs and Trade—and from the Australia-Indonesia Institute, Blake Dawson Waldron and Minter Ellison.

Finally, we wish to thank Roslyn Walker, Peter Baldwin, Bernard Quinn and Nicky Colbran for their assistance in the preparation and production of this book.

Robin Creyke
Julian Disney
John McMillan

June 1996

CONTRIBUTORS

The Hon Justice Tommy Boestomi, SH graduated with a Masters Degree from the Faculty of Law, University of Indonesia in 1957. In addition he was educated as an Officer of the Military Police in Cimahi, 1953. He has occupied many prominent positions including Chief Judge of the District Court in Bandung and Bogor and also Chief Judge of the Supreme Court in South Kalimantan and East Kalimantan. Since 1982 he has been a Justice of the Supreme Court of the Republic of Indonesia and has been a lecturer in the Faculty of Law, University of Pajajaran, Bandung since 1957.

Mrs Robin Creyke graduated from the University of Western Australia and obtained her Master of Laws degree at the Australian National University. She teaches public law subjects in the Law Faculty at the Australian National University with a particular interest in administrative law. She is a member of the Social Security Appeals Tribunal and the Nursing Homes Standards Review Panel. This has given her a specialist interest in tribunals. Another of her specialist administrative law interests is law for war veterans. She is a member of the Executive of the Australian Institute of Administrative Law.

Professor Julian Disney AO is Professor of Public Law at the Centre for International and Public Law in the Faculty of Law of the Australian National University. He graduated in law from Adelaide University and was the South Australian Rhodes Scholar in 1970. He was a NSW Law Reform Commissioner for eight years and Coordinator of the Welfare Rights Centre for six years. He was President of the Australian Council of Social Service from 1985-89 and has been a member of Commonwealth government advisory committees in relation to economic planning, housing, social security, employment, education and training, superannuation, administrative review, language and literacy.

Professor Dr CFG Sunaryati Hartono, SH graduated from the Faculty of Law, University of Indonesia in 1955. In 1962 she obtained a Postgraduate Diploma in Law from London University and in 1972 her doctorate in Legal Science from Pajajaran University. Professor Dr Hartono is currently the Head of the National Law Reform Agency, Department of Justice of the Republic of Indonesia. She is Professor of Economic Law and Interdisciplinary Research Methods and International Economic Law at Pajajaran State University; and is also Professor of Development of Law and Legal Institutions, and Economic Law at the University of Indonesia. She is a member of the UN Committee for Elimination of All Forms of Discrimination Against Women (CEDAW).

Professor Dr Paulus Effendie Lotulung obtained his doctorate in administrative law from the Sorbonne in 1982. He is a Judge and Acting Head of the Research and Development Division, Supreme Court, Republic of Indonesia; a Professor, Faculty of Law, Pakuan University, Bogor; and an Adjunct Professor, Administrative Law, Faculty of Law, University of Indonesia. During the years 1967–94, he was a Judge of the District Court in East Java, Head of the General Affairs Division, Appeal Court of Surabaya, Assistant Judge of the Supreme Court, a Judge of the Central Jakarta District Court and, most recently, a Judge and then Vice Chief Judge of the Jakarta Administrative Court.

The Hon Sir Anthony Mason AC, KBE, CBE has held many eminent positions including Commonwealth Solicitor-General between 1964 and 1969, Vice-Chairman of the UN Commission on International Trade Law in 1968, a Judge of the Court of Appeal of the Supreme Court, New South Wales between 1969 and 1972, and Pro-Chancellor of the Australian National University between 1972 and 1975. He was appointed a Justice of the High Court of Australia in 1972, a position he held until he was appointed Chief Justice of the Court in 1987. He retired as Chief Justice in 1995.

The Hon Justice Jane Mathews graduated in law with Honours from the University of Sydney, and was a Barrister at Law from 1969–80 when she was appointed a Judge of the New South Wales District Court. In 1987 Justice Mathews was appointed a Judge of the New South Wales Supreme Court. Justice Mathews served on the Supreme Court until 1994 when she was appointed a Judge of the Federal Court of Australia and became President of the Commonwealth Administrative Appeals Tribunal and part-time Deputy President of the National Native Titles Tribunal. Justice Mathews is also Deputy Chancellor of the University of New South Wales.

Mr John McMillan teaches administrative law and constitutional law in the Faculty of Law of the Australian National University. He is a Deputy Dean of the Faculty of Law, responsible for student matters. Mr McMillan was formerly an Associate to Sir Anthony Mason of the High Court of Australia; a solicitor in private legal practice; a Principal Investigation Officer with the Commonwealth Ombudsman; and has been a consultant on public law issues to Commonwealth and State parliamentary and government inquiries. He is currently a Vice-President of the Australian Institute of Administrative Law.

Mr Denis O'Brien is a partner in the Canberra office of the national law firm Minter Ellison. He holds Bachelor of Arts and Bachelor of Laws degrees from Melbourne University and a Masters of Laws degree from the Australian National University. He has a broad commercial practice, with an emphasis on administrative law, secured corporate finance, and regulatory and trade practices law. He is a former Director of the Administrative Review Council and immediate past Chairman of the Administrative Law Committee, Law Council of Australia. He is a member of the Executive of the Australian Institute of Administrative Law and a contributing author to the Administrative Law volume of *Laws of Australia*.

His Excellency Mr Oetojo Oesman, SH graduated from the Faculty of Law, University of Indonesia in 1960. He has held several 'prestigious positions' in government departments including being Director General for the Control and Development of Manpower, Department of Manpower, and Deputy Chairman and Chairman of the Agency for the Development and Implementation of *Pancasila* Indoctrination. From October 1992 to March 1993 he was Deputy Chairman of the People's Consultative Assembly (MPR) Working Group and in 1993 he became the Minister for Justice.

His Excellency Mr Singgih, SH graduated from the Faculty of Law, Airlangga State University in 1960. He held several positions with the District and Provincial Public Prosecutor's Office. He was formerly Inspector General at the Department of Justice and Associate Attorney General for Special Crimes from 1988-90. He became the Attorney General in 1990. In 1989 His Excellency Singgih attended an International Anti-Corruption Conference in Australia and again visited Australia in 1992 as the guest of the Attorney-General, Mr Michael Duffy.

Mr Stephen Skehill is currently Secretary of the Commonwealth Attorney-General's Department and was formerly Principal Member of the Veterans' Review Board. Mr Skehill is also the Official Trustee; a Member of the Commonwealth Law Enforcement Board; Member of the National Debt Commission; Member of the Board of Management and Council of the Australian Institute of Judicial Administration; Member of the Administrative Review Council; Member of the Advisory Board of the National Institute for Law, Ethics and Public Affairs, and Member of the Consultative Committee of the Centre for International and Public Law at the Australian National University.

The Hon Chief Justice HR Soerjono, SH graduated from the Faculty of Law, University of Indonesia in 1956. He has occupied many notable positions since then including being appointed Chief Judge of a number of Appeal Courts, the most recent being in 1981 as Chief Judge of the Appeal Court in Jakarta. He undertook advanced courses on human rights in the United States and the Netherlands in 1971. In 1982, he became a Justice of the Supreme Court and during this time went to the Netherlands to further his knowledge of administrative justice. In 1992 he was appointed Deputy Chief Justice of the Supreme Court in the field of customary civil law and since 1994 has been Chief Justice of the Supreme Court.

WELCOMING ADDRESS AT SEMINAR RECEPTION*

HE Mr Oetojo Oesman

Australia and Indonesia have many interests in common, not only because of their territorial proximity, but also because of their close political, economic and socio-cultural relations.

Mutual understanding of each other's culture and legal system, therefore, is important to prevent or resolve disputes which may arise between the citizens of both states, and to improve co-operation between the two countries for the many activities and projects which lie ahead.

For example, when Indonesia attracts Australians to invest in Indonesia, the Australians need to know more about Indonesia's development plans and the relevant Indonesian laws. Likewise, when Indonesia wants to increase its exports to Australia, Indonesians need to know about the Australian legal system and Australia's import and export rules.

In this era of ever-increasing international trade and globalisation, most countries, especially in the field of trade and business relations, are subject to international standards and principles. Hence a comparative approach in the study of law, including the study of international private and public law and international economic conventions, has become essential as part of our efforts to streamline and improve our international trade relations.

We need to increase our knowledge and understanding of foreign legal systems through an exchange of information, with respect not only to foreign laws and regulations, but also methods and techniques of litigation and other means of settlement of disputes, the management and organisational aspects of law, and many other matters. These steps are essential if we are to improve our own law and legal institutions, while at the same time harmonising our laws with those of the region. Indeed, regionalism brings with it a greater need for harmonisation of law.

This seminar on administrative law and administrative courts is but one of many moves for legal co-operation which need to be taken in order for contacts between the two systems to become meaningful. To increase co-operation in the economic and technical fields, we need to have a better understanding of each other's legal systems.

Further moves in the direction of closer legal co-operation might concern projects on:

- human resource development (legal education and legal training);
- legislative drafting and law enforcement techniques and methods;

* Address given at the residence of the Australian Ambassador, Jakarta, 4 April 1995.

- computerisation of law libraries and legislative databases, including the establishment of an electronic network system;
- settlement procedures in industrial and commercial disputes, including arbitration and other alternative dispute resolution procedures;
- exchange of officials and experts

to name just a few.

I sincerely hope that this seminar will be able to improve our mutual understanding on legal issues. Australian experts will explain Australian laws and ways of legal thinking to us, and from the discussions, Australian lawyers will also be able to learn and understand our ways of legal thinking.

In the future we should then be in a better position to exchange legal information and legal experts which I am sure will benefit both our people and our countries, not only in the legal field, but also economically, socially and politically.

Whether we like it or not, although we stem from different legal origins, some degree of harmonisation of laws between our two countries is essential especially within the context of the Bogor Declaration of APEC (Asia Pacific Economic Co-operation).

I therefore thank the Australian National University and the Australian Government for arranging this seminar with the Dean of the Faculty of Law of the University of Indonesia, and wish this seminar all the success in the world.

OPENING ADDRESS AT SEMINAR*

Chief Justice HR Soerjono

I believe that this seminar on administrative review, which was initiated by the Faculty of Law of the Australian National University in co-operation with the Faculty of Law of the University of Indonesia, is important not only because it enables representatives of both nations to exchange views on administrative law principles, but also because it will contribute to the development of the new Indonesian Administrative Court.

As you may be aware, the Administrative Court in Indonesia came into operation on 14 January 1991 pursuant to Act No 5 of 1986 dated 29 December 1986. The exercise of judicial power in Indonesia is provided for in Articles 24 and 25 of the 1945 Constitution. Those Articles state expressly "judicial power is exercised by the Supreme Court and other subordinate courts specified by law, and that the competence and the structure of those courts are to be regulated by law".

One of the statutes which has implemented the Articles of the Constitution is the *Basic Principles of the Judiciary Act* (Act No 14 of 1970) which in section 10(1) expressly provides that judicial power is to be exercised by the courts designated as:

- General or Ordinary Courts;
- Religious Courts;
- Military Courts; and
- Administrative Courts.

The first three courts were established before Indonesia gained independence, while the Administrative Court commenced operation only in 1991.

As a new judicial institution, the Administrative Court can learn from the experiences of other countries, especially when dealing with the same legal problems. However, that does not necessarily mean that the Court should blindly copy and apply practices adopted by other administrative law systems. The court must also develop its own approach which is consistent with the national philosophy and legal system of Indonesia. That task may require the search for universal values which can be adapted to solve indigenous Indonesian problems.

The aim of the Administrative Court in Indonesia is not only to protect the rights of the individual, but also to protect those of the Indonesian people as a whole. The principles contained in the state philosophy *Pancasila* require that the fundamental rights and obligations of individuals are to be reconciled, balanced and integrated with those of the public collectively.

* Address given at the Hotel Indonesia, Jakarta, 5 April 1995.

Although the principal function of administrative law is legal control of executive government action, it must be recognised that the Administrative Court is only one way to protect the rights of individuals and society from the misuse of power by administrative officials. Indeed, the Administrative Court is not the only existing Indonesian institution to solve administrative disputes. The administrative law system in Indonesia includes the following:

- an internal administrative process through an institution called "internal administrative review" which is administered by the officials of the administrative agency concerned. This applies in areas of government such as personnel administration, labor administration and tax administration;
- a judicial process by means of the state Administrative Court or the Administrative Appeals Court for disputes concerning the legality of administrative decisions provided such disputes are within the jurisdiction of the Administrative Court;
- a judicial process by means of the Ordinary or Civil Court for disputes concerning financial compensation for illegal actions committed by government officials. These actions are based on Article 1365 of the Indonesian Civil Code.

Although the Administrative Court is still relatively new the Court is expected to act as a "judicial control" institution to ensure that government exercises power in accordance with that part of the Indonesian state's philosophy which requires the preservation of a balance between the rights and obligations of individuals and those of society so as to achieve national harmony.

The agenda of this seminar focuses on issues which arise in administrative review. However, since the participants come from different branches of the legal profession I sincerely hope that the seminar becomes a channel to exchange experiences on a variety of important legal issues in the application of administrative review, based on the participants' experiences and perceptions in their own countries. Such a discussion will make a valuable contribution for the purposes of comparative study.

From a broader perspective, however, when confronting the issue of globalisation and the diminishing significance of nations' borders, it is essential, if nations are to work co-operatively, that the people of those nations are familiar with each other's legal systems.

Administrative law as has been aptly summarised "concerns the relationship between government and the governed".¹ If nations are to co-operate in fields such as business law, and in technical and other areas, it is essential that their people understand the legal system and legal procedures governing the relationship between the government and the governed in their own and other countries. In other words, effective economic co-operation, foreign investment or other forms of co-operation raise legal issues which impact on government administration and, therefore, require knowledge of government and administrative law.

It is also true that in exchanging information and experiences concerning the implementation of administrative law in both nations we should be able to benefit from the development of administrative law in the framework of that regional co-operation in many fields between our two nations which has evolved to a significant degree in the last few years. Indonesian judges and lawyers, having only limited experience in administrative law, are hoping to learn much from their more experienced and learned

Australian colleagues about handling administrative cases heard by administrative courts or by other specialist bodies.

I hope there will also be sufficient opportunity to discuss things such as:

- the legal procedure or settlement processes used by administrative courts or other bodies;
- substantive issues concerning the criteria for legality of government action including formal government decisions;
- execution issues or enforcement of the Court's judgments or provisional orders such as suspension of a stay order; and
- other relevant administrative law issues.

I believe there are many other administrative law topics for discussion and I sincerely hope that all participants will be able to take advantage of the time allotted to explore them.

In addition to the formal seminar program, the agenda includes visits to the Supreme Court and to the Administrative Court, so that participants may be given the opportunity to see in person how the new Administrative Court exercises its judicial function. You should note that improvements in terms of both "human resources" and "court facilities" are occurring gradually.

I am convinced that this seminar is an important step to enhance further co-operation between our two nations, especially in administrative law, and to implement and enforce principles which have been recognised as the pillars of a nation based on law. I should like to convey my deep appreciation to the joint committee of the Faculty of Law of the Australian National University and the Faculty of Law of the University of Indonesia for the excellent coordination and planning involved in this seminar.

Finally, I would like to close my speech by quoting words of wisdom from a famous French writer—Léon Duguit—who stressed the paramount importance of the "supremacy of law" in a nation based on law, as follows:

Le Droit sans la Force est impuissant
La Force sans le Droit est barbarie
C'est seulement cete force qui doit être limitée et dirigée par le Droit.
(Law without power is helpless
Power without law is only arbitrary
It is power then which should be limited and guided by law).

Notes

- 1 Anne Ardagh, BA JD with General Editor The Hon Mr Justice Young of the Supreme Court of New South Wales *Administrative Law Australia* LBC Nutshell Series, Sydney, Law Book Co, 1989.

ADDRESS AT SEMINAR DINNER*

HE Mr Singgih

The Australia-Indonesia Administrative Review Seminar is an enterprise arranged by two neighbouring countries in their effort to enhance their relationship by means of improved communication in the field of administrative law.

That relationship was established long before Indonesia became an independent state. Early contact between the two countries was mainly carried out by Indonesian fishermen. Later, during the era when Indonesia was striving for independence, a process to which Australia gave moral and material support, contact was expanded. In the era of globalisation, the benefits of the relationship have begun to be experienced by the two states, as evidenced by their joint membership of international organisations such as APEC (Asia Pacific Economic Co-operation).

The political, economic, social, cultural, and defence relationship between the two countries has developed to the point where both states benefit. Nevertheless, there is a need for a conjunction in the field of law. Law is the means to secure and enhance the existing connections in other fields of endeavour.

Australia and Indonesia have different systems of law; but rather than being a disadvantage this can be an incentive to the two states to become closer to each other. Consequently, the difference does not separate these two friendly states, it joins the two together. Like the poles of a magnet, opposites can be attracted one to the other.

As members of the world society, Australia and Indonesia respect principles of law which are universal. Together the two states observe various international law instruments, including conventions, and are committed to a number of bilateral, as well as multilateral, treaties. These are part of the matrix within which the legal relationship between Australia and Indonesia operates. These common international law obligations are the basis for development and enhancement of the relationship between Australia and Indonesia in the field of law.

Indonesian administrative law is still in the early stages of its development. Indonesia is, therefore, seeking views from many countries and legal experts, and especially from its neighbouring state Australia, which already has a long-standing system of administrative law. The Australian National University and the University of Indonesia are to be congratulated for organising a seminar on administrative law, a pioneer step in this field and one which it is hoped will lead to developments in Indonesian administrative law which can be implemented in Indonesia.

Since 1 April 1994 the Indonesian nation has entered the Second Stage of the Twenty-Five Year National Development Plan in which progress in the field of law has

* Address given at the Hotel Indonesia, Jakarta, 5 April 1995.

an important role alongside developments in the field of economics. Currently Indonesia has approximately 400 statutes which need reviewing, statutes which generally have been inherited from the Dutch colonial era and are no longer suitable to present conditions and cannot fulfil the evolving needs of the Indonesian people. Hence Indonesia faces complex problems in the legal field. In order to review those statutes Indonesia needs the support of professionals with legal qualifications, significant financial resources, and information and ideas from as wide a range of people as possible.

It cannot be denied that in this era of globalisation states appear to be borderless. Nations have to compete with one another but they also have to co-operate. In this atmosphere the role of law is important in order to secure fair competition and to ensure that the game is played according to clear and fixed rules. There will be chaos if there are no rules. There will be unfair competition and the strong will coerce the weak and the big will cheat the small. This situation can be likened to a soccer game, in which two teams are competing, sometimes aggressively, to become the winner—however, the teams must still comply with the rules of the game. This has parallels for life and society in the present free and global situation.

Co-operation in the field of law between Australia and Indonesia is needed, through programs such as this seminar, if real achievements in the legal arena are to be made by each of our countries. It is hoped that this forum will operate as a key to open relations in the future between the agencies and individuals participating in this seminar.

Existing co-operative arrangements have been made between the Indonesian Attorney General's office and the Australian Commonwealth Attorney-General's Department. In addition Indonesia has sent forty people to the University of Wollongong to study maritime law and another twenty people to the University of Melbourne to study economic law. It is hoped to achieve comparable relationships with the Australian National University and the Northern Territory University. The efforts of various universities in Australia which have an academic program in Indonesian Law are appreciated in Indonesia. The Indonesian Attorney-General's Office is willing to provide appropriate assistance for these programs by, for example, supplying relevant literature or text books in Indonesian law. These are small steps to promote the harmonious relations between the two states in the field of law.

COMPARING AUSTRALIAN AND INDONESIAN ADMINISTRATIVE LAW

Robin Creyke and John McMillan

Administrative Law in a World Community

Administrative law has a distinctly domestic focus. Concerned as it is with relations between the government and those who reside or carry on business in a country, an administrative law system will reflect national aspects as diverse as the history, politics, culture, population size, and social values of a country.

The value of comparative studies is not, however, displaced by those considerations, and already there is a richly developing jurisprudence in this field. Leading works that are familiar in Australia include the study by Professors Schwartz and Wade of British and United States administrative law;¹ Professor Schwartz's study comparing the systems of France and the United States;² the comparative study of administrative law systems in a number of European countries by Professor Schwarze;³ and Professor Galligan's published international collection of seminal administrative law articles.⁴

This book, and the seminar from which it emerged, is the first of its kind to discuss together the administrative law systems of Australia and Indonesia. The starting point for any comparison is a quite different legal and political tradition in each country. A prominent manifestation of that diversity is the separate development of a common law system in Australia and a civil law system in Indonesia. To that one must add other differences, significantly those arising from their peoples' disparate social and cultural conventions and expectations.

These differences, which undoubtedly have impacted on the administrative law systems in both countries, only serve to underscore the importance of comparative studies. Similar developments may highlight the fundamental nature of legal principles; while different features may illuminate an important aspect of a country's political or historical development. These outcomes illustrate the benefits of comparisons of this kind. Other advantages, of specific relevance to administrative law, can be described as follows.

- Comparative studies remind us that the core objectives of administrative law—which embrace government accountability, administrative justice, and better decision-making—have a universality that transcends national distinctions. That doubtless reflects a degree of similarity in the administrative problems that arise in government decision-making and the expectations which citizens have in dealings with government. Justice Boestomi affirms in his paper that controlling

maladministration, arbitrariness, abuse of power and unlawful and negligent administrative decision-making are values respected in Indonesia. They equally permeate Australian administrative law, a point stressed in the paper by Sir Anthony Mason.

- The joint response of administrative law and public administration to the problems of government has been the development of principles of good administration that likewise have a universal validity. Paramount among these is the principle variously described as "natural justice", "due process", or "procedural fairness", embodying the requirement that a person be heard before an adverse administrative decision is required.⁵ Also to be found in Australia and Indonesia, in common with a great many other countries, are legal principles that exclude bias and bad faith in administrative decision-making, that enjoin respect for individual rights, and that emphasise the importance of reasoned decision-making. The structures and procedures developed in each country for controlling administrative action have much in common too, particularly the reliance on independent courts and tribunals to check invalid government action.
- Many of the criteria espoused in international instruments as shared national aspirations intertwine with administrative law. Those which stand out include the standards defined in the International Covenant on Civil and Political Rights, and in the United Nations Charter. The impact of international law on domestic administrative law developments is a theme stressed by Australian commentators and noted in McMillan's paper.⁶
- The process of globalisation is also important in another respect. The increased interaction between countries—in commerce, technology, research, cultural exchange, political initiatives, migration and social intercourse—is accompanied by a need to know more about each other's legal systems. Not surprisingly, it was the steady development of neighbouring ties between Australia and Indonesia that provided the occasion for this present study. Hartono noted in her paper, (as too, in their welcoming addresses, did the Indonesian Minister of Justice, and the Indonesian Attorney-General) that a comparative study may assist in facilitating business and other contact between both countries, fostering the exchange of ideas, and reinforcing further administrative law developments in both countries. Harmonisation of laws can lead, in general, to an improvement in political relations and mutual respect which comes from a greater understanding of each other's legal system.
- It should not be overlooked that the purpose of comparative studies is not only to detect similarities but also to uncover differences and in that way to shed light on the unique and distinguishing features of each national system. It is interesting in the present context to note that different structures and procedures have been developed by both nations in pursuance of common objectives. Differences that stand out, for example, are the development of the Ombudsman institution in Australia, an agency which exists only in embryonic form in Indonesia; and the greater emphasis in Indonesian administrative law practice of informal avenues for resolution of disputes such as mediation and the increased weight in dispute resolution given to the community or the public interest over the interests of individuals; an emphasis deriving from the national ideology *Pancasila*.

The Constitutional and Political Underpinnings for Administrative Law in Australia and Indonesia

Administrative law is part of the fabric of government of a country and the study of the two goes hand in hand. The political and legal history of a country will preordain much of the legal framework, and the values enshrined in that framework will reflect the relationships and balance of power among the arms of government of a country.

Australia

The first point to note about Australia is that there are in fact nine different systems of administrative law, one in each of the political units—the national, State and Territorial governments—that form the Australian federation. The system which is the focus of comparative study in this book is the Commonwealth or national system of administrative law.

Another striking feature of the Australian governmental system, noted in McMillan's paper, is the British common law and political heritage. Many aspects of that heritage have a direct bearing on administrative law. The separation of powers doctrine commits to Parliament the responsibility for legislating, and correspondingly limits the freedom of the Executive to make new rules or to engage in coercive or punitive action. That doctrine, together with the rule of law, also underpins the supervisory role performed by the courts in undertaking judicial review of executive action, with a view to ensuring that there is a lawful basis for and a correct exercise of government power. The independence of the Australian judiciary ensures, as Sir Anthony Mason notes in his paper, that judicial rulings are binding upon government, and that invalidation of executive action is a familiar result.

Another important feature of relevance to administrative law is that in Australia there is a constitutional basis for judicial review. This is contained in sections 75 and 76 of the Constitution which guarantees a jurisdiction in the High Court to restrain unlawful action by a Commonwealth government agency. These guarantees highlight the role of the Constitution and the courts in setting limits for government, which is a recurring theme in Australian administrative law.

Indonesia

The constitutional structure of Indonesian government shares many features in common with Australian government. Indonesia too has a written constitution, a commitment to the rule of law (*negara hukum*), there are three (strictly five)⁷ arms of government, and respect for judicial independence.⁸

An important distinction, however, is that in a formal sense there is no separation of powers—no *trias politika*—and from that distinction many other differences follow. The reason, it should first be noted, why there is an absence of notions of separation of powers in Indonesian political ideology is said to be the belief, which existed from precolonial times and is sourced predominantly to Javanese thought, that “the unity of society was personified in the power of its ruler, and that any dispersion of power, such as that implicit in the Western conception of checks and balances, was seen as a decline in unity and strength”.⁹ In other words, fragmentation of power is seen to be divisive and to detract from the need for concerted national enterprise and effort.

Consistent with that philosophy there is a strong executive arm, evident in the extensive law-making power of the President, and the subordination of the legislature, executive and the judiciary.¹⁰ Administrative law aspects of that relationship are that the Supreme Court has no constitutionally guaranteed jurisdiction, and included among its functions are the role of providing advice to government in limited circumstances. The review powers of the Court do not extend to declaring whether statutes or their implementing regulations are unlawful, but are limited to determining whether subordinate administrative regulations and decisions are within power.¹¹ The Court is likewise limited to declaring regulations invalid, but the formal power to quash them is reserved to the administration.¹²

That is not to say, as Chief Justice Soerjono notes, that judicial independence is not formally recognised and protected by the Constitution. Articles 24 and 25 stipulate that judicial power is to be exercised by the Supreme Court and other courts; that courts must comply with statutory requirements; that the composition and jurisdiction of the courts is to be determined by law; and that the criteria for judicial qualifications and appointments must have a legal foundation. The commentary on these Articles states that "judicial power is an independent power, which means free from the influence of the Government. In this connection the status of Judges must be guaranteed by law". The commentary notes further: "The purpose of these articles is to create the foundation of an independent judiciary as one of the pillars of a democratic State based on the rule of law".¹³

A striking feature of the Indonesian government system is that it is permeated by the fundamental constitutional doctrine known as *Pancasila*. This underlying ideology, described in Hartono's paper, encompasses belief in one God; a just and civilised humanity; nationalism; rule by the people through consultation and representation; and social justice for all Indonesians. *Pancasila* has important implications for the structure of Indonesian administrative law, notably the emphasis on efficient economic development, political stability and the subordination of individual interests to those of the State.

As in other countries, the concept of the rule of law—described locally as *negara hukum*—has a distinct connotation which bears on administrative law. *Negara hukum* stems from Weberian thinking—the *rechtsstaat gedachte*—and requires that decision-making should have lawful authority and should be rational, predictable and not purely discretionary. It differs subtly from its Western counterpart as adopted in Australia in that there is no separate requirement that citizens and executive alike should be subjected to the same laws, administered by the same courts.

The legal profession has not traditionally enjoyed a high status in Indonesia. However, that position is changing. The private profession is increasing in size, reflecting pressures arising from an expanding middle class, from business, from international agencies and from the influence of urban professionals and legal aid lawyers. There are over forty government and private universities with law schools which produce graduates annually; holding a law degree can now be a prerequisite to judicial office, and, for example, is a requirement for judges on the Administrative Courts.¹⁴ The Ministry of Justice, as Chief Justice Soerjono points out in his paper, expended considerable effort on the training of the judges for the new Administrative Courts. The quality of judicial appointments, together with an increased respect for and status of members of the legal profession, is reflected in the judicial independence that has increasingly been manifested in recent jurisprudence of the courts.

The Administrative Law Systems of Australia and Indonesia

Scope of Administrative Law

Administrative law, in a broad sense, is concerned with controlling administrative decision-making and reducing errors and improper practices. Many different ways exist for pursuing that objective, though there is much commonality in the approaches that have been adopted in Australia and Indonesia. In Australia, soon after Federation in 1901, and in Indonesia, soon after Independence in 1946, supervisory and investigatory bodies, variously called public service commissions, government inspectorates, and auditors-general, were created to perform these functions. Over the same period there has also been the development in both countries of codes of conduct to provide ethical guidance for government officials. It has likewise been common in both countries to create specialist review bodies that can review decisions and resolve disputes of a particular kind: matching examples from both countries include boards and committees to review taxation decisions, to resolve labor disputes, and to examine grievances lodged by government employees.

Another common feature which epitomises the recent phase of administrative law reform in both countries is that emphasis has increasingly been placed on creating administrative control mechanisms that enable members of the public to challenge adverse administrative decisions. It is that aspect of administrative law, which embodies the notion of individual rights that can be asserted against the government, that is nowadays the central theme of this discipline. Allied to that new emphasis has been the creation of independent review bodies—typically courts and tribunals—that one expected to provide an impartial and reasoned analysis and settlement of a dispute with government that has been initiated by a member of the public.

The impetus for the Australian reform of administrative law—described in Justice Mathews' paper—was a report in 1971 of the Commonwealth Administrative Review Committee (the "Kerr Committee"). Legislation which was subsequently enacted to give effect to the recommendations of the Committee included the *Administrative Appeals Tribunal Act 1975*, the *Ombudsman Act 1976*, and the *Administrative Decisions (Judicial Review) Act 1977*. Other features were added later, principally the *Freedom of Information Act 1982*, the *Privacy Act 1988*, and the *Human Rights and Equal Opportunity Commission Act 1981*.

The Australian system of administrative law that has resulted from those changes is a comprehensive framework. At the core of the system is the right of a person to challenge the validity or correctness of a decision before an independent court or tribunal, about which more is said below. There are, in addition, rights of a kind which do not have a close counterpart in Indonesia. Four that stand out are the following.

- The *Freedom of Information Act*, which enables a person, upon request, to inspect and copy the official documents of a government agency, except for some categories of documents that are protected against public disclosure by one of the exemptions defined in the Act.
- The *Privacy Act*, which controls the collection, storage, and disclosure of personal information by government agencies, and enables a person to correct misleading personal information contained in a government file.

- The right to obtain a written statement of the reasons for a decision that the person is eligible to challenge, which is contained in a number of Acts including the *Administrative Decisions (Judicial Review) Act* (section 13) and the *Administrative Appeals Tribunal Act 1975* (section 28).
- The right to an investigation by an independent agency called the Ombudsman with power to go into an agency, to see files, to seek evidence of administrative practices and to recommend change either to individual decisions or to systems of work.

The turning point in Indonesian reform was the enactment of the *Administrative Justice Act* in 1986. The Act had a twofold purpose: to establish a separate administrative court system; and to set out a detailed procedural code for the exercise by these courts of judicial review of administrative action. The courts commenced operation on 14 January 1991. The new system interacts with the existing court system in two major ways. The first is that the new Administrative Courts can hear appeals from existing tribunals such as the Labour Disputes Settlement Committee. The second is that the Supreme Court has an extraordinary jurisdiction to undertake judicial review in limited circumstances. Also, as part of its *cassation* jurisdiction, the Supreme Court can review decisions made by the Administrative Courts.¹⁵

Administrative law, described in broad terms, also includes the framework that exists in a country for the protection of human rights. Neither country has a constitutional Bill of Rights, and instead both have followed the same path of establishing executive agencies that discharge the function of advising whether laws and executive practices comply with human rights and anti-discrimination standards. The principal body in Australia is the Human Rights and Equal Opportunity Commission which comprises six independent commissioners with separate responsibilities for enforcing standards concerned with human rights, race discrimination, sex discrimination, disability discrimination, privacy, and Aboriginal social justice. In Indonesia, there is a National Human Rights Commission which has increasingly been prepared to be critical of the government, as it demonstrated when it remonstrated about the closure of the *Tempo* weekly magazine.

Administrative Courts and Tribunals

The central element of administrative law in both countries is the presence of courts and tribunals in which an aggrieved person may challenge a decision on the basis that it is either unlawful or not the correct decision on the merits.

In the Australian federal system, a distinction has to be drawn between three different review methods. These are described in the papers of Justice Mathews and O'Brien. The function of judicial review—examining whether an administrative decision is tainted by legal error—is principally undertaken by the Federal Court of Australia, and its judicial review role is defined in the *Administrative Decisions (Judicial Review) Act 1977*. An action can be commenced in the Court by a person who is aggrieved by an adverse decision of a Commonwealth agency. There is a right of appeal from a decision of the Court to the High Court of Australia. The Federal Court also has a supervisory role in relation to the Administrative Appeals Tribunal, in that a person may appeal on a question of law from the Tribunal to the Federal Court.

The function of reviewing the merits of a decision—that is, examining whether the correct decision has been made on the facts that were presented—is committed to

administrative tribunals. The major tribunal is the Administrative Appeals Tribunal, which can review a specified range of Commonwealth decisions across the spectrum of government administration. Important differences between the judicial review and the merit review bodies are that the membership of the latter includes both lawyers and non-lawyers; the procedure of the courts tends to be more formal and adversarial, while the administrative tribunals strive for informality and many operate in a fashion that could appropriately be categorised as inquisitorial; the power of the merit review tribunals extends to substituting the correct or a more preferable decision; and the opportunity for merit review is confined to specified areas, unlike judicial review which applies to all administrative decision-making.

The third review mechanism in Australia—for which there appears to be no Indonesian counterpart¹⁶—is the Ombudsman, to whom a person may complain about defective administration in a government agency. While the Ombudsman performs a similar function to the courts and tribunals in reviewing administrative decision-making, the main feature that distinguishes this process is that it is considerably easier for a person to make a complaint to the Ombudsman—there is no complaint charge, the complaint can be made orally or in writing without legal representation, the complaint can extend broadly to any aspect of the administrative behaviour of a department and, in resolving a dispute, the Ombudsman can operate more flexibly and informally in attempting to reach an outcome that is acceptable to both the complainant and the agency.

The most notable feature of the Indonesian administrative law system is that there is now a framework of Administrative Courts, created by the *Administrative Justice Act 1986*. There are two tiers of administrative courts: the Administrative Court; and the Administrative Appeal Court. The two tiers do not operate solely as a court of first instance and a court of appeal. The Administrative Court reviews decisions which have not been reviewed by another review body. The Administrative Appeal Court reviews decisions on appeal from the Administrative Court and disputes which have already been reviewed by another body such as the Labour Disputes Settlement Committee or the Tax Evaluation Council. Existing review mechanisms must be exhausted before the Administrative Appeal Court has jurisdiction. The function of the Administrative Court is to undertake judicial review of decisions which are the subject of disputes. They do not essay merit review.

An Administrative Court is proposed to be located in the capital of each regency, the administrative unit below the Province; an Administrative Appeal Court will, in time, be found in each Provincial capital. In 1995 there were some 120 administrative law judges and Administrative Courts had been established in sixteen of a possible 300 regencies, while Administrative Appeal Courts had been set up in four of the twenty-six Indonesian Provinces.¹⁷

The jurisdiction of the Indonesian Supreme Court in administrative law matters is two-fold. Under the *cassation* jurisdiction the Court may hear an appeal on a question of law from an Administrative Appeal Court, where there has been a jurisdictional breach, misapplication or breach of the law, or negligence. An application for judicial review may also be made directly to the Court, although the Court has indicated that it will be selective about the judicial review applications that it will hear. Grounds on which judicial review may be undertaken include fraud or deceit; the discovery of new documentary evidence relevant to a decided case; excess of jurisdiction by the court, and failure to decide an issue and to provide reasons to explain the failure; conflict between

courts of co-ordinate jurisdiction in cases where the same parties or issues are involved; judicial mistake or egregious error.¹⁸

In a comparison of the framework for administrative law review in Australia and Indonesia, it is interesting to note that there are similarities that stand out concerning the definition of decisions that are reviewable, the notion of standing to initiate proceedings, the grounds for judicial review, and the scope of the remedial powers that can collectively be exercised by the courts and tribunals.

In both countries the legislation which creates the right of review defines restrictively the range of administrative activity that is challengeable. The definitions differ as to detail, though the theme is essentially the same. In Indonesia a decision to be reviewable by an Administrative Court must have the following qualities: it must involve a dispute in the field of public administration, be made under operative law, have legal consequences for an individual citizen or a corporate body, and be concrete, individual and final.¹⁹ In Australia, the comparable requirements for judicial review of a decision in the Federal Court are that the decision is made under an enactment by a government agency, that the decision adversely affected the interests of the person or corporation challenging it, and that the decision is final and operative in character.²⁰ The exclusions from judicial review, however, illustrate more of a difference between the two systems. While emergency decisions and decisions more properly heard by other civil and criminal courts are excluded in both countries, there is no Australian counterpart for some Indonesian exclusions. Examples of decisions excluded in principle in one country but not the other are decisions about important matters of national interest, decisions about matters which are the subject of judicial investigation, decisions by the armed forces and electoral decisions.²¹

Standing, or the right to initiate administrative law proceedings, is limited in both countries to those whose legal interests are adversely affected by an administrative decision. It is interesting to note also that the further elaboration of the test for standing in both countries scrutinises carefully whether an organisation or group has a sufficient interest to justify it bringing the action. In Indonesia a corporation must be an established and reputable organisation with membership records, and a constitution, and must hold meetings and elections and have a record of pursuing the aims and objectives of the body. In Australia, an organisation must normally be incorporated, and have a special or concrete interest in the decision that is greater than a mere intellectual or emotional concern.²²

The grounds for judicial review—the definition of what is unlawful—are similar, though more specifically defined in Australia. Section 53 of the *Administrative Justice Act 1986* permits review of decisions which conflict with operative law, which are made for an unauthorised purpose, or in which all the interests affected by the decision have not been taken into account. The practice adopted by the courts of interpreting these grounds in the light of civil law jurisprudence (particularly Dutch jurisprudence) has had the effect of extending them to include other concepts, notably the need for procedural propriety and good administration, which embodies the requirement for proper decision-making procedures and fair play, satisfactory evaluation of the evidence and reasons for decision, protection of existing expectations, and legal certainty, consistency, and proportionality.²³ There is a close parallel between these and many of the grounds for judicial review defined in section 5 of the Australian *Administrative Decisions (Judicial Review) Act 1977*, which include natural justice or procedural fairness, unauthorised purpose, no evidence, error of law, failure to consider relevant matters, uncertainty, and

unreasonableness. Clearly, however, a major point of departure is that among the Australian grounds is the inflexible application of government policy without adequate consideration of the merits of the individual case. The omission of a similar ground from Indonesian law is understandable in view of the Indonesian practice of according a greater measure of authority to policies embodied in written Presidential and Ministerial directives.

A comparison of the remedial powers of the different courts presents an interesting picture. Both the Administrative Court in Indonesia and the Federal Court in Australia can deal with invalid action in similar ways, by making a declaration of invalidity, revoking the decision, remitting it to the decision-maker for further consideration, or ordering that a decision be made in a case of unreasonable delay. Neither Court can remake the decision after looking at the merits of the decision under review, though in Australia this function is performed separately by the Administrative Appeals Tribunal and by other specialist tribunals which do have power to substitute a new decision. Another power of the Indonesian Administrative Court, which is unfamiliar to an Australian judge exercising judicial review, is the power to order payment of compensation or rehabilitation in a civil service personnel dispute (though there is a ceiling on the amount of compensation payable which, at the time of writing, was \$2million rupiah—approximately \$A1,250).

