



## THE IMPLEMENTATION OF THE ADMINISTRATIVE COURTS' DECISIONS

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### Introduction

1 This is the first occasion on which Australia has taken part in the activities of the International Association of Supreme Administrative Jurisdictions. The Administrative Appeals Tribunal is honoured to have been invited to take part in your VIIIth Congress and looks forward to the possibility of working further with the Association in the future.

### Background

2 As delegates will know my background is in the common law. I practised as a private lawyer in the capacity of barrister and Queens Counsel in Australia for more than 30 years prior to being appointed to the position I now hold. In the latter part of that part of my career I became a member of the Inner Temple and practised as a barrister and arbitrator in England as well as Australia.

3 However, I am no stranger to civil law thinking or to European law. I have always taken a keen interest in continental European jurisprudence and administration. In addition, for many years I was very much involved in the activities of the Union Internationale des Avocats culminating in my becoming International President of that organisation and living in Paris in 1994 and 1995. I have attended "Rentrées" and other bar functions at the invitation of local bars in most of the major

cities of Europe. These include Madrid, Barcelona and Alicante. The annual congress of the UIA was held in the Hotel Meliá Castilla in Madrid in 1996.

### Administrative Law in Australia

4           Although Australia is a common law country its system of administrative law is different to the system of administrative law in all other common law countries including England. This is because of a series of reforms introduced by the Australian Government in the second half of the 1970's. In some respects the Australian system reflects continental European systems of administrative law. However, the common law system remains at the heart of the Australian system.

5           Australia is a federation. On 1 January 1901 the former British colonies came together as states in a federation called the Commonwealth of Australia. The federation was established by a constitution which was an enactment of the United Kingdom Parliament. Each of the states have their own government and legislature. But there is also a Commonwealth Government for the whole of Australia. The Constitution confers legislative power on a Commonwealth parliament with respect to specified topics. The legislative power of the states is unlimited except that they can not legislate in conflict with Commonwealth legislation on a topic on which the Commonwealth has legislative power.

6           In practice the Commonwealth Government is very powerful. It has legislative power with respect to foreign affairs and defence as well as a long list of other important subjects. One of these is taxation. This has, in practice, been the most significant of all the Commonwealth powers because it enables the Commonwealth Government to be the principal revenue raiser in Australia. This is achieved through the levy of income tax, capital gains tax and goods and services tax (value added tax). The states depend upon grants from the Commonwealth to finance much of their expenditure. This gives the Commonwealth substantial control over state activities. Education and health are basically state matters in Australia. However, many of the education and health programmes in Australia are controlled by the Commonwealth because they rely upon the expenditure of Commonwealth funds and those funds are only granted by the Commonwealth on condition that they are

expended in accordance with the Commonwealth's directions.

7           The ideas of Montesquieu, built upon by the founding fathers of the United States of America in its Constitution, were received by Australia's federationists with much acclaim. They are pivotal to the Australian Constitution.

8           The first three chapters of the Australian Constitution are devoted respectively to the Parliament (or the Legislature), the Executive Government (or the Administration) and the Judicature (or the Courts). The Administration can never exercise the judicial power of Courts. The Courts can never exercise administrative power. Legislation permitting a Commonwealth court to make an administrative decision would be ruled unconstitutional by the High Court of Australia. These concepts, which are not present in England, provide an important basis for understanding Australian administrative law and how it has developed.

9           The strict separation of administrative and judicial power is probably the ultimate reason why in the Commonwealth of Australia there is now a system for resolving disputes relating to matters of executive action which is separate from the ordinary courts. No similar system has developed in the United Kingdom or other common law countries. This Australian system has parallels to civil code systems of law.

10          Until the middle of the 1970's the Australian system of administrative law was very much like the system in England. Most final administrative decisions were taken within departments of state. Some administrative decisions were capable of being reviewed by specialist tribunals, particularly where rights of individuals were involved. Subjects such as planning and building approvals and payments of pensions come to mind. For other decisions the only available challenge was through the courts (judicial review). Over many years the courts had established a set of criteria which were applied to test whether an administrative decision was affected by error of law.

