



VISIT TO SUPREME ADMINISTRATIVE COURT OF THAILAND AND CENTRAL ADMINISTRATIVE COURT OF THAILAND

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President of the Administrative Appeals Tribunal**

**Structure, Power and Duties of the
Administrative Appeals Tribunal of Australia**

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Introduction

1 It is a great pleasure and privilege for me to have been invited to take part in a dialogue between the administrative courts and tribunals of our two countries.

2 I have had the pleasure of visiting Bangkok and Thailand on a number of occasions. The first was in 1967. I was 23 years of age. I was then the legal clerk or associate to the Chief Justice of Australia. The event was a conference of the Chief Justices of Asia. I had the privilege of meeting your then Chief Justice, the Hon. Prakob Hutasingh and a number of Thai judges. They included Judge Sansern Kraichitti and Judge Prapasna Auychai. This visit brings back fond memories to me of that first visit to Thailand nearly forty years ago.

The Law in Australia

3 The system of law in Australia is a common law system. It is derived from the common law of England. The substantive law of Australia is close to the law of England. In most Australian courts judges and barristers dress in wigs and gowns that are the same as the wigs and gowns of English judges and barristers.

4 The common law is founded on principles developed by the courts over

centuries. The law is not written in a code or a statute. It is derived from the reasons given by judges for their decisions. Judges hearing later cases study earlier decisions and follow the statements of legal principles laid down in them. This is the doctrine of precedent. Common lawyers discover what the law is by looking at what different judges have said about a topic. The process is assisted because all important decisions and the reasons for the decisions are published in sets of reports. They are added to year by year. The Federal Court of Australia, of which Justice Tamberlin and I are judges, for example, has existed for not quite 30 years. However, there are 145 volumes of its decisions and reasons. Many lawyers pay a subscription to receive these reports. Others can access them in libraries. Reports publishing decisions of English courts go back to the middle ages. In Australia there are reports for the decisions of the High Court of Australia, the highest court in Australia, the supreme courts of the states and other courts as well, in addition to the reports of the Federal Court of Australia. These reports include reports of the decisions of the Administrative Appeals Tribunal.

5 Common lawyers are assisted in knowing the common law by reading text books and periodical articles attempting to explain the law in propositions. However, these statements of the law have no authority. Only the decisions of superior courts are authoritative.

6 Important examples of the operation of the common law are found in the law of contract. The basic contract law of Australia is the law that developed in England. A contract requires an offer by one party which is accepted by another party. There must be a promise or promises by at least one party for which there is consideration (some reciprocal promise or other detriment such as the payment of money). There is no code or statute where these propositions can be found. The propositions are simply derived from reasons for decision given over the years. The general rules are subject to exceptions and qualifications. These are also found in reports of decisions of courts. For example, in 1892 the Court of Appeal in England decided that a general advertisement could not be an offer which gave rise to a contract. That decision is recorded in a volume of the reports of English Courts for 1893. The case is called *Calill v Carbolic Smoke Ball Co.* The reference to the report in which it appears is [1893] 1 QB 256. I have this report as well as the reports of all other

English Courts in my chambers in Sydney.

7 In the beginning the only source of law in England was the common law. However, the courts were the courts of the King. They were subservient to the King's wishes. The King could accordingly make proclamations overriding the courts. This power was ultimately transferred to the Parliament. The Parliament could pass laws called statutes which altered or added to the common law. Thus, to take again the law relating to contract, the English Parliament many years ago passed a statute providing that some contracts could not be enforced unless they were in writing. The parliament can always pass statutes overriding the common law. The law of Australia is accordingly now made up of both common law principles and statutes made by parliament. The statutes have become more important over the years. For example, nearly all of the criminal law in Australia is now contained in statutes. Most powers which were originally vested in the King or the Crown, such as the power to raise taxes, are now exercised by parliament. The Federal Court of Australia and the Administrative Appeals Tribunal were both created by statute.

Government in Australia

8 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 a statute 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 cannot legislate in conflict with Commonwealth legislation on a topic on which the Commonwealth has legislative power.

9 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 the states 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.