Another important difference concerns the enforcement of court orders, which does not occur automatically in Indonesia in the same way as in Australia. Failure to implement a court order would, in Australia, be treated as a contempt of court. But in Indonesia, by reason of the doctrine of separation of powers, implementation of a court order rests with the executive. If an official has not complied with a Court order within three months, the Presiding judge may report the failure to the person's superior. If nothing is done within a further two months, the judge may appeal to the President as a matter of last resort. Justice Boestomi notes that with one or two exceptions the administration has been co-operative. It is understood however, that in contentious cases the executive may give an informal indication prior to a matter being heard as to the willingness of the administration to comply with an unfavourable order.

Monitoring and Development of the System

Australia has established an independent agency with responsibility solely for reviewing the operation and development of administrative law. The agency is the Administrative Review Council, which includes in its membership the President of the Administrative Appeals Tribunal, the Commonwealth Ombudsman, and other members appointed from government, the legal profession, trade unions, and community organisations. Executive responsibility within government for administrative law is shared between the Attorney-General and the Minister for Justice.

Responsibility in Indonesia for supervision and development of administrative law lies with the Ministry of Justice in conjunction with the Supreme Court. It is the responsibility of the Ministry, on the advice of the Supreme Court, to appoint judges and staff of the Administrative Court and, prior to the Court's commencement, training of administrative law judges was undertaken by the Supreme Court in response to a request by government.

The Impact and Achievements of Administrative Law in Australia and Indonesia

In evaluating the impact of administrative law in both countries, it is important to bear in mind that most elements of the Australian system have now been operating for over twenty years, whereas the Indonesian Administrative Court has been in operation for less than a quarter of that time.

Australia. A relatively small number of judicial review applications (between 300–400) are heard annually by the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977*. While applications come from over thirty areas of government, the bulk (over 60 per cent) concern migration. Other major areas are tax, welfare, aboriginal heritage issues, civil service, customs, veterans' affairs, and health.

Most of administrative review claims in Australia are heard by other review bodies, notably the merit review tribunals and the Commonwealth Ombudsman. In 1994–95 the Administrative Appeals Tribunal (AAT) considered 4,633 appeals, while the other specialist tribunals considered between them a further 23,394 applications. Nearly half the AAT's appeals, as Justice Mathews notes, are in disputes about welfare pensions and benefits. Complaints to the Commonwealth Ombudsman for the same period numbered 40,407, the principal areas being social security, child support, education, taxation, postal and telephone services, immigration and defence personnel disputes.

Those figures are significant given that Australia's population is only eighteen million and the figures do not include the activity of the separate State and Territory administrative law agencies. There is, nevertheless, a concern that there are invisible barriers preventing access to administrative law by disadvantaged groups in Australian society, particularly non-English speaking Australians and Aborigines and Torres Strait Islanders. Proposals have recently been made to improve access for these groups through education, publicity, and the targeting of key personnel in these communities.

As Skehill's paper indicates, an assessment of the achievements of Australia's system of administrative law would rank highly its acceptance by civil service agencies, many of which have set up internal sections with the responsibility for training officers in administrative law requirements, and for handling requests for reasons, freedom of information inquiries, and complaints from the public. That development is a sign of the broad acceptance which administrative law has gained in government, the legal profession, and in the community. It is through that acceptance that disputes arising between members of the public and government agencies can usually be considered and resolved efficiently after an impartial and professional examination of both viewpoints.

Indonesia. The matters which predominantly come before the Administrative Court relate to land title and housing disputes (nearly 70 per cent of cases). Other statistically significant areas are public sector employment, disputes about the provision of services such as electricity, the issue of permits, human rights disputes, and tax cases. Previously many of these cases would not have been open to challenge.

Along with the extension in the range of matters that can be reviewed, there appears to be a willingness increasingly by the bureaucracy to obey court orders, despite the absence of power in the Administrative Court to effectively enforce its orders. Significantly the Court has been prepared to find against the Government in some high profile cases, as exemplified in the well-known case involving the closure of the weekly magazine *Tempo*. Some see decisions of that kind as enhancing the credibility of the

Administrative Court, and increasing public confidence in the institution. President Soeharto has also indicated, that he sees the new Administrative Court system as being a venue in which Indonesian citizens can pursue human rights claims.

Future Developments

At a time when trade, defence and other links between both countries are increasing, an understanding of each other's legal systems, including the administrative law systems, has value for both sides. In the short term the main benefit of increased knowledge is likely to be felt at the system's level, but administrative law in each country will increasingly be relevant to businesses, legal practitioners and citizens who operate jointly in both jurisdictions. Both systems are evolving, and in the search for solutions to common problems each system may find solutions which are of interest to the other.

Examples of Australian administrative law practice which have been of interest to some Indonesian observers are the access to and protection of information in Australia under the *Freedom of Information Act 1982* and the *Privacy Act 1988*, respectively, and the investigation and resolution processes of the Ombudsman. Nonetheless, heed should be taken of Lotulung's warning that an institution akin to an Ombudsman would not translate easily unless the Indonesian Parliament gained greater authority vis-a-vis the executive. Another element of Australian administrative review machinery which may be of interest to Indonesians is the use of merit review tribunals to remake decisions after taking into account the factual as well as the legal matters impacting on the dispute.

An aspect of the Indonesian administrative law structure which is relevant to Australian conditions is the two-tiered structure of the Administrative Court and the Administrative Appeal Court. There is a similarity with proposals made recently in Australia for replacing the present system of administrative tribunals with a new two-tiered tribunal, separating the trial and appeal levels of administrative review. Australian administrative lawyers may also find interest in the more comprehensive powers which may be exercised by the Administrative Court in Indonesia including the investigative role of judges and their power to award damages and to order specific remedies such as retraining or rehabilitation.

Other matters of common interest are the increased use in both countries of internal review procedures; the impact of administrative case in particular sectors such as protection of indigenous land title; an increase in administrative case reporting with a view to the development of administrative law jurisprudence; training of administrative law judges and members of non-judicial review bodies; and consideration as to the most appropriate body which is financially and politically independent to monitor the operation and development of the administrative review system.

Exploration of these matters of common interest could lay the groundwork for projects of benefit to both Australia and Indonesia. In the search for administrative justice there are opportunities for each country to learn from the other. Those opportunities should be actively promoted for the greater harmonisation of our laws and of relations between these neighbouring countries.

Notes

- 1 B Schwartz and H W R Wade *Legal Control of Government: Administrative Law in Britain and the United States* Oxford, Clarendon Press, 1972. See also B Schwartz "English Administrative Law: An American Perspective" (1995) 44 *Admin Review* 75.
- 2 B Schwartz *French Administrative Law and the Common Law World, an Introduction* New York, New York University Institute of Comparative Law, 1954.
- 3 J Schwarze *European Administrative Law* London, Sweet and Maxwell, 1992.
- 4 D J Galligan (ed) *The International Library of Essays on Law and Legal Theory, Areas 17: Administrative Law* Aldershot, Dartmouth Publishing Co Ltd, 1992.
- 5 Justice/All Souls "Principles of Good Administration" in *Administrative Justice: Some Necessary Reforms* Oxford University Press, 1988.
- 6 Indonesia has subscribed to the 1948 *Universal Charter of Human Rights* but not to the *UN Covenant on Civil and Political Rights*.
- 7 The five arms of government are the President and the executive branch; the Supreme Advisory Council (MPR); the People's Representative Council (DPR) or Parliament; the Financial Auditing Board; and the Judiciary.
- 8 C W Gray *Indonesian Public Administration: Policy Reform and the Legal Process* Ann Arbor, Michigan, University Microfile International, 1985, 57-58.
- 9 *Id* 261. See also D S Lev "Judicial Institutions and Legal Culture" in C Holt (ed) *Culture and Politics in Indonesia* New York, Cornell University Press, 1972, 268.
- 10 For example, D S Lev "Judicial Authority and the Struggle for an Indonesian Rechtsstaat" (1987) 13 *Law & Society Review* 556. See also J Mackie and A MacIntyre "Politics" in H Hill (ed) *Indonesia's New Order: The Dynamics of Socio-Economic Transformation* Sydney, Allen & Unwin, 1994, 22, 23.
- 11 *Basic Law of the Judiciary* (Law No 14 of 1970) s 26(1). See also D S Lev "Judicial Authority and the Struggle for an Indonesian Rechtsstaat" (1978) *op cit* 62.
- 12 *Id* 63.
- 13 *The Judicial System in Indonesia (General View)* Jakarta, The Supreme Court of the Republic of Indonesia, 1993, 1.
- 14 *Administrative Justice Act 1986* s 14(1)(f).
- 15 *Supreme Court Act 1970* ss 30, 46, 67.
- 16 The closest comparison is an established practice by which a person may send a letter of complaint against a government agency to Post Office Box 5,000 for investigation or referral as appropriate. At the seminar on which this book is based, the Indonesian participants did not rate this procedure as comparable in independence or effectiveness to an office of Ombudsman, and great interest was shown in the latter.
- 17 H B Mangkoedilaga "Indonesian State Administrative Courts: Existence, Challenge and Hope" an as yet unpublished paper presented at the 50th Anniversary of Indonesian Independence Conference, University of Melbourne, Melbourne, 28 September 1995, 3-4.
- 18 *Administrative Justice Act 1986* s 67.
- 19 *Administrative Justice Act 1986* s 1(3), (4).
- 20 *Administrative Decisions (Judicial Review) Act 1977* ss 3, 5; and *Bond v Australian Broadcasting Tribunal* (1990) 170 CLR 321.
- 21 *Administrative Justice Act 1986* ss 2, 49. See also *The Judicial System in Indonesia (General View)* Jakarta, The Supreme Court of the Republic of Indonesia, 1993, 15.
- 22 For example, *Australian Conservation Foundation v Minister for Resources* (1989) 19 ALD 70, *North Coast Environment Council Inc v Minister for Resources* (1994) 127 ALR 580.
- 23 See also, B Quinn *Indonesia's Administrative Justice Act of 1986: Implications for Legal and Bureaucratic Culture* a sub-thesis submitted in partial fulfilment of the degree of Honours in Asian Studies, Australian National University, 1994, 81-86.

AN OVERVIEW OF LEGAL DEVELOPMENTS IN INDONESIA: TOWARDS THE ESTABLISHMENT OF A NATIONAL LEGAL SYSTEM

Professor Dr Sunaryati Hartono

The strategic position of the Republic of Indonesia, located as it is between two oceans and two continents, is one of its important features. For many years Indonesia was the economic and trade transit as well as the business destination for many traders of neighbouring countries, such as China, India, Arab countries, Vietnam, Cambodia, Madagascar, Australia and other Pacific Ocean countries.

The territory of Indonesia extends from Sabang in Northern Sumatra to Merauke in Irian Jaya and consists of 17,058 big and small islands, of which roughly 6,000 are inhabited. Sumatra, Java, Kalimantan, Sulawesi, Maluku, Bali, Lombok, Sumba, Sumbawa and Timor, are the best known internationally.

Historical Background of the Indonesian Legal System

(See Figures at the end of this paper)

Prior to the Japanese Occupation in 1942 Indonesia was a Dutch colony. The legal system comprised Dutch tailored laws side-by-side with indigenous customary (*adat*) and Islamic (religious) laws (see Figure 5). On the 17 August 1945 Indonesia proclaimed its independence as a unitary and democratic republic. Its national philosophy, *Pancasila* (the Five Principles) consists of Belief in the One Supreme God, Humanity, National Unity, Decision-making after Consultation (Democracy), and Social Justice.

On the 18 August 1945 the Republic of Indonesia acquired its first Constitution, now known as the 1945 Constitution. There was another Constitution, the Temporary Constitution of 1950 but in 1959 the 1945 Constitution was re-established by Presidential Decree and has applied since then.

Although the Indonesian legal system has undergone considerable change since Independence, the aim is still to work towards an integrated national system of law based on the *Pancasila* philosophy and the 1945 Constitution (see Figures 6-9).

Court System

Before Independence, there were two kinds of civil courts, the European Court of Justice (*Raad van Justitie*), and the District Court (*Landraad*) for indigenous Indonesians. Apart

from these courts there were Islamic Courts dealing with marriage and divorce between Indonesian Muslims. Cases concerning indigenous people were first brought before the village head to be decided according to the local customs, mores and *adat* laws. An appeal from such a decision was brought before the District Court with its Dutch or Dutch-educated Indonesian judges but the case was still decided according to what the judges regarded as *adat* law. For such cases the European Court of Justice was the final appeal court.

Disputes between Europeans (which included Americans and Japanese) were brought before Dutch judges at the European Court of Justice, with an appeal and *cassation* to the High Court (*Hooggerrechtshof*).

There were differences between the procedure in the European Court of Justice and the District Court. The European Court applied the Code of Civil Procedure,¹ which was almost the same as the procedural law applicable in Holland at that time. Disputes involving Europeans or Foreign Orientals (Chinese, and other Asians and Arabs) and indigenous Indonesian were tried on the basis of Intergentile Law (or Interpersonal Conflict of Laws) before the District Court.

The main differences between the procedural laws in both Courts was that in the District Court:

- (a) oral argument was permitted;
- (b) representation by a lawyer was not required;
- (c) the judge's role was inquisitorial;
- (d) married women were allowed to defend themselves (in contrast to the procedure in the European Court, where women had no such right); and
- (e) the procedure was more simple.

The court system was based on two fundamental articles, Articles 131 and 163 of the Netherlands East Indies Basic Statute,² which divided the inhabitants of Indonesia into three groups:

1. Europeans, which included Continental Europeans, Japanese and others whose family law was based on the same principles as Dutch (or European) family law. Also regarded as Europeans were the Eurasian offspring of Europeans born in the Netherlands-Indies.
2. Indigenous Indonesians, including foreigners, who had been assimilated into Indonesian society.
3. Foreign Orientals, such as Chinese, Indians, Arabs and others.

Article 131 stated:

- (a) The civil and criminal laws of the Netherlands applied to Europeans, except in special circumstances;
- (b) Indonesians and Foreign Orientals were not subjected to the same laws as Europeans, or were not governed by laws commonly applicable to all groups of inhabitants, but were governed by their own religious and customary laws, except when the public interest demanded otherwise;
- (c) At the same time, Indonesians and Foreign Orientals had the right to opt to be subject to the law applicable to Europeans, either in general or for specific legal matters, the conditions for which were regulated by special ordinances.

In 1917 a statute was passed providing that the Civil Code and the Commercial Code (which at that time only applied to Europeans) was to apply to the Chinese also.³ There was an exception with regard to the adoption of children and for a special kind of partnership (*kongsi*) used only by Chinese businessmen. In 1924 the rules of the Civil Code relating to property and contract law, and the Commercial Code were made applicable to non-Chinese Orientals (Arabs, Indians, etc).⁴

Prior to the 1950s the Civil and Commercial Codes were not applicable to indigenous Indonesians. However, since Independence matters regulated by both Codes have increasingly been engaged in by Indonesians and after 1966 the Indonesian Government made the Codes universally applicable to all Indonesians. Nowadays even village people may be subject to these laws; for example, when they seek credit from a State bank or perform any service for a State company.

Towards a National Legal System

One of the important statutes leading to a national legal system was promulgated during the Japanese Occupation, shortly before Independence. That statute, known as the Law of the Unification of the Jurisdiction of the Courts, was one of the Acts which abolished the European Court of Justice as well as the jurisdiction of the village heads to try *adat* law cases. According to this law all legal disputes had to be heard by the District Court (*Pengadilan Negeri*) as the court of first instance. Appeals were made to the High Court (*Pengadilan Tinggi*), and cassations to the Supreme Court (*Mahkamah Agung*). This law unified the judicial system in Indonesia. From that time there was no separate court system for Europeans, Foreign Orientals and Indonesians.

The Civil Procedure Law for the District Court as laid down in the Revised Netherlands East Indies Statute still applies, while the substantive law continues to be determined by Articles 131 and 163 of the Netherlands East Indies Basic Statute, at least until new laws are promulgated. This is the position in relation to the Basic Agrarian (Land) Law,⁵ the Marriage Law,⁶ the Foreign Investment Law,⁷ the Domestic Investment Law,⁸ and many other new laws, such as the Company Law of 1995. In 1981 the Criminal Procedure Code was promulgated. Further, the rules governing contracts, commercial matters, and insurance and banking, which are contained in the 1948 Civil Code and the Commercial Code and which, prior to Independence applied only to Europeans and Foreign Orientals, have now become applicable to all indigenous Indonesians engaged in business, banking and insurance activities. It is clear that the last fifty years have seen many changes, both procedural and substantive, in law in Indonesia. It is certainly no longer true that Indonesian law is the same as Dutch law.

Currently the Indonesian Government is strongly promoting the unification of Indonesian law for all its nationals, by modernising and codifying the law. However, many *adat* law experts and people in religious (Islamic) quarters oppose the notion that custom and religious law should be superseded by uniform laws. As a consequence of this opposition it has been decided that the first priority in developing uniform laws should be in less sensitive areas of law, such as contracts, corporate law and economic law in general, while the more sensitive areas, such as family law, inheritance and so on will take longer to develop.

Current Sources of Indonesian Law

The main sources of law are:

- the philosophy of *Pancasila* contained in the Preamble to the 1945 Constitution;
- the 1945 Constitution;
- statutes;
- government decrees and decisions;
- judicial decisions; and
- customary law.

The most important source of Indonesian national law is the philosophy of *Pancasila* which is found in paragraph IV of the Preamble to the 1945 Constitution. *Pancasila* consists of five main principles which are interrelated to form one integrated philosophy. *Pancasila* is regarded as the *grundnorm* of Indonesian law and for that matter of Indonesian society as a whole.

The second most important source of modern Indonesian law is the 1945 Constitution which is the supreme law of the land. It is important to note that, unlike Dutch law, the explanatory notes on the Constitution and other legislation are inseparable from the constitutional articles so that when interpreting the law one should consider both the articles and the commentary together.

Unlike the Australian legal system, which follows the common law tradition, the Indonesian legal system is based on continental law. Therefore in Indonesia legislation is the most important, although not the only, source of law. In 1848 Indonesia received its first codes, the Civil and Commercial Codes. But as mentioned earlier these Codes only applied fully to Europeans and partly to Foreign Orientals (Chinese, Indians, Arabs, etc). They did not, therefore, govern the bulk of indigenous Indonesians, whose law was their *adat* law.

This plurality of Indonesian laws means that even today conflicts still arise between customary law, Islamic law and uniform laws, such as the Basic Agrarian Law and the Marriage Law, which were promulgated after the Proclamation of Independence in 1945.

The Penal Code of 1866 was the only Code which applied to all inhabitants from its inception. This Penal Code, as amended from time to time, still forms the basis of Indonesian criminal law, although in the years since Independence a number of separate statutes have been promulgated, which have considerably extended the scope of criminal law. At present there is a new Penal Code in the making which it is hoped will become law in the near future. A new Criminal Procedure Code was also promulgated in 1981, but the attempts at drafting a new Civil Code and a new Criminal Code have posed difficulties. Because of the rapidity of social and economic change, every five years or so statutes become outdated as new problems emerge which have not been contemplated by the legal drafters. Hence Indonesia has adopted a policy of partial codification which means that specific parts of the Civil or Commercial Code are promulgated separately from time to time. Recently Parliament (DPR) succeeded in enacting New Act No 1 of 1995 relating solely to limited liability companies.

Law Reform

Since 1958 a separate body has been established with the special task of undertaking law reform. This body, the Institute for the Development of National Law (*Lembaga Pembinaan Hukum Nasional*), which is under the control of the Prime Minister, consists of representatives of political parties and legal academics who have been involved in drafting a number of bills. For some reason or another these bills have never been enacted, perhaps because at the time the preference for codified law was still very strong. Following a number of changes which began in 1974 this body became part of the Department of Justice and is now known as the National Law Reform Agency (*Badan Pembinaan Hukum Nasional*).

In 1988 this law reform body was restructured and is now in charge of legal development in the broadest sense of that expression. It currently consists of three centres: the Centre for Planning a National Legal System (*Pusat Perencanaan Hukum Nasional*), the Centre for Development of a National Legal System (*Pusat Pembinaan Sistem dan Pranata Hukum Nasional*) and the Centre for Legal Documentation and Information (*Pusat Dokumentasi dan Informasi Hukum*).

All three Centres are working towards the development of the Indonesian legal system. Their work covers the development of the law, and of relevant institutions and legal procedure, the dissemination of legal information, continuing legal education, the promotion of the economy and a law-abiding attitude in society based on the *Pancasila* and the 1945 Constitution.

It is hoped that in the sixth Five Year Development Plan (*Repelita*), all colonial legislation will be superseded by national legislation, or at least by national and official legal texts which can be used by judges, government lawyers and law practitioners in their day-to-day activities.

Recent Developments Influencing the National Legal System

Interpretation of Laws

The application of law requires a consideration of judicial interpretation and attention must be given to the attitude of executive departments. Interpreting laws without regard to these other sources is inadequate. Moreover old Colonial laws need to be reinterpreted and reviewed against the principles contained in *Pancasila* and the Constitution, which may produce a different meaning as compared with the original interpretation.

Recent developments in international economic relations also influence existing laws and regulations. These developments mean that many important national laws need to be reviewed. Examples are the Basic Agrarian Law,⁹ the Foreign Investment Law,¹⁰ the Domestic Investment Law,¹¹ rules and regulations implementing the law on the Preservation of the Environment,¹² and intellectual property law which includes patents, trade marks, copyright and industrial design law.

These laws should never be read in isolation but should be construed in conjunction with relevant governmental decrees and/or judicial decisions. That process, of course, requires expert knowledge of the Indonesian legal system. The need for such expertise is why it is often difficult for a layman or a foreign lawyer to fully understand the

interrelationship between legislation, government decrees and case law. Similarly it is also very difficult for Indonesian lawyers to fully understand how to interpret and apply foreign law.

Currently the bulk of Indonesian law is to be found in the form of government decrees and decisions: Presidential Decrees (*Keputusan Presiden*); Ministerial Decisions (*Keputusan Menteri*); Presidential Instructions (*Instruksi Presiden*); Decisions of the Director General (*Keputusan Direktorat Jenderal*); and decisions of lesser officials.

The reason underlying this phenomenon is the fact that in the years of accelerated and planned development, social and economic change (and thus new and increased social and economic demands) have required rapid solutions and decisions which were not anticipated by the legislators. The legislative process has been unable to keep pace with the pressing and ever-changing needs of society.

In order to obtain a clearer picture of the extent of government decrees and decisions, the National Law Reform Agency is collecting and classifying all regulations and decisions issued by departments. We are now in the process of computerising in databanks these decrees and decisions for retrieval for administrative and research purposes. It is hoped that in the near future such information will be available to the public, after the system has been tested by the government, courts, and universities.

Judicial Decisions

Since colonial times the principle of judicial independence has been upheld. Judicial freedom means that, in practice, judgments and decisions of the courts rarely become binding precedents, because the Indonesian legal system has never adhered to the principle of *stare decisis*. Nevertheless, decisions of very respected judges may be followed by other judges, which means that the legal reasoning in such decisions becomes part of the general law. To be recognised as case law (*yurisprudensi tetap*) such decisions must be supported by professors of law (*opinio doctorum*) and the legal profession at large. By computerising case law it is hoped to provide better and faster information to judges, lawyers, and the public and thereby improve access to the law. The computerisation of laws and governmental regulations will help to overcome the uncertainty caused by insufficient legal information.

Conclusion

An increase in the awareness of how each country makes law and resolves legal issues will help avoid the misunderstanding and conflict which has occurred in the past between Australians and Indonesians.

The establishment of the WTO (World Trade Organization), the result of the GATT round of negotiations in 1994, and the commitment of both countries to the Bogor Declaration by APEC (Asia Pacific Economic Co-operation) countries will have a tremendous impact on Indonesia's and Australia's national economic and legal systems. International commitments should lead to a liberalisation of the economy and of trade in member countries and will impose on each member state an obligation to permit the entry of goods and services from all other members. Therefore every member state will be obliged to enact new economic laws and regulations more in line with the principles of a market economy. However, each state has laws and principles which serve its national economic interests and enhance the standard of living of its own citizens. The objectives

of Indonesian economic development are mirrored in paragraph IV of the Preamble to our 1945 Constitution, and national economic policy cannot deviate from Article 33 of the Constitution. Likewise the Australian Constitution must also support laws and policies directing its own national economic interests.

Our main task for the future is, therefore, to find a compromise or meeting between various views and to ensure there is a harmonisation of interests and laws. Indonesia's law reform in the last two decades focused on basic economic laws, and laws supporting economic and business activities. This included the replacement of our Civil and Commercial Codes containing rules on the law of contract, including standard terms of contract about property, intellectual property, the sale of goods and services, unlawful acts (tort), insurance, and intermoda transportation, including land, air, and sea transportation. Economic and business laws and regulation enacted outside the Civil and Commercial Codes can not be ignored either, such as the law on foreign and domestic investment, on the stock exchange, on banking, bankruptcy, on procedural law, arbitration law, land law, housing law, and on secured transaction bankruptcy law, to name but some areas.

To further these purposes work should be undertaken on a comparison of the legal systems of Indonesia and Australia. Activities of this kind will be useful to assist in future developments between the two legal systems, developments which will require a greater understanding of the legal techniques and methods used in both countries.

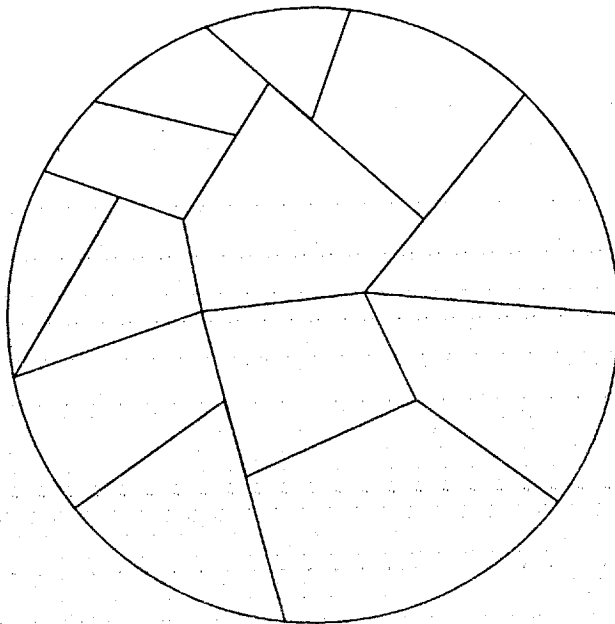
Finally I would like to stress that in the future, harmonisation of economic and business laws and regulations as well as of legal institutions between Australia and Indonesia would enhance not only our legal systems, but also the economic and political relations between our two countries. That better understanding will lead to greater appreciation and mutual respect.

Notes

- 1 *Reglement op Rechtsvordering* (the Regulation for Civil Procedure) (S.G. 1847 No 52 as amended by S.G. 1849 No 63).
- 2 S.G. 1855 No 2.
- 3 S.G. 1917 No 129
- 4 S.G. 1924 No 556.
- 5 Act No 5 of 1960.
- 6 Act No 1 of 1974.
- 7 Act No 1 of 1967.
- 8 Act No 6 of 1968.
- 9 Act No 5 of 1960.
- 10 Act No 1 of 1967.
- 11 Act No 6 of 1967.
- 12 Act No 4 of 1982.

FIGURE 1

THE HISTORY OF
THE DEVELOPMENT AND CREATION OF LAW IN INDONESIA:
TOWARDS A NATIONAL LEGAL SYSTEM



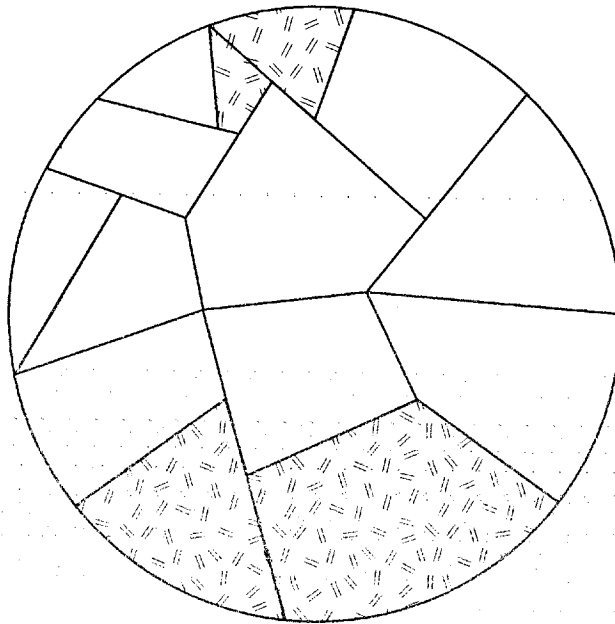
EXPLANATION:



Original (Native) *Adat* Law

FIGURE 2

THE HISTORY OF
THE DEVELOPMENT AND CREATION OF LAW IN INDONESIA:
TOWARDS A NATIONAL LEGAL SYSTEM



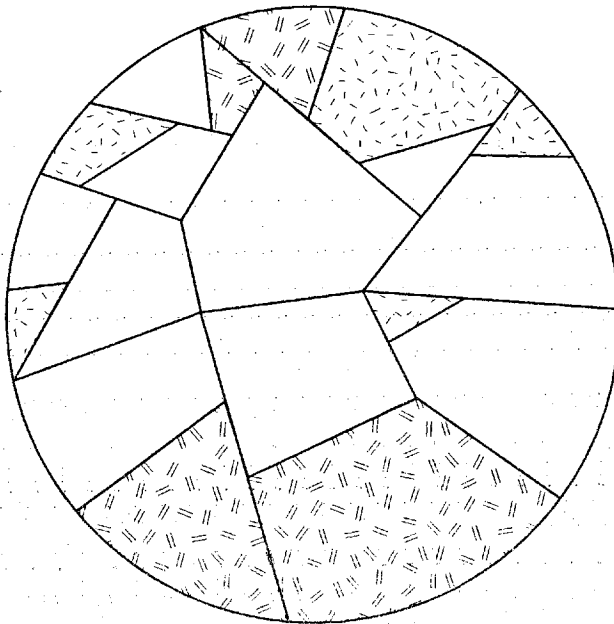
EXPLANATION:

Original (Native) *Adat* Law

Reception of Hindu Religious Law

FIGURE 3

FOURTEENTH CENTURY



EXPLANATION:

Original (Native) *Adat* Law

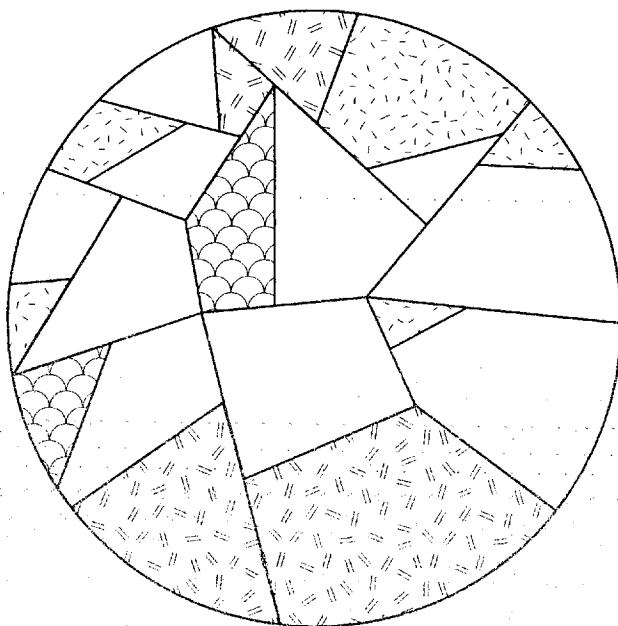
Reception of Hindu Religious Law



Reception of Islamic Law

FIGURE 4

SEVENTEENTH CENTURY



EXPLANATION:

Original (Native) *Adat* Law

Reception of Hindu Religious Law



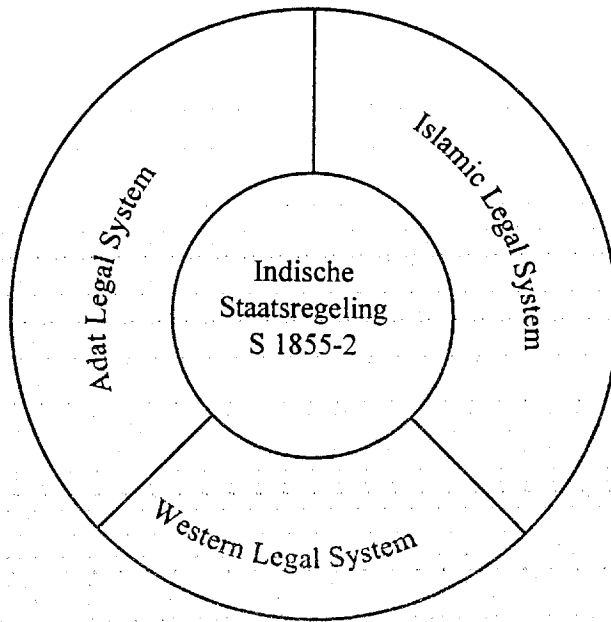
Reception of Islamic Law



Reception of Christian-Catholic Law

FIGURE 5

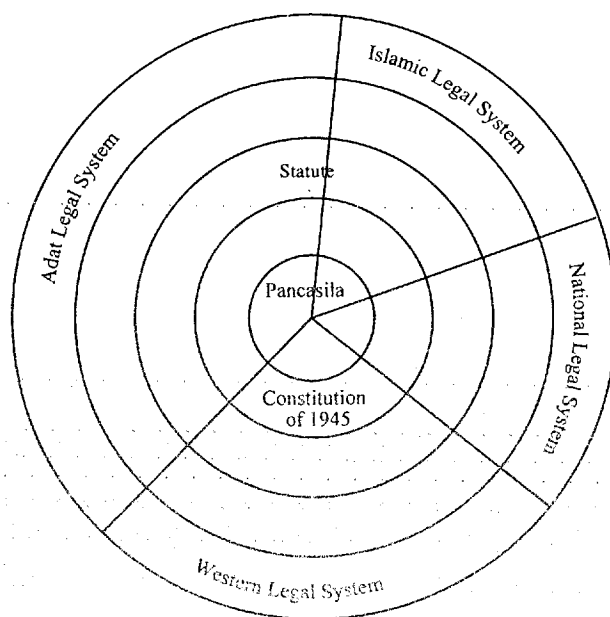
PRE-INDEPENDENCE



Indische Staatsregeling = Indonesian Legal System

FIGURE 6

POST-INDEPENDENCE

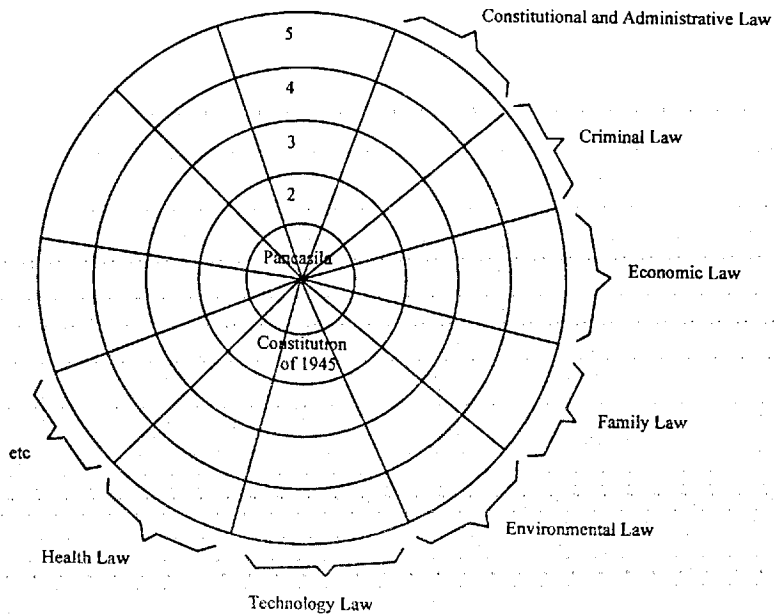


EXPLANATION:

Central Circle	<i>Pancasila</i> "Five Principles"
Second Circle	Constitution of 1945
Third Circle	Laws—Legislation
Fourth Circle	Jurisprudence (Court Decisions)
Fifth Circle	Customary Law

FIGURE 7

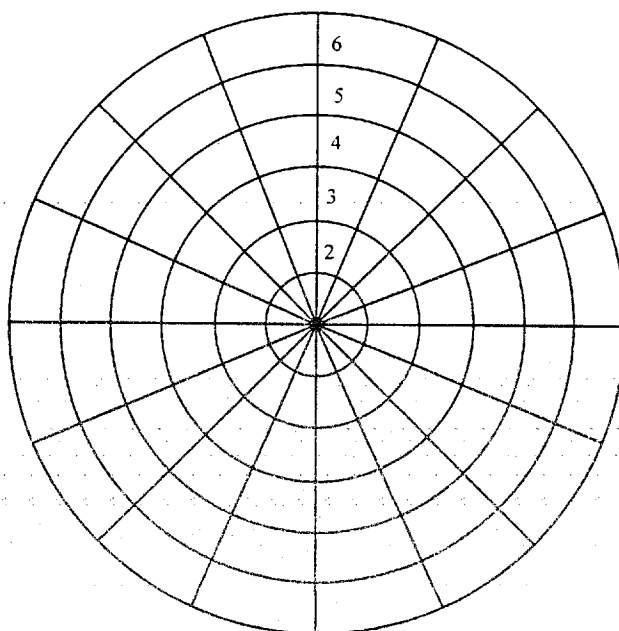
NEW AREAS OF LAW POST-INDEPENDENCE



Constitutional values become more complete and may be continually added to through the addition of new areas of law, all of which derive from the *Pancasila* and Constitution of 1945, and consist of Legislation, Jurisprudence and Customary Law.

FIGURE 8

PRINCIPAL SOURCES OF INDONESIAN LAW



EXPLANATION:

1. *Pancasila*
2. Constitution of 1945
3. Legislation or Written Law
4. Jurisprudence
5. Customary Law
6. International Law

FIGURE 9
The Historical and Cultural Development of Human Society

FIRST STAGE			SECOND STAGE		THIRD STAGE	
Prehistoric Society			Agrarian Society	Industrial Society	Post-Industrial Society	Knowledge and Information Society
ENERGY:	physical/ muscular		water, wind, fire, natural forces	coal, oil, mechanical, electricity, industrial and financial	electricity, radiation, solar	science and technology
POWER:	brute physical		land and natural resources	entrepreneurship	money and information	knowledge and technology
LAW:	of the jungle		as a framework of social order: unwritten • <i>adat</i> • religious	as a framework for determining status (eg Napoleonic code): • ownership rights • contract • codified (legislation and common) • etc	as social control: • constitutional • administrative • economic • criminal • information	as the framework for development: - as determining the limits of individual and social freedoms (in balance) for the prosperity of the people: - is of a more international nature (globalisation and international rule of law) • environmental • technological • information • health • economic • etc
			INDUSTRIAL REVOLUTION		INDONESIAN REVOLUTION	
			AGRICULTURAL REVOLUTION			
SOCIETY			LAW			

AN OVERVIEW OF THE AUSTRALIAN LEGAL SYSTEM

John McMillan

Origins of the Australian Legal System

Aboriginal peoples have occupied the Australian continent for at least 40,000 years. The Australian legal system derives, however, from the fact of British settlement after 1788. England had lost the American colonies in the War of Independence, and needed another location for the transportation of prisoners. By 1829 Britain had claimed legal sovereignty over the entire Australian continent, eventually establishing six separate colonies.

The colonists brought an English legal system to Australia. English legislation and common law applied from the outset, in a way that supplanted the rights which the indigenous inhabitants had traditionally derived from their own laws and customs.