11          Administrative decision-making in the modern state is now very widespread and very complex. Most citizens of most states must now be subject to a number of

administrative decisions each year. One thinks of taxation assessments, driving licenses and the like. It was not always like this. However, the modern trend was apparent by the 1970's and those in Government in Australia began thinking about whether final decision-making on administrative matters effecting private rights should appropriately be made in secret, without reasons, and without opportunity for review on the merits.

12           The Australian Government set up a Committee to consider the existing mechanisms for review of administrative decisions. The landmark report of the Committee became a blueprint for a new approach to administrative decision-making in Australia at the Commonwealth level.

13           The most significant recommendation of the Committee was that there should be a general tribunal with power to reconsider afresh most Commonwealth administrative decisions. The recommendation was for reconsideration of the merits. The newly created tribunal would be able to choose freely between all the decision-making options available to the original decision-maker and exercise all the discretions conferred on that decision-maker.

14           The recommendations of the Committee ultimately led to the establishment of four acts of the Commonwealth Parliament. They were the *Administrative Appeals Tribunal Act 1975*, the *Federal Court of Australia Act 1976*, the *Ombudsman Act 1976* and the *Administrative Decisions (Judicial Review) Act 1977*.

#### The Administrative Appeals Tribunal

15           The *Administrative Appeals Tribunal Act* established the Administrative Appeals Tribunal to be a general tribunal for the review of Commonwealth administrative decisions. Jurisdiction was to be conferred upon it by individual acts of Parliament. Its decision-making would be based upon a hearing at which the applicant for the review and the original decision-maker would usually both be represented. It would give reasons for its decisions. The model for the practices and procedures of the Tribunal was a common law judicial model although its jurisdictions were not judicial but administrative.

16 To complement the merits review of administrative decisions provided for in the *Administrative Appeals Tribunal Act* the Commonwealth Parliament enacted the *Administrative Decisions (Judicial Review) Act* to provide for limited judicial review by the Federal Court of Australia, which had been newly created by the *Federal Court of Australia Act*.

17 The *Judicial Review Act* provided for general review of administrative decisions for error of law but with some limitations. Nearly all Commonwealth administrative decisions could be challenged for error of law under the *Judicial Review Act* in the Federal Court. However, only specifically designated administrative decisions could be challenged on their merits as well as for error of law in the Administrative Appeals Tribunal. Naturally, the jurisdiction of the Administrative Appeals Tribunal extended to correcting errors of law because the Tribunal would not remake or affirm a decision tainted by error of law.

18 The unique nature of the Australian Administrative Appeals Tribunal meant that many novel issues relating to the way in which a tribunal with many of the characteristics of a court should go about making its decisions needed to be resolved. One of these was how the Tribunal should characterise its decision-making role. This issue was resolved relatively early in its history when the Tribunal adopted as an appropriate description of its decision-making function that it should make “the correct or preferable decision” in each case: correct, when there was only one proper decision; preferable, when alternatives were available or a discretion was to be exercised.

19 The *Administrative Appeals Tribunal Act* provides that the decisions of the Administrative Appeals Tribunal shall be the final administrative decision subject only to an appeal to the Federal Court of Australia on a question of law. There is, in turn an appeal from the Federal Court of Australia, confined to error of law, to the final court in Australia, the High Court of Australia,

20 The High Court of Australia and the Federal Court of Australia form part of the judicial court system of Australia. They are part of the Judicature under the Australian Constitution. Each of the states and territories of Australia have their own

superior courts. The apex of the court system is the High Court of Australia which is a general court of appeal for all Australia. It hears appeals from state courts. In addition to the Federal Court of Australia there is also a Family Court of Australia and a Federal Magistrates' Court of Australia. The Federal Magistrates' Court is below the Federal and Family Courts of Australia in the judicial hierarchy.

21           It follows that although the Administrative Appeals Tribunal in Australia represents an approach to Administrative law which has parallels to some of the continental European systems, and particularly the system in France, the analogy is by no means complete. There is no complete separation of administrative and judicial courts. While the Administrative Appeals Tribunal is the final arbiter of administrative decisions as such, the Federal Court and ultimately the High Court can rule on questions of law. The ultimate decision, however, remains with the Administrative Appeals Tribunal. If the Federal Court answers a question of law differently to the Administrative Appeals Tribunal the matter must return to the Administrative Appeals Tribunal for reconsideration on the merits in accordance with the new determination of the law.