10 The separation of power 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.

11 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 cannot exercise administrative power. Legislation permitting a judicial decision to be made by a body which is not a court would be ruled unconstitutional by the High Court of Australia. These concepts, which are not present in England, or in the states of Australia, provide an important basis for understanding Australian administrative law and how it has developed.

12 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.

Administrative Law in Australia

13 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.

14 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 affecting private rights should appropriately be made in secret, without reasons, and without opportunity for review on the merits.

15 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.

16 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.

17 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

18 The *Administrative Appeals Tribunal Act* established the Administrative Appeals Tribunal to be a general tribunal for the review of Commonwealth administrative decisions. It has no common law jurisdiction, unlike Australian courts. All its power comes from the Commonwealth Parliament. Jurisdiction is conferred upon it by individual acts of Parliament. Its decision-making is based upon a hearing at which the applicant for the review and the original decision-maker are usually both represented. It gives reasons for its decisions. The model for the practices and procedures of the Tribunal was the model of common law courts although its jurisdictions were not judicial but administrative.

19 There is nothing new in common law countries about independent tribunals which review administrative decision on their merits. They existed long before the 1960's. However, there were not so many of them. Australia had Taxation Boards of Review. The Australian states had tribunals reviewing decisions relating to land development. There were guardianship and mental health tribunals. However, the intervening years have seen ever increasing numbers of tribunals established in the United Kingdom, Canada and New Zealand. Australia was no exception. However, Australia adopted a new approach to the problem.

20 The establishment of the Administrative Appeals Tribunal was part of the adoption in Australia of a completely new regime for administrative law. The Administrative Appeals Tribunal was just part of a large package. The establishment of the Federal Court of Australia was itself part of the scheme. Part of the jurisdiction of the court came under the *Administrative Decisions (Judicial Review) Act 1975* which codified the common law grounds of judicial review. Most importantly, that Act imposed a statutory obligation upon decision-makers to give written reasons for their decisions. The common law had stopped short of requiring reasons for all administrative decisions. Without reasons it was difficult to challenge decisions because there was usually nothing upon which to base a challenge. The legislative scheme also included the establishment of the Administrative Review Council, to advise the Government on all matters of administrative law, and the establishment of the office of Omubdsman.

21 Tribunals are generally not courts in the strict sense. This does not matter in the United Kingdom. It does not even matter in the Australian states. All these places have residential tenancy tribunals. They are simply exercising judicial power. This is because they are determining disputes between individuals. However, in Australia, at the Commonwealth level, it does matter. A tribunal whose task was simply to determine disputes between individuals would be unconstitutional. The High Court would declare it unconstitutional. It would be a body exercising judicial power which was not a court.

22 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*.

23 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.

24 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 administrative 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.

25 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,

26 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.

27 There is no separate administrative court system in Australia. The separation of powers doctrine would not permit such a structure at the Commonwealth level. Claims against the Government of all kinds are brought in the ordinary courts including the Federal Court.

28 The Administrative Appeals Tribunal was created exclusively to reconsider Commonwealth Government administrative decision, but to undertake this reconsideration in the same manner as that courts carry out their task.

29 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 administrative 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.

30 The Tribunal has developed rapidly since it was established more than 30 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*.

31 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.

32 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.

33 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.

34 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.

35 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.

36 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.

37 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.

38 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.

39 The sole function of the Administrative Appeals Tribunal is to make administrative decisions. Each decision must relate to a prior decision – the decision under review. The Tribunal substitutes its own decision for the decision it is reviewing. It makes a new decision in place of the previous decision. In remaking the original decision and substituting that for 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.

40 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.

41 The fresh decision made by the Administrative Appeals Tribunal, when substituted for the original decision, becomes the decision of the original decision-maker. The person or agency who made the original decision must then act on the

new decision as if that decision had been made by the original decision-maker.

42 Historically, the Crown in England could not be sued. 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.

43 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.

44 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.

45 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.

46 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.

47 Nowadays the decisions of the Administrative Appeals Tribunal can be readily accessed on the Internet (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.

48 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.

49 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.

50 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.

Conclusion

51 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. 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. The government recognises that it is bound to implement the decisions of the Administrative Appeals Tribunal. This is because the decisions of the Administrative Appeals Tribunal become government decisions.