Institutions of government, imitating those found in Britain, were also created. A turning point was the 1850s, when most of the Australian colonies acquired new constitutions, modelled on the twin principles of representative government and responsible government. That meant that the legislature would thereafter be elected by local people, and would appoint Ministers who would have executive responsibility for finance, land, and other local issues. It was from that point on that the colonies largely controlled their own affairs and steadily developed their own legislation in place of the English laws which the settlers had brought.

The six colonies, joined at times by New Zealand, met frequently thereafter with a view to forming a new political entity. The result was that on 1 January 1901, the first day of the twentieth century, there was born the new nation of the Commonwealth of Australia. It retains the distinction of being the only nation exclusively to occupy an entire continent.

The Constitution that Australia acquired in 1901 was enacted by the British Parliament,¹ though it had been drafted at two political conventions held in Australia in the 1890s and approved by the Australian people voting at referendums held in 1899–1900. As those events signified, Australia was to remain a unit of the British Empire for many years. After 1901 Britain could still enact legislation applying to Australia, as indeed it occasionally did. The highest court in the Australian legal hierarchy was still the Privy Council sitting in England. The British Monarch, the King or Queen, also remained Australia's Head of State.

For most purposes those connections with Britain were important more in legal theory than in political practice. After 1901 Australia was self-governing in most respects and increasingly, after World War I, Australia was regarded as an independent nation in international law and politics. Surprisingly, however, formal legal independence from Britain did not come until 1986. In that year an Act called the *Australia Act 1986*, which formally declared Australia's legal independence from Britain, was enacted concurrently by the Australian and British Parliaments. The *Australia Act 1986* terminated the power of the British Parliament to legislate for Australia and completed the task of abolishing appeals from Australian courts to the Privy Council.

The historical connection with Britain is still reflected in many ways. We retain the Constitution which Britain enacted in 1900—though the method for amending the Constitution is a national referendum of Australian voters (section 128). The Australian Head of State is Queen Elizabeth II—though, by an interesting legal fiction introduced by an Australian Act in 1953,² she bears the status and title of "Queen of Australia". Australia is also a member of the Commonwealth of Nations, a political alliance of fifty-one former British colonies that includes many Asian countries such as India, Malaysia, and Singapore.

The Australian Constitutional Framework

The system of government established by the Constitution in 1901 was a blend of three major elements: the British system of responsible government, the United States system of federalism, and the separation of legislative, executive and judicial powers. The result is distinctive, though it has not been without its difficulties.

The Australian Federal System

Australia has a federal system, meaning that there are two levels of government. There is a national government, called the Federal or Commonwealth government, which is based in Canberra, and independent governments in six regions, or States: New South Wales, Victoria, Queensland, South Australia, Western Australia, and Tasmania. Some other regions, called territories, are formally under Commonwealth control. In some territories a system of self-government has been established (examples being the Northern Territory and the Australian Capital Territory) while some other territories are administered by officials appointed by the Commonwealth government (for example, Christmas Island).

There is a marked resemblance between the United States and the Australian federal models. The legislative powers of the Commonwealth Parliament are specified in the Constitution and to that extent are limited (sections 51, 52). The powers of the State Parliaments are not specified and the States can legislate on any topic with the exception of some that have been committed exclusively to national control (such as currency and tariffs). There are, accordingly, many topics on which both the Commonwealth and the States can legislate concurrently. In the event of a conflict the national law prevails (section 109).

On the face of this design the States might have been the more important level of government. The specified powers of the Commonwealth Parliament were focused mainly on two roles: it was made responsible for aspects of foreign relations, such as defence, immigration, and treaties; and it could establish a national commercial system,

by its responsibility for taxation, commerce, corporations, telegraphic communication, currency, banking, and insurance. By contrast, the legislative capacity of the States embraced many domestically significant areas such as health, education, housing, transport, and civil and criminal law.

That constitutional design is still in place, since there have been few amendments to the text of the Constitution. The design bears little resemblance, however, to the way in which government is now carried on in Australia. Judicial decisions, and political and financial changes, have substantially changed the original constitutional design without changing the constitutional text.

As to judicial interpretation of the Constitution, what the High Court of Australia has said, in brief, is that the specified powers of the Commonwealth Parliament are to be interpreted broadly, without regard to any motive that may lie behind the use of those powers and without considering the effect which that use may have on the federal balance of power.³ For example, under its power to legislate on the topic of foreign affairs, the Commonwealth Parliament can give effect to an international treaty obligation on an issue that would otherwise be a State responsibility. A controversial illustration from recent times was a Commonwealth Act that gave effect to an international environmental heritage treaty, by prohibiting the Tasmanian State Government from damming the Franklin River which is situated in a wilderness heritage zone.⁴ In the same way, the Commonwealth Parliament has enacted a comprehensive human rights protection scheme, by implementing international treaties like the International Covenant on Civil and Political Rights.

There has also been an astute use by the Commonwealth of the limited powers made available to it by the Constitution. An illustrative example is that the Commonwealth raises far more money than it needs for its own services from personal income and company taxation, and has effectively excluded the States from this source of revenue. Commonwealth financial grants are then made to the States, often with conditions attached that specify the way in which the money is to be spent (section 96). In this way the Commonwealth can impose its policies and exert its influence on matters such as health, education, and transport. The use of national power in this way has been the subject of legal challenge by the States but the High Court has usually upheld the national initiatives.⁵

An apt summary of those constitutional trends would be that the position of the States has been weakened but not crippled. State policies and legislation are still crucial in many areas, particularly civil and criminal law, education, building, urban development, and environment. State political autonomy is also manifest. At present, for example, the Labor Party holds government at the national level but there are Liberal Party governments in four States. Furthermore, virtually all Australian community, sporting, and cultural organisations are organised along federal lines, with separate State and national branches. Media reporting, too, has a distinctively regional focus. The result is that many people identify strongly with their State of residence, a fact borne out by opinion polls which show that only 30 per cent or so of people would abolish the federal system and replace it with a unitary system.

Australian National Government

Legislative power is conferred by the Constitution upon the Commonwealth Parliament, which sits in Canberra. The Parliament follows the British/American model and contains

two houses which must both assent to an Act of Parliament. Like the foreign counterparts, the Parliament also has an active committee system to conduct inquiries and scrutinise government administration.

The lower house of Parliament, the House of Representatives, is the house of government, and contains the Prime Minister, the Treasurer, and many other Ministers. The House of Representatives contains 147 members, each of whom is elected for three years in a separate electorate. The upper house of Parliament, the Senate, comprises seventy-six members: twelve elected from each State for a term of six years, and four senators to represent the Northern Territory and the Australian Capital Territory. The equal representation of the States in the Senate reflects an intention that it should serve a special role in advocating State interests in national policy-making.

Within Parliament, formal recognition is given to the Opposition which by convention is granted numerous privileges. These include rights in debate, membership of committees, election funding, and administrative and personnel support.

State Government

The main point of differentiation from the national system is that State government is constituted in each State by a separate State constitution. Those constitutions have each been enacted by the State legislature, and for the most part can be amended by those legislatures without the need for a referendum of voters.

Otherwise, there are many similarities between the structure of the national and State legislatures. In all but one State (Queensland) there is a bicameral system, described as the Legislative Assembly (lower house) and the Legislative Council (upper house). The State legislatures are each elected by democratic process and function in a similar fashion to the Commonwealth Parliament.

The Executive in Australian Government

Both at the national and at the State level the exercise of executive power is in accordance with the British model of responsible government (also described as Westminster or parliamentary government). Responsible government entails that the Ministers who control the executive departments of state are members of the Parliament and their right to function as a government continues only while they have the confidence of the lower house of the Parliament.

The Queen's representative, the Governor-General or the Governor of a State, is formally the head of the Executive. This is amply depicted in the Constitution, which confers a great many powers upon the Governor-General; for example, to summon and dissolve Parliament, to appoint and dismiss Ministers, to assent to legislation, to propose the annual budget, to establish departments of state, to appoint judges, and to be commander-in-chief of the armed forces. It is, however, a well-established convention that the powers of the Governor-General should be exercised at the initiative of, and in accordance with advice received from, government Ministers. To that extent, the role of the Governor-General is pre-eminently formal and ceremonial.

A controversial event which challenged that neat definition of responsible government was the dismissal in 1975 of the Labor Prime Minister, Mr Gough Whitlam, by the Governor-General, Sir John Kerr. The context for the dismissal was a climate of political turmoil. The Labor Government did not control the Senate, which was refusing

to pass the Government's budget. The Opposition, which controlled the Senate, was demanding that the Government call an early election, citing government scandals and financial mismanagement as its reason. The existing financial reserves of the Government were running low and the impasse seemed destined to continue. The Governor-General stepped in, dismissed the Prime Minister, and appointed the Leader of the Opposition (Mr Malcolm Fraser) as a "caretaker Prime Minister". An election was held, at which Labor was defeated.

Whether the Governor-General broke the conventions of the Constitution is a matter that is still debated keenly in Australia. It is claimed, on one side of the debate, that a Governor-General must necessarily have a "reserve power" which can be exercised in exceptional circumstances contrary to the advice of government Ministers. An appropriate circumstance for intervention is said to be the need (as in 1975) to force an election when the government is unable to secure passage of its budget by *both* houses of Parliament. On the other side of the debate, the argument is made that an intervention of that kind is undemocratic, provokes controversy and instability, and undermines responsible government to the extent of denying the role of the lower house of Parliament in selecting and dismissing governments. That sharp division of opinion points up the fragile balance that was drawn by the Australian Constitution when it blended the British and United States models of responsible government and federalism.

The constitutional crisis of 1975 will be mentioned again below in the discussion of constitutional conventions and the monarchy/republic debate.

The Australian Judicial System

There is a separate system of courts in each jurisdiction. The highest court in the Commonwealth system is the Federal Court of Australia, and in each State the highest court is the Supreme Court of that State. At the apex of the Australian judicial system is the High Court of Australia. It has seven judges, appointed by the national government after consultation with the States. The High Court can hear appeals on any issue from the Federal Court and from any State Supreme Court.

Most Australian courts exercise a combined jurisdiction embracing civil law, criminal law, and administrative law. Specialist courts exist too, such as the federal Family Court, the federal Industrial Relations Court, and the New South Wales Land and Environment Court. The creation of administrative tribunals—such as the Administrative Appeals Tribunal and the Immigration Review Tribunal—has also been a strong trend in recent years.

Australian courts are distinguished by their independence from the other institutions of government. An important aspect of this independence is the constitutional requirement that federal judges are appointed until the retiring age of seventy and can only be removed earlier from office by Parliament on the exceptional grounds of proved misbehaviour or incapacity. (Constitution, section 72(2)). Customarily the principal criterion for appointment to a court is professional legal competence. Those appointed to the judicial bench have usually practised independently as barristers for at least fifteen years, though there are exceptions such as the occasional appointment of solicitors or government Ministers with prior legal experience.

Other important principles and conventions reinforce the independence of the judiciary. The prevailing method of dispute resolution is the adversarial method, by which the role of a court is limited to impartially resolving the particular dispute that is

presented to it by the parties. It is expected, further, that there will be no unauthorised interference by other persons in the proceedings of a court, and that the orders and decision of a court will be implemented by those to whom they are directed. Breach of that requirement is a contempt of court to be dealt with by a court imposing a punitive sanction.

A consequence of judicial independence is that courts have been well-placed to have a decisive impact on Australian political and constitutional history. It is not uncommon that decisions of the High Court, declaring legislation to be unconstitutional and invalid, have had a marked impact on the implementation of a government's program. Notable examples include the invalidation of the Chifley Government's bank nationalisation scheme in 1947–48,⁶ the Menzies Government's *Communist Party Dissolution Act* in 1951,⁷ the Whitlam Government's resources development program in 1975,⁸ and the Hawke Government's ban on political advertising on television and radio in 1992.⁹

Many fundamental political and social questions have also ultimately been resolved by the courts as legal issues. Examples include the status of Aboriginal law and custom in the Australian legal system,¹⁰ whether Australia was legally independent of Great Britain,¹¹ the delineation of Australia's territorial boundaries,¹² the common law obligations of the Governor-General in administrative decision-making,¹³ the impact of international law on Australian executive practices,¹⁴ and the scope of Australia's refugee program.¹⁵

Constitutional Conventions and Principles

The formal written rules of a legal system present only a partial picture. Another important element is the unwritten or informal collection of conventions, principles and concepts that influence the thinking and behaviour of those who exercise power within a system. This element frequently explains how legal systems with a similar formal structure can have a strikingly different character and appearance.

The constitutional principles that are discussed in this paper by no means provide a definitive coverage of Australian legal philosophy.¹⁶ Two reasons for selecting the principles to be discussed are that they have a particular relevance to the public law dimension of the legal system, and they are concrete to the point of being reflected directly in the jurisprudence of Australian courts.

Constitutional Conventions

The operation of all political systems is governed in part by constitutional conventions—unwritten rules—that operate alongside and often modify the text of the written Constitution. Australia is not unique in this respect but probably relies more heavily on conventions than many other systems.

The reason is that the Constitution does not provide an accurate picture of how government actually operates. Nor, in a sense, was it meant to be overly prescriptive. The nineteenth century British approach to constitutional drafting typically created a document that would permit evolution without the need for formal constitutional amendment. This reflected, too, the inherited wisdom of British constitutional law. Britain had never had a written Constitution in the form that other countries had. There was reliance instead on conventions and the influence of history to provide security and

stability in political democracy. Not surprisingly, Britain preferred for the colonies a form of constitution that would allow incorporation of that distilled experience and wisdom.

Conventions have been especially important in the operation of the system of responsible government. The text of the Constitution is largely silent on this aspect. There is no mention, for example, of the Prime Minister, the Cabinet, the concept of government and opposition, or the role of Parliament in installing and removing governments by a vote of confidence. The constitutional picture is in fact quite different, suggesting that a Governor-General appointed by the Queen could exercise ultimate power in the public domain. The adaptation of that formal structure, in a way that for the most part is stable, predictable and democratic, is secured by recognised constitutional conventions.

Undoubtedly the constitutional crisis of 1975 shook the confidence of many people in the resilience of conventions, and many proposals have since been made for codifying the conventions of responsible government and including them as part of the text of the Constitution.¹⁷ For the moment, effort has been devoted instead to clarifying and ratifying those conventions. This was chiefly done by a body called the Australian Constitutional Convention which contained representatives of all Australian governments.¹⁸

A brief reference should be made as well to other areas of the Australian legal system in which conventions have been important. Recognised conventions define matters as diverse as the independence of the judiciary, the functioning of Parliament, and the annual Premier's Conference of Commonwealth and State leaders. Australia's *de facto* and political independence of Great Britain, which occurred long before the passage of the *Australia Act 1986*, was likewise secured by conventions that defined the legislative self-restraint of Britain, the status of Australia in international affairs, the relationship of the Queen to Australian Ministers and the Governor-General, and the separate relationship between Britain and the States.

Constitutionalism

Constitutionalism is a principle of limited government—that the Parliament and the government derive their power from a higher source, a written constitution, and must act consistently with any limitations which are imposed by that fundamental or organic law. Underlying this doctrine is a notion of the “sovereignty of the people”, who give authority to the Constitution, and who have individual interests that rank ahead of the collective interests which are represented by governments.

The principle of constitutionalism stems mainly from American political foundations, as does the related idea that a violation of a constitutional limitation can be restrained by the judiciary. The decision to that effect by the US Supreme Court in 1803 in *Marbury v Madison*¹⁹ was followed in Australia notwithstanding the absence of any clear statement in the Australian Constitution. High Court judgments are replete with references to its role as the “guardian of the Constitution”. As explained earlier, judicial invalidation of legislation and executive action is routine and uncontroversial.

An extension of the principle of constitutionalism which is of growing importance in Australia is the notion that parliaments and governments are limited as well by constitutional values that are implicit in the constitutional framework. A weighty value

which the High Court has discerned implicit in the Constitution is the principle of representative democracy, incorporating freedom of political speech. Commonwealth and State Acts which contravene representative democracy can be declared invalid. Statutes which have suffered that fate in recent years include a Commonwealth Act that forbade political election advertising on television and radio,²⁰ a Commonwealth Act that punished criticism of members of an industrial court,²¹ and a State defamation Act to the extent that it would insulate parliamentarians from criticism.²²

Parliamentary Supremacy

This is often said to be the central principle of English constitutional law and practice. The doctrine has a number of important legal implications, of which three stand out. The first is that Parliament can make any law that it chooses, including a law that is retroactive, that breaches principles of morality, religion, common law, or international law, that is inconsistent with an earlier Act, or that is inconsistent with a government's election manifesto or policies. The second is that the courts will enforce legislation, without an inquiry into the wisdom or motive of the Parliament. The third is that the people also have an obligation of obedience and have no right to ignore a law which offends their conscience.

The doctrine of parliamentary supremacy has had to be modified in Australia to take account of the existence of a written constitution that imposes limitations on parliaments, but in other respects the doctrine is a guiding beacon in constitutional practice. The manifestations of the doctrine are numerous. In Australian legal history the doctrine provides a major obstacle to the recognition of Aboriginal customary law because it pre-existed the establishment of Australian parliaments. In constitutional interpretation, as explained above, the courts uphold the validity of Commonwealth Acts without inquiring into the effect or intention of an Act to subvert the federal balance. In administrative law, the concept of judicial review has been circumscribed (on the surface at least), to avoid any inquiry by the courts into the wisdom or equity of administrative action. And in statutory interpretation generally, courts strive to find the Parliament's purpose in passing legislation. For a long while, indeed, courts declined to look beyond the words of an Act to find its meaning in external documents like the record of parliamentary debates or a government statement. Interestingly, it was an Act of Parliament that directed the courts to seek assistance in construction from these other sources.²³

Separation of Powers

This doctrine stipulates that three major organs of the State shall each perform a single and different function: the legislature will enact laws; the executive will apply those laws in individual cases; and, in the event that a dispute arises about the meaning or application of a law, the dispute will be resolved conclusively by the judiciary. This doctrine which emerged from English constitutional history, was explained to the world by the French political philosopher Montesquieu, and was refined and popularised in the United States Constitution.

Separation of powers could never be practised in any pure form in Australia. Responsible government is itself a fundamental breach, since the executive's Ministers also sit in the Parliament. History has confirmed, too, the necessity for widespread delegation from the legislature to the executive of the power to make subordinate legislation.

The separation of powers doctrine has, nevertheless, had a great influence on the approach of the judiciary in Australia. From the outset the High Court insisted that a strict separation of the judicial function was essential and required by the Constitution.²⁴ A consequence is that judicial functions can be exercised only by courts: executive agencies, for example, lack any direct power to enforce their own orders or decisions or to punish a person for disobedience. The converse proposition also holds too: courts cannot exercise executive functions. This partly explains why there has been a significant growth of administrative tribunals in Australia. The function which those tribunals perform, of reviewing the merits of an administrative decision, is regarded as an executive function that cannot easily be conferred upon a court.

The extension of judicial review into all corners of government likewise reflects a degree of judicial self-confidence that is born of a belief in the separation of powers. Illustrating that trend are recent court decisions that judicial review can be undertaken of the validity of decisions made by the Governor-General, by the Australian Security Intelligence Organisation, and perhaps even by the Commonwealth Cabinet.²⁵

Rule of Law

The rule of law is a universal legal principle but has a meaning that is adjusted usually to the historical and cultural context of a particular country. In the English legal heritage the rule of law acquired a special meaning and significance that owed much to the writings of an influential English legal academic, Professor Albert Dicey.²⁶ As he explained, the rule of law speaks differently to the governors and to the governed. Individuals, on the one hand, can engage in any activity which is not specifically prohibited by law. The executive government, by contrast, can only undertake activities that are specifically authorised by law. In particular, the executive has no inherent authority to impose taxation, to interfere with private property, or to take punitive action against members of the public.²⁷

Under the banner of this principle the courts have always declared that they have a special duty to protect the interests of the individual. Government must be able to point to a clear or explicit legal foundation for any action that interferes with the liberty or property of a person.²⁸ In the absence of proper authority the government may be found liable at common law to pay damages for trespass or assault. In administrative law litigation, too, the courts tend to side regularly with the individual interests of people, rather than with the collective interests of the people as reflected in the policies of the executive.

Liberalism

The ideology of liberalism, which is dominant in Australia as in many other western societies, pervades the political, social and legal system. A core liberal belief is the liberty of the individual from encroachment; from control or demands imposed by others, and from obligations that have not been agreed to. The emphasis, then, is upon the rights which individuals have against the community, rather than upon their obligations and subordination to communal and group interests. Flowing from the core belief are many other broad claims, including that individual liberty requires equality of treatment among citizens, and that liberty will crystallise in specific rights which belong to the individual.

Individual liberty can never be an absolute interest, for the unqualified claims of one person will inevitably clash with the claims of another. Government and society are

premised upon some degree of restriction, control and obligation. There are, nevertheless, signs of liberal philosophy running through most of the foundation legal doctrines of English law. It can be seen, for example, in criminal law, which is built upon the presumption of innocence; in contract law, which enables individuals to choose the commercial obligations that bind them; in property law, which is premised upon the freedom of the individual owner of property to exclude others and to control the use of property; and in administrative law, which defines the right of individuals to challenge government decisions by which they are aggrieved.

Sources of Australian Law

Acts of Parliament

The major source of new legal rules is Acts of Parliament. The Commonwealth Parliament in some years enacts upwards of 200 Acts, covering more than 6,000 pages of text.

The importance of this source of law is underlined by the principles described above, which commit the law-making function to Parliament, not the executive government. There are, as explained, many things which can only be done by a government with the authority of an Act, particularly administrative activity that is coercive, punitive or intrusive. Moreover, the Constitution provides that all money received by the government must be paid into a central fund (the Consolidated Revenue Fund), and that money can only be expended from that fund under the authority of an Act of Parliament (Constitution, sections 81, 83). The consequence, accordingly, is that virtually all major government policies and programs have to be established by an Act of Parliament.

Australian Acts are drafted in a style that is relatively technical and formal. Although Acts are often quite detailed, they are unlike legislative codes, and principally define an outline or framework that requires elaboration by subordinate legislation, judicial interpretation, and executive policies.

Subordinate Legislation

Most Acts of Parliament authorise the executive government (usually the Governor-General) to make regulations to supplement the Act. Ordinarily the regulations specify procedural and formal issues, such as the forms to be used under an Act; but at times the regulations are more significant and substantive. An example is the immigration rules, which are contained mainly in regulations.

Two important controls are placed on executive law-making. First, regulations must usually be tabled (or notified) in Parliament and either house can approve a resolution disallowing the regulations.²⁹ Second, it is axiomatic that regulations, as a subordinate form of legislation, must be consistent with the Act under which they were made and with other Acts. A regulation which infringes this principle will be invalid.³⁰

Common Law

An aspect of Australia's British legal heritage is the adoption of the common law system. That is, legal principles are enunciated by Australian courts in resolving individual cases, and over time those principles collectively constitute a body of legal doctrine. Decisions

of English courts also contribute to this process but have dwindled in importance in the last two decades.

The importance of common law in Australia has been steadily decreasing at a rate that corresponds to the growth of legislative regulation of Australian society. There are, nevertheless, areas in which common law remains the paramount source of legal principles, such as the law of contract and of personal injury. Judicial review of administrative action also has a common law basis that has been retained in all Australian jurisdictions. The common law defined not only the substantive principles of judicial review—such as the doctrine of natural justice—but also the procedural remedies by which a judicial review action would be commenced—such as the prerogative writs of *certiorari* and *mandamus*, and the equitable remedies of injunction and declaration.

The importance of common law continues to be reflected in the Australian legislative drafting style. Legislation commonly uses broad and discretionary phrases in the expectation that judicial interpretation will amplify the meaning of the statutory text. An example is the *Administrative Decisions (Judicial Review) Act 1977*, which relies on common law supplementation by providing simply that a decision is unlawful if there was “a breach of the rules of natural justice”, “an exercise of a discretionary power in bad faith”, or “any other exercise of a power in a way that constitutes abuse of the power” (section 5).

Executive Power

The executive has no power as such to make law but there are two aspects of executive power that warrant mention in this context.

In the first place, there are many actions that can be undertaken by the executive in the absence of statutory authority. The view is taken that the executive has an inherent authority to carry out a range of functions that are necessary to enable it to function as a legal person on a day-to-day basis. For instance, relying only on the executive power government agencies can conduct research and inquiries, execute contracts, establish an administrative system, develop property, conduct foreign relations, and enter into treaties. The major qualification (mentioned above) is that the executive needs statutory authority for actions that are coercive or punitive, which raise taxation, or which interfere with fundamental freedoms such as the right to property and personal autonomy.

Second, the executive faces a practical need to develop policies and guidelines to amplify the meaning of legislation. While these executive policies do not have the force of law, their practical influence is considerable. Two control mechanisms have accordingly been adapted from American administrative law. One mechanism is contained in the *Freedom of Information Act 1982* (Part II), and provides that executive policies which amplify the meaning of legislation must be made available to the public. The second mechanism, which is yet to be enacted, is the *Legislative Instruments Bill 1995* which requires that executive rules and orders that have a legislative character must be made by a process that involves public consultation and must be published in a form that makes them publicly accessible.

International Law

Australia has been a recent signatory to a large number of international instruments that have a human rights flavour. Accession to those instruments is an executive action which

does not by itself give domestic legal effect to an instrument. It is primarily the role of Parliament to decide whether to incorporate an international instrument into Australian law.

The courts, however, are increasingly proposing that international law should influence the development of Australian law. This was given as a major reason by the High Court in *Mabo v Queensland (No 2)* in 1992 for granting common law recognition to Aboriginal native title (discussed further below). In a remark that has been quoted frequently since, Mr Justice Brennan reasoned that:

international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration.³¹

International law was used in a similar way in another case to develop a common law principle that a serious criminal trial of a person should not proceed until the person has adequate legal representation.³² Administrative law principles are being re-fashioned too. In a recent decision the power to deport a person was checked by the UN Convention on the Rights of the Child to the extent that deportation of a parent could not occur until a hearing had first been held on the impact of that decision on the children of the parent.³³ Failure to comply with that requirement spelt the invalidity of the decision.

The Australian Approach to the Protection of Rights

The measures that have been developed in Australia for the protection of rights have their counterparts in other countries, but the combined effect of those measures is now a distinctive aspect of the Australian legal system. The following discussion looks only at the Commonwealth government, but there is a comparable range of protections established in most Australian States and Territories.

Constitutional Protections

Australia does not have a constitutional Bill of Rights that protects individual rights against legislative, executive or judicial infringement. Limiting government power in that way would not have sat easily with the concept of parliamentary supremacy. The view was taken by those who drafted the Constitution that adequate protection derived from the combined impact of the system of representative democracy, principles like the rule of law, common law doctrines, and social attitudes. Only a few rights were given constitutional protection, such as freedom of religion and, surprisingly, the right to seek judicial review of administrative decisions (Constitution, sections 116, 75). There have been occasional constitutional referendums to insert other protections into the Constitution, but so far those referendums have been unsuccessful.

That description of the Constitution is now heavily qualified by some recent cases in which the High Court has interpreted the Constitution in a way that limits the ability of the Parliament to interfere with basic freedoms. Mostly the limitations are said to be implied in the Constitution, leading some commentators to claim that the Court has unearthed an implied constitutional bill of rights.

One foundation for the new jurisprudence is the implied constitutional principle of representative democracy. Working from that foundation, a Commonwealth Act could

not prohibit the freedom of political speech, whether by banning political advertising or criticism of the government.³⁴ Another constitutional basis for protecting rights is the separation of judicial power, which not only secures the independence of the judiciary but is perceived also as a safeguard of individual liberty. For instance, it was held in a recent case that an immigration law which prevented a person from approaching a court to seek release from unlawful detention was an invalid interference with the separation of judicial power.³⁵

Human Rights Scheme

Parliament has created a Human Rights and Equal Opportunity Commission, which has a range of investigatory, research, and advisory functions, to monitor the observance of human rights in Australia.³⁶ Individual complaints about breach of human rights can be undertaken by five different divisions of the Commission.

- The Human Rights Commissioner can investigate whether administrative action interferes with one of the traditional freedoms such as freedom of expression, assembly and thought, due process, and equality before the law.
- The Race Discrimination Commissioner can investigate whether a person has been deprived of a political, economic, social, cultural or other public right by reason of their colour, descent, or national or ethnic origin.
- The Sex Discrimination Commissioner has a comparable function in relation to complaints of discrimination based on sex, marital status or pregnancy.
- The Disability Discrimination Commissioner can investigate whether a person has unjustifiably been denied a facility or opportunity by reason of a physical or mental disability.
- The Privacy Commissioner can investigate a complaint that a government official has breached a privacy standard concerning the collection, storage, use, correction, and disclosure of personal information.

There are two major differences between the Commonwealth human rights scheme and a constitutional Bill of Rights of the kind that operates in the United States. First, the Australian scheme does not restrain the Parliament from enacting legislation that breaches human rights, and Parliament can likewise authorise the executive to infringe those rights. In those circumstances the most a Commissioner can do is to publish a report which is critical of the government agency or the legislation which it is administering. Second, the Australian scheme uses executive agencies (the Commissioners) to enforce the scheme and to protect rights. The role of the courts is limited to interpreting the human rights legislation in the event of doubt and to enforcing an order of one of the Commissioners in the event that the order is being ignored.

In other respects, however, the Australian scheme provides more extensive protection than that provided by many constitutional Bills of Rights. Some aspects of the scheme (the prohibitions against race and sex discrimination) apply not only to the public sector but also to private sector activity. The remedies available to the Commissioners are probably more flexible than those available to most courts, for example, the Commissioners mostly try to conciliate between disputing parties but can ultimately issue injunctive or mandatory orders or award financial compensation to a party. A Commissioner is also more able than a court to handle each year a considerable volume of complaints and does so at no cost to the complainant.

Administrative Law

The development of a comprehensive system of administrative law has been one of the more remarkable episodes in Commonwealth law reform during the last two decades. The reform has been motivated by a number of related objectives, principally to make government more accountable, to improve the quality of public administration and to create additional protection for the citizen in relation to the government.

From the perspective of the individual there are two major categories of rights that are conferred by administrative law. The first is the right to challenge a government decision before an independent and impartial review body. In brief, the three main options for review are: judicial review of the legality of a decision in the Federal Court pursuant to the *Administrative Decisions (Judicial Review) Act 1977*; review of the merits of a decision by an administrative tribunal such as the Administrative Appeals Tribunal, the Immigration Review Tribunal, or the Social Security Appeals Tribunal; and an investigation of administrative processes generally by the Commonwealth Ombudsman.

It should be noted that those rights of challenge are frequently exercised. The Commonwealth Ombudsman receives each year in excess of 40,000 complaints and inquiries. The five major administrative tribunals receive annually between them nearly 30,000 applications for review.

The second category of rights have to do with access to information about government decision-making. The main Acts that embody this right are the *Freedom of Information Act 1982* which requires the government to release upon request documents that are not exempt under the Act; the *Administrative Decisions (Judicial Review) Act 1977* which enables a person to obtain a written statement of the reasons for a decision which adversely affects that person; and the (as yet to be enacted) *Legislative Instruments Bill 1995* which requires public notification and consultation in the making of legislative rules.

A related judicial development that has enhanced open government has been a vigorous enforcement by the courts of the common law doctrine of natural justice. This doctrine requires that an official who is making a decision that could adversely affect a person should give prior notice to the person of the information on which the decision might be based. The extension of that obligation to immigration decision-making (deportation, visas, and refugee applications) has been at the centre of administrative law litigation in Australia.

Common Law Principles

The rule of law as adapted to English legal tradition requires that common law principles apply to the government as they apply to the citizen. This means, in a practical sense, that government activity which unlawfully interferes with the property or liberty of a person can be restrained by judicial order or rectified by an order to pay compensatory damages. Common law doctrines which provide protection to a person in this way are the doctrine of trespass, which applies to the unlawful invasion of property or personal security; and false imprisonment, which applies to the unlawful detention of a person. Once again, the pursuit of common law damages has been a prominent trend in recent administrative law litigation.

Current Issues in Australian Public Law

Constitutional Reform

Australia's Constitution is now ninety-five years old. It has provided a framework for stable democratic government, but the document has its flaws. There are many provisions that are outmoded and which reflect the concerns and objectives of a different era in Australian history. Aspects of the Constitution are also a source of practical difficulty, particularly concerning the management of the federal system and the election of the national parliament. A recent 900-page report of a non-partisan Constitutional Commission appointed by the Government recommended textual alterations on nearly every subject dealt with in the Constitution.³⁷

The issue which now dominates the discussion of constitutional reform is whether Australia should change from a monarchy to a republic. The national Labor Government has signalled its support for this change and in 1995 announced proposals for a constitutional referendum to be held within a few years. The Government favours minimal constitutional change, by replacing the Governor-General with a President who would be elected by a two-thirds majority at a joint sitting of both houses of the Commonwealth Parliament. The role of the President would principally be formal and ceremonial yet would retain "reserve powers" akin to those exercised by the Governor-General in 1975.³⁸ There has been vigorous public debate of these proposals, with most criticism being levelled at the suggestion that the President should be selected by Parliament rather than by popular vote.

Ultimately the hurdle that will have to be crossed is that constitutional change of that kind must be agreed to by the people at a referendum. Section 128 of the Constitution requires that the referendum be approved by a majority of voters nationally, and by a majority of voters in four of the six States. It has been difficult in the past to secure that agreement, and only eight of forty-two referendum proposals have been successful. The conventional wisdom is that a referendum proposal which is controversial or which is opposed by a major political faction is certain to be defeated.

The serious attention which is now given in Australia to the issue of constitutional reform was marked by the creation in 1991 of the Constitutional Centenary Foundation. The Foundation is an independent, non-partisan organisation, funded by Commonwealth and State governments, and chaired by a former Governor-General, Sir Ninian Stephen. The task of the Foundation is to lead a decade of constitutional debate prior to the centenary of Australian Federation in 2001.

Recognition of Aboriginal Laws and Customs

The description of Australian legal history given earlier in this paper began by noting that in 1788 English law supplanted the laws and customs of indigenous Australians. The impact of that development was predictably harsh. The unique cultural and religious relationship of Aboriginal communities to the land was severed by the introduction of a new system of land title; they were thereafter governed comprehensively by English criminal and civil law; and yet some benefits of the legal system (such as the right to vote) were withheld.

The legal injustice suffered by indigenous Australians has been addressed progressively during the last three decades. The measures have included a constitutional

referendum in 1967 which removed some discriminatory references from the Constitution; the passage of national land rights legislation applying to the Northern Territory in 1976; the proposed recognition of Aboriginal customs on matters like marriage, punishment, and hunting and gathering rights; and the creation of an Aboriginal and Torres Strait Islander Commission, with elected regional councillors and commissioners to make policy and devise programs for indigenous Australians.

Symbolically and practically, the most significant development was probably the *Mabo* decision of the High Court in 1992 recognising that rights arising from traditional native title were not fully extinguished by the colonisation of Australia.³⁹ Those rights, provided they had not been taken away by later inconsistent government action, could be claimed and enjoyed by the descendants of the traditional owners. At the forefront of the Parliamentary response to the *Mabo* decision was the *Native Title Act 1994* creating a National Native Title Tribunal to adjudicate native title claims. The Act also protects native title against adverse State government action and establishes an Indigenous Land Fund to benefit Aboriginal Australians who would not be in a position to make a title claim under the *Mabo* decision.

The *Mabo* decision has also added vigour to an established movement for constitutional change to give explicit recognition in the Constitution to the history, culture and rights of indigenous Australians. Among the proposals that have been advanced is a treaty or instrument of reconciliation—a *Makarrata*—between Aborigines and later settlers.

Access to Justice

The benefits which a legal system can offer to citizens are premised upon them having access to the legal system. The cost of legal services is often the most visible barrier but access can be restricted in a great many other ways as well. Chief among these is the lack of familiarity which people commonly have with law and with legal processes.

Concern that these barriers exist has sparked a large number of Commonwealth and State inquiries in recent years. The myriad proposals formed the basis of an "Action Plan" devised recently by an independent Access to Justice Advisory Committee appointed by the Commonwealth government. The recommendations of the Committee were recently accepted by the Government in a four-year \$160 million strategy to reform the Australian justice system.⁴⁰ The broad-ranging reform program includes removal of the barriers to legal services arising from language, cultural and gender differences; reduction of the high cost of legal services; stimulation of competition among lawyers; presentation of legislation in a form that is easier for people to read and interpret; introduction of more efficiency and less formality in legal processes; encouragement of alternative dispute resolution; and harmonisation of Commonwealth and State laws and regulatory schemes.

A further issue which the Committee emphasised was the important role that a comprehensive and efficient administrative law system can play in ensuring access to justice. It was proposed that every State in Australia should establish an administrative law system that conforms to certain minimum requirements: an efficient system of judicial review; a comprehensive system of merits review; an Ombudsman; a freedom of information scheme; a right to the reasons for a decision; and a right to be notified of review options. The Committee concluded that those features "are necessary to any

administrative law system if it is to provide people with accessible and credible means of disputing government decisions. These features...are a crucial ingredient in an accountable system of government".

Globalisation

The waning influence of British heritage on the Australian legal system has coincided with a shift towards the integration of Australian law and international standards. The blending of domestic and international norms is nowadays a trend in many countries. The trend has been particularly marked in Australia and is reflected in structural change as much as in legal thinking.⁴¹

The most visible aspect of the trend has been the adjustment of Australian laws to conform to international treaty standards on matters as diverse as environmental conservation, air safety, food standards, employment conditions, sexual privacy, human rights protection, motor vehicle safety, and telecommunications. The fact that Australia has committed itself as a party to all the major United Nations human rights treaties is a central theme in public debate whenever questions about discrimination or inequality are raised. In the same way, economic decision-making is frequently driven by opinions expressed by international agencies like the Organisation for Economic Co-operation and Development and the International Monetary Fund. Judicial thinking is changing, too, as can be seen in the examples given earlier in this paper of recent decisions emphasising that Australian law should be administered compatibly with international law principles and obligations.

It is relevant in this context to note as well that in the current Australian debate about whether to be a republic rather than a monarchy, a potent argument is that constitutional reform would signify that the Australian legal system has moved from a British colonial past to an accommodation with the dominant Asian and multicultural context in which its destiny will be determined. That outlook fits an established pattern in which the Australian legal system is evolving and adapting to a new cultural and geographical context.

Notes

- 1 *Commonwealth of Australia Constitution Act 1900* (UK).
- 2 *Royal Style and Titles Act 1953*.
- 3 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers' Case)* (1920) 28 CLR 129.
- 4 *Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1.
- 5 For example, *Victoria v Commonwealth (Second Uniform Tax Case)* (1957) 99 CLR 575.
- 6 *Melbourne Corporation v Commonwealth (State Banking Case)* (1947) 74 CLR 31, and *Bank of New South Wales v Commonwealth (Bank Nationalisation Case)* (1948) 76 CLR 1.
- 7 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.
- 8 *Victoria v Commonwealth (Petroleum and Minerals Authority Case)* (1975) 134 CLR 81.
- 9 *Australian Capital Television Pty Ltd v Commonwealth (No 2) (Political Broadcasts Case)* (1992) 177 ALR 106.
- 10 *Mabo v Queensland (No 2)* (1992) 175 CLR 1; and *Walker v New South Wales* (1994) 126 ALR 321.
- 11 *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172.