22           The Tribunal has developed rapidly since it was established more than 25 years ago. It began with a small number of members and a tiny jurisdiction. It now has more than 70 members and has jurisdiction conferred on it by nearly 400 acts of the Commonwealth Parliament. Most of the acts confer jurisdiction on the Tribunal in multiple areas. For example, the act governing the regulation of corporations confers jurisdiction on it to review virtually all decisions made under the *Corporations Act*.

23           The Administrative Appeals Tribunal has registries and hearing rooms in every state of Australia and in the Australian Capital Territory which is the site of Canberra, the home of the Commonwealth Government. Its wide jurisdiction includes decisions relating to aviation, bankruptcy, Commonwealth employees' compensation, corporations, customs and excise, environmental protection, freedom of information, health and aged care, heritage protection, higher education, immigration and citizenship, income support, industry, insurance and superannuation, national security, primary industries, professional qualifications,

social security (pensions), taxation, War Veterans' pensions and many other areas.

24           Before a matter is finally determined by the Administrative Appeals Tribunal it has usually been considered two or three times. The first decision will have been made by a minister of state, or delegate, or by that Minister's department or a government agency. The second decision, except where the decision is that of a minister, will be a review of the first decision within the department or agency. In many cases there is then reconsideration by an independent specialist tribunal. Social security, income support and similar decisions must first be reconsidered by the Social Security Appeals Tribunal before an application can be made to the Administrative Appeals Tribunal. War Veterans' pension decisions must be reconsidered by the Veterans' Review Board before an application can be made to the Administrative Appeals Tribunal. Certain immigration decisions must first be considered by the Migration Review Tribunal or the Refugee Review Tribunal before an application can be made to the Administrative Appeals Tribunal.

25           The Administrative Appeals Tribunal is directed by its President who must be a judge of the Federal Court of Australia. Although the President must be a judge the President does not exercise judicial power in the capacity of President of the Administrative Appeals Tribunal. Being a judge is simply a qualification for appointment. Once appointed the authority to act elsewhere as a judge is not relevant to the role as President of the Tribunal.

26           In addition to the President, federal judges may be appointed as members of the Tribunal. A number of judges of the Federal Court of Australia and the Family Court of Australia are members of the Tribunal. As with the President their holding office as judges is a qualification for appointment but they do not exercise judicial power when hearing and deciding matters in the Tribunal.

27           There are three other levels of membership of the Tribunal: Deputy President, Senior Member and Member. The deputy presidents are all lawyers. Most of the senior members are lawyers. Some of the members are lawyers. The members of the Tribunal who are not lawyers are mostly persons with a distinguished background in one or more professions or other areas of expertise which are of

relevance to the work of the Tribunal.

28 Tribunal members accordingly include accountants to deal with taxation cases and other matters where accounting expertise is helpful; actuaries for insurance and similar matters; aviators for airline and pilot licence matters; defence experts such as generals, admirals and air marshals to deal with war veterans' claims; medical practitioners both general and specialist to deal with injury claims and so on.

29 The Tribunal can hear matters with panels of one, two or three members. Most cases are now heard by single members of the Tribunal but multi member panels are used for important or difficult cases and cases requiring expertise outside the law.

30 The legislation establishing the Administrative Appeals Tribunal requires it to make a hearing the centrepiece of its reconsideration of an administrative decision. Accordingly, decisions are preceded by a hearing at which the claimant and the government agency are usually, but not always, represented by lawyers. At the hearing oral evidence is given and the witnesses are cross examined. Rulings are made as to whether written evidence should be received and considered by the Tribunal. However, the common law rules relating to the admissibility of evidence do not apply to the Tribunal. Nevertheless, a hearing in the Administrative Appeals Tribunal has distinct parallels to a hearing before a common law court.

