

**Council of Australasian Tribunals National Conference
Melbourne, 4-5 June 2015
Dreams and Realities; The Evolution of Tribunals.
Opening Address**

**Hon. Justice Duncan Kerr
President, Administrative Appeals Tribunal**

Colleagues,

L P Hartley began his 1953 novel, *The Go-Between*, with the evocative line 'The past is a foreign country: they do things differently there'.¹

In Australia we certainly did.

Young Australians, in fact anyone under 50, will have thought it strange that in 2010 former Prime Minister Mr Fraser nominated administrative law reform as his greatest achievement.²

Reforming administrative law seems far too modest to be the most prized legacy of a man who was at the centre of the great national and international controversies of his time.

¹ Hartley L P, *The Go-between* (Harmondsworth: Penguin Books in association with Hamish Hamilton, London, 1953)

² Obituary: The West Australian, *Fraser's Legacy Transcended the Dismissal* (West Australian Newspapers Limited, 21 March 2015).

See also:

<http://www.abc.net.au/7.30/content/2010/s2827147.htm>

But the Australia Malcom Fraser grew up in is not the Australia of today.

As government had become more complex and its reach greater, the Australia Malcolm Fraser knew as a young man had developed a vast range of administrative discretions that could be exercised in a way that potentially could detrimentally affect the life, liberty, property, livelihood or other interests of a person.

If a citizen suffered an adverse decision there was little he or she could do about it. In a limited number of specific areas of public administration there were opportunities for further review: the War Pensions Entitlement and Assessment Appeals Tribunals and the Taxation Boards of Review are examples; but in the main an administrator's decision was effectively final.

Federal review jurisdiction had not been conferred on State Supreme Courts so the sole route to judicial review of a Commonwealth government decision was via the exercise of the High Court of Australia's original jurisdiction pursuant to s 75(v) of the Constitution – which

required applying for what were then referred to as the 'prerogative writs'. Few pursued that costly option. If they did they were confronted by an area of law that was then complex and arcane.

Criticism of the system grew to a point where something needed to be done.

In 1968 the Gorton Government announced the appointment of the Commonwealth Administrative Review Committee (the Kerr Committee) to review Commonwealth administrative law mechanisms. No-one expected it to amount to much.

Driven by the vision of its chair, the Kerr Committee ignored its quite narrow terms of reference. As Professor McMillan has observed³;

'Three years later the Committee presented a plan for an entirely new system of administrative law that rested upon a fresh vision of the role that external review agencies should play in safeguarding the rights of the public in relation to executive decision-making'.

³ McMillan J, *The Vision in Hindsight: Parliament and the Constitution: Paper No. 11* (Research Paper No. 13 2000-01, Department of Parliamentary Library, 2000), page 3. http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp0001 viewed 1 June 2015.

The high aspiration of the Kerr Committee was for 'the evolution of an Australian system of administrative law'.⁴ The theme underlying the report of the Kerr Committee⁵ was a need to develop a comprehensive, coherent and integrated system of administrative review.

The Kerr Committee's recommendations were not uniformly welcomed.

Wayne Martin, who later became Chief Justice of the Supreme Court of Western Australia, as a young lawyer was an advisor to the Administrative Review Council. Delivering the 2013 Whitmore Lecture⁶ Martin CJ noted that one of the projects he had worked on had involved the identification of the classes of decisions which should be excluded from the operation of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act) that had been enacted to implement the Kerr

⁴ *Commonwealth Administrative Review Committee Report*, Commonwealth Government Printing Office, Canberra, 1971 (Parliamentary Paper no. 144 of 1971), title to chapter 18.

⁵ *Commonwealth Administrative Review Committee Report*, Commonwealth Government Printing Office, Canberra, 1971 (Parliamentary Paper no. 144 of 1971).

⁶ Address by the Hon. Chief Justice of the Supreme Court of Western Australia, Wayne Martin AC, *Forewarned and Four-Armed – Administrative Law Values and the Fourth Arm of Government*. Delivered in Sydney on 1 August 2013 at the 2013 Whitmore Lecture. http://www.supremecourt.wa.gov.au/S/speeches_2013.aspx?uid=9442-1219-8077-2336 at page 4, viewed on 1 June 2015.

Committee's recommendation that judicial review be made more accessible. He recalled:

Meetings were held with senior officers, usually secretaries or deputy secretaries, of most major Commonwealth departments. There was a recurrent theme to the representations which we received. They were to the effect that while the virtue of the legislative reform and its potential to significantly enhance the quality and fairness of administrative decision making by other agencies of government was acknowledged and indeed applauded, there were nevertheless particular features of the decisions made by their department which necessitated exemption from the new regime.⁷

Anyone curious about the back story of how it came to be that so few exemptions were incorporated in the ADJR Act will find the 2013 Whitmore Lecture interesting.