- 12 *New South Wales v Commonwealth (Seas and Submerged Lands Act Case)* (1975) 135 CLR 337.
- 13 *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170; and *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342.
- 14 For example, *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353.
- 15 For example, *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379.
- 16 See for example, S Bottomley, N Gunningham, S Parker *Law in Context* Federation Press, rev ed 1994 (particularly the discussion of "liberalism" in Ch 2); and M Davies *Asking the Law Question* Law Book Co, 1994.
- 17 For example, *Final Report of the Constitutional Commission* AGPS, 1988, Ch 5.
- 18 The conventions are reprinted in C Sampford and D Wood "Codification of Constitutional Conventions in Australia" (1987) *Public Law* 231.
- 19 2 Law Ed 135 (1803).
- 20 See note 9 above.
- 21 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.
- 22 *Theophanus v Herald and Weekly Times Ltd* (1994) 182 CLR 104.
- 23 *Acts Interpretation Act 1901* section 15AB.
- 24 For example, *R v Kirby; Ex parte Boilermakers' Society of Australia (Boilermakers' Case)* (1956) 94 CLR 254.
- 25 Respectively, *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170; *Church of Scientology Inc v Woodward* (1982) 154 CLR 25; and *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 75 ALR 218.
- 26 A V Dicey *The Law of the Constitution* London, Macmillan & Co, 10th ed, 1964.
- 27 For example, *A v Hayden* (1984) 156 CLR 532.
- 28 For example, *Coco v R* (1994) 179 CLR 427.
- 29 *Acts Interpretation Act 1901* section 49.
- 30 For example, *Swan Hill Corporation v Bradbury* (1937) 56 CLR 746.
- 31 (1992) 175 CLR 1, 42.
- 32 *Dietrich v R* (1993) 177 CLR 292.
- 33 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353.
- 34 See the cases referred to above at notes 21–23.
- 35 *Lim v Minister for Immigration* (1992) 176 CLR 1.
- 36 See *Race Discrimination Act 1975*, *Sex Discrimination Act 1984*, *Human Rights and Equal Opportunity Act 1986*, *Privacy Act 1988* and *Disability Discrimination Act 1992*.
- 37 *Final Report of the Constitutional Commission* AGPS, 1988.
- 38 *An Australian Republic: The Way Forward* AGPS, 1995. See also Report of the Republic Advisory Committee *An Australian Republic: The Options* AGPS, 1993.
- 39 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.
- 40 Attorney-General's Department *Justice Statement* AGPS, 1994; Access to Justice Advisory Committee *Access to Justice: An Action Plan* AGPS, 1994.
- 41 P Alston and M Chiam *Treaty-Making and Australia: Globalisation versus Sovereignty?* Federation Press, 1995.

HISTORICAL DEVELOPMENT OF THE ADMINISTRATIVE COURT IN INDONESIA

Justice Tommy Boestomi

Development of the Administrative Court

The Administrative Court in Indonesia was founded only four years ago. It commenced operation in January 1991 having been set up by Act No 5 of 1986. It is, therefore, very new in comparison with the history of legal development. For a state to be called *Negara Hukum* (or *Rechtsstaat*), one which is based on the rule of law, a state must have an administrative court. Such a court functions to safeguard people's rights against the arrogant arbitrariness of state power. It is general wisdom that power tends to corrupt no matter how limited it is. As a state based on the ideology of *Pancasila* it is the aim of the Indonesian Government to give priority to the well-being of its people. In addition since rulers should serve the public, public servants are expected to avoid arrogance and to serve members of society. Nevertheless governments should be watchful to avoid maladministration, arbitrary acts of public officials, abuse of power and other unlawful or negligent acts. Breaches of duty by officials impose a duty on the Administrative Court, as one of the organs of judicial power, to redress the grievances suffered by the people, and to see that law and order is upheld.

Article 24 of the 1945 Constitution expressly provides that:

- (1) Judicial power shall be vested in the Supreme Court and such subordinate courts as may be established by law.
- (2) The organisation and jurisdiction of these courts shall be provided by law.

Section 14 of the *Basic Principles of the Judiciary Act 1970* (Act No 14 of 1970), provides:

- (1) Judicial power shall be exercised by the following courts:

A general or ordinary court;

A religious court;

A military court;

An administrative court.

- (2) The *Mahkamah Agung* (Supreme Court) is the highest court.

- (3) *Cassation* may be requested before the Supreme Court from decisions of courts other than the Supreme Court.

- (4) The Supreme Court exercises the highest level of supervision of the activities of the lower courts under the law.

Thus, the creation of the Administrative Court in Indonesia has complied with the requirements of Act No 14 of 1970 as well as realising the objectives of a state based on the rule of law.

At the apex of bodies exercising judicial functions stands the Supreme Court. Accordingly, it was the duty of the Supreme Court, in co-operation with the Department of Justice, to recruit the first group of judges of the Administrative Courts, especially those appointed as the Chief Judges of the Administrative Court in various regencies or districts. The Judges of the Administrative Court were selected from senior judges with a wide experience in civil law.

An intensive course was conducted for the new judges before they commenced their assignment, amongst other things, on the law relating to administrative procedure. The purpose of this training was to enable the judges to understand that their role in the new Court was quite different from their role in the general courts. Nevertheless, in accordance with civil law procedure both types of judges actively participate during the legal process, since there is no obligation for the parties to be assisted by legal counsel.

It is important to note that the defendant in an administrative case is always a government official. This is reflected in section 1(6) of Act No 5 of 1986, which says:

The defendant is a government administrative body or a government official, who made a decision further to authority granted or otherwise delegated to him, who has been brought before the court by a private individual or a private body.

The present civil procedure law was introduced during colonial times and was especially used for "indigenous people" (*orang pribumi*). It is less complicated than the procedure which applies to other groups in Indonesia. Nevertheless, modern requirements for fair administration are fully recognised. Thus a trial is open to the public, both parties have equal status before the court, the defendant has the right to defend himself, and the decision must be handed down within a reasonable time. Section 4(2) of the *Basic Principles of the Judiciary Act* (Act No 14 1970), expressly provides: "Justice is to be exercised fairly, efficiently, and inexpensively".

We are still awaiting the enactment of a new civil procedure law which is presently being discussed by a special committee of Parliament. We hope it will provide that it is mandatory for parties to be assisted by legal counsel, at least at the *cassation* stage before the Supreme Court, since the Supreme Court adjudicates only on matters of law and not fact. Unfortunately the present *Administrative Justice Act* contains no provision on this matter.

Government Support for Court

It is important to note the supportive attitude taken by the Indonesian Government prior to the establishment of the Administrative Court. This was illustrated by the Government's request for the Supreme Court to provide special briefings to public officials on the relevant administrative issues. Accordingly courses were conducted by Supreme Court justices for high ranking government officials (Class I and II category), and afterwards by senior judges of the Administrative Court of Appeals and the Administrative Courts for other lower level government officials. This reflected the enthusiastic reception given by

the Government to the birth of the Administrative Court in Indonesia, and its efforts to uphold the spirit of the rule of law in Indonesia. Although in practice one or two public officials have been reluctant to enforce the Court's judgments, so far most difficulties have been resolved.

The Minister for Reform of State Institutions issued a circular letter (*Surat Edaran*) to his subordinates, instructing those whose decisions were annulled by the Court to comply fully with the Court's decision. That was further proof of the Government's intention to uphold the rule of law in Indonesia.

Role of Court

The existence of the Administrative Court creates a foundation which, hopefully, will build an opportunity to benefit the public and will support steps to clean up state administration. We are working towards this end and we are confident that these ideals will be realised. The activities of Administrative Court judges should be of value to seekers after justice who will benefit from the ethical and legal skills of the judges. For example, an ordinary citizen may complain to the Court about unlawful administrative action simply by writing a letter. In those circumstances it is the duty of the Court to construe the complaint as if it were formally correct, both in a legal sense and so it can be properly understood by the other party to the dispute. In addition, it is important that the Court provide guidance to officials so that public decisions are well grounded in the law, whether the legal foundation is written or unwritten law (what is called the "general principle of good governance"), so that administrators can avoid the possibility of being brought before the Administrative Court.

Court Process

The role of the judge can be seen from section 63 of Act No 5 of 1986 which provides:

- (1) Before determining the substance of the disputed matter, the judge is obliged to make a preliminary ruling in order to clarify any unclear aspect of the claim.
- (2) In the preliminary process referred to in subsection (1) the judge:
 - (a) is obliged to advise the plaintiff how to supplement the claim so that it contains the necessary information. This must be accomplished within 30 days;
 - (b) may seek an explanation from the relevant administrative body or officials.
- (3) If within the period mentioned in subsection (2)(a) the plaintiff has not corrected the claim the judge must declare that the claim is unacceptable.
- (4) With respect to a decision of the kind referred to in subsection (3) the only legal remedy is submission of a new claim.

These sections deal with the preparatory stage of the process in which the role of the judge is pre-eminent. This process is evidence that the law makers are determined to create a strong judiciary in this field, a judiciary which is to be a strong moral force whose task it is to establish a powerful, upright and effective administration. The emphasis on process is new to the law and differs substantially from the procedure which applies in other areas of law. The *Administrative Justice Act 1986* determines also what

is called the "dismissal process" under which the Chief Judge of the Court is authorised to decide which claims will proceed.

Section 62 of this Act provides:

- (1) In the preliminary consultation stage the Chief Judge is given the discretion to make a decision that the claim is unacceptable or not well founded, in the following circumstances:
 - (a) the substantive issues in the case are outside the Court's jurisdiction;
 - (b) the requirements specified in section 56 for submission of a proper claim have not been fully complied with by the plaintiff despite the fact that the plaintiff was advised how to correct the claim;
 - (c) the claim is not based on proper legal grounds;
 - (d) the action requested has in fact been complied with by the administration;
 - (e) the claim was submitted prematurely or was out of time.
- (2)
 - (a) The preliminary decision referred to in subsection (1) must be made prior to the date set down for hearing when both parties are required to appear;
 - (b) the order to the parties must be executed by the Court Secretary on the advice of the Chief Judge.
- (3)
 - (a) For decisions mentioned in section 1 "appeal" should be made to the Court within 14 days after the handing down of the decision;
 - (b) the appeal must be made in accordance with the rules set out in section 56.
- (4) The "appeal" referred to in subsection (3) must be heard and decided by the Court in a summary proceeding.
- (5) If the appeal is upheld by the Court, the decision referred to in subsection (1) becomes void at law and the merits of the case must be heard and decided in the normal way.
- (6) There is no remedy for the decision the subject of the appeal.

Jurisdiction

With respect to the jurisdiction of the Administrative Court when resolving administrative disputes, section 1(4) states:

An administrative dispute is a dispute which arises in the field of administration between a private person or a private legal body with a central or regional administrative body or administrative official or with a regional government, as the result of an administrative decision, including personnel disputes, made under existing law.

In a dispute the plaintiff is always a private person or a private body, while the defendant is always a government administrative body or public official. Further information about defendants is contained in section 1(6) which provides:

The defendant is an administrative body or an administrative official which has made a decision in accordance with authority vested in the official or which has been delegated to him, and has been brought before the Court by a private person or a private body.

In the dispute the issue is the administrative decision. In order to identify the decision section 1(3) says:

An administrative decision is a written decision which was made by an administrative body or administrative official in accordance with the legal authority given to that body or official under existing law. A decision must be concrete, individual, and final, and must affect a private person or a private body.

Section 1(3) is a most important article since it describes what is an administrative dispute. Accordingly the article requires further analysis.

The expression "written decision" refers specifically to the content and not the form of the decision made by the administrative body or official. The decision must be written but the requirement that it be in writing does not necessarily mean that it should be in a particular form as is required for personnel appointments and other similar matters. The writing requirement is mandatory for evidentiary purposes. Accordingly at law a memorandum or note is sufficient evidence of a decision of an administrative body or an official provided it clearly contains:

- (a) the name of the administrative body or official making the decision;
- (b) the object of the written communication; and
- (c) the subject of the decision.

An administrative body or official may be either a central or a regional administrative body or an official exercising executive authority. The legal result of the official's action must arise from administrative law and must create rights or obligations in other people.

For a decision to be "concrete" the subject matter must not be theoretical but must be tangible and capable of being executed. Examples are decisions concerning a house, or the dismissal of a government employee. To be "individual" a decision must not apply to the public generally but to a particular individual. If the decision involves more than one person, the names of all affected persons must be mentioned. For instance, a decision to widen a road must note the names of all those affected by the decision.

To be "final" the decision must have been finally resolved and have binding effect. Any decision which has to be approved by another higher authority or body is not yet final and hence cannot have a binding effect on the rights and obligations of the person concerned. For example, a decision to appoint someone as a public servant needs further approval by the personnel administration agency.

Another important section which should be mentioned is section 55 which concerns time limits for making a claim. It provides:

A claim is to be registered within 90 days of receipt or notification of the decision of the administrative body or official.

Section 36 notes that in administrative cases the assistance of legal counsel is permitted. The section provides:

- (1) A claim shall contain:
 - (a) the plaintiff's or legal counsel's name, citizenship, address and occupation;
 - (b) the defendant's profession and domicile;
 - (c) the legal grounds for and requested action by the Court.

- (2) If the claim has been made and signed by the plaintiff's legal counsel, the claim must be accompanied by a formal letter from a notary.
- (3) If it is at all possible the defendant should attach a copy of the disputed decision.

According to section 53 the claim should contain the legal grounds on which it is based, as follows:

- (1) A private person or private legal body which believes that a right has been denied by a decision of an administrative body may submit a written claim to the competent Court containing a request that the disputed decision be annulled or declared invalid, with or without a request for compensation.
- (2) The legal grounds on which a claim may be based as set out in subsection (1) are:
 - (a) that the disputed decision of the administrative body is contrary to existing law;
 - (b) that the administrative body or official when making the decision referred to in subsection (1) has exercised authority for purposes other than those specified by law;
 - (c) that the administrative body or official when making or refusing to make the decision referred to in subsection (1) should not have made the decision or refused to make that decision bearing in mind the interests of the party concerned.

Section 58 should be noted. The section states:

If necessary the judge has power to require both parties to appear personally before the Court, despite the fact that they have been represented by legal counsel.

Section 80 also illustrates the active role of the judge. The section provides:

For the purpose of making the proceedings more efficient the Chairman of the panel has the right to provide guidance to the parties in relation to the legal procedure and the evidence which they may use during the proceedings.

Also notable is section 83 which reflects the Legislature's concern for the interests of third parties who believe their interests have been damaged by the claim before the Administrative Court. Section 83 provides as follows:

- (1) During the proceedings, any person with an interest in the claim brought by another person may join in the claim either on his own initiative or by the submission of a petition, or on the initiative of the judge. The interested person acts as:
 - (a) a party to protect his own right; or
 - (b) a party who joins one of the disputing parties.
- (2) A petition referred to in subsection (1) can either be accepted or refused by the Court and the decision must be expressly recorded.
- (3) An appeal against a decision referred to in subsection (2) can not be made independently, but can only be submitted with any appeal against the final decision on the merits of the case.

According to the commentary a third party, either at his own initiative or on the initiative of the judge, may be included in a dispute as a "co-defendant" (*tergugat intervensi*) or "a co-plaintiff" (*penggugat intervensi*). However, since legislation stipulates that a

defendant must always be an administrative official, the explanatory notes on this matter are still under consideration.

The even-handedness of administrative law is demonstrated by section 93 which provides:

An administrative official who is summoned as a witness must appear personally before the court.

Another significant section is section 97 which says:

- (1) When the examination of the case has been concluded both parties must be given the opportunity to make a final submission containing their conclusions.
- (2) After both parties have submitted their conclusions as referred to in subsection (1), the Chairman of the panel will adjourn the hearing to permit consultation among the members of the panel in private in order to make the final decision.
- (3) The decision of the panel of judges will be unanimous unless despite efforts to do so, no consensus can be achieved. In such a case the decision must be reached by majority.
- (4) If following a consultation in an attempt to reach agreement as mentioned in subsection (3) there is no consensus, the consultation is postponed until the next session.
- (5) If in the next consultation no majority can be reached, the decision of the panel Chairman is decisive.
- (6) The Court's decision may be handed down the same day in public, or postponed to another day. In the latter case both parties must formally be notified.
- (7) The verdict of the court can be either that:
 - (a) the claim is denied;
 - (b) the claim is successful;
 - (c) the claim is unacceptable; or
 - (d) the claim is null and void.
- (8) If a claim is accepted, the Court's decision may make a specific order binding the administrative body or official which made the decision.
- (9) The order referred to in subsection (8) may be:
 - (a) to overturn the decision;
 - (b) to overturn the decision and substitute a new decision; or
 - (c) the making of a new decision by the administrative body when the claim is based on section 3.
- (10) The order referred to in subsection (9) may be accompanied by an order for compensation.
- (11) When the Court's decision referred to in subsection (8) relates to a matter of personnel administration, in addition to the order referred to in subsections (9) and (10), an order for rehabilitation may be made.

Enforcement

Having explored the jurisdiction of the Administrative Court, sections 115 and 116 concerning enforcement of the Court's decision should be noted. These sections state:

Only decisions which are final and binding may be executed.

- (1) Within 14 days a copy of the decision is to be delivered to the parties by a registered letter from the Court Secretary at the instance of the Chairman of the panel which tried the case.
- (2) If within four months after the delivery of a decision which is final and binding as referred to in subsection (1) the defendant has not complied with the order referred to in section 97(9)(a), the decision the subject of the dispute will cease to apply.
- (3) If the defendant has been ordered to comply with an order under section 97(9)(b) and (c) and after three months the order has not been executed, the plaintiff may petition the Chairman of the panel referred to in subsection (1), so that the Court will order the defendant to execute it.
- (4) If the defendant still does not comply with the order, the Chairman of the panel must report the matter to the official's superior in the government agency.
- (5) The superior referred to in subsection (4), within two months of receiving the report from the Chairman of the panel must order the official referred to in subsection (3) to execute the Court's decision.
- (6) If the superior referred to in subsection (4) ignores the order referred to in subsection (5), the Chairman of the panel must report the matter to the President, as the government's highest authority, to order the official to execute the Court's decision.

Section 116(6) permits the intervention of the President when an official refuses to execute the Court's decision. Intervention by the President is a matter of last resort and for that reason every effort must be made to convince defendants to act in good faith and comply with decisions of the Administrative Court.

Other Process Issues

To assist people further, sections 98 and 99 provide a fast track process for certain kinds of disputes, provided that there are sufficient legal grounds and the case is an emergency one. If the petition is successful the hearing will be conducted by a single judge, as compared with an ordinary case when the hearing is conducted by a panel of judges.

With respect to rules of evidence, section 100 stipulates:

- (1) Admissible materials are:
 - (a) letters or other written documents;
 - (b) expert testimony;
 - (c) testimony of witnesses;
 - (d) statements by the party; or
 - (e) matters within the personal knowledge of the judge.
- (2) Judicial notice is taken of matters of common or public knowledge.

Section 106 provides:

The judge may take judicial notice of matters of which he has personal knowledge and the truth of which he is convinced.

Section 107 states:

The judge must determine what facts must be proved, and for evidence to be admissible there must be evidentiary material from two sources which must be acceptable to the judge.

It is clear that the judge's personal judgment is very important. This section is also significant since determining the burden of proof, and deciding who has to prove what, may be critical to the outcome of the case.

These are the fundamental issues which arise under the Act for the Administrative Court. They explain the differences between the operations of the Administrative Court and Civil Law Procedure. This is illustrated by the fact that no mediation is recommended during the hearing, although in practice the Jakarta Court has encouraged a mediated settlement which successfully concluded matters between the parties. This was a praiseworthy initiative by the Court since the ideals of nationhood and statehood are for the people to live harmoniously and in peace.

There is no provision in this Act for "counter-claims" which are known as "*gugat rekonvensi*", the assumption being that the Act is to protect people from administrative abuse and not for other purposes. Legal remedies such as *cassation* and review are provided by the Act, even though *cassation* would be adequate to resolve the case. Another notable element of the Act relating to the Administrative Court is found in the structuring—one section will typically refer to another, for example, sections 48 and 51(3).

THE AUSTRALIAN SYSTEM OF ADMINISTRATIVE REVIEW

Justice Jane Mathews

This paper provides an overview of the review of Commonwealth administrative decisions within the Australian legal system. The paper focuses on

- the review of administrative decisions, made by Commonwealth officials and bodies, within the Australian administrative law framework;
- the principles and objectives which underlie this system; and
- the institutions which are responsible for ensuring that those principles are adhered to and the objectives are met.

Australian Administrative Law

Australian administrative law is primarily concerned with the regulation of decision-making by government officials and government bodies. Regulation of these decision-makers has a number of purposes:

- to ensure that government decision-making is fair, transparent and lawful;
- to ensure that decision-makers are accountable;
- to ensure that decision-makers do not act arbitrarily; and
- to protect the rights and interest of citizens who are affected by government decision-making.

The underlying philosophy of the administrative review system is that under a democratic government citizens are entitled to protection from an arbitrary or unlawful exercise of power. Hence, there is a need for a comprehensive system of administrative review to provide citizens with redress where needed.

The Australian system of administrative law provides a variety of means of ensuring these outcomes. At a Commonwealth level these include

- the investigation of administrative processes by the Office of the Commonwealth Ombudsman;
- judicial review of decisions and the decision-making process by the courts; and
- external review of the merits of a decision by administrative tribunals.

Other laws also operate to protect individuals and to ensure the accountability of decision-makers, namely freedom of information and privacy legislation.

Origins of the Contemporary Administrative Review System

The current system of review of Commonwealth administrative decisions is twenty years old. It had its origins in three governmental inquiries which were conducted in the 1970s.¹ These inquiries were established to examine

- the impact which governmental decision-making was having on Australia's citizens; and
- whether there were sufficient safeguards in place to ensure that governmental powers were being exercised in a responsible and lawful way.

The findings of these inquiries emphasised the need for an integrated system which would

- safeguard the interests of citizens affected by administrative decisions;
- ensure that administrative decision-makers were accountable for their actions;
- ensure processes that were efficient, fair, open and impartial; and
- supplement judicial review of decisions by the courts.

The package of reforms introduced was called the "new administrative law". It was intended to provide a cohesive, integrated system for reviewing administrative decisions.

Key Components of the "New Administrative Law"

The key components of the reform package were

- the creation of an office of Commonwealth Ombudsman (*Ombudsman Act 1976*);
- the codification and procedural reform of the system of judicial review of administrative decisions (*Administrative Decisions (Judicial Review) Act 1977* (hereafter referred to as the *AD(JR) Act*);
- the establishment of a general administrative tribunal (the Commonwealth Administrative Appeals Tribunal, created by the *Administrative Appeals Tribunal Act 1975* (hereafter referred to as the *AAT Act*) to review the merits of administrative decisions;
- the establishment of the Administrative Review Council to monitor the operation of administrative review mechanisms and developments in administrative law and practices (section 51(1) of the *AAT Act*);
- the formalisation of a right to reasons for administrative decisions (section 13 of the *AD(JR) Act* and section 28 of the *AAT Act*);
- access to documents held by the government, under freedom of information legislation (*Freedom of Information Act 1982* (hereafter referred to as the *FOI Act*)); and
- the enactment of privacy legislation (the *Privacy Act 1988*).

Objectives of Administrative Review

There are a number of objectives which are sought to be achieved through the review of administrative decisions by external bodies, such as the Ombudsman, tribunals, and courts.

The primary objective is to protect citizens from unlawful, arbitrary or unfair decisions which have been reached by resort to unfair, inequitable or unlawful processes.

Independent external review of decisions serves also to encourage confidence in government and in the officials, departments and other bodies which implement the laws and policy of government within the community.

The system of administrative review itself must be readily accessible to citizens. People need to be made aware of the avenues of redress which are available if they are dissatisfied with a decision or with the decision-making process.

The system itself must provide inexpensive and efficient forms of redress. The Australian system of administrative review places considerable emphasis on accessibility, efficiency, minimisation of cost, streamlined processes and use of plain language. Translation and interpreter services are readily available. Public education about the system of review and how to access it is encouraged.

The Australian system of administrative review is designed to have a normative or educative role in relation to decision-makers. The system is not solely concerned with providing justice on an individual basis. There must also be communication between the review body and the governmental decision-maker as to the elements of a "good" decision. The system of review of decisions should send powerful signals to government about the proper role of a decision-maker and the appropriate exercise of power. Decision-makers should be encouraged continually to improve the quality of their decision-making.

The normative function outlined above is the responsibility of all institutions engaged in administrative review, be it the office of the Commonwealth Ombudsman, the Federal Court of Australia or one of the administrative tribunals.

On that note it is appropriate to turn now to the individual institutions which make up the Australian administrative review system and to examine their operation, the positive impact that they may have on decision-making, as well as noting in certain circumstances some of the limitations on their effectiveness.

Administrative Investigation by the Office of the Commonwealth Ombudsman

The office of the Commonwealth Ombudsman is an independent body which has wide powers to investigate complaints about Commonwealth administration. An investigation by the Ombudsman may result from a complaint by a member of the public. Alternatively, it may be at the initiative of the Ombudsman that an investigation is conducted into a particular matter that has come to the Ombudsman's attention.

The role of the Ombudsman is to investigate complaints impartially, to resolve disputes and to address defective administration where it is found in Commonwealth departments. An investigation may reveal inefficient or inappropriate behaviour in a

particular department. Often the intervention of the Ombudsman will result in a government department acknowledging that there is a problem with the processes of the department and subsequently taking steps to rectify the problem. The Ombudsman may also make suggestions about action which could be taken to remedy a particular problem (for example, a procedural problem within a government department).

After an investigation is completed, the Ombudsman makes a report to the government department of the findings. It should be noted that the Ombudsman does not have any enforcement power. The only sanction lies in reporting the inaction of an official or department to the Commonwealth Parliament. It follows that recommendations by the Ombudsman rely to a large extent on the goodwill and co-operation of the administration for their implementation.

The office of the Ombudsman is, however, part of an integrated system of review of administrative action which allows a choice to be made by an affected party as to the appropriate avenue of review depending on the circumstances of the individual case. There are mechanisms in place to ensure that where an individual has complained to a particular body which is not the most appropriate one to handle that complaint, it can be referred to a more appropriate body in the review system. An example of this is an arrangement which is in place between the Commonwealth Administrative Appeals Tribunal and the Commonwealth Ombudsman's office. If either organisation receives a complaint which is more appropriately dealt with by the other, it will be referred across to the other body.

Judicial Review under the Administrative Decisions (Judicial Review) Act 1977

Judicial review by the courts was an area which the reformers of the 1970s found in need of reform. The previous common law judicial remedies were very technical and cumbersome and offered only limited redress for affected parties. In addition, at common law there was no requirement that a decision-maker give reasons for a decision.

The government of the day decided to make review of the legality of administrative decisions streamlined and straightforward. As a result the *Administrative Decisions Judicial Review Act* was enacted in 1977.

The *AD(JR) Act* sets out the grounds upon which the legality of a decision, or conduct leading to the decision, of a Commonwealth government official or agency may be challenged. The challenge under that Act will be made to the Federal Court of Australia.

Judicial review may be sought under the *AD(JR) Act* in three different situations: where a decision has already been reached; where a decision is in the process of being made; or where there has been a failure to make a decision.

In order to seek review under the *AD(JR) Act*, sections 3 and 5 provide that:

- a person must demonstrate that they have standing under the Act—to do so they must be “an aggrieved person”;
- there needs to be a “decision” made under an enactment (this includes a failure to make a decision);
- the decision must be of an “administrative character”; and
- the grounds of review claimed must be those set out in the Act.

What are the grounds of review? In general terms, judicial review is available where decision-makers have exceeded their powers or have failed to comply with prescribed procedures. In summary, the grounds are:

- the decision-maker breached the rules of natural justice. The two limbs of natural justice are: the absence of bias on the part of the decision-maker before an adverse decision is made and the right of a person to be heard;
- the decision-maker failed to observe procedures required by law;
- the decision-maker did not have jurisdiction to make the decision;
- the decision that was made was not authorised by the enactment under which the decision was purportedly made;
- there was an improper exercise of power;
- an error of law was made;
- there was fraud;
- there was no evidence for the decision.

The important difference between judicial review and review by administrative tribunals is that judicial review may only examine the *legality* of a decision. It is not the function of judicial review to examine the *merits* of a particular case.

In addition, the remedies which are available to an applicant for judicial review are more limited than those available to an applicant seeking external merits review by a tribunal. This is because the Federal Court can only remit a matter to the original decision-maker to make a decision according to law. The Court has no power to substitute its own decision for the decision under review.

External Merits Review by Administrative Tribunals

External merits review involves reconsideration of a decision on its merits by an administrative tribunal which is separate and independent from the division of government that was responsible for the primary decision.

Merits review by tribunals has been described as being part of the process of administrative decision-making. Merits review tribunals "step into the shoes" of the government decision-maker and exercise all the powers that are available by law to that decision-maker.

What is understood by the terms "administrative review" or "external merits review"? One definition of the word "merit" is "that which is deserved" (*Oxford Dictionary*). So when a tribunal is called upon to examine the "merits" of a particular case it must consider all notions of fairness, equity, due process and legality. It must also ensure that all facts and circumstances which are relevant to the particular matter have been carefully considered and weighed. This is usually described as ensuring that the "correct or preferable decision" is made.² A "correct" decision is one that was made according to law. A "preferable" decision, where there is a possible range of correct decisions, is the one which reflects the most appropriate exercise of the decision-maker's discretion.

It is important to note that before external merits review occurs there will often be two preceding stages. There will, firstly, be an original or primary decision. This decision will usually follow a standard decision-making model, applying a clear set of rules. Often

some discretion is involved. Where that decision is challenged, it will usually be because the affected person does not agree with the way in which the discretion was exercised, or believes that proper procedures were not followed.

Following the original or primary decision, there may be internal review of the decision. Sometimes internal review is required by law, but in other cases it is adopted as a matter of policy and expediency. Internal review is generally done by another more senior officer within the same organisation, and is normally done in the absence of the person affected. If the decision is resolved at this level there will be no need for the affected person to proceed to an administrative tribunal.

The next stage is external merits review by an administrative tribunal. Australia has three different models of external merits review.

Model 1: Two-Level External Review

Two levels of external review are provided in jurisdictions where a very large number of decisions are routinely being made by government decision-makers.

In the Commonwealth context, social welfare (the Department of Social Security) and the entitlement of war veterans to government benefits (the Department of Veterans' Affairs) are areas in which there is a high volume of decision-making. Accordingly, a first-level specialist tribunal has been inserted into the external review process in each area. The two specialist tribunals are, respectively, the Social Security Appeals Tribunal and the Veterans' Review Board. Persons affected by a government decision in these areas must initially apply to have the decision reviewed by these tribunals. Except in a very limited number of circumstances, an applicant cannot proceed directly to second-level tribunal review.

First-level specialist review tribunals are expected to operate more quickly and less formally than the second-level review tribunal. If a party is unhappy with the decision of the first-level tribunal he or she may then appeal to the second-level tribunal (the Commonwealth Administrative Appeals Tribunal). The second-level tribunal is able to give more detailed attention to difficult issues of fact and law.

Model 2: Single-Level Review by Specialist Tribunal

The late 1980s saw the introduction by the Australian Government of two new specialist review tribunals. The Immigration Review Tribunal reviews specified migration decisions and the Refugee Review Tribunal reviews decisions relating to refugee status made by the Commonwealth Department of Immigration.

Both tribunals provide first and final external merits review. The AAT does not have jurisdiction to review decisions made by these tribunals, and nor is there second-level review by any other tribunal. The only avenue available to a person who is aggrieved by a decision of these tribunals is judicial review by a superior court—either the Federal Court or the High Court of Australia.

Model 3: Single-Level External Review by General Administrative Tribunal

Under this model, a person who is dissatisfied with a decision that has been made by a government official or department (whether it is the first decision or has been reviewed

internally) may apply to have the decision reviewed by the general review tribunal, the Commonwealth Administrative Appeals Tribunal. The AAT is a general review tribunal, in the sense that the decisions which it may review cover a great number of subject areas. In respect of many appealable decisions the AAT constitutes the single or only level of external merits review by an administrative tribunal.

Commonwealth Administrative Appeals Tribunal

The Commonwealth Administrative Appeal Tribunal was established by the *Administrative Appeals Tribunal Act 1975*. It commenced operation on 1 July 1976. Like the other external review tribunals mentioned above, the AAT is an administrative body not a judicial one.

The AAT provides external review of the merits of Commonwealth administrative decisions made by primary decision-makers and by first-level specialist tribunals. It is the final review body within the administrative system. Appeals may be made to the Federal Court of Australia but only in relation to matters of law. The AAT may also refer particularly complex or important questions of law to the Federal Court for resolution. Once the question of law is settled by the Federal Court, the entire matter is then referred back to the AAT for final determination.

As noted earlier, the AAT is not a court and is entirely separate from the court system. It is also independent from the administration whose decisions it reviews. This independence is very important as it demonstrates that decisions are reviewed in their entirety by a completely independent decision-making body.

The AAT membership consists of a President who is a Judge of the Federal Court of Australia, Deputy Presidents who are lawyers, Senior Members and Members. Most Senior Members are lawyers, and some have expertise in other areas. The members have special expertise in diverse areas such as accountancy, administration, environmental matters, medicine, military service, taxation and social welfare. Some judges of the Federal Court and Family Court of Australia are part-time Deputy Presidents of the AAT. They preside in certain cases which require their particular legal skills.

The composition of the membership means that the AAT can draw on both legal expertise and other specialist expertise (for example, medical expertise) in making its decisions. When dealing with questions of law, the AAT may be constituted by a single tribunal member who must be a legal member. Most cases are heard by a panel of three members, constituted by a presiding member (usually a legal member, either a Deputy President or a Senior Member) and two specialist members. In this way, the AAT is able to bring to the consideration and resolution of each individual matter the most appropriate range of skills and expertise.

In certain circumstances, a panel of three members will be required by law. In other cases, it is a matter for the President to decide the composition of the AAT for the hearing of the particular case.

The AAT's Functions

The AAT can only review decisions which it is specifically given jurisdiction to review. The jurisdiction to review a decision is given by the legislation under which the original decision is made. Currently, applications for review of decisions may be lodged with the AAT under 264 separate Commonwealth enactments.

Obviously the range of decisions reviewable by the AAT is very wide. However, the majority of applications made to the AAT result from a few areas of Commonwealth decision-making. The largest numbers of applications lodged with the AAT are made in relation to the social welfare area. This includes social security benefits (such as income support and other types of benefits) and war veterans' entitlements. These matters constituted 47 per cent of all applications lodged with the AAT in 1993-94, and there is unlikely to be much change in the next collection period (1994-95).

Other areas which constitute a large part of the workload of the AAT are taxation, employment and retirement benefits, customs, bounties and subsidies. Whilst not contributing as many cases to the AAT's workload, another significant area of the AAT's work is the review of decisions made by Commonwealth Ministers and departments that concern the release of government information under the *Freedom of Information Act 1982* and the *Archives Act 1983*.

The AAT has available to it all of the powers of the decision-maker which made the original decision. It goes about its fact-finding function independently of the original decision-maker or the first-level specialist tribunal. Having regard to all of the facts that it has found and applying the relevant law, the AAT makes the decision which it considers to be the correct or preferable decision.

The AAT has the power to affirm, vary or set aside a decision under review. Where a decision is set aside, the AAT may substitute a new decision or send the matter back to the relevant decision-making agency with directions or recommendations as to further action it should take. In some cases the AAT may be asked to give an advisory opinion on a matter which is referred to it.

The AAT, therefore, unlike the Federal Court or the Ombudsman, has determinative power. It can finally determine the rights and obligations of both parties to the dispute.

The AAT's Processes

In fulfilling its task of reaching the correct or preferable decision, the AAT has available to it a wide range of powers and procedures that generally are not available to the courts. These include, for example, the use of conciliation and mediation as part of the ordinary pre-hearing processes of the AAT. Once a matter reaches hearing, an informal approach can also be adopted. The AAT is not bound by the rules of evidence and may adopt the level of formality which it believes is appropriate in the circumstances. Parties before the AAT are entitled to be legally represented, but often they are not. The AAT can readily accommodate to either situation.

The AAT's practices and procedures are designed to ensure that in all appropriate cases parties are afforded the opportunity of resolving a dispute without proceeding to hearing and determination. The AAT uses a number of pre-hearing processes in order to assist parties to resolve their dispute by agreement. The two main processes are conferences and mediation.

Conferences are presided over by members or staff of the AAT. They are designed to clarify and limit the issues in dispute between the parties. During the conference process, points of agreement often emerge which lead to the parties being able to settle their differences.

Mediation is also available in all jurisdictions in the AAT. It is entirely voluntary. Through this process, parties are encouraged to find solutions to their difficulties which will meet the needs of all concerned.

It is apparent that these mechanisms have been very successful. In the year 1993–1994, 76 per cent of all applications lodged with the AAT were finalised without proceeding to formal hearing.

The AAT is conscious that its decision-making sets the standard for the rest of the Commonwealth administrative system. It is my belief that the decisions of the AAT have an effect on the quality of decisions being made by primary decision-makers and first-level specialist tribunals. The AAT does set an example by the production of high quality decisions.

The Administrative Review Council

The Administrative Review Council (ARC) was established under the *AAT Act*. Although established under the same Act as the AAT it is independent from the AAT. The main function of the ARC is to advise the Commonwealth government about administrative law matters.

Its chief role is to supervise the system of administrative law as a whole. Much of its work involves carrying out research into various aspects of administrative review including rights to review, the powers, procedures and jurisdiction of Commonwealth government agencies. It is also involved in examining how well certain systems are working, such as the operation of review tribunals. Another important function of the ARC is to promote knowledge among citizens about the entire administrative review process.

The Council is currently preparing a major report on reform and restructure of the merit review tribunal system (see Postscript).

Freedom of Information

The regime introduced by the *Freedom of Information Act 1982* was novel and reasonably controversial. The Act provided a means whereby citizens could gain access to certain information held by the government.

The principal objective of the *FOI Act* was to enhance openness, accountability and public participation in government. The Act addressed this objective:

- by giving members of the public a legally enforceable right of access to official information in documentary form held by ministers and agencies except where an essential public interest required confidentiality to be maintained; and
- by requiring information about the operations of Commonwealth agencies, particularly rules and practices affecting members of the public in their dealings with those agencies; to be made publicly available.

The operation of this legislation is currently being reviewed by the Administrative Review Council and the Australian Law Reform Commission. The review is examining how well the freedom of information system is working and whether amendments need to be made to the law that underpins the system as well as to the processes and procedures

by which it is administered at the Commonwealth level. The review will not be completed until the end of 1995.

Postscript

It has recently been recommended by the Administrative Review Council³ that the AAT and the existing specialist review tribunals should be united into a new, single tribunal, called the Administrative Review Tribunal (ART). The ART would contain two levels. The first level, that would hear all applications for review in a context that emphasised fairness, justice, informality and efficiency, would be divided into specialist divisions based on the jurisdiction of the existing tribunals (for example, migration division, welfare rights division, veterans' payments division, general division, and commercial and taxation divisions). At the second level would be a Review Panel that could, in certain circumstances, review decisions made by the specialist divisions of the ART. The matters heard by the Review Panel would be limited to those that were referred by one of the specialist divisions, or that raised an important principle or issue of general significance.

The Council's report also made other recommendations for improving the effectiveness of the merits review system. These included recommendations to ensure that people are better informed about their rights of review, and to make it simpler for a person to apply for review and to appear before a tribunal without legal representation. Other important recommendations were to ensure that the members appointed to tribunals have relevant skills and experience, that government agencies have processes in place to evaluate the normative benefits that can flow from tribunal decisions, and that more emphasis be given to the development of structures for internal review of agency decisions.

The Government's response to the Council's wide ranging proposals for reform are expected to be announced in 1996.

Notes

- 1 *Commonwealth Administrative Review Committee Report* Parliamentary Paper No 144 of 1971; *Final Report of the Committee on Administrative Discretions*, Parliamentary Paper No 316 of 1973; *Report of the Committee of Review of Prerogative Writ Procedure* Parliamentary Paper No 56 of 1973.
- 2 *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 589.
- 3 Administrative Review Council *Better Decisions: Review of Commonwealth Merits Review Tribunals* Report No 39 (1995).