31 The sole function of the Administrative Appeals Tribunal is to make decisions. Each decision must relate to a prior decision – the decision under review. In remaking the original decision, or a substituted decision replacing the original decision, the Administrative Appeals Tribunal may exercise all the powers and discretions that are conferred on the original decision-maker. The precise powers conferred upon the Administrative Appeals Tribunal are powers:

1. To affirm the decision under review.
2. To vary the decision under review.



3. To set aside the decision under review and –

(a) make a fresh decision in substitution for the decision under review; or

(b) remit the matter for reconsideration in accordance with any directions or recommendations of the Tribunal.

32 The Administrative Appeals Tribunal is not like a French administrative court. It has no general jurisdiction to decide disputes generally involving public functions. Its role is to review and remake government decisions affecting citizens and corporations. Disputes involving government action which do not involve the remaking of decisions are heard by the ordinary judicial courts in Australia.

#### The implementation of the Administrative Courts Decisions

33 The special role of the Administrative Appeals Tribunal is important to the topic of this Conference in a number of ways. They will be addressed below under each of the sub topics the Conference will consider. Broadly speaking two matters are of significance. First, since the Administrative Appeals Tribunal is remaking decisions of government the decisions as remade will be implemented without demur unless a decision is further challenged on the ground that its making involved error of law.

34 All decisions reconsidered by the Administrative Appeals Tribunal are government decisions which are basically to be implemented by government. They may involve the grant of a licence or the authorisation of conduct or the payment of compensation. Implementation will usually require nothing more than an act of government. The departments of state are bound to, and will, implement the decisions of the Tribunal. The second matter of significance is associated with the matters referred to above. Since the Administrative Appeals Tribunal is not a court it does not have enforcement powers. Indeed, if it did have enforcement powers it might be considered to have judicial powers contrary to the requirements of the Australian Constitution. The Administrative Appeals Tribunal's lack of need for

powers of enforcement and the potential constitutional prohibition on such powers impact on all aspects of the topics of this Conference.

35           The execution of all decisions of the Administrative Appeals Tribunal in Australia is entirely in the hands of the administrative decision-maker who made the original decision. Suppose the Australian Companies and Securities Commission made an order banning a securities dealer from giving stock market advice for one year and the Administrative Appeals Tribunal decided that the ban should be for five years. The Commission would simply enforce the five year ban by invoking the powers which enabled it to impose the one year ban.

36           Enforcement of decisions of the Administrative Appeals Tribunal is accordingly to be found in the actions of Government itself. Government and its agencies would never decline to carry a Tribunal decision into effect.

37           Part of the reason for this approach is that in law the decision of the Tribunal becomes the decision of the relevant government minister, department or agency. That this is so has the consequence that the Tribunal's rulings on the law, as well as its findings of fact have legal effect.

38           This is to be contrasted with judicial powers of enforcement. Judicial review is confined to error of law. If review is sought of an administrative decision in the Federal Court of Australia on the basis that there has been error of law the Federal Court cannot remake the decision. The Federal Court only pronounces the correct proposition of law. In addition, the Court will have power to grant one of the prerogative writs of prohibition (to prevent the making and implementation of an unlawful decision), certiorari (to quash an unlawful decision once made) and mandamus (to compel the carrying out of a duty). To these may be added the power to make declaratory judgments (which declare legal rights and obligations) and injunctions (which restrain unlawful conduct). All these remedies are enforceable by the Federal Court itself which can ultimately arrest and imprison for contempt of its orders.

39           Historically, the Crown in England was immune from suit. A vestige of this

immunity was carried through to Australia. However, this immunity has little relevance today. Since Federation in 1901 the Commonwealth of Australia has been liable to be sued. The Constitution and legislation of the Commonwealth Parliament permit proceedings to be taken against the Commonwealth and its instrumentalities. Judgments requiring action by the Commonwealth or its instrumentalities will be honoured without enforcement action. Judgments requiring money to be paid are required by legislation to be satisfied.