A PERSPECTIVE ON ADMINISTRATIVE REVIEW FROM THE GOVERNMENT SERVICE

Stephen Skehill

My purpose in this paper is to provide an insight from the perspective of the Australian Government Service into the Australian system of administrative law. My remarks are confined to what is known as the Commonwealth "administrative law package". In particular, my comments are confined to the administrative law accountability and review regimes of general application which have been superimposed on the Commonwealth administration since the mid-1970s. They are:

- the Administrative Appeals Tribunal (AAT) and like tribunals;
- the Ombudsman;
- the *Freedom of Information Act 1982*; and
- the *Administrative Decisions (Judicial Review) Act 1977*.

Many other initiatives which I do not touch upon have also been taken to require greater accountability and review of Commonwealth administration in specific fields, including the *Archives Act 1983*, the *Privacy Act 1988*, public sector employment legislation, and community-wide anti-discrimination and other human rights legislation.

In offering a comment from the perspective of the Australian Government Service, I should first explain something of my own role and background because that clearly influences my capacity to offer this perspective.

First, as Secretary to the Attorney-General's Department, an important role for myself and my departmental colleagues is to advise the Attorney-General and the Minister for Justice on the application and extension of the administrative law system. For example, we examine all draft legislation which would confer new decision-making powers upon Commonwealth officers to ascertain whether or not those powers should be exercised subject to some or all of the administrative review system.

We in the Attorney-General's Department are often thus seen as "champions" of the system and thereby biased in our support of it. Needless to say, we claim that we are balanced rather than biased, but there is no doubt that our perspective is at times different from that of colleagues in other departments and agencies who must operate subject to administrative law on a daily basis, and particularly those involved with high-volume decision-making processes.

Second, few of the decisions or actions of the Attorney-General's Department are affected by the system and thus our personal experience is not as great as that of our

colleagues in some other departments. In part this is due to the nature of the work we undertake; in part, we would assert, it is due to the quality with which we undertake that work.

The Ombudsman has almost unlimited jurisdiction over the work of the Attorney-General's Department; so too, the *Freedom of Information Act* 1982 (hereafter referred to as the *FOI Act*) applies to our document holdings; there is significant potential challenge to many decisions we take under the *Administrative Decisions (Judicial Review) Act* 1977 (hereafter referred to as the *AD(JR) Act*); and there are important statutory discretions which we exercise and which can be reviewed by the AAT (for example, in the administration of insolvent estates under bankruptcy legislation). Despite this high potential for challenge to our decisions, few of the decisions we take in the Attorney-General's Department are in fact challenged.

Some may say that our experience of the system is more theoretical than practical. Accordingly, on this basis also, our perspective may differ somewhat from that of colleagues in other departments.

Third, I should mention something of my personal experience with the administrative law package because that necessarily colours my own view. I was for some years in the late 1970s one of the Commonwealth's more frequent advocates before the AAT in its early and formative days in a major jurisdiction, customs. In the early 1980s I managed the caseload to the AAT in two significant jurisdictions, social security and workers' compensation. At the same time, I was responsible for the policy and management of one of the major high-volume tribunals outside the AAT, the Social Security Appeals Tribunal. In the mid-1980s I presided over one of the largest of the Commonwealth's administrative tribunals, the Veterans' Review Board. Finally, in the early 1990s I participated in a detailed evaluation of another tribunal—the Immigration Review Tribunal—and was involved in the establishment of a new tribunal, the Refugee Review Tribunal.

Hopefully, this experience gives me an informed basis for offering the perspectives which follow.

Overview

In this paper I discuss what I believe are the major perspectives on Australian administrative law from the viewpoint of those in government service. They are as follows:

- It is essential that the reasons for introducing a system of administrative review are well thought through. The purposes of the system should be clearly identified and the design of the system tested against those purposes.
- It is then essential to make sure that government decision-makers whose decisions are to be subject to review are carefully introduced to the new system and helped to see the benefits that the system may offer.
- It is important that the system is applied appropriately. The review machinery applicable to particular decision types or decision-makers should be appropriate.
- As a matter of effective management it is vital that there is an efficient system of internal review within individual agencies in order to ensure that disputed

decisions are reviewed and amended internally rather than being pursued unnecessarily through an external review mechanism.

- It is necessary that a balance be struck between review machinery of general application and methods of review that might be designed especially for particular jurisdictions, such as specialist tribunals.
- The resource implications of introducing administrative review must be carefully assessed and the necessary resources provided if efficiency in decision-making is to be achieved.
- There must be a preparedness to review administrative practices and procedures and, if necessary, the law itself, if the potential benefits of the system are to be gained.
- The operation of the system of review and its continuing appropriateness to contemporary circumstances must be evaluated on an ongoing basis.
- It is essential that great care be taken to ensure that only persons of high quality are appointed to the administrative review bodies that oversight government administration.

The Administrative Appeals Tribunal

The reports leading to the establishment of the Administrative Appeals Tribunal (AAT) suggested that it would be a tribunal with a general jurisdiction across the breadth of Commonwealth decision-making and that it would replace many other specialist tribunals which then existed. As events transpired, the AAT was created as something of a "shell" with a very limited jurisdiction under some specified Acts of Parliament. In the following years the jurisdiction of the AAT was steadily increased and is now very broad, though it is still far from comprehensive and general.

At the time, the customs jurisdiction was the most exercised. The Tribunal was frequently called upon to review decisions as to the classification of goods imported into Australia (to determine the applicable rate of import duty) or as to the value of goods (which affected the quantum of duty payable).

In retrospect, I suggest that it was beneficial for the AAT to be able to establish itself, its approach to its task and its internal procedures, with a relatively confined and low-volume jurisdiction. Had the AAT been called on to operate from the outset in a wide range of areas of decision-making, and with the speed and consistency that is demanded in high-volume jurisdictions such as the social security, repatriation or general immigration areas, I suspect that its acceptability to the bureaucracy and the success of its introduction would have been greatly hampered.

I cannot stress enough my view that a key element to the successful introduction of an effective administrative review system is the attitude of the bureaucracy. The key to this is a proper understanding of the purpose of the system. Is it merely to provide benefit to the individual citizen in respect of a dispute with government, or is some broader purpose to be achieved?

In Australia, I think it is fair to say that we strive to achieve not only the correct or preferable decision for the citizen but to do so within a climate or context of systemic change designed to lead to better quality decision-making on a general basis. This may in turn lead to a need to refine policy and legislation, and also to better policy-making and

legislative development skills. A proper perception of these broader purposes affects the way those within the system operate and certainly calls for a different attitude from within the bureaucracy.

Customs was at the time a traditional and proud administration working in a highly technical environment with complicated and frequently amended legislation over which the administration itself exerted considerable influence and with many staff who believed that they were the people best able to interpret these laws. In this environment it would have been easy for those whose decisions were to be reviewed to resent the role of the Tribunal, to seek to ignore it or to actively frustrate its work. To its great credit, Customs took a positive approach to the Tribunal. It decided that review by the Tribunal offered an opportunity to demonstrate that its decisions were more often right than wrong and, where they were found to be wrong, an opportunity to learn lessons from the mistakes which were made so that future error could be avoided. Rather than resisting this new form of oversight and scrutiny, those in positions of power at Customs at the time decided to welcome the system of review and to seek to gain benefit from it.

To this end, two things were done. First, a separate group of lawyers and para-legals was established within the Customs service to coordinate the response to the AAT and to other administrative review bodies. Secondly, a program of education about the new system was undertaken for key decision-makers. The most senior officers of the Customs service actively sought the involvement and support of key managers.

The decision to establish an in-house legal advocacy capacity meant that Customs could ensure that its view was put to the AAT without undue legality, that advocates could be carefully briefed, and that a cohesive team of people with specialist skills in a unique area of the law could be built up. The instructions given to these advocates were that they should actively assist the Tribunal to reach the correct or preferable decision, that they should not seek to win at any cost, that they should disclose to the Tribunal all arguments for and against, and that they should seek to assist the other side if it was clear that those representing the applicant were not able to put the best case possible.

From time to time, the advocates would address meetings of customs agents—those non-government persons who were licensed to represent importers and exporters in their dealings with Customs and whose clients relied on their advice as to whether or not they should appeal customs decisions to the AAT. The aim here was to ensure that the availability of challenge was understood. Clearly, a right to seek review is only beneficial if its availability is known and understood by those who might exercise it.

This *amicus curiae* or “friend of the court” role was important and set an example to other Commonwealth departments and agencies as their decisions progressively came within the AAT’s jurisdiction.

Moreover, as Tribunal reasons were handed down, the in-house group carefully analysed them and worked with Customs decision-makers to assess the implications of the reasons for ongoing decision-making across the organisation. Where it was perceived that the Tribunal’s reasons meant that other decisions were liable to be overturned if challenged, changes to staff instructions were made, policy was reviewed and, in some cases, changes to the law were put forward to ensure that future decision-making would be consistent with government policy.

This model was gradually adopted by a number of other departments and agencies. For some agencies the small number of decisions challenged meant that the establishment of an in-house advocacy capacity could not be justified on economic grounds. It was

nevertheless important that these agencies should have access to quality advocacy services on an as-needed basis and these were provided by the Office of the Australian Government Solicitor who built up knowledge of the AAT and its procedures and expertise within particular areas of its jurisdiction.

Other Tribunals

As mentioned earlier, the AAT was intended by those who first conceived it to be a tribunal of general jurisdiction across the breadth of Commonwealth decision-making, and that it would replace many other review tribunals. That intention has not been fully met. While the AAT has a broad jurisdiction across many areas of Commonwealth decision-making, it is not comprehensive and there are a number of other significant tribunals, for example, the Social Security Appeals Tribunal, the Immigration Review Tribunal, the Refugee Review Tribunal and the Veterans' Review Board. There are also other smaller specialist tribunals, such as the Trade Practices Tribunal, the National Native Title Tribunal and the Copyright Tribunal.

Some tribunals are integrated with the AAT. For example, decisions of the Social Security Appeals Tribunal and the Veterans' Review Board can in turn be appealed to the AAT. We refer to these as "intermediate" or "first-tier" tribunals. Other tribunals stand wholly or largely outside the AAT system, for example, the National Native Title Tribunal and the Immigration and Refugee Review Tribunals.

Some tribunals have their origins prior to the creation of the AAT and have simply been continued despite its creation; others have been created more recently. A number of justifications are advanced for their continued existence outside the AAT, including:

- the volume of work they handle is too great for the AAT;
- their jurisdiction requires specialist skills that are not available within the AAT; and
- it is appropriate for the relevant portfolio Minister to be responsible for the Tribunal in question, whereas the AAT is responsible to the Parliament through the Attorney-General and the Minister for Justice.

Whether this is a desirable state of affairs is the subject of a recent report on the merit review tribunal system by the Administrative Review Council,¹ that was prepared at the request of the Minister for Justice. The report has proposed that the existing specialist tribunals and the AAT be united in a new tribunal, the Administrative Review Tribunal. This proposal has ignited debate once again on whether it is desirable to retain specialist tribunals with members trained and qualified to work within particular areas of detail and expertise, or whether merit review is better undertaken within a single-tribunal structure. The government's response to the report, which is expected in 1996, may establish guiding principles for the further development of merit review in Australia in the coming decades.

Internal Review

When a decision of a government department or agency is challenged before a tribunal, the Ombudsman or a court, it is essential, in my view, that the department or agency conducts some form of review of the decision to see whether or not it is worthy of being

defended or whether a new decision should be made in its place. To allow review to take place without internal reconsideration would, in my view, be bad administration. The process of review is resource-intensive. Reconsideration that leads to a new decision and possibly to full resolution of the dispute in question avoids that resource cost.

It is thus necessary for departments and agencies whose decisions are under review to keep a "watching brief" over the process of review to assess whether or not the process is producing material, evidence or argument which may lead to a resolution of the underlying dispute.

In some high-volume jurisdictions, and in all FOI matters appealed to the AAT, internal review is a necessary precondition to the exercise of a right of appeal to an "external" tribunal. These preconditions have been imposed by legislation in the belief that the most resource and time-efficient way of resolving disputes between citizens and the bureaucracy will be via an internal reconsideration.

Whether this belief will be achieved in practice depends on the calibre of internal review officers and the environment in which they are asked to operate. For example:

- Will they be required to abide by internal and unenforceable policy manuals despite their belief that application of these manuals will produce a result inconsistent with the law required to be applied by the external tribunal or the court?
- Will they be placed in an invidious position of being asked to review decisions of fellow officers who will resent their intrusion with resultant tensions in the workplace, or will the internal culture accept this review role?

There are some who strongly support the existing internal review systems. Theory certainly says that internal review should work well. But there are some who say that internal systems are not properly structured and that they simply place an unnecessary barrier between the citizen and independent external review. This is an important question, especially given the resources devoted to internal review in some agencies, and it is necessary that we get the balance right. The Administrative Review Council, in the recent report on tribunals to which I have referred, was in favour of further development of internal review, provided certain safeguards are maintained. The main safeguards singled out by the Council are that internal review should be timely, not subject to an application fee, and undertaken by agency officers who have sufficient independence of other officers.

Appellable Decisions

A key to the successful operation of any system of review is to ensure that the jurisdiction of the relevant tribunal is adequately defined. Some decision types are quite inappropriate for inclusion within the jurisdiction of a tribunal such as the AAT—decisions of the Cabinet are an obvious example, but there are other less obvious examples which warrant careful consideration.

The Administrative Review Council provides guidance to government on the principles which it believes should influence government in deciding whether or not the jurisdiction of the AAT should be expanded.² The Attorney-General's Department relies quite heavily on these guidelines when advising government in relation to proposed legislation which would introduce new decision-making powers or when it is suggested

that existing decision-making powers be added to the AAT's jurisdiction.

It is important that these jurisdictional issues be correctly considered if broader purposes of government decision-making are not to be undesirably distorted. Let me give just one example. Assume that there is a scheme to issue import or export licences for predetermined total quantities of goods and that licences are issued up to the quota limit. If an unsuccessful licence applicant later appeals to a tribunal and is granted a licence following a finding that the decision to refuse a licence was incorrect, a number of possible consequences could follow:

- the new licence may be regarded as increasing the total quota—in which event the government policy in setting that quota in the first place is subverted and this may have significant implications for management of the national economy;
- alternatively, the size of the licence amount of other licencees may need to be adjusted to accommodate the amount to be allowed under the new licence—in which case the established rights of other licencees will be adversely affected by a decision designed to redress the wrong perceived to have been done to the applicant to the tribunal; or
- if adjusting the size of the existing licences is not an option because the licencees have already fully exercised their import or export rights, the successful applicant will have had a hollow victory—the licence issued by the tribunal will be ineffective.

This example shows that care must be taken in deciding what decisions are to be within the jurisdiction of a body such as the AAT—or, at least, what remedies it can award. In the case referred to above, it may be that the only feasible remedy is monetary damages for profit foregone by the successful appellant.

The Ombudsman

The main role of the Ombudsman is not to examine the merits of a particular decision—whether or not it was the correct or preferable decision—but rather to consider whether or not the bureaucracy has engaged in what is often referred to as “defective administration”. This means that the focus is often on the process that was followed.

From the point of view of the bureaucracy, it is important that the demarcation in role between the Ombudsman, tribunals and the courts is clearly defined. Otherwise any one action may be subjected to examination in a number of competing forums and this can be both resource-intensive and inefficient.

From the same perspective, it is important that the Ombudsman and his or her staff have a realistic understanding of the bureaucracy and what is reasonable or possible within it. It is not unusual to hear a complaint that the process which the Ombudsman claims should have been followed might be fine in an ideal world but is unrealistic in practice. Whether this complaint is correct is essentially subjective, and this itself means that the potential for tension between the Ombudsman and the bureaucracy is high. That we have had in Australia relatively limited actual tension is good, but we need to be constantly alert to the potential and keen to avoid it.

A key to this is again a proper understanding by the bureaucracy of the broader systemic purposes of the administrative law system, which extend beyond redress for the individual complainant to include an overall improvement in decision-making and

administrative process.

This must equally be matched by a determination on the part of the Ombudsman and staff to have a clear and realistic knowledge and understanding of the environment in which the bureaucracy must operate. Idealistic perceptions of what should be possible in a Utopian situation will not help anyone. To avoid these perceptions requires information exchange and understanding on both sides.

Freedom of Information

It is clear that citizens will not be able effectively to exercise their administrative review rights if the decision-making process is so shrouded in secrecy that possible error or grounds of complaint cannot reasonably be detected. Access to government documents becomes important if these rights of review are to be effectively exercised.

At the same time, however, the bureaucracy has a clear need to be able to give confidential and candid advice to government and within the bureaucracy itself. The clear concern of the bureaucracy is where the balance is struck between "open government" and confidentiality.

In assessing this balance, it is again important that the bureaucracy has a well-defined understanding of the purpose of the system of review and information access and a realisation of the potential benefits of scrutiny in achieving better overall decision-making and administrative processes. It is often said that the best disinfectant is sunlight. In just the same way, the prospect that documents will be open to public scrutiny makes the bureaucrat keen to ensure that they will not be the subject of criticism (for example, by a disclosure of documents indicating an inappropriate comment or that regard was had to irrelevant considerations in reaching a decision).

There are multiple tensions in information access between public scrutiny and privacy of the individual, between open government and internal bureaucratic candour, and between the protection of sources of confidential information and the right of a citizen to a fair trial. Resolving those tensions is fundamental to effective government.

In my experience, the early concern of the bureaucracy was essentially with the prospect of embarrassment which might have flowed from public scrutiny of files that were poorly maintained and often showed inappropriate comment or irrelevant consideration. Now, after many years of scrutiny and significant improvement in all aspects of file-handling and underlying decision-making, I think the concern within the bureaucracy is far more principled and relates almost entirely to the resolution of those tensions.

As the bureaucracy develops and evolves over time, new tensions emerge. For example, a number of government service providers, such as significant elements of the Attorney-General's Department, are now required to compete with private enterprise in order to retain the business of government. Clearly they perceive a significant threat to their competitive capability if their private sector rivals can use the *Freedom of Information Act 1982* to access their internal commercially sensitive documents when they have no such recourse to the same documents generated by their competitors.

The Administrative Review Council and the Australian Law Reform Commission are currently undertaking a major review of our FOI legislation. The review is timely and the bureaucracy will watch the outcome with significant interest.

Judicial Review

The *Administrative Decisions (Judicial Review) Act 1977* was designed to codify the pre-existing common law rules by which citizens could challenge in the courts the legality of government action. In the sense that the Act simply brought the existing rules into a code and did not significantly change them, it could be argued that it posed little threat or offered little challenge to the bureaucracy.

But its impact was far wider than that. Mere codification meant that the rules were now more easily ascertained and this of itself alerted many citizens to the prospects of challenge. The introduction of the *AD(JR) Act* within a broader package of administrative review machinery further heightened the attention focussed on bureaucratic process and decision-making. The climate in which the bureaucracy operated significantly changed: the preparedness to challenge its actions greatly increased and the number of actions initiated in the courts grew markedly.

Perhaps the greatest effect on the bureaucracy came from the right granted by section 13 of the *AD(JR) Act* to demand and receive a statement of the reasons for a decision, the facts on which the decision was based and the evidence supporting those findings of fact. The task of preparing these statements is resource-intensive, and the task calls for improvement in the processes leading to decisions, such as better file-keeping and better recording of reasons. Again, the prospects for achieving systemic improvement in administrative process and decision-making are obvious.

At the same time bureaucratic concerns tend to focus on some key issues—the demarcation between the respective roles of the courts, tribunals and the Ombudsman so as to avoid duplicate challenges on multiple fronts, and a proper definition of the jurisdiction of courts. In that last field, perhaps the two areas of greatest tension are the extent to which courts will have regard to and respect stated government policy, and any perceived tendency of courts to extend beyond review of the legality of decisions into review of their merits. Attention has focussed on decisions in which a court has substituted its own decision for that of the original decision-maker after finding that the decision was so unreasonable that no reasonable person could have arrived at it. The boundary between review of legality and merits review becomes exceedingly blurred in these instances.

The impact of the *AD(JR) Act* has been uneven across the bureaucracy. In many departments and agencies challenges have been few and are often averted by providing a meaningful and helpful statement of reasons under section 13 of the *AD(JR) Act*. But for others the impact has been major. The most notable is in the immigration area, where court decisions have led to frequent legislative amendment in an ongoing attempt to ensure that government policy is fully reflected in legislation which will provide some reasonable guarantee of certainty as to the outcome of court review. Given the many subjective decisions taken in this highly complex area of decision-making and the innumerable ways in which human beings are able to construct their affairs, this is a major task.

Many court decisions under the *AD(JR) Act* have been followed by legislative change designed to refine and entrench government policy. This is a resource-intensive task in its own right. But I am convinced that over time this process of challenge and change has led to improved policy development and legislative drafting skills within government. At the same time, however, I am sure that the bureaucracy has no basis for complacency in these areas.

Ongoing Evaluation

It will be apparent from what I have said that a key to successfully implementing and operating our system of administrative review is an ongoing process of evaluation to ensure that the system continues to meet its stated aims, and that those aims remain relevant to contemporary circumstances. In Australia this task falls predominantly to two bodies:

- the Attorney-General's Department, which has a general responsibility of advising the Attorney-General and the Minister for Justice on all legislation administered by them, including the *Administrative Appeals Tribunal Act 1975*, the *FOI Act* and the *AD(JR) Act* (the Ombudsman legislation is within the responsibility of the Department of the Prime Minister and Cabinet); and
- the Administrative Review Council (ARC).

I have already referred to the work of the ARC. This body is created by statute and has a general and independent role of advising the government on how the administrative review machinery is or should be operating. It has an independent President and the President of the AAT, the Ombudsman and the President of the Australian Law Reform Commission are *ex officio* members.

From the perspective of the government service, it is essential that the ARC understand and be alert to the concerns of the bureaucracy. There is accordingly a keen interest in appointments to the Council. The established practice has been to appoint both private sector members and public sector members. This composition is important to ensure that the Council is appropriately informed of the potential of its recommendations for successful implementation and to increase their acceptability within the bureaucracy.

Resources

It will be apparent that none of the above could have been done without the dedication of considerable resources in many areas of the government service. The AAT, other tribunals, the Ombudsman and the Federal Court needed members, staff, accommodation and equipment. Within agencies whose decisions were challenged resources were needed to provide internal review and either to supply an in-house advocacy service or to brief advocates from the office of the Australian Government Solicitor. That office, in turn, needed to develop and maintain skills in the administrative law area. Educating staff about the system, reviewing tribunal, court and Ombudsman decisions, and bringing about systemic or legislative change in response to those decisions, also required resources.

In some areas, the Government also felt it necessary to provide financial or other assistance to citizens wishing to challenge decisions who could not themselves be expected to have the financial capacity or personal fortitude to take on a challenge to a large bureaucratic organisation without some form of help. This, of course, has imposed another cost on government.

Other costs have come in appointing staff to support the ongoing operation and expansion of the system of review. We have officers in the Attorney-General's Department who examine all proposed legislation which confers new decision-making powers on Commonwealth officers to ascertain whether or not the AAT or some other

tribunal should be given jurisdiction over those new decisions. We also have staff who provide support to the Administrative Review Council with ongoing analysis and evaluation of the system to make sure that it constantly meets contemporary needs.

Finally, it must be recognised that some tribunal or court decisions have imposed a heavy direct cost on government. This applies, for example, where it is found that the legislation has imposed a liability on government which may not have been contemplated at the time the legislation was prepared and which must be met—at least until the law can be changed. In the Australian context, the various court and tribunal decisions interpreting the legislation relating to pensions and benefits for returned military personnel and their dependents provides perhaps the most significant example of this additional financial cost.

These resources, in totality, are significant. The opportunity cost must always be borne in mind—what else might be done with these resources if they were not dedicated to the administrative review machinery? This makes the evaluation role of the Administrative Review Council even more significant.

In my view, however, a failure to continue to provide the resources necessary to support the system would eventually be counter-productive. Backlogs of appeals would build up, citizen expectations would go unmet, improvements in administration would not be realised, and the system of government itself would eventually be called into disrepute.

Quality of Appointments

One thing is clear from the Australian experience. Administrative review bodies can have a considerable impact not only upon decisions affecting individual citizens but also far more broadly upon decision-making generally, upon the implementation of government policy, and upon levels of expenditure under government programs.

Recognition of these potential impacts means that it is incumbent upon government to take considerable care in the selection and appointment of individuals as tribunal members, as Ombudsmen and as judges. Failure to do so can produce extremely negative results of broad and systemic proportions and will certainly affect the regard with which citizens view not only the administrative review system but also government in general.

Conclusion

I hope I am correct in saying that, from the perspective of the government service, the Commonwealth administrative review system has been of overall benefit even though it has not been without its problems, has been resource-intensive, and still embodies a number of problems that need to be overcome.

Notes

- 1 Administrative Review Council *Better Decisions: Review of Commonwealth Merits Review Tribunals* Report No 39 (1995).
- 2 The Guidelines have been republished by the Council in its *Seventeenth Annual Report 1992-93* Ch 7.

A PERSPECTIVE ON ADMINISTRATIVE REVIEW FROM PRIVATE LEGAL PRACTICE

Denis O'Brien

A revolution in administrative law took place in Australia during the mid-1970s to the early 1980s. The revolution was the result of the enactment by the Commonwealth Parliament of the *Administrative Appeals Tribunal Act 1975*, the *Ombudsman Act 1976*, the *Administrative Decisions (Judicial Review) Act 1977* and the *Freedom of Information Act 1982*. It is appropriate to refer to these changes as a revolution because they threw open a wide field of government decision-making to more effective scrutiny and, in so doing, prompted changes to the processes of decision-making within Commonwealth government administration which enhanced the quality and fairness of those processes.

In looking at the Commonwealth administrative law system from the perspective of a private practitioner, one is, of course, considering the system from the point of view of the client for whom the practitioner acts. The benefits which the system has brought for clients seeking to challenge administrative decisions have been marked.

The first part of this paper contrasts, from the client's point of view, the state of administrative review before the administrative law reforms were introduced with the state of administrative review after those reforms.

Administrative Review—Before

Prerogative Writs

It is fair to say that, before the enactment of the administrative law reforms, administrative law in Australia was thought of almost exclusively in terms of judicial review by means of the prerogative writs of *prohibition*, *certiorari* and *mandamus*. In seeking relief under the prerogative writs, a person faced a minefield of complexity. Each remedy had its own rules, and if the client sought the wrong remedy the action would fail. The writ of prohibition, for example, would issue only if there was some remaining action to restrain and if the error challenged was a jurisdictional error. The writ of certiorari, by contrast, could review either a jurisdictional error or an error of law within jurisdiction that appeared "on the face of the record".

To add further complexity to all this, the prerogative writs had associated with them some restrictive rules limiting those who had standing to seek relief.

The complexity of judicial review under the prerogative writs often deterred practitioners and their clients from bringing actions for judicial review. Despite these

difficulties, there were in many cases no real alternatives to use of the prerogative writs in order to seek review of an administrative decision.

Limited Availability of Review on the Merits

The far more satisfactory form of review from the point of view of the client is review on the merits. Review of a decision on its merits extends beyond review on the strictly legal grounds on which review is available in the courts: the review extends to a consideration of whether, on the material before the reviewing body, the same decision or a more correct decision should be made.

Before the creation of the Administrative Appeals Tribunal review on the merits was not broadly available at the Commonwealth level. There had, for many years, been specialist tribunals set up to enable a person whose interests were affected by a particular decision to obtain review of that decision. For example, a taxpayer who considered that a tax assessment made by the Commissioner of Taxation was wrong was able to appeal to a taxation board of review; a returned serviceman claiming an entitlement to a pension or benefit could appeal against an adverse decision to a special repatriation tribunal; and an injured government employee had a right of appeal to a special workers' compensation tribunal to dispute an adverse workers' compensation decision.

Apart from special areas such as these, whole areas of Commonwealth administration were virtually inaccessible to review on the merits. The High Court case of *Green v Daniels*,¹ decided in 1977, is a good illustration. The applicant was a school leaver who applied for unemployment benefits soon after leaving school at a time when she was unable to find work. She was denied unemployment benefits by the Department of Social Security, which was (unlawfully) applying a policy that school leavers were disqualified for unemployment benefits during school holidays and would only become entitled upon the resumption of the next school year. The only forum to which Ms Green could turn to establish her entitlement to unemployment benefits was the High Court of Australia in its original jurisdiction under section 75(v) of the Constitution. Nowadays such cases are resolved in a relatively informal way by the Administrative Appeals Tribunal which, since 1977, has exercised a jurisdiction in social welfare matters.

No Entitlement to Reasons for Decision

A further yawning gap in administrative law was the absence of a legal right to obtain the reasons for an administrative decision.

The last half of the twentieth century has seen extraordinary growth in the impact of government on the lives of individuals and corporations. Government activity has increased significantly in the health and social welfare fields, in the area of taxation and in business regulation. This is reflected in the increased legislative output of the Commonwealth Parliament, which has grown from an average of just over 100 Acts a year in the 1960s to an average of about 200 Acts a year in the past ten years (including the relatively new phenomenon of "omnibus" Bills which amend several Acts).

Despite this increased capacity of government agencies to make decisions affecting the lives of citizens, the common law in Australia did not give to the citizen an entitlement to be told the reasons why a particular decision affecting him or her was made.² The inability to get reasons for an administrative decision significantly confined the circumstances in which judicial review could be obtained to those cases where the

making of the decision involved the creation of "a record" on the face of which some error appeared.³

No Ombudsman to Deal with Complaints

Before the creation of the office of Ombudsman by the *Ombudsman Act 1976*, no mechanism existed (apart from the possibility of making a complaint to a Member of Parliament) to deal with grievances by members of the public about the actions of Commonwealth agencies.

No Right of Access to Government Documents

Before the enactment of the *Freedom of Information Act 1982*, members of the public did not have a right of access to documents held by government agencies.

Administrative Review—After

The administrative law reforms in the 1970s and 1980s opened up the processes of Commonwealth government administration and placed in the hands of the public new tools for challenging and scrutinising government decisions. Before the reforms, administrative law was a relatively insignificant area of legal practice. Since the reforms, the practice of administrative law has grown in importance as lawyers seek to promote the interests of their clients through using the new tools that have become available to challenge and scrutinise government action.

Judicial Review

Under the *Administrative Decisions (Judicial Review) Act 1977* (hereafter referred to as the *AD(JR) Act*) the Federal Court has jurisdiction to review the legality of administrative decisions made under Acts of the Commonwealth Parliament or under subordinate legislation. As we have seen above, at common law the traditional way of seeking judicial review was by means of the prerogative writs, with all the complexity their use entailed. The *AD(JR) Act* simplified the procedure for obtaining judicial review (section 16). It established a simple, single form of proceeding, namely an application for review. It also codified the grounds of review as developed by the courts and set them out in the Act (section 5).

For clients the prime advantage of judicial review under the *AD(JR) Act* over judicial review by means of the prerogative writs is that they no longer have to choose which form of proceeding they wish to bring. They are no longer caught up in sterile argument about whether they have sought the appropriate remedy.

The standing rules are also considerably simplified. Any person who is aggrieved by a decision of an administrative character made under an enactment is entitled to seek review of that decision (sections 3, 5).

The result for the private practitioner is that it is considerably easier to advise a client about bringing a judicial review application. One focuses on the grounds of review and considers to what extent (if any) the process of decision-making in the particular case has infringed one or other of those grounds. The application for review is tailored to those grounds of review. The application may claim, for example, that the decision-maker

acted beyond power, took irrelevant considerations into account or breached the rules of natural justice in making the decision. Particulars of each ground of review relied upon are set out in the application for review.

The application must be supported by an affidavit by the applicant. The respondent may file an affidavit in reply. If the court concludes that a particular ground of review is established, the court normally sets aside the decision in question but certain other orders are also possible.

Administrative Appeals Tribunal

The Administrative Appeals Tribunal has jurisdiction, in some but not all areas of Commonwealth administration, to adjudicate on the merits of decisions made by administrators in the exercise of powers conferred on them by Acts or subordinate legislation. When new legislation is made at the Commonwealth level, consideration is given to whether classes of administrative decision contemplated by the new legislation should be made subject to review on the merits. The legislation may then confer a review function on the Administrative Appeals Tribunal.

The Tribunal, as its name suggests, performs an administrative, not a judicial, function. It is empowered by its Act to exercise all the powers and discretions of the original decision-maker (section 43). It has been said that the Tribunal stands in the shoes of the decision-maker and makes up its own mind on the material before it.⁴ Unlike a court, it may substitute a different decision if it considers that a different decision is appropriate.

As an administrative body, the Tribunal has no power to award costs. Each party therefore bears its own legal costs of the proceedings. This is an important feature of the Tribunal in ensuring access to administrative justice. Clients who succeed before the Tribunal may be disappointed that they are unable to recover their legal costs from the other side. However, non-corporate clients in particular are generally comforted to know when considering whether to bring proceedings that, if they lose, they will not be saddled also with the legal costs of a government agency.

The procedure for making an application to the Tribunal is simple. The application must be in writing and may be made in accordance with the form set out in the regulations made under the *Administrative Appeals Tribunal Act 1975* (hereafter referred to as the *AAT Act*). The application must be lodged at a registry of the Tribunal. There is a registry in each of the capital cities of the States and Territories of Australia. A filing fee of \$300 is payable, unless the applicant is seeking review of an income maintenance decision. The fee is refundable if the Tribunal ultimately decides in the applicant's favour.

Once the application for review is lodged, the decision-maker is required to lodge with the Tribunal copies of all documents relevant to the decision. The matter then proceeds through a preliminary conference and sometimes a mediation conference but, if it does not settle, may then proceed to an adversarial hearing.

In conducting a hearing the Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks fit (section 33(1)(c)).

Appeals lie to the Federal Court from a decision of the Administrative Appeals Tribunal but only on questions of law (section 44).

Statements of Reasons

Both the *AD(JR) Act* and the *AAT Act* contain provisions that enable a person aggrieved by an administrative decision to get from the decision-maker a statement of reasons for the decision. This statement may be sought irrespective of any wish on the part of the applicant to challenge the decision either on judicial review under the *AD(JR) Act* or on the merits under the *AAT Act*.

Section 13 of the *AD(JR) Act*, which confers this right, remedied the deficiency in the law referred to above under which a person had no entitlement to get reasons for a decision which adversely affected that person's interests. Subject to certain exemptions, section 13 gives every person whose interests are affected by a decision made under a Commonwealth enactment an entitlement to obtain reasons for the decision. The purpose of section 13 is twofold:

- to overcome the real grievance a person may have when not given the reasons why a particular action affecting them was taken; and
- to enable a person affected by such action to see what was taken into account and whether an error has been made so that they may decide whether to challenge the decision.⁵

The section does not require that reasons be given automatically with every decision. Instead, it gives a person affected by a decision twenty-eight days to request reasons for the decision. Once a request is made, the decision-maker must:

- set out his or her findings on material questions of fact by reference to the evidence or other material on which those findings were based; and
- give reasons for the decision.

Upon being furnished with the reasons statement, the person affected by the decision is able to understand the basis upon which the decision was made and the process of reasoning. The person or his or her advisers are then better able to assess whether the decision should be accepted or challenged.

One of the deficiencies of the *AD(JR) Act*, however, is that there are some classes of decisions which, although subject to judicial review under the Act, do not attract the obligation to give reasons upon request. Having regard to the fact that the Act was introduced to make judicial review more accessible than review by means of the prerogative writs, it is difficult to comprehend the lack of congruence between these two elements of the Act.⁶

The exclusions from the obligation to provide reasons are set out in Schedule 2 to the Act. Those exclusions are an eclectic list and none of them has a satisfactory explanation. In my view, none of them is justified.⁷ There are increasing signs that the Federal Court, when faced with a judicial review case in which the applicant was unable to get reasons for the decision because of one of the exclusions, will order discovery to allow the applicant to get at the facts upon which the decision in question was made.⁸ It would be unfortunate if the existence of the Schedule 2 exclusions was to have the result of importing more frequently into judicial review litigation the significant costs associated with discovery.

The Administrative Review Council has recommended the repeal of Schedule 2.⁹ Although that report was presented to the Commonwealth government on 14 February 1991, no action has yet been taken on it.

Freedom of Information Act

Another mechanism for getting information from Commonwealth agencies is the *Freedom of Information Act 1982* (hereafter referred to as the *FOI Act*). Under that Act, members of the public are entitled to access to documents held by Commonwealth agencies, subject to certain exemptions.¹⁰

Unlike some other elements of the administrative law package, the *FOI Act* had models in other countries, particularly the *FOI Act* enacted at the federal level in the United States of America in 1966, upon which the Australian Act was modelled.

The *FOI Act* is a useful tool for journalists, Opposition politicians and others who may have an interest in finding out what the records held by government agencies on a particular topic may disclose. The Act can also be a useful aid for the lawyer acting on behalf of a client proposing to bring an administrative law application. A routine FOI request can sometimes bring to light material of critical significance to the applicant's case. For example, in *Tahmindjis v Brown*¹¹ documents obtained on an FOI request showed that a magistrate engaged in committal proceedings had, in the course of the proceedings, improperly communicated with a senior officer of the Attorney-General's Department who was at the time acting as a legal adviser to the informants. The committal proceeding was thereupon declared to be invalid.

An FOI request may also support a party's case in private litigation, for example, in a case where a government agency holds some information which may be relevant to an issue between the parties.¹²

Ombudsman

The Ombudsman investigates complaints about defective administration. If the Ombudsman concludes that action taken by an agency was contrary to law, was unreasonable or oppressive or was otherwise deficient, the Ombudsman may recommend to the agency that action be taken to rectify the wrong. If dissatisfied with the response of the agency, the Ombudsman may report to the Prime Minister and ultimately to the Parliament. If a report is made to the Parliament, the matter will, as a matter of course, be taken up by a parliamentary committee. The Ombudsman conducts investigations in private and operates in a relatively informal way. Most Commonwealth agencies are subject to the Ombudsman's jurisdiction. The services of the Ombudsman are provided free of charge.

As with the *FOI Act* there were models in other jurisdictions for the Ombudsman. Indeed, the origin of that office can be traced back to the office of Ombudsman created by the Swedish *Riksdag* in 1809. The first English-speaking country to appoint an Ombudsman was New Zealand in 1962.

In my experience many lawyers overlook the fact that they can use the services of the Ombudsman to investigate complaints by their clients that they have been treated badly by Commonwealth agencies. Depending on the nature of the problem, review by the Ombudsman can be the ideal, inexpensive solution for certain clients.

Maturing of the System

Specialist Tribunals

The basic features of the administrative review system described above have not altered fundamentally since they were first put in place in the late 1970s and early 1980s. There have, however, been significant developments, particularly in the area of review on the merits. Of most importance has been the creation of specialist "first-tier" review tribunals below the Administrative Appeals Tribunal. These specialist first-tier tribunals are the Social Security Appeals Tribunal and the Veterans' Review Board. Until recently there was also a third specialist tribunal, the Student Assistance Review Tribunal, but its jurisdiction was subsumed in 1995 into the Social Security Appeals Tribunal.

These tribunals were established to meet the demands of high-volume review jurisdictions. They are intended to operate as a filtering mechanism, to provide a quick and informal process of review as a means of resolving large numbers of cases before they reach the Administrative Appeals Tribunal.

A further development has been the creation in the immigration area of two specialist tribunals with a final merits review jurisdiction, namely, the Immigration Review Tribunal and the Refugee Review Tribunal. The creation of these tribunals has been more controversial, given that the Administrative Appeals Tribunal was established as a general tribunal which could undertake review on the merits across a multitude of decision-making areas.

An important part of the thinking behind the creation of the Administrative Appeals Tribunal as a general review tribunal was that Australia should try to avoid the expense and divergence in decision-making which comes from a proliferation of different review tribunals. The creation of the Immigration Review Tribunal and the Refugee Review Tribunal has confronted this thinking.

In 1994 the Government decided that the system of merits review tribunals needed a full study and it referred the matter to the Administrative Review Council. The Report of the Council in 1995¹³ made a large number of recommendations for improving the effectiveness of the merits review system. A key recommendation, noted in Justice Mathews's paper, is to merge the AAT and the existing specialist tribunals in a new tribunal to be called the Administrative Review Tribunal.

Internal Review Officers

Another important development in the area of review on the merits has been the introduction by government agencies, either on a formal or informal basis, of internal review officers who will look again at decisions about which individuals are dissatisfied. Sometimes legislation requires a dissatisfied individual formally to seek internal review before they approach an external review body. In other cases, an informal approach may be made.

From the point of view of the private legal practitioner the existence of a comprehensive administrative review system has made it easier to discuss the concerns of clients with officers of government agencies. With administrative law awareness now well-established in Commonwealth agencies (although one strikes notable exceptions from time to time), legal practitioners normally find that government officers will readily discuss with a practitioner problems which a client may have with a particular decision.

Sometimes these informal approaches can lead to a resolution of the matter without further expense to the client.

Freedom of Information Developments

Other welcome developments have occurred in the area of freedom of information. I understand that, upon request, departments like the Veterans' Affairs Department and the Department of Social Security will customarily make a client file available to the client without the necessity for the client to go through the formal process and expense of a freedom of information request.

Code of Practice for Notifying Review Rights

A further refinement of the administrative law system has been the introduction of a code of practice which government agencies must follow to tell people about their review rights. The code provides that a person whose interests may be affected by a reviewable decision should be given notice of their right to have the decision reviewed. Once again, this has been an important development from the point of view of the legal practitioner because it increases the likelihood that clients will be in a position to seek advice about pursuing their review rights.

Register of Legislative Instruments

Legislation in Australia takes two forms: Acts passed by the Parliament (primary legislation) and subordinate legislation made by a person or body to whom power to make such delegated legislation has been delegated by an Act of the Parliament. The practical reason for this two-pronged approach to law making is to avoid the need for Acts of the Parliament to be cluttered with matters of detail. Instead, the detail and procedural matters are left to subordinate legislation.

The traditional form of subordinate legislation is regulations made under the parent Act. Regulations must be laid before the houses of the Parliament and may be disallowed by the Parliament. They are published in a series known as Statutory Rules, similar to the way Acts of the Parliament are published in their own series.

In recent times, however, other forms of subordinate legislation have been permitted by Acts of Parliament. This development has been the direct result of the flood of legislation which all governments now seem to promote. The new forms of subordinate legislation go under a variety of names, such as determinations, orders, by-laws, rules and guidelines. Some of this subordinate legislation is made subject to parliamentary disallowance and some of it is not. Much of it is not published in an accessible series and some of it is very poorly drafted.

The result for members of the public is that sometimes their rights are affected by instruments that are difficult to understand. An even more fundamental difficulty at times is the difficulty of getting a copy of the subordinate instrument.

Many of these problems will be addressed if the *Legislative Instruments Bill* is enacted. If enactment occurs the Act will:

- integrate all subordinate legislation into a single class;
- establish more or less uniform processes for the making of such legislation; and
- establish a register of legislative instruments.

The register will be accessible to the public and a legislative instrument will not be enforceable unless it is entered on the register.

The Act will become a further important plank in the administrative law system. It should lead to improvements in the drafting of legislative instruments and will make it easier for members of the public and their legal advisers to find the law that governs administrative action.

Another important feature of the Act is that it will require public consultation processes to be followed before many legislative instruments are made. The public consultation process will be similar to that applying in the United States of America under the *Administrative Procedure Act*.

Assisting the Client

When a client seeks advice from a lawyer concerning an administrative decision which the client wishes to challenge, the first inquiry is whether the decision is one that is reviewable by the Administrative Appeals Tribunal on its merits. If it is, review by the Tribunal will be preferred because it is only in that forum that the client can have a more favourable decision made should the Tribunal conclude that the original decision was wrong. That is what the client usually wants. Clients generally find it hard to understand that, if they seek judicial review and succeed in their application before the Federal Court, the Court has no power to remake the decision but will only set it aside and remit the matter to the decision-maker for the making of a fresh decision.

The decision will be reviewable by the Administrative Appeals Tribunal if a provision of the particular Act, regulation or other statutory instrument under which the decision was made has conferred jurisdiction on the Tribunal to review decisions of the kind in question.

The lawyer's first task therefore is to identify the statutory authority for the particular decision and to see if jurisdiction has been conferred on the Tribunal to review the decision. I regret to say that many lawyers in Australia do not understand this jurisdictional base of the Tribunal. I have seen many letters from lawyers written on a client's behalf which threaten to take a government agency to the Administrative Appeals Tribunal in circumstances where the Tribunal simply has no jurisdiction (for example, in a case of a contractual dispute between an agency and an individual).

Once the lawyer has worked out whether the particular decision is reviewable by the Tribunal or instead is a decision that can only be reviewed by the Federal Court under the *AD(JR) Act*, the lawyer will usually write to the agency on behalf of his or her client seeking a statement of reasons for the decision.

The lawyer must not delay. A request for a statement of reasons must be made within twenty-eight days of the date of the decision. Once the request is made, the 28-day time limit for bringing an application for review is suspended, and starts to run from the day on which the statement of reasons is provided.

Another important step which the lawyer might take on behalf of a client is to seek a stay of the decision in question. Both in the Federal Court under the *AD(JR) Act* and in the Administrative Appeals Tribunal the granting of a stay is discretionary. The approach of both the Federal Court and the Tribunal when faced with a stay application is first to

inquire whether there is a serious question to be tried and then to determine the matter on the balance of convenience.¹⁴

Pressures on Administrative Review System

User Pays

In recent years the administrative review system has come under pressure from government, brought about partly by the influence of a user-pays philosophy within government. The user-pays approach has seen the introduction of significant fees and charges which must be paid if one wants access to the system. The imposition of fees and charges at reasonably high rates has had a marked effect in the freedom of information area. The charges for access to documents have significantly reduced the number of freedom of information requests.

Attempts to Restrict Judicial Review

Of more fundamental concern are the attempts that are made from time to time to restrict judicial review. The *AD(JR) Act* has always contained a schedule listing classes of decisions that are excluded from review under the Act. In my view there is no justification for that schedule, since the entitlement to seek judicial review, albeit through the use of the prerogative writs, is entrenched in the Commonwealth Constitution (section 75(v)). Given that constitutional entitlement to judicial review, the exclusions from the *AD(JR) Act* should in my view be abandoned.

In fact, the contrary tends to occur. A recent proposal to expand the exclusions is contained in a report reviewing the *Public Service Act 1922* which proposes the removal of public service personnel decisions from the ambit of the *AD(JR) Act*.

A further attempt to restrict judicial review has occurred in the migration area. Legislation came into force last year to exclude the *AD(JR) Act* entirely in relation to review of migration decisions and, instead, to put in place a more restricted code of judicial review under which many of the traditional grounds of review (including the ground of breach of the rules of natural justice) are not available.¹⁵

In my view this attempt in the migration area to quarantine judicial review is an unfortunate development. The pity of the change is that it seems unnecessary in light of the expanded rights to review on the merits that are now available in the migration area. Having regard to the availability of review on the merits through the Immigration Review Tribunal and the Refugee Review Tribunal, the Government should have left judicial review alone, relying on the good sense of the Federal Court not to entertain judicial review applications except in special circumstances on the ground that an adequate alternative avenue for review exists, namely, through those tribunals.¹⁶

Lawyers representing the interests of their clients have an important role to play in keeping under scrutiny actions of government such as those discussed above which are aimed at constricting the institutions and processes of administrative review.

The Future

Administrative review is concerned with government decision-making. It therefore operates in a changing environment. It must constantly re-invent and refine itself to meet changes in the government landscape if it is to remain relevant to the ordinary person.

Government Contracting

An area of change which the administrative review system needs to address is government contracting. This area is growing in importance, with an apparent trend towards the delivery of government services by contract.¹⁷ However, contract decisions are often beyond the reach of the *AD(JR) Act* because review is only available under that Act of decisions made under statute, and much government contractual activity does not have a statutory base. The Ombudsman may be able to investigate a complaint concerning a government contract but, if a contract has been let, it will rarely be appropriate for the contract to be undone.¹⁸

Reform in this area may require the introduction, as part of the administrative review system, of a bid protest procedure similar to that in operation in the United States of America. Time prevents a full discussion of how such a system could work in Australia.¹⁹ Suffice it to say that in Australia it would be possible to establish a bid protest procedure under which

- a formal protest could be made by a party disadvantaged in the contractual process; and
- a body such as the Administrative Appeals Tribunal had power to review a decision dismissing a protest against exclusion of a party from the tender process or against the award of a contract.

Freedom of Information

Freedom of information may be another area of development for administrative law. The Australian Law Reform Commission and the Administrative Review Council are presently examining whether freedom of information should be extended to the private sector to allow, for example, individuals to get access to their medical records held by private medical practitioners and private hospitals.

Damages in Administrative Law

A topic debated for some time in administrative law circles is whether a person who suffers loss as a result of invalid administrative action should be entitled to recover damages in respect of the loss. The courts in Australia have traditionally refused to entertain claims for damages in these circumstances. Attempts made in some recent administrative law cases to get the courts to recognise the concept of an "administrative tort", for which damages is the appropriate remedy, have failed.²⁰ The courts have taken the view that governments stand in the same position as citizens when it comes to damages claims against them. Thus the government will only be liable to pay compensation if negligence is proved or if the government is found to be in breach of contract. This approach was confirmed recently by the High Court in *Northern Territory of Australia v Mengel*.²¹

Conclusion

This paper has looked at the Australian Commonwealth system of administrative law from the point of view of the private lawyer seeking to advance the interests of a client. There is no doubt that the modern administrative law system has significantly empowered the individual in dealings with the government. Administrative law has given practitioners effective tools to advance the interests of their clients in their relationship with government. While the system is not perfect and while it needs to be kept under review so that it can be adapted to meet new challenges, it has made a significant contribution towards ensuring that individuals in Australia are treated fairly by government.

Notes

- 1 (1977) 13 ALR 1.
- 2 *Public Service Board of NSW v Osmond* (1986) 159 CLR 656.
- 3 The power of the courts to order discovery of documents would often not remedy the absence of reasons: see *Kioa v West* (1985) 159 CLR 550 at 625.
- 4 *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 589.
- 5 *Minister for Immigration Local Government and Ethnic Affairs v Taveli* (1990) 94 ALR 177 at 201-202.
- 6 *Secretary, Department of Foreign Affairs and Trade v Boswell* (1992) 108 ALR 77 at 87.
- 7 In a parliamentary debate on the *AD(JR) Act*, Senator Gareth Evans, then an Opposition Senator, had this to say: "To exclude the right to reasons while retaining the right to judicial review is to give applicants for review a non-right. It is a nonsense. It is like Hamlet without the ghost". (Senate *Hansard* 20 August 1980 at 157).
- 8 *Australian Securities Commission v Somerville* (1994) 33 ALD 405.
- 9 Administrative Review Council *Review of Administrative Decisions (Judicial Review) Act: Statements of Reasons for Decisions* Report No 33 (1991).
- 10 The justification for freedom of information legislation was well expressed by the US statesman and President, James Madison, as follows:

A popular Government without popular information or the means of acquiring it, is but a Prologue to a Farce or a Tragedy or perhaps both. Knowledge will forever govern ignorance, and a people who mean to be their own Governors, must arm themselves with the power knowledge gives.

(James Madison, letter to W T Barry, 4 August 1822. Cited in *A Citizen's Guide on Using the Freedom of Information Act and the Privacy Act of 1974 to Request Government Records* Fourth Report to the 102d Congress by the Committee on Government Operations, p 2).
- 11 (1985) 60 ALR 120.
- 12 For an example of a case where FOI was used as an adjunct to private litigation, see *Corrs v Collector of Customs* (1987) 74 ALR 428.
- 13 Administrative Review Council *Better Decisions: Review of Commonwealth Merits Review Tribunals* Report No 39 (1995).
- 14 *Castlemaine Tooheys Ltd v South Australia* (1986) 67 ALR 553.
- 15 *Migration Act 1958* Part 4B.
- 16 The *AD(JR) Act* s 10 confers on the Federal Court a discretion not to entertain a judicial review application where an adequate alternative avenue of review exists.
- 17 See, for example, the *Employment Services Act 1994*, which establishes a contractually-based case management system under which private agencies are engaged to case manage those seeking employment.

- 18 See discussion of the problems in Commonwealth Ombudsman *Annual Report 1987-88* at 21-22.
- 19 For a fuller discussion, see the author's article, "Tenderers Need Room for Protest" *Directions in Government* (Feb 1993).
- 20 See, for example, *Bienke v Minister for Primary Industries and Energy* (1994) 34 ALD 413.
- 21 (1995) 129 ALR 1.

COMPARATIVE REFLECTIONS ON THE TWO SYSTEMS OF ADMINISTRATIVE REVIEW*

Professor Dr Paulus Effendie Lotulung

This seminar has carefully studied the administrative review systems which apply in Australia and Indonesia. All those present would agree that there exist differences in our systems. However, there are also many similarities involving important substantive matters, although expressed in rather different terminology.

There are several reasons for the differences. These include the two countries' constitutional backgrounds. Australia is a federation, comprising several States each with its own government sharing power with a central government. Indonesia is a unitarian republic with regional governments and a dominant central government. Such a situation, to some extent, has created legal institutions in each country which are different from each other, including in the area of administrative review.

Another reason for the differences between the two systems is the historical and social philosophy of each country. The history of each nation has contributed considerably to reshaping its legal culture. Accordingly, although both nations recognise the rule of law, a notion producing principles of universal value, the implementation and enforcement of the rule of law concept needs to be adjusted according to the historical and cultural context of the respective countries.

These perceptions indicate why bodies exercising administrative review differ from each other as a matter of structural organisation and in terms of their purposes. Examples are the presence amongst Australian administrative review mechanisms of

- an independent investigative body called an Ombudsman vested with special legal authority;
- the various administrative tribunals which have specialist authority or competence; and
- the judicial review powers which exist under the *Administrative Decisions (Judicial Review) Act 1977*.

By contrast in Indonesia no such institution as an Ombudsman exists. There are agencies called Boards or Committees which exercise functions similar to the specialist tribunals in Australia. However, they are very limited in number and have a restricted jurisdiction. Examples are

- the Labour Disputes Settlement Committee (Central and Regional);
- the Board of Civil Servants or Government Employees' Disputes (BAPEK);
- the Taxation Evaluation Board; and

- the Administrative Court which is one of the bodies exercising judicial power and is recognised, at law, as a branch of the judicature, subordinate to the Supreme Court, the highest court in Indonesia.

In addition to the main differences which have already been mentioned, there are notable similarities between the two systems, although the terminology describing them may be different. These include the following.

- Judicial review restricts the role of the judge to an examination of decisions from the point of view of their legality and the judge may not determine the merits of the dispute. In addition a court exercising judicial review may not substitute its decision for the administrative decision which is being reviewed.
- The grounds of judicial review. Although the legal terminology used in Australia is different from that used in Indonesia (see Mathews' paper at p 67), the terminology adopted in both countries has a similar meaning. For example, note the terminology describing the grounds of judicial review in the *Administrative Justice Act 1986* section 53(2) which, in addition, contains the general principles of good administration, a concept similar to the Australian notion of natural justice.

There are also similarities in the procedures adopted in both jurisdictions such as:

- a time limit for submitting an application for review;
- the possibility of seeking the suspension of an administrative decision;
- the standing rules for bodies, for example, in environmental disputes;
- the other eligibility criteria for those seeking review such as the nature of the "decision" (see at pp 15, 66, 109 and compare with the *Administrative Justice Act 1986* sections 1(3)-(4)).

Other Australian administrative review elements which need further study in Indonesia include Australia's *Freedom of Information Act 1982*. On the other hand, in my view it would be difficult to introduce an Ombudsman in Indonesia because to be effective that institution requires a balance of power in government in which the Parliament has a stronger role vis-a-vis the President than exists at present in Indonesia.

To end these thoughts with a question, O'Brien's paper indicated that there have been attempts to restrict judicial review in Australia in the fields of public service personnel decisions and in the migration area. That seems to an Indonesian to be contrary to the extensive system of administrative review which exists in Australia and I wonder why this has been allowed to occur?

Notes

- * Comments made by Professor Dr Lotulung at a session to conclude the Seminar.

THE AUSTRALIA LECTURE 1994

THE RULE OF LAW AND JUDICIAL REVIEW

*Sir Anthony Mason**

I am greatly honoured to be invited to deliver the second Australia Lecture in Jakarta. This lectureship is intended to play a part in fostering greater mutual understanding between Indonesia and Australia and in promoting co-operation between our two countries based on cultural and economic exchanges. Near neighbours though we are, our relationship in the past has not been as close as might have been expected.

The explanation lies in a variety of differentiating factors: geographical, cultural and historical. For present purposes, it is sufficient to say that the eighteenth century European settlement of Australia brought with it a political, legal and cultural heritage that was, though European, distinctly British. In essence, that political and legal heritage was not significantly affected by the post second world war migration of southern Europeans to Australia. The result is that Australia, as an inheritor of the British political system (the Westminster system) and the English common law, has had no experience of the European civil law, as Indonesia had with Dutch law. Similarly, until very recent times, Australia has had comparatively little contact with Asian legal systems other than those based on the English common law model.

That picture is changing. The growth of trade and investment in the Asia-Pacific region is focusing attention in Australia and elsewhere on the legal systems of other countries. There is in this region, in common with the rest of the world, an upsurge of interest in comparative law. That interest is by no means confined to commercial and trade law. It extends to various aspects of domestic law, including fundamental rights. The content of domestic law is increasingly affected by international conventions and treaties, a matter to which I shall refer later. For the moment, I seek merely to indicate that Australia is now taking a new interest in Indonesia, its laws and legal system.

On the assumption that Indonesia has a reciprocal interest in Australia, I propose to talk about some fundamental aspects of the Australian legal system so that its characteristics may be more readily appreciated by Indonesian observers.

The Rule of Law

General Characteristics

The rule of law is the foundation of most societies. The rule of law gives cohesion to a society and saves it from descending into civil strife and despotism. In Australia, as in

most countries, the law is supreme. Those who exercise power must conform to the law, a concept memorably captured in the celebrated aphorism "a government of laws, and not of men".¹ Those words, so often repeated, signify two things: first, the rejection of rule by executive decision or arbitrary power so that every act of government or of persons seeking to exercise power may be challenged by appeal to law; and, secondly, that an appeal to law is determined by the courts. To express it another way, the rights, powers, privileges, duties and liabilities of everyone and every institution, including government, are defined by law, the law being a body of rules recognised and enforced by the courts. It follows that a person can be punished for breach of the law but for nothing else.

That principle was recently restated by the High Court of Australia in a case² in which it declared invalid section 54R of the *Migration Act 1958*. That section, which was directed to a particular class of illegal migrants, provided that "[a] court is not to order the release from custody of a designated person". A "designated person" was defined to mean a non-citizen who had been on a boat in the territorial sea of Australia within a specified timeframe, who had not presented a visa or been granted an entry permit, and who had been subjected to certain procedures by the relevant department.³ In arriving at its conclusion, the Court made the point that the Australian Constitution makes the adjudgment and punishment of criminal offences a function to be undertaken exclusively by the courts mentioned in the Constitution. The Court made the further point that no person can be imprisoned by Commonwealth government authority except in accordance with an order of such a court.⁴ In passing, I note that this principle does not prevent the enforcement by military tribunals of military law, at least to the extent to which military law creates, in peace time, offences which are exclusively disciplinary.⁵

One aspect of the rule of law, as understood by countries following the common law tradition, is the concept of equality before the law. Everyone is subject to the law of the land as administered by the courts. Officials, even Ministers of the executive government, are not exempted from complying with the law or from the jurisdiction of the courts. Of course, the law may prescribe special rules applicable to a class of office holders. Thus, Members of Parliament can claim privilege for remarks defamatory of others made in Parliament and judges can also claim privilege in respect of such remarks in court proceedings.

The Legislative Organs and the Role of the Courts

In Australia, the law comprises the Constitution (the supreme law), the statutes enacted by the Commonwealth Parliament and State and Territory legislatures, subordinate legislation made pursuant to statutory authority, and the common law. The common law is a body of rules formulated by the judges virtually from time immemorial. Those rules cover much of our criminal law, the law of contract, the law of torts, equity law and a significant part of our public law.

The law-making function of the courts in developing the common law is subordinate to that of the legislatures. In developing the common law, the courts proceed with circumspection, having close regard to the need for consistency, continuity and certainty in the law, especially in commercial law and property transactions where so much depends upon certainty and the predictability of outcomes. Investors and business people want a legal framework of known and knowable rules. But the common law is subject to legislative alteration and in recent decades there have been many instances of legislative

alteration of the common law. In some areas, legislatures have substituted a statutory regime for the pre-existing body of common law rules. However, the common law, which continues to be moulded by the courts to accord with contemporary needs, still forms a very considerable part of current Australian law. Perhaps the most notable example of the formulation of a principle of the common law in recent times was the recognition by the High Court of indigenous native title to land in *Mabo v Queensland (No 2)*,⁶ a decision to which I shall refer later.

Apart from moulding the common law, the courts also have the important responsibility of interpreting the Constitution and the statutes enacted by the legislatures. Although in interpreting a statute the court seeks to ascertain the will or intention of the legislature as manifested by the words it has employed, the court does not confine itself to an analysis of the words used but looks to such matters as statutory purpose and policy, history, impact on the pre-existing law and, where appropriate, considerations of legislative power. The courts bring to this task of interpretation presumptive rules of construction, some of them designed to protect fundamental values such as personal liberty. For example, the courts require a plain and unmistakable expression of intention to curtail the liberty of the individual or to authorise what otherwise would amount to a trespass upon the premises of an individual.

The foregoing sketch of the role of the courts as it has evolved historically conveys a picture of the authoritative position of the courts in our society. One can imagine an alternative approach in which the legislature itself issues interpretations of its statutes when questions arise as to their meaning. That is not an approach that has been adopted in common law or civil law jurisdictions. Given the fundamental importance of the rule of law, it was natural that the interpretation of statutes, along with the interpretation of the Constitution, was entrusted to the judges who enforced the general law. The result has been that the interpretation of statutes has been influenced to a significant degree by values embedded in the common law with which the judges are familiar by virtue of their experience.

The Australian Constitution

The principal object of the Australian Constitution is to divide legislative powers between the Commonwealth and the States. That is a matter which I shall not address but you might note that the division of powers is a complicating element in our system of government and it generates many important constitutional contests in the High Court of Australia.

Express Provisions Protecting Rights

The Constitution, unlike the United States Constitution and European constitutions, does not contain a comprehensive bill of rights. It contains few express guarantees of fundamental rights, and they have not always been interpreted as free-standing guarantees. Thus, the provision⁷ that the trial on indictment of any offence against a Commonwealth law shall be by jury has been described as procedural only so that there are Commonwealth laws which create offences triable without a jury that are punishable by more than one year's imprisonment. On the other hand, the constitutional provision⁸ which confers on out-of-State residents the same rights as those enjoyed by in-State residents has been given a broad operation, thereby circumventing an attempt by one

State to exclude lawyers from other States from competing effectively with lawyers resident in that State in the courts of that State.⁹ The most significant guarantee, from an economic perspective, is the guarantee of freedom of interstate trade.¹⁰ Its operation is confined to invalidating discriminatory burdens of a protectionist kind designed to protect intrastate trade or manufacture against competition from interstate trade.¹¹ The section therefore does not prevent reasonable regulation in the public interest, so long as it does not involve the prohibited element of discrimination.¹² Another important provision is the requirement that the acquisition of property for Commonwealth purposes must be on just terms.¹³

Implied Constitutional Protection of Rights

One implication which has been made in the Constitution and serves to protect fundamental rights is freedom of communication with respect to political discussion. The implication of this freedom is based on the proposition that freedom of political discussion is an essential element in the representative democracy and government for which the Constitution provides. The existence of this freedom resulted in the invalidation of statutory provisions making it an offence to use words calculated to bring the Industrial Relations Commission (the federal industrial tribunal) into disrepute.¹⁴ The provision was held to purport to suppress criticism of the Commission which might be justifiable, fair and reasonable.

The operation of the implication also invalidated legislation enacted by the Federal Parliament restricting television and radio broadcasting of political matter in relation to elections.¹⁵ The purpose of the legislation was to safeguard the integrity of the political process by reducing, if not eliminating, pressure on political parties and candidates to raise substantial sums of money in order to engage in political campaigning on television and radio, a pressure said to render them vulnerable to corruption and undue influence by those who donate to political campaign funds. However, the Court held that the legislative scheme severely restricted freedom of communication in relation to the electoral process in such a way as to discriminate against potential participants in that process by excluding them from access to television and radio broadcasting.

It has also been said that the Constitution embraces, by necessary implication, the common law doctrine of legal equality,¹⁶ a label given to two aspects of the rule of law which I have already mentioned, namely:

- (1) the subjection of all persons, whatever their rank or condition, to the ordinary laws and to the jurisdiction of the ordinary courts; and
- (2) the inherent equality of all persons under the law and before the courts.

Statutory Protection of Rights

Generally speaking, fundamental rights are protected by Commonwealth and State statutes. One example is the *Racial Discrimination Act 1975* the purpose of which is to prohibit racial discrimination and ensure that persons enjoy equal rights regardless of race and ethnicity. Pursuant to the Commonwealth Parliament's constitutional power to make laws with respect to external affairs, the Act gives effect to the International Convention on the Elimination of All Forms of Racial Discrimination. Another example is the *Human Rights and Equal Opportunity Act 1986* which established a Commission

to inquire into and report on any act or practice that might be inconsistent with human rights as declared in international instruments to which Australia is a party.

I should also mention the *Freedom of Information Act 1982* which creates a general right of access to information in documentary form in the possession of Ministers, departments and public authorities, limited only by exceptions necessary for the protection of essential public interests and the private and business affairs of persons in respect of whom information is collected and held by departments and public authorities.¹⁷

Generally speaking, a privilege against disclosure attaches to Cabinet proceedings and to such papers as would reveal Cabinet proceedings.¹⁸ Cabinet is the highest executive decision-making body in our political system. It consists of the Prime Minister and Ministers of the government drawn from the members in the political party in Parliament. The Cabinet is collectively responsible to Parliament for government policies and individual Ministers are responsible to Parliament for the workings of their departments. These two aspects make up the doctrine of responsible government which is a central feature of the parliamentary or Westminster system. Ultimately, responsible government entails responsibility not only to Parliament but also, through Parliament, to the people. Thus, responsible government is connected with representative government, the Members of Parliament being elected by the people to represent them.

The Status of International Law in Australian Domestic Law

In Australia, unlike the United States, an international convention or treaty to which Australia is a party does not automatically become part of our domestic law. In order that the provisions of the instrument become part of our law, it is necessary that they be incorporated in our law by a statute. Parliament, pursuant to its power to make laws with respect to external affairs, can enact a statute to give effect to the instrument. That is what the *Racial Discrimination Act* did.

This does not mean that the provisions of such an instrument, if not incorporated into our law by statute, play no part at all in the formulation of our domestic law. In the case concerning native title to land, *Mabo (No 2)*,¹⁹ it was acknowledged that, although the common law does not necessarily conform with international law, the latter is an important and legitimate influence on the development of the common law, especially when international law declares the existence of universal human rights. On the other hand, a provision in a convention not legislated into effect has been said to be an insufficient basis for holding that there is a right of a particular kind when that right has never formed part of our law.²⁰

So far, there has been relatively little development of the common law by reference to international law. It is conceivable that this could change. There are many conventions to which Australia is a party which have not been made part of our domestic law by statute and, in recent times, there has been an increase in the number of international conventions which seek to regulate conduct within national boundaries, conventions whose conduct has little to do with international law in its traditional sense.

The Separation of Powers and the Vesting of Judicial Power in the Courts

The doctrine of the separation of powers, identified with less than complete accuracy by Montesquieu as a central element in the English Constitution, has been a feature of democratic constitutions, such as the Australian Constitution. Though the separation in our case is not absolute, the Constitution draws a distinction between the legislative functions of Parliament, the executive power exercised by the government and the judicial power which is vested in the courts.

In conformity with the rule of law and the separation of powers, the exercise of judicial power is entrusted to the courts. The purpose of this provision is to ensure that punishment for breach of the law and legal controversies will be determined by the courts described in the Constitution and that the determination of such matters would not be reposed in other organs of government. However, the vesting of federal judicial power in the courts does not prevent Parliament from conferring jurisdiction on tribunals standing outside the orthodox court system jurisdiction.

Independence of the judiciary is an indispensable element in the rule of law in a democratic society. The people—including the litigants—look to a judiciary which is not beholden to government or other powerful interests. The independence of judges strengthens impartiality, thus ensuring fair trials. Judicial independence also reinforces the separation of powers. More importantly, judicial independence contributes to public confidence in the administration of justice. Judicial independence is protected by our Constitution. It provides that federal judges shall hold office until age seventy and shall not be dismissed otherwise than by Parliament for proved misbehaviour or incapacity.

Judicial Review

Judicial Review of Legislation for Validity

Because the Australian Constitution divides legislative and executive powers between the Commonwealth (the central polity) and the States, there are limitations and restrictions on federal and State powers. So, questions arise as to the validity of legislation enacted by the Parliament and the State legislatures. The courts, particularly the High Court of Australia, the nation's constitutional court and final court of appeal, determine the validity of statutes when challenged. The courts also determine the validity of regulations made pursuant to statutes. The legitimacy of non-elected judges determining the validity of laws enacted by the elected representatives of the people has been the subject of debate in the United States. But, in Australia, the constitutional legitimacy of that exercise of jurisdiction by Australian courts is beyond doubt.

Judicial Review of Administrative Action

In the last twenty years, judicial review of administrative decisions has expanded. That has occurred partly by reason of the wider statutory jurisdiction conferred upon the Federal Court. Speaking generally, that Court will set aside an administrative decision directly affecting the rights or interests of a party if it is beyond power or involves an abuse of power or procedural irregularity such as a denial of natural justice.

Judicial review of administrative decisions has been the subject of vigorous debate in Australia. That is because the courts are called upon to review administrative decisions which may have great importance for government and may have very significant political, economic and social consequences (for example, the issue of television licences and mining licences). But the primary purpose of judicial review of administrative action is to safeguard legality and procedural regularity. The courts are not concerned with the merits of the decision. The court cannot simply substitute for the decision of the administrator the decision which the court believes to be right. The jurisdiction does not extend to "second guessing" the administrator. Nor would a court substitute a general policy of its choice for the general policy formulated and adopted by an administrator. On the other hand, a court will set aside a decision if it is so unreasonable that no reasonable decision-maker could ever have come to it. This basis for review has been explained on the footing that the administrative conclusion is so unreasonable that it amounts to an abuse of power with the result that the decision must be considered unlawful.²¹

The perspective of judicial review is significantly different from that of the administrative decision-maker. The focus of the judge in reviewing administrative action is whether the individual has been dealt with fairly. On the other hand, the focus of the administrator is on the attainment of the perceived policy objectives. However, the experience which administrators have gained from judicial review has made them alive to the standards of fairness applied by judges so that modern administrators are well aware of the need to give a person affected a fair opportunity to present his or her case.

Judicial Review of Discretionary Decisions

A theoretical problem presented by the notion that the rule of law is the antithesis of rule by executive decision or arbitrary power is the prospect that the law, by means of a statute, might authorise the executive to exercise an unfettered discretion in taking action or making a decision. In practice, this eventuality does not arise. Parliamentary procedures are designed to ensure that rights are not so expressed as to depend upon insufficiently defined administrative powers or upon non-reviewable decisions. Furthermore, because the courts interpret general discretions on the footing that they are intended to give effect to the scope or purpose of the relevant statute, criteria for the exercise of a discretion can be implied. However, it is probably true to say that the less specific the criteria for the exercise of a discretion, the less susceptible the exercise of the discretion will be to judicial review.

Judicial Review of Economic Decisions

There is no general exemption of economic decisions from judicial review. The decisions of the Industrial Relations Commission settling the terms and conditions of industrial awards, including rates of pay, are subject to review, but with some limitations. But a decision is only subject to review if it directly affects the person complaining about the decision and on the grounds previously mentioned. Because decisions of non-government corporations operating otherwise than under a statute are not subject to judicial review, it has been contended that government business enterprises should be likewise exempted. However, the present position is that, if an enterprise takes action or makes a decision under a statute, it will be subject to review if it does not fall within an exemption. Decisions having economic significance are sometimes protected by statutory clauses

restricting judicial review. Awards made by the Industrial Relations Commission are protected in this way, but these clauses do not entirely exclude review. They merely restrict it.

The Justification for Judicial Review of Administrative Action

The doctrine of the separation of powers might well support an argument that it is not for the ordinary courts to review administrative decisions. In other words, if review is to be undertaken it should be undertaken, as it is in France, by administrative courts. This argument has some force. In one respect we have accepted the argument. In the federal sphere, we have provided for review of administrative decisions on the merits by the Administrative Appeals Tribunal. However, in accordance with the English approach, we continue to have review, in the more limited form previously discussed, by the ordinary courts. The justification for taking that course is that administrators and public authorities must conform to the law of the land and that the ordinary courts should enforce the law in relation to administration just as they do in other cases. So the justification comes back to the rule of law. Judicial review enforces the rule of law and is the means by which executive action is confined to the powers and functions assigned to it by law.²² The interests of the individual are protected accordingly.

But the separation of powers remains an important consideration. That doctrine provides a powerful reason why the courts should confine themselves to review of the legality of the decision or the proceedings, including the grounds of review which are relevant to legality of the decision and natural justice. Review on the merits would trespass beyond that boundary and take the courts into the heart of the administrative function itself. Likewise, review of policy would also take the courts beyond their judicial province.

The doctrine of the separation of powers also influences the courts in declining to review executive decisions in the exercise of functions which traditionally have been regarded as removed from judicial supervision. Decisions affecting national security and foreign relations and Cabinet decisions are examples usually given. Another illustration was the refusal of the High Court to review a decision of a State government not to appoint certain magistrates to a new court when the court to which they had been appointed was abolished in the course of a reorganisation of the court structure undertaken in the public interest.²³ The court recognised that the appointment of judicial officers was a matter falling within the province of the executive.

Mabo (No 2)

The decision of the High Court in *Mabo (No 2)* is a striking illustration of the importance in our society of the law as it is recognised and declared by the courts. In that case, the Court decided by majority that the common law of Australia recognises a form of native title to land which reflects the entitlement of the indigenous inhabitants in accordance with their laws or customs—which may be described in your country as *adat*—to their traditional lands. The Court acknowledged that native title to land might be extinguished by inconsistent Crown grant or by appropriation by the Crown to a use inconsistent with native title, without giving rise to an entitlement to compensatory damages, subject to the operation of the *Racial Discrimination Act 1975*. The Court also stated that native title to land is also extinguished if the clan or group, by ceasing to acknowledge their laws or customs, loses its connection with the land or if the members of the clan or group cease

to exist. The judgment of the Court proceeds on the view that Aboriginal native title is communal rather than individual.

Consequently, the recognition of native title to land does not affect the ownership of land which was alienated, at least before 1975, by the Crown by means of Crown grants inconsistent with native title. And, in the settled areas of Australia, much of the land has been alienated in this way to private owners. But, in the non-settled areas of Australia, there is scope for the recognition of native title to land. There are many questions yet to be resolved. For example, what is the impact of a pastoral lease or a mining tenement on the existence of native title?

Since the decision the Western Australian Parliament and the Australian Parliament have enacted legislation with a view to providing a legislative regime governing native title. The federal *Native Title Act 1994* sets up a native title tribunal, the function of which is to process and finalise claims to native title. Both the federal and the Western Australian legislation are under challenge and, after hearing argument, the High Court is considering its decision on the validity of the Acts.²⁴

Adversarial Resolution of Disputes

One element of our system of justice, not unrelated to the rule of law, is that controversies between parties are resolved by a determination given by a court (or tribunal) after hearing the arguments of the parties. The proceedings are adversarial in that the parties are entitled to present their cases. In other words, the common law judge does not control or shape the proceedings in the same way as the European civil law judge does. Some would say that the adversarial nature of our legal system has played a significant part in its becoming too complex and too costly. Others might say that, in relation to the making of administrative decisions, because the system insists on procedural fairness and the entitlement by a party to present a case, it places too much emphasis on procedure at the expense of substantive efficiency. Be that as it may, the complexity of our laws and the high cost of our legal system have generated concern on the ground that it is restricting access to justice. The same comment may be made about the adversarial system in common law countries such as the United States and the United Kingdom.

A concentrated effort is now under way to encourage resort to other modes of dispute resolution, for example, mediation, conciliation and arbitration, with a view to easing the burdens of an overworked court system. These methods of dispute resolution, though not unknown in Australia, have not been widely used except in the area of industrial relations, family law and in resolving commercial disputes. It is also worth noting that, in some areas, pre-trial "conferences" have been made compulsory so as to encourage parties to settle their differences before the commencement of the trial.

Concluding Remarks

What I have said conveys an impression of the importance of the law as recognised and enforced by the courts in our society. The rule of law, as a central element of a democratic society, ensures first, that government and its agencies act in conformity with the law and, second, that the rights and interests of individuals under the law are protected. The operation of the rule of law in Australia imposes significant constraints on those who exercise power. It may also affect the promptness with which decisions,

particularly some economic decisions, may be made. The operation of the rule of law, as we know it, has emerged by way of evolutionary development as an integral element in the particular form of democratic society in which Australians live. The incidents of the rule of law vary as between countries. What is suitable for one society is not necessarily appropriate for another.

Two current and important developments which I have mentioned offer the prospect that Australia may be able to profit from Indonesian experience. We have had relatively little experience in dealing with native title to land. Indonesia has a sophisticated system of indigenous title. Your experience in this area may be of value to us in the future. The other development is the move towards alternative dispute resolution. In terms of inexpensive informal mediation and conciliation, you have had much more experience than we have had. We are latecomers in this field. Again, I would hope that we could profit from your experience, particularly in the settlement of claims where the parties cannot afford costly representation. Our experience has been greater in commercial cases, where the amounts in dispute are large and the procedures are more formal.

I hope that this visit will contribute in some way to closer bonds between our two countries and that together they can advance peace, prosperity and progress in the region in which we live.

Notes

- * This is the text of the Australia Lecture delivered by Sir Anthony Mason in Jakarta in October 1994. It is reproduced here by kind permission of Sir Anthony and of the Australia-Indonesia Institute which, in conjunction with the Australian Studies Centre, University of Indonesia, sponsored Sir Anthony's visit to Jakarta.
- 1 *United States v Mine Workers* (1946) 330 US 258 at 307-308 per Frankfurter J.
- 2 *Chui Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 37.
- 3 Section 54K. Note that a "designated person" was also defined to include a non-citizen born in Australia whose mother is a designated person.
- 4 *Ibid* at 27-28.
- 5 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518.
- 6 (1992) 175 CLR 1.
- 7 Section 30.
- 8 Section 117.
- 9 *Street v Queensland Bar Association* (1989) 168 CLR 461.
- 10 Section 92.
- 11 *Cole v Whitfield* (1988) 165 CLR 360.
- 12 *Barley Marketing Board (NSW) v Norman* (1990) 171 CLR 182.
- 13 Constitution s 51(xxi).
- 14 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.
- 15 *Australian Capital Television Pty Ltd v The Commonwealth* (No 2) (1992) 177 CLR 106.
- 16 *Leeth v The Commonwealth* (1992) 174 CLR 455 at 488-492 per Deane and Toohey JJ.
- 17 *Freedom of Information Act 1982* s 3(1)(b).
- 18 *The Commonwealth v Northern Land Council* (1993) 176 CLR 604.
- 19 (1992) 175 CLR at 42.
- 20 *Dietrich v The Queen* (1992) 177 CLR 292 at 306.
- 21 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 36-37.
- 22 *Church of Scientology v Woodward* (1982) 154 CLR 25 at 70.
- 23 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1.
- 24 The High Court subsequently found the Western Australian legislation was inoperative under s 109 of the Constitution (*Western Australia v Commonwealth (Native Title Case)* (1995) 128 ALR 1).