40           A *res judicata* estoppel will arise with respect to all decisions of Australian courts. In addition an estoppel will arise with respect to all issues of law or fact decided in litigation between the same parties. However, estoppel is a rule of evidence, and because the rules of evidence do not apply in the Administrative Appeals Tribunal strictly there can be no *res judicata* or other estoppel. Even if estoppel were a rule of law it would not operate to interfere with administrative decision-making.

41           Nevertheless, good administration involves consistency. One of the purposes of the Australian Government establishing the Administrative Appeals Tribunal was to improve the quality of administrative decision-making by the Australian Government. This aim of the Government has been substantially realised. This is because the availability of review of Government decisions has caused the relevant departments of state to introduce procedures and systems which lead to more acceptable and justifiable decision-making to reduce the incidence of applications for review.

42           A characteristic of common law systems of jurisprudence is the doctrine of precedent. The doctrine is accompanied by two characteristics not so common in continental European jurisprudence. The first is the giving of detailed reasoned judgments. The second is the publication and ready availability of the decisions of courts. These common law characteristics are carried through to the work of the Administrative Appeals Tribunal.

43           The legislation governing the decisions of the Administrative Appeals Tribunal requires that the Tribunal give written reasons for decisions which include the

Tribunal's findings of fact together with reference to the evidence or other material on which the findings are based. The decisions of the Tribunal are accordingly contained in published documents which are generally between 10 and 30 pages long.

44            Nowadays the decisions of the Administrative Appeals Tribunal can be readily accessed on the Internet ([www.aat.gov.au](http://www.aat.gov.au)). However, there are also two sets of published reports which contain the decisions of the Tribunal. The first is the *Administrative Law Decisions*. It presently contains 73 volumes. About 6 volumes are currently added each year. Each volume contains about 800 pages. Not every decision of the Tribunal is reported but all significant decisions are. This set of reports commenced in 1976 at the time the Tribunal commenced hearing appeals. The other set of reports is the *Administrative Appeals Reports*. It commenced a few years later than the *Administrative Law Decisions*. It now contains 36 volumes each of which is about 600 pages long. Both these sets of reports are freely available by subscription from their publishers. Government departments and many lawyers subscribe to them.

45            The giving of detailed reasons for decision and the publication of those reasons are the matters which underpin the doctrine of precedent. Their presence naturally leads at least to an informal doctrine of precedent. Uniformity of decision-making is desirable. The publication of reasons makes it possible. Accordingly, although no *res judicata* or other estoppel and no formal doctrine of precedent exists in administrative law, members of the Administrative Appeals Tribunal will follow earlier decisions of the Tribunal unless they are satisfied that the earlier decision is manifestly wrong. This is particularly so when the same issue arises in proceedings between the same parties. Effectively there is a *res judicata* in the Administrative Appeals Tribunal as well as issue estoppel. Effectively there is a doctrine of precedent.

46            Government departments and agencies treat themselves as bound by the decisions and the reasoning of the Administrative Appeals Tribunal. This is, in part, because they know that on review the Tribunal will make the same decisions it has previously made on the same issues. The sensible course for government

departments and agencies is to make the decision they know the Tribunal will make.

47 Decisions of the Administrative Appeals Tribunal accordingly have very substantial influence. If the Tribunal determines that Australia's income tax legislation has a particular application in one claim then that result will effectively determine all similar claims.

48 It is possible to deal with the detailed topics for the Conference with some simple propositions:

1. The Judicial Consequences of the Administrative Judge's decisions

(a) The diversity of the judicial consequences of the administrative judge's decisions

49 For the Administrative Appeals Tribunal the diversity of consequences of its decisions is seen in the fact that they not only determine the rights and obligations of the parties to the proceedings including the Government department or agency concerned but they govern all subsequent decision-making within the Tribunal and within Government from the level of the original decision.