APPENDIX A

KEY PROVISIONS OF THE AUSTRALIAN ADMINISTRATIVE DECISIONS (JUDICIAL REVIEW) ACT 1977

AN ACT

Relating to the Review on Questions of Law of Certain Administrative Decisions

[Assented to 16 June 1977]

BE IT ENACTED by the Queen, and the Senate and House of Representatives of the Commonwealth of Australia, as follows:

Short title

1. This Act may be cited as the *Administrative Decisions (Judicial Review) Act 1977*.

Commencement

2. This Act shall come into operation on a date to be fixed by Proclamation.

Interpretation

3. (1) In this Act, unless the contrary intention appears:
 - “ACT enactment” means an enactment as defined by section 3 of the *Australian Capital Territory (Self Government) Act 1988*;
 - “Court” means the Federal Court of Australia;
 - “decision to which this Act applies” means a decision of an administrative character made, proposed to be made, or required to be made, as the case may be (whether in the exercise of a discretion or not) under an enactment, other than a decision by the Governor-General or a decision included in any of the classes of decisions set out in Schedule 1;
 - “duty” includes a duty imposed on a person in his capacity as a servant of the Crown;
 - “enactment” means, subject to section 3A:
 - (a) an Act other than the *Commonwealth Places (Application of Laws) Act 1970* or the *Northern Territory (Self Government) Act 1978*;
 - (b) an Ordinance of a Territory other than the Northern Territory;
 - (c) an instrument (including rules, regulations or by-laws) made under such an Act or under such an Ordinance; or

(d) a law, or a part of a law, of the Northern Territory declared by the regulations, in accordance with section 19A, to be an enactment for the purposes of this Act;

and, for the purposes of paragraph (a), (b) or (c), includes a part of an enactment;

“failure”, in relation to the making of a decision, includes a refusal to make the decision;

...

(2) In this Act, a reference to the making of a decision includes a reference to:

- (a) making, suspending, revoking or refusing to make an order, award or determination;
- (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
- (c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
- (d) imposing a condition or restriction;
- (e) making a declaration, demand or requirement;
- (f) retaining, or refusing to deliver up, an article; or
- (g) doing or refusing to do any other act or thing;

and a reference to a failure to make a decision shall be construed accordingly.

(3) Where provision is made by an enactment for the making of a report or recommendation before a decision is made in the exercise of a power under that enactment or under another law, the making of such a report or recommendation shall itself be deemed, for the purposes of this Act, to be the making of a decision.

(4) In this Act:

- (a) a reference to a person aggrieved by a decision includes a reference:
 - (i) to a person whose interests are adversely affected by the decision; or
 - (ii) in the case of a decision by way of the making of a report or recommendation—to a person whose interests would be adversely affected if a decision were, or were not, made in accordance with the report or recommendation; and
- (b) a reference to a person aggrieved by conduct that has been, is being, or is proposed to be, engaged in for the purpose of making a decision or by a failure to make a decision includes a reference to a person whose interests are or would be adversely affected by the conduct or failure.

(5) A reference in this Act to conduct engaged in for the purpose of making a decision includes a reference to the doing of any act or thing preparatory to the making of a decision, including the taking of evidence or the holding of an inquiry or investigation.

...

Applications for review of decisions

5. (1) A person who is aggrieved by a decision to which this Act applies that is made after the commencement of this Act may apply to the Court for an order of review in respect of the decision on any one or more of the following grounds:
- (a) that a breach of the rules of natural justice occurred in connection with the making of the decision;
 - (b) that procedures that were required by law to be observed in connection with the making of the decision were not observed;
 - (c) that the person who purported to make the decision did not have jurisdiction to make the decision;
 - (d) that the decision was not authorized by the enactment in pursuance of which it was purported to be made;
 - (e) that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made;
 - (f) that the decision involved an error of law, whether or not the error appears on the record of the decision;
 - (g) that the decision was induced or affected by fraud;
 - (h) that there was no evidence or other material to justify the making of the decision;
 - (j) that the decision was otherwise contrary to law.
- (2) The reference in paragraph (1)(e) to an improper exercise of a power shall be construed as including a reference to:
- (a) taking an irrelevant consideration into account in the exercise of a power;
 - (b) failing to take a relevant consideration into account in the exercise of a power;
 - (c) an exercise of a power for a purpose other than a purpose for which the power is conferred;
 - (d) an exercise of a discretionary power in bad faith;
 - (e) an exercise of a personal discretionary power at the direction or behest of another person;
 - (f) an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case;
 - (g) an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power;
 - (h) an exercise of a power in such a way that the result of the exercise of the power is uncertain; and
 - (j) any other exercise of a power in a way that constitutes abuse of the power.
- (3) The ground specified in paragraph (1)(h) shall not be taken to 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 (including facts of which he was entitled to take notice) from which he could reasonably be satisfied that the matter was established; or
- (b) the person who made the decision based the decision on the existence of a particular fact, and that fact did not exist.

Applications for review of conduct related to making of decisions

6. (1) Where a person has engaged, is engaging, or proposes to engage, in conduct for the purpose of making a decision to which this Act applies, a person who is aggrieved by the conduct may apply to the Court for an order of review in respect of the conduct [on any one or more of the following grounds:]

...

[Here follows a list of grounds of review based on those in section 5(1).]

Applications in respect of failures to make decisions

7. (1) Where:
- (a) person has a duty to make a decision to which this Act applies;
 - (b) there is no law that prescribes a period within which the person is required to make that decision; and
 - (c) the person has failed to make that decision;
- a person who is aggrieved by the failure of the first-mentioned person to make the decision may apply to the Court for an order of review in respect of the failure to make the decision on the ground that, there has been unreasonable delay in making the decision.
- (2) Where:
- (a) a person has a duty to make a decision to which this Act applies;
 - (b) a law prescribes a period within which the person is required to make that decision; and
 - (c) the person failed to make that decision before the expiration of that period;
- a person who is aggrieved by the failure of the first-mentioned person to make the decision within that period may apply to the Court for an order of review in respect of the failure to make the decision within that period on the ground that the first-mentioned person has a duty to make the decision notwithstanding the expiration of that period.

Rights conferred by this Act to be additional to other rights

10. (1) The rights conferred by sections 5, 6 and 7 on a person to make an application to the Court in respect of a decision, in respect of conduct engaged in for the purpose of making a decision or in respect of a failure to make a decision:
- (a) are in addition to, and not in derogation of, any other rights that the person has to seek a review, whether by the Court, by another court, or

- by another tribunal, authority or person, of that decision, conduct or failure; and
- (b) shall be disregarded for the purposes of the application of subsection 6(3) of the *Ombudsman Act 1976* and subsection 24(2A) of the *Complaints (Australian Federal Police) Act 1981*.
- (2) Notwithstanding subsection (1):
- (a) the Court, or any other court, may, in a proceeding instituted otherwise than under this Act, in its discretion, refuse to grant an application for a review of a decision, conduct engaged in for the purpose of making a decision, or a failure to make a decision, for the reason that an application has been made to the Court under section 5, 6 or 7 in respect of that decision, conduct or failure; and
- (b) the Court may, in its discretion, refuse to grant an application under section 5, 6 or 7 that was made to the Court in respect of a decision, in respect of conduct engaged in for the purpose of making a decision, or in respect of a failure to make a decision, for the reason:
- (i) that the applicant has sought a review by the Court, or by another court, of that decision, conduct or failure otherwise than under this Act; or
- (ii) that adequate provision is made by any law other than this Act under which the applicant is entitled to seek a review by the Court, by another court, or by another tribunal, authority or person, of that decision, conduct or failure.
- (3) In this section, "review" includes a review by way of reconsideration, re-hearing, appeal, the grant of an injunction or of a prerogative or statutory writ or the making of a declaratory or other order.

Manner of making applications

11. (1) An application to the Court for an order of review:
- (a) shall be made in such manner as is prescribed by Rules of Court;
- (b) shall set out the grounds of the application; and
- (c) shall be lodged with a Registry of the Court and, in the case of an application in relation to a decision that has been made and the terms of which were recorded in writing and set out in a document that was furnished to the applicant, including such a decision that a person purported to make after the expiration of the period within which it was required to be made, shall be so lodged within the prescribed period or within such further time as the Court (whether before or after the expiration of the prescribed period) allows.
- (2) Any other application to the Court under this Act shall be made as prescribed by Rules of Court.
- (3) The prescribed period for the purposes of paragraph (1)(c) is the period commencing on the day on which the decision is made and ending on the twenty-eighth day after:

- (a) if the decision sets out the findings on material questions of fact, refers to the evidence or other material on which those findings were based and gives the reasons for the decision—the day on which a document setting out the terms of the decision is furnished to the applicant;

...

- (6) The applicant for an order of review is not limited to the grounds set out in the application but, if he wishes to rely on a ground not so set out, the Court may direct that the application be amended to specify that ground.

...

- (9) Strict compliance with Rules of Court made for the purposes of this section is not required and substantial compliance is sufficient.

Application to be made a party to a proceeding

- 12. (1) A person interested in a decision, in conduct that has been, is being, or is proposed to be, engaged in for the purpose of making a decision, or in a failure to make a decision, being a decision, conduct or failure in relation to which an application has been made to the Court under this Act, may apply to the Court to be made a party to the application.
- (2) The Court may, in its discretion:
 - (a) grant the application either unconditionally or subject to such conditions as it thinks fit; or
 - (b) refuse the application.

Reasons for decision may be obtained

- 13. (1) Where a person makes a decision to which this section applies, any person who is entitled to make an application to the Court under section 5 in relation to the decision may, by notice in writing given to the person who made the decision, request him to furnish a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision.
- (2) Where such a request is made, the person who made the decision shall, subject to this section, as soon as practicable, and in any event within 28 days, after receiving the request, prepare the statement and furnish it to the person who made the request.

Certain information not required to be disclosed

- 13A. (1) This section applies in relation to any information to which a request made to a person under subsection 13(1) relates, being information that:
 - (a) relates to the personal affairs or business affairs of a person, other than the person making the request; and
 - (b) is information:
 - (i) that was supplied in confidence;
 - (ii) the publication of which would reveal a trade secret;

- (iii) that was furnished in compliance with a duty imposed by an enactment; or
- (iv) the furnishing of which in accordance with the request would be in contravention of an enactment, being an enactment that expressly imposes on the person to whom the request is made a duty not to divulge or communicate to any person, or to any person other than a person included in a prescribed class of persons, or except in prescribed circumstances, information of that kind.

...

Certification by Attorney-General concerning the disclosure of information

14. (1) If the Attorney-General certifies, by writing signed by him, that the disclosure of information concerning a specified matter would be contrary to the public interest:

- (a) by reason that it would prejudice the security, defence or international relations of Australia;
- (b) by reason that it would involve the disclosure of deliberations or decisions of the Cabinet or of a Committee of the Cabinet; or
- (c) for any other reason specified in the certificate that could form the basis for a claim in a judicial proceeding that the information should not be disclosed;

the following provisions of this section have effect.

(2) Where a person has been requested in accordance with section 13 to furnish a statement to a person:

- (a) the first-mentioned person is not required to include in the statement any information in respect of which the Attorney-General has certified in accordance with subsection (1) of this section; and
- (b) where the statement would be false or misleading if it did not include such information—the first-mentioned person is not required by that section to furnish the statement.

(3) Where, by reason of subsection (2), information is not included in a statement furnished by a person or a statement is not furnished by a person, the person shall give notice in writing to the person who requested the statement:

- (a) in a case where information is not included in a statement—stating that the information is not so included and giving the reason for not including the information; or
- (b) in a case where a statement is not furnished—stating that the statement will not be furnished and giving the reason for not furnishing the statement.

(4) Nothing in this section affects the power of the Court to make an order for the discovery of documents or to require the giving of evidence or the production of documents to the Court.

Stay of proceedings

15. (1) The making of an application to the Court under section 5 in relation to a decision does not affect the operation of the decision or prevent the taking of action to implement the decision but:
- (a) the Court or a Judge may, by order, on such conditions (if any) as it or he thinks fit, suspend the operation of the decision; and
 - (b) the Court or a Judge may order, on such conditions (if any) as it or he thinks fit, a stay of all or any proceedings under the decision.

Powers of the Court in respect of applications for order of review

16. (1) On an application for an order of review in respect of a decision, the Court may, in its discretion, make all or any of the following orders:
- (a) an order quashing or setting aside the decision, or a part of the decision, with effect from the date of the order or from such earlier or later date as the Court specifies;
 - (b) an order referring the matter to which the decision relates to the person who made the decision for further consideration, subject to such directions as the Court thinks fit;
 - (c) an order declaring the rights of the parties in respect of any matter to which the decision relates;
 - (d) an order directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the Court considers necessary to do justice between the parties.
- (2) On an application for an order of review in respect of conduct that has been, is being, or is proposed to be, engaged in for the purpose of the making of a decision, the Court may, in its discretion, make either or both of the following orders:
- (a) an order declaring the rights of the parties in respect of any matter to which the conduct relates;
 - (b) an order directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the Court considers necessary to do justice between the parties.
- (3) On an application for an order of review in respect of a failure to make a decision, or in respect of a failure to make a decision within the period within which the decision was required to be made, the Court may, in its discretion, make all or any of the following orders:
- (a) an order directing the making of the decision;
 - (b) an order declaring the rights of the parties in relation to the making of the decision;
 - (c) an order directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the Court considers necessary to do justice between the parties.

- (4) The Court may at any time, of its own motion or on the application of any party, revoke, vary, or suspend the operation of, any order made by it under this section.

Intervention by Attorney-General

18. (1) The Attorney-General may, on behalf of the Commonwealth, intervene in a proceeding before the Court under this Act.

Act not to apply in relation to certain decisions

19. (1) The regulations may declare a class or classes of decisions to be decisions that are not subject to judicial review by the Court under this Act.

SCHEDULE 1

Section 3

CLASSES OF DECISIONS THAT ARE NOT DECISIONS TO WHICH THIS ACT APPLIES

- (a) decisions under the *Conciliation and Arbitration Act 1904* or the *Industrial Relations Act 1988*;
- (b) decisions under the *Commonwealth Banks Act 1959*;
- (c) decisions under the *Coal Industry Act 1946*, other than decisions of the Joint Coal Board;
- (d) decisions under any of the following Acts:
 - Australian Security Intelligence Organization Act 1956*¹
 - Australian Security Intelligence Organization Act 1979*
 - Inspector-General of Intelligence and Security Act 1986*
 - Telecommunications (Interception) Act 1979*
 - Telephonic Communications (Interception) Act 1960*;²
- (da) decisions under section 13 of the *Migration Act 1958*;
- (e) decisions making, or forming part of the process of making, or leading up to the making of, assessments or calculations of tax, charge or duty, or decisions disallowing objections to assessments or calculations of tax, charge or duty, or decisions amending, or refusing to amend, assessments or calculations of tax, charge or duty, under any of the following Acts:
 - Australian Capital Territory Taxation (Administration) Act 1969*
 - Debits Tax Administration Act 1982*
 - Coal Excise Act 1949*

1 The *Australian Security Intelligence Organization Act 1956* was repealed by the *Australian Security Intelligence Organization Act 1979* (No 113, 1979).

2 The *Telephonic Communications (Interception) Act 1960* was repealed by the *Telecommunications (Interception) Act 1979* (No 114, 1979).

Customs Act 1901
Customs Tariff Act 1987
Estate Duty Assessment Act 1914
Excise Act 1901
Fringe Benefits Tax Assessment Act 1986
Gift Duty Assessment Act 1941
Income Tax Assessment Act 1936
Pay-roll Tax Assessment Act 1941
Pay-roll Tax (Territories) Assessment Act 1971
Petroleum Resource Rent Tax Assessment Act 1987
Acts providing for the assessment of sales tax
Superannuation Guarantee (Administration) Act 1992
Taxation (Unpaid Company Tax) Assessment Act 1982
Training Guarantee (Administration) Act 1990
Trust Recoupment Tax Assessment Act 1985
Wool Tax (Administration) Act 1964;

- (ea) decisions of the Commissioner of Taxation under Subdivision B (except subsection 222 AGF(3) of Division 8 of Part VI of the *Income Tax Assessment Act 1936*;³
- (f) decisions of the Commissioner of Taxation under subsection 3E(1) of the *Taxation Administration Act 1953*;
- (g) decisions under Part IV of the *Taxation Administration Act 1953*;
- (ga) decisions under section 14ZY of the *Taxation Administration Act 1953* disallowing objections to assessments or calculations of tax, charge or duty;
- (h) decisions under the *Foreign Acquisitions and Takeovers Act 1975*;
- (j) decisions, or decisions included in a class of decisions, under the Banking (Foreign Exchange) Regulations in respect of which the Treasurer has certified, by instrument in writing, that the decision or any decision included in the class, as the case may be, is a decision giving effect to the foreign investment policy of the Commonwealth Government;
- (k) *Repealed*
- (l) decisions of the National Labour Consultative Council;
- (m) decisions of the National Companies and Securities Commission made in the performance of a function, or the exercise of a power, conferred, or expressed to be conferred, upon it by any State Act or a law of the Northern Territory;
- (n) decisions of the Ministerial Council for Companies and Securities established by Part VII of the Agreement between the Commonwealth and the States a copy of which is set out in the Schedule to the *National Companies and Securities Commission Act 1979*;
- (o) decisions under the *Defence Force Discipline Act 1982*;

3 Subdivision B deals with the making, reduction and revocation of estimates of certain liabilities.

- (p) decisions under section 42 of the *Customs Act 1901* to require and take securities in respect of duty that may be payable under the *Customs Tariff (Anti-Dumping) Act 1975*;
- (q) decisions under subsection 25(1) or Part IIIA of the *Commonwealth Electoral Act 1918*;
- (r) decisions under the *Extradition Act 1988*;
- (s) determinations made by the Child Support Registrar under Part 6A of the *Child Support (Assessment) Act 1989*;
- (s) decisions under an enactment of Qantas Airways Limited or a company that is a subsidiary of that company;
- (t) decisions of Snowy Mountains Engineering Corporation Limited or a body corporate that is a subsidiary of that body corporate;
- (u) decisions of CSL Limited or a company that is a subsidiary of that company;
- (u) decisions under the *Witness Protection Act 1994*;
- (v) decisions under subsection 60A(2B) of the *Australian Federal Police Act 1979*.

SCHEDULE 2

Section 13

CLASSES OF DECISIONS

THAT ARE NOT DECISIONS TO WHICH SECTION 13 APPLIES

- (a) decisions in connection with, or made in the course of, redress of grievances, or redress of wrongs, with respect to members of the Defence Force;
- (b) decisions in connection with personnel management (including recruitment, training, promotion and organization) with respect to the Defence Force, including decisions relating to particular persons;
- (c) decisions under any of the following Acts:
 - Consular Privileges and Immunities Act 1972*
 - Diplomatic Privileges and Immunities Act 1967*
 - International Organizations (Privileges and Immunities) Act 1963*;
- (d) decisions under the *Migration Act 1958*, being:
 - (i) decisions under section 11Q, other than:
 - (A) a decision relating to a person who, at the time of the decision, was, within the meaning of that Act, the holder of a valid visa; or
 - (B) a decision relating to a person who, having entered Australia within the meaning of that Act, was in Australia at the time of the decision;
 - (ii) decisions in connection with the issue or cancellation of visas;

- (iii) decisions whether a person is a person referred to in paragraph (b) of the definition of "exempt non-citizen" in subsection 5(1) of that Act; or
- (iv) decisions relating to a person who, having entered Australia, within the meaning of that Act, as a diplomatic or consular representative of another country, a member of the staff of such a representative or the spouse or a dependent relative of such a representative, was in Australia at the time of the decision;
- (e) decisions relating to the administration of criminal justice, and, in particular:
 - (i) decisions in connection with the investigation or prosecution of persons for any offences against a law of the Commonwealth or of a Territory;
 - (ii) decisions in connection with the appointment of investigators or inspectors for the purposes of such investigations;
 - (iii) decisions in connection with the issue of search warrants under a law of the Commonwealth or of a Territory;
 - (iv) decisions in connection with the issue of seizure warrants issued under Division 1 of Part XII of the *Customs Act 1901*; and
 - (v) decisions under a law of the Commonwealth or of a Territory requiring the production of documents, the giving of information or the summoning of persons as witnesses;
- (f) decisions in connection with the institution or conduct of proceedings in a civil court, including decisions that relate to, or may result in, the bringing of such proceedings for the recovery of pecuniary penalties arising from contraventions of enactments, and, in particular:
 - (i) decisions in connection with the investigation of persons for such contraventions;
 - (ii) decisions in connection with the appointment of investigators or inspectors for the purposes of such investigations;
 - (iii) decisions in connection with the issue of search warrants, or seizure warrants issued under Division 1 of Part XII of the *Customs Act 1901* under enactments; and
 - (iv) decisions under enactments requiring the production of documents, the giving of information or the summoning of persons as witnesses;
- (g) decisions of the Minister for Finance to issue sums out of the Consolidated Revenue Fund under an Act to appropriate moneys out of that Fund for the service of, or for expenditure in respect of, any year;
- (h) decisions under section 32 or 36A of the *Audit Act 1901*;
- (i) decisions of the Commonwealth Grants Commission relating to the allocation of funds;
- (j) decisions of any of the following Tribunals:

- Academic Salaries Tribunal
 - Defence Force Remuneration Tribunal
 - Federal Police Arbitral Tribunal
 - Remuneration Tribunal;
- (k) decisions of any of the following authorities in respect of their commercial activities:
- Aboriginal and Torres Strait Islander Commercial Development Corporation
 - Australian Dairy Corporation
 - Australian Honey Board
 - Australian Industry Development Corporation
 - Australian Meat and Live-stock Corporation
 - Australian National Railways Commission
 - Australian Wheat Board
 - Australian Wool Corporation
 - Canberra Commercial Development Authority
 - Christmas Island Phosphate Commission
 - Health Insurance Commission
 - Housing Loans Insurance Corporation;
- (l) decisions of the Reserve Bank in connection with its banking operations (including individual open market operations and foreign exchange dealings);
- (m) decisions in connection with the enforcement of judgments or orders for the recovery of moneys by the Commonwealth or by an officer of the Commonwealth;
- (n) *Repealed*
- (o) decisions of the National Director of the Commonwealth Employment Service made on behalf of that Service to refer, or not to refer, particular clients to particular employers;
- (p) decisions under the *Civil Aviation Act 1988* that:
- (i) relate to aircraft design, the construction or maintenance of aircraft or the safe operation of aircraft or otherwise relate to aviation safety; and
 - (ii) arise out of findings on material questions of fact based on evidence, or other material:
 - (A) that was supplied in confidence; or
 - (B) the publication of which would reveal information that is a trade secret;
- (q) decisions in connection with personnel management (including recruitment, training, promotion and organization) with respect to the Australian Public Service or any other Service established by an enactment or the staff of a Commonwealth authority, other than a decision relating to, and having regard to the particular characteristics of, or other circumstances relating to, a particular person;

- (r) decisions relating to promotions, transfers, temporary performance of duties, or appeals against promotions or selections for temporary performance of duties, of or by individual officers of the Australian Public Service;
- (s) decisions relating to transfers or promotions under section 53A of the *Public Service Act 1922*;
- (t) decisions relating to:
 - (i) the making of appointments in the Australian Public Service or any other Service established by an enactment or to the staff of a Commonwealth authority;
 - (ii) the engagement of persons as employees under the *Public Service Act 1922* or under any other enactment that establishes a Service or by a Commonwealth authority; or
 - (iii) the making of appointments under an enactment or to an office established by, or under, an enactment;
- (u) decisions in connection with the prevention or settlement of industrial disputes, or otherwise relating to industrial matters, in respect of the Australian Public Service or any other Service established by an enactment or the staff of a Commonwealth authority;
- (w) decisions relating to the making or terminating of appointments of Secretaries under the *Public Service Act 1922*;
- (y) decisions relating to:
 - (i) engaging, or terminating engagements of, consultants; or
 - (ii) employing, or terminating the employment of, staff, under the *Members of Parliament (Staff) Act 1984*;
- (z) decisions relating to promotions, transfers, temporary performance of duties, or appeals against promotions or selections for temporary performance of duties, of or by individual members or staff members of the Australian Federal Police;
- (za) determinations under section 26E of the *Australian Federal Police Act 1979* relating to individual members or staff members of the Australian Federal Police;
- (zb) decisions relating to the activities of the Export Finance and Insurance Corporation under Part 4 or 5 of the *Export Finance and Insurance Corporation Act 1991*;

APPENDIX B

KEY PROVISIONS OF THE ADMINISTRATIVE APPEALS TRIBUNAL ACT 1975

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ADMINISTRATIVE APPEALS TRIBUNAL ACT 1975

AN ACT

To establish an Administrative Appeals Tribunal

[Assented to 28 August 1975]

PART I—PRELIMINARY

Short title

1. This Act may be cited as the *Administrative Appeals Tribunal Act 1975*.

...

Interpretation

3. (1) In this Act, unless the contrary intention appears:

“ACT enactment” means an enactment as defined by section 3 of the *Australian Capital Territory (Self-Government) Act 1988*;

“authority of the Commonwealth” means an authority, tribunal or other body, whether incorporated or not, that is established by an enactment;

“Deputy President” means a member appointed as a Deputy President of the Tribunal after the commencement of Part III of the *Statute Law (Miscellaneous Amendments) Act (No 1) 1982*;

“Deputy Registrar” means a Deputy Registrar of the Tribunal;

“enactment” means, subject to section 3A:

- (a) an Act;
- (b) an Ordinance of a Territory other than the Northern Territory; or
- (c) an instrument (including rules, regulations or by-laws) made under an Act or under such an Ordinance; and includes an enactment as amended by another enactment;

...

- (3) A reference in this Act to a decision includes a reference to:

- (a) making, suspending, revoking or refusing to make an order or determination;
- (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;

- (c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
- (d) imposing a condition or restriction;
- (e) making a declaration, demand or requirement;
- (f) retaining, or refusing to deliver up, an article; or
- (g) doing or refusing to do any other act or thing.

...

PART II—ESTABLISHMENT OF THE ADMINISTRATIVE APPEALS TRIBUNAL

Establishment of Tribunal

5. There is hereby established an Administrative Appeals Tribunal, which shall consist of a President and such number of other members as are appointed in accordance with this Act.

Appointment of members of Tribunal

6. (1) The members shall be appointed by the Governor-General.
- (2) A Judge who is to be appointed as a member (other than the President) of the Tribunal shall be appointed as a presidential member.
- (3) A person (other than a Judge) who is to be appointed as a member of the Tribunal shall be appointed as a Deputy President of the Tribunal, as a senior member of the Tribunal, or as a member of the Tribunal.
- (4) A member (other than a Judge) shall be appointed either as a full-time member or as a part-time member.

Qualifications for appointment

7. (1) A person shall not be appointed as the President unless he is a Judge of the Federal Court of Australia.
- (1A) A person shall not be appointed as a Deputy President unless he is enrolled as a legal practitioner of the High Court, of another federal court or of the Supreme Court of a State or Territory and has been so enrolled for not less than 5 years.
- (1B) A person shall not be appointed as a senior member unless he:
- (a) is enrolled as a legal practitioner of the High Court, of another federal court or of the Supreme Court of a State or Territory and has been so enrolled for not less than 5 years; or
 - (b) has, in the opinion of the Governor-General, special knowledge or skill relevant to the duties of a senior member.
- (2) A person shall not be appointed as a non-presidential member (other than a senior member) unless he:
- (a) is enrolled as a legal practitioner of the High Court, of another federal court or of the Supreme Court of a State or Territory;

- (b) has had experience, for not less than 5 years, at a high level in industry, commerce, public administration, industrial relations, the practice of a profession or the service of a government or of an authority of a government;
- (c) has obtained a degree of a university, or an educational qualification of a similar standing, after studies in the field of law, economics or public administration or some other field considered by the Governor-General to have substantial relevance to the duties of such a member; or
- (d) has, in the opinion of the Governor-General, special knowledge or skill in relation to any class of matters in respect of which decisions may be made in the exercise of powers conferred by an enactment, being decisions in respect of which applications may be made to the Tribunal for review.

Term of appointment

8. (1) Subject to this Part (other than subsection (3)), a presidential member who is a Judge holds office until he or she attains the age of 70 years or ceases before attaining that age to be a Judge.
- (2) Subject to this Part (other than subsection (3)), where the instrument appointing a person as a full-time member to an office of Deputy President or of senior member provides that this subsection applies to the appointment, the person holds office until he or she attains the age of 70 years or 65 years, as the case may be.
- (3) Subject to this Part, a member holds office for such period of at most 7 years as is specified in the instrument of appointment, but is eligible for re-appointment.
- (4) A person appointed as a full-time member to an office of Deputy President, or an office of senior member or of member, ceases to hold office on attaining the age of 70 years or 65 years, as the case may be.
- (5) A Judge who has attained the age of 70 years shall not be appointed as a member.
- (6) A person shall not be appointed as a full-time member to an office of Deputy President, or an office of senior member or of member, if the person has attained the age of 70 years or 65 years, as the case may be.
- (7) Subject to this Part, a member holds office on such terms and conditions as are prescribed.

PART III—ORGANIZATION OF THE TRIBUNAL

Constitution of Tribunal for exercise of powers

21. (1) Subject to subsection (1A) and to any other provision made in this Act or in any other enactment with respect to the constitution of the Tribunal in

relation to particular proceedings, the Tribunal shall, for the purpose of the exercise of its powers in relation to a matter, be constituted by:

- (aa) a presidential member who is a Judge and 2 other members (not being Judges);
- (ab) 3 Deputy Presidents;
- (ac) 2 Deputy Presidents and one non-presidential member;
- (a) a Deputy President and 2 non-presidential members;
- (b) a presidential member alone;
- (c) 3 non-presidential members of whom at least one is a senior member; or
- (d) a non-presidential member alone.

...

Places of sitting

24. Sittings of the Tribunal shall be held from time to time as required at the places at which the Registries of the Tribunal are established, but the Tribunal may sit at any place in Australia or in an external Territory.

...

PART IV—REVIEWS BY THE TRIBUNAL OF DECISIONS

Tribunal may review certain decisions

25. (1) An enactment may provide that applications may be made to the Tribunal:
- (a) for review of decisions made in the exercise of powers conferred by that enactment; or
 - (b) for the review of decisions made in the exercise of powers conferred, or that may be conferred, by another enactment having effect under that enactment.

...

- (3) Where an enactment makes provision in accordance with subsection (1), that enactment:

- (a) shall specify the person or persons to whose decisions the provision applies;
- (b) may be expressed to apply to all decisions of a person, or to a class of such decisions; and
- (c) may specify conditions subject to which applications may be made.

- (3A) Where an enactment makes provision in accordance with this section for the making of applications to the Tribunal for the review of decisions of a person made in the exercise of a power conferred on that person, that provision of that enactment applies also in relation to decisions made in the exercise of that power:

- (a) by any person to whom that power has been delegated;

- (b) in the case where the provision specifies the person by reference to his being the holder of a particular office or appointment—by any person for the time being acting in, or performing any of the duties of, that office or appointment; or
 - (c) by any other person lawfully authorized to exercise that power.
- (4) The Tribunal has power to review any decision in respect of which application is made to it under any enactment.

Persons who may apply to Tribunal

27. (1) Where this Act or any other enactment provides that an application may be made to the Tribunal for a review of a decision, the application may be made by or on behalf of any person or persons (including the Commonwealth or an authority of the Commonwealth) whose interests are affected by the decision.
- (2) An organization or association of persons, whether incorporated or not, shall be taken to have interests that are affected by a decision if the decision relates to a matter included in the objects or purposes of the organization or association.
- (3) Subsection (2) does not apply in relation to a decision given before the organization or association was formed or before the objects or purposes of the organization or association included the matter concerned.

Notice of decision and review rights to be given

- 27A. (1) Subject to subsection (2), a person who makes a reviewable decision must take such steps as are reasonable in the circumstances to give to any person whose interests are affected by the decision notice, in writing or otherwise:
- (a) of the making of the decision; and
 - (b) of the right of the person to have the decision reviewed.
- (2) Subsection (1) does not apply to:
- (a) a decision that is deemed to be made because of the operation of subsection 25(5); or
 - (b) a decision in respect of which provision relating to the notification of a right of review is made by another enactment; or
 - (c) any of the following decisions:
 - (i) a decision not to impose a liability, penalty or any kind of limitation on a person;
 - (ii) a decision making an adjustment to the level of periodic payments to be made to a person as a member of a class of persons where a similar adjustment is being made to the level of such payments to the other members of the class;
 - (iii) if an enactment establishes several categories of entitlement to a monetary benefit—a decision that determines a person to be in the most favourable of those categories;
- if the decision does not adversely affect the interests of any other person; or

- (d) a decision under the *Corporations Law* of a State or an internal Territory to which section 1317B of that Law applies; or
 - (e) a decision under the *Australian Securities Commission Law* of a State or an internal Territory to which section 244 of that Law applies.
- (3) A failure to do what this section requires does not affect the validity of the decision.
- (4) In this section:
- “reviewable decision” means:
- (a) a decision that is reviewable by the Tribunal; or
 - (b) a decision that is reviewable by:
 - (i) a person whose decision on review is reviewable by the Tribunal; or
 - (ii) a person whose decision on review, because of subparagraph (i), is a reviewable decision.

Review—Code of Practice

- 27B. (1) The Attorney-General may determine, in writing, a Code of Practice for the purpose of facilitating the operation of subsection 27A(1).
- (2) A person, in taking action under subsection 27A(1), must have regard to any such Code of Practice that is then in force.
- (3) A Code of Practice is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*.

Person affected by decision may obtain reasons for decision

28. (1) Where a person makes a decision in respect of which an application may be made to the Tribunal for a review, any person (in this section referred to as the “applicant”) who is entitled to apply to the Tribunal for a review of the decision may, by notice in writing given to the person who made the decision, request that person to furnish to the applicant a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision, and the person who made the decision shall, as soon as practicable but in any case within 28 days after receiving the request, prepare, and furnish to the applicant, such a statement.
- ...
- (2) If the Attorney-General certifies, by writing signed by him, that the disclosure of any matter contained in a statement prepared in accordance with subsection (1) would be contrary to the public interest:
- (a) by reason that it would prejudice the security, defence or international relations of Australia;
 - (b) by reason that it would involve the disclosure of deliberations of the Cabinet or of a Committee of the Cabinet; or
 - (c) for any other reason specified in the certificate that could form the basis for a claim by the Crown in right of the Commonwealth in a judicial

proceeding that the matter should not be disclosed; the following provisions of this section have effect.

Manner of applying for review

29. (1) An application to the Tribunal for a review of a decision:
- (a) shall be in writing;
 - (b) may be made in accordance with the prescribed form;
 - (c) shall set out a statement of the reasons for the application; and
 - (d) if the terms of the decision were recorded in writing and set out in a document that was furnished to the applicant or the decision is deemed to be made by reason of the operation of subsection 25(5)—shall be lodged with the Tribunal within the prescribed time.
- (1A) If, in an application, a person does not furnish an address at which documents in relation to the proceeding may be served, any address of the person shown in the application, or later notified to the Tribunal as an address for service, is taken to be an address furnished by the person at which such documents may be served.
- (2) Subject to subsection (3), the prescribed time for the purposes of paragraph (1)(d) is the period commencing on the day on which the decision is made and ending on the twenty-eighth day after:
- (a) if the decision sets out the findings on material questions of fact and the reasons for the decision—the day on which a document setting out the terms of the decision is furnished to the applicant;
- (7) The Tribunal may, upon application in writing by a person, extend the time for the making by that person of an application to the Tribunal for a review of a decision (including a decision made before the commencement of this section).

Applications—payment of fees

- 29A. (1) Subject to subsection (2), an application to the Tribunal, whether for a review of a decision or otherwise, is not taken to be made unless the prescribed fee (if any) in respect of the application is paid.
- (2) An application in respect of which a fee is waived under the regulations, whether at the time of lodgment or later, is taken to be made at the time it is lodged with the Tribunal.

Parties to proceeding before Tribunal

30. (1) Subject to paragraph 42A(2)(b), the parties to a proceeding before the Tribunal for a review of a decision are:
- (a) any person who, being entitled to do so, has duly applied to the Tribunal for a review of the decision;
 - (b) the person who made the decision;

- (c) if the Attorney-General intervenes in the proceeding under section 30A—the Attorney-General; and
 - (d) any other person who has been made a party to the proceeding by the Tribunal on application by the person in accordance with subsection (1A).
- (1A) Where an application has been made by a person to the Tribunal for a review of a decision, any other person whose interests are affected by the decision may apply, in writing, to the Tribunal to be made a party to the proceeding, and the Tribunal may, in its discretion, by order, make that person a party to the proceeding.

...

Intervention by Attorney-General

- 30A. (1) The Attorney-General may, on behalf of the Commonwealth, intervene in a proceeding before the Tribunal.

...

Tribunal to determine persons whose interests are affected by decision

31. Where it is necessary for the purposes of this Act to decide whether the interests of a person are affected by a decision, that matter shall be decided by the Tribunal and, if the Tribunal decides that the interests of a person are affected by a decision, the decision of the Tribunal is conclusive.

Representation before Tribunal

32. At the hearing of a proceeding before the Tribunal, a party to the proceeding may appear in person or may be represented by some other person.

Procedure of Tribunal

33. (1) In a proceeding before the Tribunal:
- (a) the procedure of the Tribunal is, subject to this Act and the regulations and to any other enactment, within the discretion of the Tribunal;
 - (b) the proceeding shall be conducted with as little formality and technicality, and with as much expedition, as the requirements of this Act and of every other relevant enactment and a proper consideration of the matters before the Tribunal permit; and
 - (c) the Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate.
- (1A) The President may authorise a member to hold a directions hearing in relation to a proceeding.
- (2) For the purposes of subsection (1), directions as to the procedure to be followed at or in connection with the hearing of a proceeding before the Tribunal may be given:
- (a) where the hearing of the proceeding has not commenced—by a person holding a directions hearing in relation to the proceeding, by the President or by a member authorized by the President to give directions for the purposes of this paragraph; and

- (b) where the hearing of the proceeding has commenced—by the member presiding at the hearing or by any other member authorized by the member presiding to give such directions.
- (2A) Without limiting the operation of this section, a direction as to the procedure to be followed at or in connection with the hearing of a proceeding before the Tribunal may:
- (a) require any person who is a party to the proceeding to provide further information in relation to the proceeding; or
 - (b) require the person who made the decision to provide a statement of the grounds on which the application will be resisted at the hearing; or
 - (c) require any person who is a party to the proceeding to provide a statement of matters or contentions upon which reliance is intended to be placed at the hearing.
- ...
- (4) An authorization by the President under this section to give directions as to the procedure to be followed at or in connection with the hearing of a proceeding may be of general application or may relate to the hearing of a particular proceeding or particular proceedings or to proceedings included within a class or classes of proceedings.

Conferences

34. (1) Where an application is made to the Tribunal for a review of a decision, the President may, if he thinks it desirable to do so, direct the holding of a conference of the parties or their representatives presided over by the President or another presidential member, by a non-presidential member assigned to the relevant Division or by an officer of the Tribunal.
- (2) The President may also direct that such a conference is to be held in the case of applications made to the Tribunal for a review of a decision of a kind specified in the direction.
- (3) At the hearing of a proceeding before the Tribunal, unless the parties otherwise agree, evidence shall not be given, and statements shall not be made, concerning any words spoken or act done at a conference held in accordance with this section.
- (4) If:
- (a) a conference held in accordance with this section in respect of a proceeding is presided over by a member of the Tribunal; and
 - (b) a party to the proceeding who, or a representative of whom, was present at the conference notifies the Tribunal before, or at the commencement of, the hearing that he objects to that member participating in the hearing;
- that member is not entitled to be a member of the Tribunal as constituted for the purposes of the proceeding.