(b) Enforcement and the principle of legal certainty

50 The role of the Administrative Appeals Tribunal is to remake Government decisions. Enforcement is not an issue for the Tribunal because it does not order or direct conduct as much as substitute one decision of Government for another. The result of decisions of the Tribunal is to remake a Government decision in a way which will involve Government action, rather than Tribunal action, for enforcement. If a decision is made that an applicant is entitled to a pension which was denied by the relevant government agency then the pension will immediately be paid because the Tribunal's decision becomes the agency's decision which it must carry into effect. If a decision is made that a pension has been paid to someone not qualified and must be repaid then the relevant government agency will have available to it the means to recover the money. Sometimes this will be achieved by deduction from another

government payment. Sometimes it will require legal action. In that event the agency will commence proceedings in the ordinary judicial courts for recovery. This is a substantial difference between the system in the Commonwealth of Australia and some parts of continental Europe. The court in which a government agency seeks to enforce payment of a debt will have multiple powers for enforcement including sale of real and personal property and even attachment and committal to imprisonment for contempt in appropriate cases.

(c) The restrictions to *res judicata*

51                   There is no formal *res judicata* estoppel in the Administrative Appeals Tribunal. However, informally, not only is there a *res judicata* but decisions will not only bind the Tribunal when considering other cases involving the same issue but also Government Ministers, departments and agencies when making decisions on the same issue. This is because there is an informal doctrine of precedent applying to the Administrative Appeals Tribunal.

2. The power of the administrative courts for enforcing their decisions

(a) Prevention against risks of inaction

52                   This does not arise in the Administrative Appeals Tribunal. Government departments and agencies recognise that they are bound to act in accordance with the decisions of the Administrative Appeals Tribunal and they do so promptly. Where enforcement needs to be taken against non government parties the relevant government department or agency will have ample rights available to it either through internal government actions available to it or through action in the civil courts. Actions in civil courts are rarely necessary.

(b) The incitement to enforce or the dissuasion from inaction

53                   This dilemma does not arise. Government will automatically carry decisions of the Administrative Appeals Tribunal into effect by their own unprompted action when the non government party has succeeded and by government or court action

when the government agency has succeeded.

(c) The sanction of inaction

54 Inaction is not an outcome in the Australian system involving review by the Administrative Appeals Tribunal. The exception will be when the substance of the decision is not to act. For example a failed application for compensation will result in inaction. Otherwise any decision will be carried into effect voluntarily by Government and through internal or court enforcement proceedings if action by non-government parties is required. There will, of course, be cases where a decision not to take action will be made for compassionate or other discretionary reasons where this is permitted by law. However, this will not involve inaction in enforcement but will leave nothing to enforce.

3. The guarantees provided to the plaintiffs relating to the efficiency of enforcement

(a) The extrajudicial ways

55 Most enforcement of decisions of the Administrative Appeals Tribunal will be extra judicial. Government agencies will simply carry the decision of the Tribunal into effect as if it were a decision of the agency. Only on rare occasions, when a non government party is required to, and does not, perform an act, will judicial enforcement be necessary.

(b) The access to the executing judge

56 There is no concept of an executing judge in Australian administrative law except to the extent that in those rare cases in which legal action is required against a non government party proceedings may lead to enforcement in an ordinary judicial court.

(c) Execution and lawsuits settlements

57 Lawsuits are confined in Australia to the circumstances described above.

## Conclusion

58           The system of administrative law in Australia is different to many administrative law systems in continental Europe and others based on the civil law in contrast to the common law. In particular there is no distinction between judicial courts and administrative courts in Australia. Issues of administrative law can arise in the ordinary judicial courts. Enforcement proceedings can be taken in these courts both by and against government and non government parties. However, the establishment in 1975 of the Administrative Appeals Tribunal as a general tribunal which can review most executive decisions of the Australian Government was almost unique in the common law world. The Administrative Appeals Tribunal does have parallels to the continental European system because it is outside the judicial system in Australia and is the highest tribunal in a structure of tribunals separate from the courts which resolves disputes on matters of administrative law. It does this by reconsidering and remaking the decisions of the executive arm of government. Enforcement issues do not generally arise because the government recognises that it is bound to implement the decisions of the Administrative Appeals Tribunal and it does this without any need for prompting. It is able to do this because the decisions of the Administrative Appeals Tribunal become government decisions. In rare cases where action by non government parties is required and they refuse to perform their obligations the government agency involved will either be able to enforce a decision by its own acts or will have ample power to invoke the jurisdiction of one of Australia's ordinary judicial courts to enforce the decision.