Mediation

- 34A. (1) Where an application is made to the Tribunal for a review of a decision, the President may, if he or she thinks it desirable to do so and the parties consent, direct that the proceeding, or any part of the proceeding or any matter arising out of the proceeding, be referred to a mediator for mediation.
- (2) A mediator is to be a member or officer of the Tribunal directed by the President to mediate in the particular case.
- (3) A direction may be given under subsection (1) whether or not a conference under section 34 has also been held in relation to the proceeding.
- (4) If, in the course of a mediation:
- (a) agreement is reached between the parties or their representatives as to the terms of a decision of the Tribunal in the proceeding or in relation to the part of the proceeding or the matter arising out of the proceeding that would be acceptable to the parties; and
 - (b) the terms of the agreement are reduced to writing, signed by or on behalf of the parties and lodged with the Tribunal; and
 - (c) the Tribunal is satisfied that a decision in those terms or consistent with those terms would be within the powers of the Tribunal; the Tribunal may, if it appears to it to be appropriate to do so, act in accordance with whichever of subsection (5) or (6) is relevant in the particular case.
- (5) If the agreement reached is to the terms of a decision of the Tribunal in the proceeding, the Tribunal may, without holding a hearing of the proceeding, make a decision in accordance with those terms.
- (6) If the agreement relates to a part of the proceeding or a matter arising out of the proceeding, the Tribunal may, in its decision in the proceeding, give effect to the terms of the agreement without dealing at the hearing of the proceeding with the part of the proceeding or the matter arising out of the proceeding, as the case may be, to which the agreement relates.
- (7) Except at the hearing of a proceeding before the Tribunal where the parties otherwise agree, evidence of anything said or act done at a mediation is not admissible in any court or in any proceedings before a person authorised by a law of the Commonwealth or of a State or Territory, or by the consent of the parties, to hear evidence.
- (8) A person who mediates in respect of a proceeding may not be a member of the Tribunal as constituted for the purposes of the proceeding other than for the purpose of the Tribunal making a decision in accordance with subsection (5) or (6) or dismissing under subsection 42A(1) or (2) the application giving rise to the proceeding.

Hearings to be in public except in special circumstances

35. (1) Subject to this section, the hearing of a proceeding before the Tribunal shall be in public.
- ...

Participation by telephone etc.

- 35A. A person holding a directions hearing or presiding over a conference mentioned in section 34, a mediator conducting a mediation under section 34A and the Tribunal in the hearing of a proceeding may allow a person to participate by:
- (a) telephone; or
 - (b) closed-circuit television; or
 - (c) any other means of communication.

Disclosure not required: Attorney-General's public interest certificate

36. (1) If the Attorney-General certifies, by writing signed by him, that the disclosure of information concerning a specified matter, or the disclosure of any matter contained in a document, would be contrary to the public interest:
- (a) by reason that it would prejudice the security, defence or international relations of Australia;
 - (b) by reason that it would involve the disclosure of deliberations or decisions of the Cabinet or of a Committee of the Cabinet; or
 - (c) for any other reason specified in the certificate that could form the basis for a claim by the Crown in right of the Commonwealth in a judicial proceeding that the information or the matter contained in the document should not be disclosed; the following provisions of this section have effect.
- (2) A person who is required by or under this Act to disclose the information or to produce to, or lodge with, the Tribunal the document in which the matter is contained for the purposes of a proceeding is not excused from the requirement but the Tribunal shall, subject to subsection (3) and to section 46, do all things necessary to ensure that the information or the matter contained in the document is not disclosed to any person other than a member of the Tribunal as constituted for the purposes of the proceeding, and, in the case of a document produced to or lodged with the Tribunal, to ensure the return of the document to the person by whom it was produced or lodged.
- (4) In considering whether information or matter contained in a document should be disclosed as mentioned in subsection (3), the Tribunal shall take as the basis of its consideration the principle that it is desirable in the interest of securing the effective performance of the functions of the Tribunal that the parties to a proceeding should be made aware of all relevant matters but shall pay due regard to any reason specified by the Attorney-General in the certificate as a reason why the disclosure of the information or of the matter contained in the document, as the case may be, would be contrary to the public interest.

Disclosure not required: State Attorney-General's public interest certificate

- 36B. (1)** If the Attorney-General of a State certifies, by writing signed by him or her, that the disclosure of information concerning a specified matter, or the disclosure of any matter contained in a document, would be contrary to the public interest:
- (a) by reason that it would involve the disclosure of deliberations or decisions of the Cabinet, or of a Committee of the Cabinet, of the State; or
 - (b) for any other specified reason that could form the basis for a claim by the Crown in right of the State in a judicial proceeding that the information or the matter contained in the document should not be disclosed; the following provisions of this section have effect.
- (2)** A person who is required by or under this Act to disclose the information, or to produce to, or lodge with, the Tribunal the document in which the matter is contained, for the purposes of a proceeding is not excused from the requirement, but the Tribunal shall, subject to subsection (3) and to section 46, do all things necessary to ensure that the information, or the matter contained in the document, is not disclosed to any person other than a member of the Tribunal as constituted for the purposes of the proceeding, and, in the case of a document produced to or lodged with the Tribunal, to ensure the return of the document to the person by whom it was produced or lodged.
- ...
- (5)** In considering whether information, or matter contained in a document, should be disclosed as mentioned in subsection (3), the Tribunal shall take as the basis of its consideration the principle that it is desirable in the interest of securing the effective performance of the Tribunal's functions that the parties to a proceeding should be made aware of all relevant matters, but shall pay due regard to any reason that the Attorney-General of the State has specified in the certificate as a reason why the disclosure of the information, or of the matter contained in the document, as the case may be, would be contrary to the public interest.
- ...

Lodging of material documents with Tribunal

- 37. (1)** A person who has made a decision that is the subject of an application for a review by the Tribunal shall, within 28 days after receiving notice of the application, lodge with the Tribunal such number of copies as is prescribed of:
- (a) a statement setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision; and
 - (b) every other document or part of a document that is in his possession or under his control and is considered by him to be relevant to the review of the decision by the Tribunal.
- ...

- (2) Where the Tribunal is of the opinion that particular other documents or that other documents included in a particular class of documents may be relevant to the review of the decision by the Tribunal, the Tribunal may cause to be served on the person a notice in writing stating that the Tribunal is of that opinion and requiring the person to lodge with the Tribunal, within a time specified in the notice, the prescribed number of copies of each of those other documents that is in his possession or under his control, and a person on whom such a notice is served shall comply with the notice.
- (3) This section has effect notwithstanding any rule of law relating to privilege or the public interest in relation to the production of documents.
- ...

Power of Tribunal to obtain additional statements

38. Where the Tribunal considers that a statement referred to in paragraph 37 (1)(a) that is lodged by a person with the Tribunal does not contain adequate particulars of findings on material questions of fact, an adequate reference to the evidence or other material on which those findings were based or adequate particulars of the reasons for a decision, the Tribunal may order that person to lodge with the Tribunal, within a time specified in the order, an additional statement or additional statements containing further and better particulars in relation to matters specified in the order with respect to those findings, that evidence or other material or those reasons.

Opportunity to make submissions concerning evidence

39. Subject to sections 35, 36 and 36B, the Tribunal shall ensure that every party to a proceeding before the Tribunal is given a reasonable opportunity to present his case and, in particular, to inspect any documents to which the Tribunal proposes to have regard in reaching a decision in the proceeding and to make submissions in relation to those documents.

Powers of Tribunal etc.

40. (1) For the purpose of reviewing a decision, the Tribunal may:
- (a) take evidence on oath or affirmation;
 - (b) proceed in the absence of a party who has had reasonable notice of the proceeding; and
 - (c) adjourn the proceeding from time to time.
- (1A) Subject to subsection (1B), for the purposes of the hearing of a proceeding before the Tribunal, the member presiding at the hearing, the Registrar, or a Deputy Registrar may summon a person to appear before the Tribunal at that hearing:
- (a) to give evidence; or
 - (b) to give evidence and produce any books, documents or things in the possession, custody or control of the person or persons named in the summons that are mentioned in the summons; or

- (c) to produce any books, documents or things in the possession, custody or control of the person or persons named in the summons that are mentioned in the summons.
- (1B) A summons under subsection (1A) may require a person to appear at a directions hearing to produce books, documents or things instead of at the hearing before the Tribunal.

...

- (2) The member who presides at the hearing of a proceeding before the Tribunal:
 - (a) may require a person appearing before the Tribunal at that hearing to give evidence either to take an oath or to make an affirmation; and
 - (b) may administer an oath or affirmation to a person so appearing before the Tribunal; and
 - (c) if a person participates by a means allowed under section 35A, may make such arrangements as appear to the member to be appropriate in the circumstances in relation to administering an oath or affirmation to the person.

...

- (4) A person summoned to appear before the Tribunal may request that he be represented by counsel or a solicitor and upon such request being made the Tribunal may allow such person to be represented.

...

- (7) The application of this section extends to a directions hearing, a conference mentioned in section 34 or a mediation under section 34A (an "incidental proceeding") as if it were a proceeding before the Tribunal and a power that under this section is conferred on the Tribunal or a member of the Tribunal for the purpose of reviewing a decision may be exercised for the purposes of an incidental proceeding by the person holding the directions hearing or the conference, or the mediator, as the case may be.

Operation and implementation of a decision that is subject to review

- 41. (1) Subject to this section, the making of an application to the Tribunal for a review of a decision does not affect the operation of the decision or prevent the taking of action to implement the decision.
- (2) The Tribunal or a presidential member may, on request being made, as prescribed, by a party to a proceeding before the Tribunal (in this section referred to as the "relevant proceeding"), if the Tribunal or presidential member is of the opinion that it is desirable to do so after taking into account the interests of any persons who may be affected by the review, make such order or orders staying or otherwise affecting the operation or implementation of the decision to which the relevant proceeding relates or a part of that decision as the Tribunal or presidential member considers appropriate for the purpose of securing the effectiveness of the hearing and determination of the application for review.

...

Manner in which questions to be decided

42. (1) A question of law arising in a proceeding before the Tribunal at which a presidential member is presiding (including the question whether a particular question is one of law) shall be decided in accordance with the opinion of the member presiding.
- (2) Subject to subsection (1), when the members constituting the Tribunal for the purposes of a particular proceeding are divided in opinion as to the decision to be made on any question:
- (a) if there is a majority of the one opinion—the question shall be decided according to the opinion of the majority; or
 - (b) in any other case—the question shall be decided according to the opinion of the member presiding.

...

Power of Tribunal where a proceeding is frivolous or vexatious

- 42B. (1) Where an application is made to the Tribunal for the review of a decision, the Tribunal may, at any stage of the proceeding, if it is satisfied that the application is frivolous or vexatious:
- (a) dismiss the application; and
 - (b) if the Tribunal considers it appropriate, on the application of a party to the proceedings, direct that the person who made the application must not, without leave of the Tribunal, make a subsequent application to the Tribunal of a kind or kinds specified in the direction.
- (2) A direction given by the Tribunal under paragraph (1)(b) has effect despite any other provision of this Act or a provision of any other Act.
- (3) The Tribunal may discharge or vary such a direction.

Power of Tribunal if parties reach agreement

- 42C. (1) If, at any stage of a proceeding for a review of a decision:
- (a) agreement is reached between the parties or their representatives as to the terms of a decision of the Tribunal in the proceeding or in relation to a part of the proceeding or a matter arising out of the proceeding that would be acceptable to the parties (other than an agreement reached in the course of a mediation under section 34A); and
 - (b) the terms of the agreement are reduced to writing, signed by or on behalf of the parties and lodged with the Tribunal; and (c) the Tribunal is satisfied that a decision in those terms or consistent with those terms would be within the powers of the Tribunal; the Tribunal may, if it appears to it to be appropriate to do so, act in accordance with whichever of subsection (2) or (3) is relevant in the particular case.
- (2) If the agreement reached is to the terms of a decision of the Tribunal in the proceeding, the Tribunal may make a decision in accordance with those terms without holding a hearing of the proceeding or, if a hearing has commenced, without completing the hearing.

- (3) If the agreement relates to a part of the proceeding or a matter arising out of the proceeding, the Tribunal may in its decision in the proceeding give effect to the terms of the agreement without, if it has not already done so, dealing at the hearing of the proceeding with the part of the proceeding or the matter arising out of the proceeding, as the case may be, to which the agreement relates.

Review by Tribunal

43. (1) For the purpose of reviewing a decision, the Tribunal may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision and shall make a decision in writing:
 - (a) affirming the decision under review;
 - (b) varying the decision under review; or
 - (c) setting aside the decision under review and:
 - (i) making a decision in substitution for the decision so set aside; or
 - (ii) remitting the matter for reconsideration in accordance with any directions or recommendations of the Tribunal.
- (2) Subject to this section and to sections 35 and 36D, the Tribunal shall give reasons either orally or in writing for its decision.

...

- (5A) Subject to subsection (5B), a decision of the Tribunal comes into operation forthwith upon the giving of the decision.
- (5B) The Tribunal may specify in a decision that the decision is not to come into operation until a later date specified in the decision and, where a later date is so specified, the decision comes into operation on that date.
- (6) A decision of a person as varied by the Tribunal, or a decision made by the Tribunal in substitution for the decision of a person, shall, for all purposes (other than the purposes of applications to the Tribunal for a review or of appeals in accordance with section 44), be deemed to be a decision of that person and, upon the coming into operation of the decision of the Tribunal, unless the Tribunal otherwise orders, has effect, or shall be deemed to have had effect, on and from the day on which the decision under review has or had effect.

...

Appeals to Federal Court of Australia from decisions of the Tribunal

44. (1) A party to a proceeding before the Tribunal may appeal to the Federal Court of Australia, on a question of law, from any decision of the Tribunal in that proceeding.
- ...
- (4) The Federal Court of Australia shall hear and determine the appeal and may make such order as it thinks appropriate by reason of its decision.
 - (5) Without limiting by implication the generality of subsection (4), the orders that may be made by the Federal Court of Australia on an appeal include an order affirming or setting aside the decision of the Tribunal and an order

remitting the case to be heard and decided again, either with or without the hearing of further evidence, by the Tribunal in accordance with the directions of the Court.

- (6) If the Federal Court of Australia makes an order remitting a case to be heard and decided again by the Tribunal, the Tribunal need not be constituted for the hearing by the person or persons who made the decision to which the appeal relates.

...

Reference of questions of law to Federal Court of Australia

45. (1) The Tribunal may, of its own motion or at the request of a party, refer a question of law arising in a proceeding before the Tribunal to the Federal Court of Australia for decision but:
- (a) in the case of a proceeding before the Tribunal constituted by 2 or more members at which a presidential member presides—a question shall not be so referred without the concurrence of that presidential member; or
 - (b) in the case of a proceeding before the Tribunal at which a presidential member does not preside—a question shall not be so referred without the concurrence of the President.
- (2) The Federal Court of Australia has jurisdiction to hear and determine a question of law referred to it under this section and that jurisdiction shall be exercised by that Court constituted as a Full Court.

...

PART V—ADMINISTRATIVE REVIEW COUNCIL

...

Establishment of Council

48. There is hereby established a Council by the name of the Administrative Review Council.

Composition of Council

49. (1) The Council shall consist of:
- (a) the President;
 - (b) the Commonwealth Ombudsman holding office under the *Ombudsman Act 1976*;
 - (c) the President of the Law Reform Commission established by the *Law Reform Commission Act 1973*; and
 - (d) not less than 3 nor more than 10 other members.
- (2) The members referred to in paragraph (1)(d) shall be appointed by the Governor-General and shall be appointed as part-time members.

...

Qualifications for appointment

50. A person shall not be appointed as a member referred to in paragraph 49(1)(d) unless he has had extensive experience at a high level in industry, commerce, public administration, industrial relations, the practice of a profession or the service of a government or of an authority of a government or has an extensive knowledge of administrative law or public administration.

Functions and powers of Council

51. (1) The functions of the Council are:

- (a) to ascertain, and keep under review, the classes of administrative decisions that are not the subject of review by a court, tribunal or other body;
- (b) to make recommendations to the Minister as to whether any of those classes of decisions should be the subject of review by a court, tribunal or other body and, if so, as to the appropriate court, tribunal or other body to make that review;
- (c) to inquire into the adequacy of the law and practice relating to the review by courts of administrative decisions and to make recommendations to the Minister as to any improvements that might be made in that law or practice;
- (d) to inquire into the adequacy of the procedures in use by tribunals or other bodies engaged in the review of administrative decisions and to make recommendations to the Minister as to any improvements that might be made in those procedures;
- (e) to make recommendations to the Minister as to the manner in which tribunals engaged in the review of administrative decisions should be constituted;
- (f) to make recommendations to the Minister as to the desirability of administrative decisions that are the subject of review by tribunals other than the Administrative Appeals Tribunal being made the subject of review by the Administrative Appeals Tribunal; and
- (g) to make recommendations to the Minister as to ways and means of improving the procedures for the exercise of administrative discretions for the purpose of ensuring that those discretions are exercised in a just and equitable manner.

PART VI—MISCELLANEOUS**Advisory opinions**

59. If an enactment so provides, the Tribunal may give an advisory opinion on a matter or question referred to it in accordance with the enactment and, for the purpose of giving such an opinion, the Tribunal may hold such hearings and inform itself in such manner as it thinks appropriate.

Protection of members, mediators, barristers and witnesses

60. (1) A member has, in the performance of his duties as a member, the same protection and immunity as a Justice of the High Court.
- (1A) A mediator has, in the performance of his or her duties as a mediator under this Act, the same protection and immunity as a Justice of the High Court.
- (2) A barrister, solicitor or other person appearing before the Tribunal on behalf of a party has the same protection and immunity as a barrister has in appearing for a party in proceedings in the High Court.
- (3) Subject to this Act, a person summoned to attend or appearing before the Tribunal as a witness has the same protection, and is, in addition to the penalties provided by this Act, subject to the same liabilities, as a witness in proceedings in the High Court.

Failure to comply with summons

61. (1) A person served, as prescribed, with a summons to appear as a witness before the Tribunal shall not, without reasonable excuse:
- (a) fail to attend as required by the summons; or
 - (b) fail to appear and report himself from day to day unless excused, or released from further attendance, by a member.
- Penalty: \$1,000 or imprisonment for 3 months.
- (2) A person served, as prescribed, with a summons under this Act to produce a book, document or thing must not, without reasonable excuse, fail to comply with the summons.
- Penalty: \$1,000 or imprisonment for 3 months.

Refusal to be sworn or to answer questions

62. A person appearing as a witness before the Tribunal shall not, without reasonable excuse:
- (a) when required in pursuance of section 40 either to take an oath or make an affirmation—refuse or fail to comply with the requirement;
 - (b) refuse or fail to answer a question that he is required to answer by the member presiding at the proceeding; or
 - (c) refuse or fail to produce a document that he was required to produce by a summons under this Act served on him as prescribed.
- Penalty: \$1,000 or imprisonment for 3 months.
- ...

Extended operation of certain provisions

- 62B. Sections 61, 62 and 62A apply in relation to a directions hearing, a conference mentioned in section 34 or a mediation under section 34A as if it were a proceeding before the Tribunal.

Contempt of Tribunal

63. A person shall not:
- (a) insult a member in or in relation to the exercise of his powers or functions as a member;
 - (b) interrupt the proceedings of the Tribunal;
 - (c) create a disturbance, or take part in creating or continuing a disturbance, in or near a place where the Tribunal is sitting; or
 - (d) do any other act or thing that would, if the Tribunal were a court of record, constitute a contempt of that court.
- Penalty: \$1,000 or imprisonment for 3 months.
- ...

Fees for witnesses

67. (1) A person summoned to appear as a witness before the Tribunal is entitled to be paid fees, and allowances for expenses, fixed by or in accordance with the regulations in respect of his attendance.
- (2) Subject to subsection (3), the fees and allowance shall be paid:
- (a) in a case where the witness was summoned at the request of a party other than the person who made the decision subject to review—by that party; and
 - (b) in any other case—by the Commonwealth.
- (3) The Tribunal may, in its discretion, order that the fees and allowances of a witness referred to in paragraph (2)(a) shall be paid, in whole or in part, by the Commonwealth.
- ...

Legal assistance

69. (1) A person who:
- (a) has made, or proposes to make, an application to the Tribunal for a review of a decision;
 - (b) is a party to a proceeding before the Tribunal instituted by another person; or
 - (c) proposes to institute a proceeding, or is a party to a proceeding instituted, before a court in respect of a matter arising under this Act; may apply to the Attorney-General for the provision of assistance under this section in respect of the proceeding.
- (2) Where an application is made by a person under subsection (1), the Attorney-General may, if he is satisfied that it would involve hardship to that person to refuse the application and that, in all the circumstances, it is reasonable that the application should be granted, authorize the provision by the Commonwealth to that person, either unconditionally or subject to such conditions as the Attorney-General determines, of such legal or financial assistance in relation to the proceeding as the Attorney-General determines.

APPENDIX C

KEY PROVISIONS OF THE INDONESIAN ADMINISTRATIVE JUSTICE ACT 1986

THE PEOPLE'S REPRESENTATIVE COUNCIL
OF THE REPUBLIC OF INDONESIA*

DETERMINES

To provide for: An Act regarding State administrative justice.

CHAPTER I GENERAL PROVISIONS

PART ONE

Interpretation

Article 1

In this Act:

- (1) State Administration is the process of carrying out the functions of implementing the affairs of both central and regional government;
- (2) A State Administrative Body or Official is a body or official which implements the affairs of government on the basis of operative law;
- (3) A State Administrative Decision is a written determination handed down by an administrative body or official containing a legal act of State Administration based on operative law which is of a concrete, individual and final nature and which creates legal consequences for a person or civil law body;
- (4) A State Administrative Dispute is a dispute arising in the arena of State Administration between a person or civil law body and a State Administrative Body or Official at the central or regional level as a result of the handing down of a State Administrative Decision under operative law, and includes public service disputes;
- (5) A Claim is a request in the form of a demand made to a State Administrative Body or Official and submitted to a Court for judgement;

* This translation of the *Administrative Justice Act 1986* is taken from the Appendix to B Quinn *Indonesia's Administrative Justice Act of 1986: Implications for Legal and Bureaucratic Culture* a sub-thesis submitted in partial fulfilment of the degree of Honours in Asian Studies, Australian National University, 1994.

- (6) The Defendant is the State Administrative Body or Official who hands down a decision on the basis of the authority vested or delegated to them which is being challenged by the person or civil law body;
- (7) The Court is the State Administrative Court and/or the State Administrative Appeal Court in the jurisdiction of State Administrative Justice;
- (8) The Judge is a Judge of the Administrative Court and/or the Administrative Appeal Court.

Article 2

The following are not included within the definition of a State Administrative Decision within the meaning of this Act:

- (a) State Administrative Decisions which represent a civil law activity;
- (b) State Administrative Decisions which represent regulations of a general nature;
- (c) State Administrative Decisions which still require assent;
- (d) State Administrative Decisions which are handed down on the basis of provisions of the Criminal Law Code or the Criminal Law Procedure Code or other laws of a criminal nature;
- (e) State Administrative Decisions which are handed down on the basis of an investigation by a judicial body on the basis of the provisions of operative law;
- (f) State Administrative Decisions regarding the administration of the Armed Forces of the Republic of Indonesia;
- (g) A decision of the Indonesian Electoral Commission, both central and regional, regarding the results of a general election.

Article 3

- (1) When a State Administrative Body or Official fails to hand down a decision when it is their obligation to do so such failure shall be considered to be a State Administrative Decision.
- (2) When a State Administrative Body or Official fails to hand down the requested decision, and the time period specified by law within which the decision must be made has elapsed, the Administrative Body or Official shall be considered to have refused to hand down the requested decision.
- (3) In cases where the relevant law does not specify a time period for making a decision for the purposes of paragraph (2), then after the lapse of four months from the date of receiving the request the relevant Administrative Body or Official shall be considered to have handed down a decision refusing the request.

PART TWO

Status

Article 4

The State Administrative Justice system is one of the organs of judicial power through which the people may seek justice in administrative disputes.

Article 5

- (1) Judicial power in the jurisdiction of Administrative Justice is exercised by:
- (a) State Administrative Courts;
 - (b) State Administrative Appeal Courts.
- (2) Judicial power in the jurisdiction of State Administrative Justice climaxes at the Supreme Court as the Highest National Court.

PART THREE**Location of Courts****Article 6**

- (1) State Administrative Courts sit in the main or capital city of each regency, and their jurisdiction will cover the area of that regency.
- (2) State Administrative Appeal Courts sit in the capital city of each province, and their jurisdiction shall cover the territory of the province.

PART FOUR**Formation****Article 7**

- (1) The technical development of the justice system for the Court shall be implemented by the Supreme Court.
- (2) The development of the organisation, administration and finances of the Court shall be implemented by the Department of Justice.
- (3) The development of the Court as provided for by paragraph (1) and paragraph (2) shall not diminish the independence of the Judges in investigating and deciding Administrative Disputes.

CHAPTER II**COMPOSITION OF THE COURT****PART ONE****General****Article 8**

The Court shall comprise:

- (a) The State Administrative Court which represents a court of first instance;
- (b) The State Administrative Appeal Court which represents an appellate court.

Article 9

The Administrative Courts shall be created by Presidential Decision.

Article 10

The Administrative Appeal Courts shall be created by an enactment.

Article 11

- (a) The Court comprises an Executive, a Judicial Bench, a Clerk and a Secretary.
- (b) The Executive comprises a Chairperson and a Deputy Chairperson.
- (c) The Judicial Bench of the Administrative Appeal Court is the High Bench.

...

Article 14

- (1) To be appointed as a Judge of the State Administrative Court, a candidate must fulfil the following conditions:
 - (a) be an Indonesian citizen;
 - (b) be devoted to the belief in one Almighty God;
 - (c) be faithful to the *Pancasila* and the Constitution of 1945;
 - (d) not be a former member of the banned Indonesian Communist Party or any of its mass organisations and not be a person who was directly or indirectly involved in "the Indonesian Communist Party's Counter Revolutionary Movement of 30th September (G.30.S/PKI)" or any prohibited organisations;
 - (e) be a public servant;
 - (f) be a law graduate or a graduate in another discipline with expertise in the field of State Administration;
 - (g) be at least twenty five years of age;
 - (h) be responsible, honest, just and not of culpable character.
- (2) To be appointed as Chairperson or Deputy Chairperson of an Administrative Court at least ten years experience as a Judge of the Administrative Court is required.

...

CHAPTER III

THE POWERS OF THE COURT

Article 47

The Court has the duty and the authority to hear, decide and settle all Administrative Disputes.

Article 48

- (1) In the case where a State Administrative Body or Official is given the authority by or on the basis of law to settle certain disputes through administrative review processes then such Administrative Disputes must be settled through those existing avenues of administrative review.
- (2) The Court shall only have jurisdiction to hear, decide and settle an administrative dispute of the type referred to in paragraph (1) when all the relevant existing avenues of administrative review have been exhausted.

Article 49

The Court shall not have jurisdiction to hear, decide and settle an Administrative Dispute in cases where the decision under dispute is handed down:

- (a) during war time, states of emergency, conditions of natural disaster or other situations of extraordinary danger; or
- (b) in situations which are, on the basis of law, of pressing public interest.

Article 50

Administrative Courts have the duty and authority to hear, decide and settle Administrative Disputes at first instance.

Article 51

- (1) The Administrative Appeal Court has the duty and authority to hear and decide Administrative Disputes at the appeal level.
- (2) The Administrative Appeal Court also has the duty and authority to hear and decide at first and final instance jurisdictional disputes arising between the Administrative Courts within its jurisdiction.
- (3) The Administrative Appeal Court has the duty and authority to hear, decide and settle at first instance Administrative Disputes falling within Article 48.
- (4) A decision of the Administrative Appeal Court under paragraph (3) is subject to a request for cassation.

...

CHAPTER IV**RULES OF PROCEDURE****PART ONE****Claims****Article 53**

- (1) An individual or civil law body who feels that their interests have been injured by a State Administrative Decision may submit a written claim to the competent Court containing a demand that the Administrative Decision under dispute be declared void or invalid, with or without an accompanying demand for compensation and/or rehabilitation.
- (2) Reasons which may be used in a claim made under paragraph (1) are:
 - (a) The State Administrative Decision under challenge conflicts with operative law;
 - (b) The State Administrative Body or Official, in making the decision under challenge, had used their authority for a purpose other than that for which it was granted;
 - (c) The State Administrative Body or Official, in making or failing to make the decision under challenge, after taking into account all the interests affected by the decision, should not have made or failed to make that decision.

...

Article 56

- (1) The claim must contain:
 - (a) the name, nationality, place of residence and occupation of the claimant or his or her representative;
 - (b) the name, position and location of the defendant;
 - (c) the basis of the claim and the matter which the Court is requested to decide.
- (2) When a claim is made and signed by a representative of the claimant the claim must be accompanied by a valid delegation of authority.
- (3) The claim must, whenever possible, be accompanied by the Administrative Decision disputed by the claimant.

...

Article 62

- (1) In a consultative meeting, the Chairperson of the Court has authority to decide via a declaration with accompanying evaluation that the submitted claim is rejected or without basis for the reason that:
 - (a) the basis of the claim does not fall within the jurisdiction of the Court;
 - (b) the conditions contained in Article 56 have not been fulfilled by the claimant despite him or her having been informed and reminded of them;
 - (c) the claim is not based upon acceptable grounds;
 - (d) the demands made in the claim have already been met by the Administrative Decision under challenge;
 - (e) the claim was submitted prematurely or after the expiry of the prescribed time limit.
- (2)
 - (a) A declaration made under paragraph (1) shall be announced in the consultative meeting after summoning the disputants to listen to it, before the hearing date is fixed;
 - (b) the summoning of the disputants shall be executed by registered letter from the Clerk of the Court by order of the Chairperson of the Court.
- (3)
 - (a) An objection to the determination made under paragraph (1) may be submitted to the Court within a period of fourteen days after the declaration is announced;
 - (b) Such an objection shall be submitted in accordance with the provisions of Article 56.
- (4) An objection lodged under paragraph (3) shall be heard and decided by the Court in accelerated proceedings.
- (5) In the case of the objection being upheld by the Court the declaration under paragraph (1) fails in law and the basis of the claim shall be heard, decided and settled in standard proceedings.
- (6) No legal avenue is available to challenge a decision on an objection.

Article 63

- (1) Before investigation of the basis of the dispute commences, the Judge is obliged to hold a preparatory hearing to clarify a claim which is ambiguous.
- (2) In the preparatory hearing under paragraph (1) the Judge:
 - (a) is obliged to advise the claimant to improve the claim and complete it with the data required within a period of thirty days;
 - (b) may request an explanation of the State Administrative Body or Official party to the dispute.
- (3) When the claimant fails to complete their claim within the time period specified in paragraph (2), the Judge may declare that the claim will not be accepted.
- (4) A decision under paragraph (3) is not subject to legal challenge, but a new claim may be submitted.

...

PART TWO**The Hearing at First Instance**

...

Article 83

- (1) For the duration of the hearing, any person who has an interest in the dispute of another party currently being heard by the Court, either on their own initiative via submission of a request or on the Judge's initiative, may participate in the Administrative Dispute, acting as:
 - (a) a party defending their rights; or
 - (b) a party to a joint action with one of the other disputing parties.
- (2) A request under paragraph (1) may be granted or refused by the Court in a decision included in the report of the hearing proceedings.
- (3) A decision of the Court under paragraph (2) is not subject to an independent right of appeal, but must be appealed in conjunction with an appeal against the final decision on the central claim.

...

Article 97

...

- (7) The decision of the Court may be in the form of:
 - (a) rejection of the claim;
 - (b) upholding the claim;
 - (c) refusal to accept the claim;
 - (d) dropping of the claim.
- (8) Where the claim is upheld, the Court decision may specify the obligation which must be undertaken by the State Administrative Body or Official responsible for handing down the Administrative Decision.
- (9) Obligations imposed under paragraph (8) may be in the following forms:
 - (a) revocation of the Administrative Decision under dispute; or

- (b) revocation of the Administrative Decision under dispute and the creation of a new Administrative Decision; or
 - (c) in the case of a claim based upon Article 3, the issuing of an Administrative Decision.
- (10) Obligations imposed under paragraph (9) may be accompanied by an obligation to pay compensation.
- (11) In the case of a Court decision made under paragraph (8) involving a public service dispute, in addition to an order under paragraph (9) and (10), an order of rehabilitation may also be granted.

...

PART FOUR

The Decision of the Court

Article 108

- (1) The Decision of the Court shall be announced at a public sitting.
- (2) When one or both of the parties are not in attendance at the time the Court's decision is announced a copy of the decision shall be forwarded by registered letter to the relevant party by order of the Chairing Judge of the Session.
- (3) Failure to comply with the provisions of paragraph (1) shall result in the Court's decision being invalid and without the force of law.

Article 109

- (1) The decision of the Court must contain;
 - (a) A heading of: "IN THE NAME OF JUSTICE BASED ON A BELIEF IN ONE ALMIGHTY GOD";
 - (b) the name, office, nationality, place of residence or location of the disputing parties;
 - (c) a precise summary of the claim and the reply of the defendant;
 - (d) a consideration and evaluation of all the evidence submitted and all the matters arising in the course of the hearing of the dispute;
 - (e) the legal reasoning forming the basis of the decision;
 - (f) the Court order awarded and the Court costs;
 - (g) the day and date of the decision, the names of the Judges on the bench, the name of the Clerk and a summary of the attendance or the non-attendance of the parties.
- (2) Failure to fulfil one of the provisions contained in paragraph (1) may render the Court decision void.

...

PART FIVE

Implementation of the Court Decision

Article 115

Only a Court decision which has received the force of law can be enforced.

Article 116

- (1) The Clerk of the Court shall, within fourteen days, send a copy of the legally enforceable Court decision to the disputing parties by registered letter by order of the Chairperson of the Court which heard the case at first instance.
- (2) When, within four months after the legally enforceable court decision has been sent to the disputants under paragraph (1), the defendant has not yet performed an obligation imposed under Article 97 paragraph (9) letter (a), the Administrative Decision under dispute shall cease to have the force of law.
- (3) Where the defendant is ordered to perform an obligation under Article 97 paragraph (9) letters (b) and (c) and those obligations have not been performed within three months the claimant may submit a request to the Chairperson of the Court referred to in paragraph (1) that the Court order the defendant to implement the Court decision.
- (4) If the defendant continues to fail to implement the Court decision, the Chairperson of the Court shall bring the matter to the notice of the defendant's superior authority.
- (5) The superior authority referred to in paragraph (4) shall, within two months of receiving notice from the Chairperson of the Court, instruct the relevant official to implement the Court decision as ordered under paragraph (3).
- (6) Where the superior authority referred to in paragraph (4) ignores the provisions of paragraph (5) the Chairperson of the Court shall appeal to the President as the holder of supreme government authority, to order the relevant official to carry out the Court decision.

Article 117

- (1) Where an obligation is imposed under Article 97 paragraph (11) and the defendant is unable or only partially able to implement a legally enforceable Court decision because of circumstances altering the situation after the decision was made and/or received the force of law, he or she is obliged to report this matter to the Chairperson of the Court referred to in section 116 paragraph (1) and the claimant.
- (2) Within a period of three days after receiving notice under paragraph (1) the claimant may submit a request to the Chairperson of the Court who sent the enforceable Court decision, that the defendant be obliged to pay a sum of money or other compensation he or she requests.
- (3) The Chairperson of the Court, after receiving a request under paragraph (2), shall order that the two parties be summoned to attempt to achieve an agreement as to the amount of money or other compensation which the defendant must pay.
- (4) When all attempts made to reach an agreement as to the sum of money or other compensation have failed, the Chairperson of the Court shall determine the sum of money or compensation in a declaration accompanied by an adequate evaluation.

- (5) The declaration of the Chairperson made under paragraph (4) may be submitted to the Supreme Court for redetermination by either the claimant or the defendant.
- (6) The decision of the Supreme Court made under paragraph (5) must be obeyed by both parties.

Article 118

- (1) Where the decision of the Court referred to in Article 116 paragraph (1) contains an obligation on the defendant under Article 97 paragraph (9), paragraph (10), and paragraph (11), a third party who has not yet participated in the dispute hearing under Article 83 and who is concerned that his or her interests may be injured by the implementation of the legally enforceable Court decision may lodge a challenge to the implementation of the decision at the Court which heard the case at first instance.
- (2) A challenge under paragraph (1) may only be lodged prior to the implementation of the legally enforceable Court decision and must contain reasons for the request in accordance with the provisions of Article 56; the provisions of Articles 62 and 63 also apply to such a challenge.
- (3) A challenge under paragraph (1) does not automatically result in the postponement of the implementation of a legally enforceable Court decision.

Article 119

The Chairperson of the Court is responsible for the supervision of the implementation of the legally enforceable Court decision.

PART SIX

Damages

Article 120

- (1) A copy of the Court decision containing an obligation to pay damages shall be sent to the claimant and the defendant within three days of the decision receiving the force of law.
- (2) A copy of the Court decision containing an obligation to pay damages referred to in paragraph (1) shall also be sent by the Court to the State Administrative Body or Official which is obliged to pay the damages within three days of the Court decision receiving the force of law.
- (3) The amount of damages and the manner of implementing the provisions of Article 97 paragraph (10) shall be more thoroughly regulated by Government Regulations.

PART SEVEN

Rehabilitation

Article 121

- (1) When a Public Service-related claim is upheld as referred to by Article 97 paragraph (11), a copy of the Court decision containing the obligation to undertake rehabilitation shall be sent to the claimant and the defendant within three days of the decision receiving the force of law.

- (2) A copy of the Court decision containing an obligation to undertake rehabilitation, referred to in paragraph (1) shall also be sent by the Court to the State Administrative Body or Official which is obliged to undertake the rehabilitation, within three days of the decision receiving the force of law.

PART EIGHT

Hearing at the Appeal Level

Article 122

A decision of the Administrative Court is subject to appeal to the Administrative Appeal Court by both the claimant and the defendant.

...

PART NINE

Hearing at the Cassation Level

Article 131

- (1) Request may be made for a cassation hearing in the Supreme Court, for a final level decision.
 - (2) The procedure for the cassation hearing under paragraph (1) shall be in accordance with the provisions of Article 55 paragraph (1) of Act Number 14 of 1985 Regarding the Supreme Court.
- ...

CHAPTER VI

TRANSITIONAL PROVISIONS

...

Article 143

- (1) When this Act first commences operation the Minister for Justice, taking into account the opinion of the Chairperson of the Supreme Court, shall control the appointment of Chairpersons, Deputy Chairpersons, Judges, clerks, Deputy Clerks, Junior Clerks, Relief Clerks and Deputy Secretary in all Courts of Administrative Justice.
- (2) The appointment of the office of Chairperson, Deputy Chairperson, Judge, Clerk, Deputy Clerk, Junior Clerk, Relief Clerk, and Deputy Secretary under paragraph (1) may depart from the other provisions of this Act.

APPENDIX C

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Aspects of Administrative Review in Australia and Indonesia

This book contains the papers delivered at the inaugural Australia-Indonesia Legal Seminar in Jakarta in 1995. The Seminar series, initiated by the Australian National University, is to be held on an annual basis alternating between Australia and Indonesia. Its establishment reflects the need for Australians and Indonesians to know more about each other's legal systems and the context in which they operate.

The first Seminar concentrated on examining and comparing administrative review systems in the two countries. The Australian system, developed largely during the last 20 years, includes the Commonwealth Administrative Appeals Tribunal, the Ombudsman, the Judicial Review Act and the Freedom of Information Act. A key feature of the Indonesian system, established only a few years ago, is the network of Administrative Courts operating under an Administrative Justice Act.

This book includes addresses and papers delivered at the Seminar by the Chief Justice, the Minister for Justice and the Attorney-General of Indonesia as well as by prominent Indonesian law reformers and judges. Australian authors include the head of the Administrative Appeals Tribunal, the head of the Commonwealth Attorney-General's Department and other prominent administrative lawyers. The opportunity has also been taken to publish the 1994 Australia Lecture, delivered in Jakarta by Sir Anthony Mason (then Chief Justice of the High Court of Australia).