⁷ Address by the Hon. Chief Justice of the Supreme Court of Western Australia, Wayne Martin AC, *Forewarned and Four-Armed – Administrative Law Values and the Fourth Arm of Government*. Delivered in Sydney on 1 August 2013 at the 2013 Whitmore Lecture. Page 5.

But if the Kerr Committee's proposal to simplify access to judicial review caused great consternation within Commonwealth departments; that consternation was as nothing compared to the fears officials expressed regarding the Committee's proposal that a general administrative tribunal possessing a comprehensive merits review jurisdiction be established.

The Kerr Committee had concluded that:

The basic fault of the entire structure is, however, that review cannot as a general rule ... be obtained "on the merits"—and this is usually what the aggrieved citizen is seeking⁸

What was needed, in the Committee's view, was an expanded framework for the review of decisions on their merits.

The Hon. Bob Ellicott QC has spoken about the strong opposition he encountered, first as Solicitor-General in the Gorton, McMahon and Whitlam Governments and later as the Fraser Government's Attorney-

⁸ *Commonwealth Administrative Review Committee Report*, Commonwealth Government Printing Office, Canberra, 1971 (Parliamentary Paper no. 144 of 1971), paragraph 58.

General, when he sought to implement that recommendation. The kind of resistance he encountered was well encapsulated by Sir Antony Mason:

Let there be no mistake about this. There was a very strong bureaucratic opposition to the Kerr Committee recommendations. The mandarins were irrevocably opposed to external review because it diminished their power. Even after the reforms were in place Sir William Cole, Chairman of the Public Service Board, and Mr John Stone, Secretary of the Treasury, were implacable opponents of the reforms.⁹

Without the unfailing backing of two strong leaders, otherwise clashing yet united in this respect, the prospects of such reform would have been bleak. But combined, Whitlam and Fraser, with the support of their respective Attorney's General, broke the back of that bureaucratic opposition. The *Administrative Appeals Tribunal Act 1975* (Cth) was enacted by the Whitlam government and brought into operation by its successor.

⁹ The Hon. Sir Antony Mason AC KBE, *The Kerr Report of 1971: Its continuing significance* (Whitmore Lecture, 19 September 2007), page 2.

Once you know the full story, Malcolm Fraser's 2010 statement that he regarded reforming Australia's administrative law as his most significant achievement is not a modest claim: it seems so only in retrospect because we take what was achieved for granted.

The power of an idea whose time has come is immense. The tide of reforms implementing of the Kerr Committee's recommendations spread beyond the Commonwealth to the States and Territories. Unconstrained by the strict application of separation of powers doctrine, State and Territory merits review tribunals are no longer simple copies of the AAT but complex and evolving entities in their own right—incorporating broad civil jurisdictions. 'Super Tribunals' have evolved in all states and territories except my own; Tasmania: and similar change is in the air there.

I find it immensely frustrating that we take so for granted what Malcom Fraser saw as the highlight of his career.

Your conference organising committee has put together a programme which invites all of us to reflect upon the evolution of merits review over the past four decades. The speakers and panellists this conference brings together are well suited to provide perspective on how much has been achieved.

I am delighted that the presidents and heads of a significant number of Australasian tribunals have accepted the organising committee's invitation to participate in this discussion. But the programme theme invites more than nostalgia—it asks us to think about future directions.

As members of COAT we need to think how we can take a more active role in policy input given the anticipated abolition of the Administrative Review Council. The Administrative Review Council was established to perform broadly the policy review functions envisaged by the Kerr Committee. Its demise leaves a large gap to fill.

On behalf of the Conference Organising Committee I am delighted to welcome you to Melbourne for the Council of Australasian Tribunal's

2015 National Conference “Dreams and Realities: The Evolution of Tribunals”.

I am particularly delighted that the Attorney-General of Australia, Senator the Hon. George Brandis QC, has accepted our invitation to give a keynote address incorporating his reflections on future directions for Commonwealth merits review. The Attorney-General will be attending tomorrow.

One of the Kerr Committee’s recommendations was to bring together review into a single body rather than creating specialist tribunals. Forty years later, with the passage of the *Tribunals Amalgamation Act* (Cth) that recommendation will be implemented. I am sure the Attorney will reflect on the significance of this.

Once that is achieved it may be time for COAT to begin a discussion as to whether merits review should be universal but subject to express exclusions, akin to the ADJR Act, rather than the reverse. As the Kerr Committee recognised, merits review is usually what the aggrieved

citizen is seeking because it allows tribunals to reach the correct or preferable decision.

Even if readily available judicial review has a more limited remit. It exists to correct legal errors. In *Attorney General (NSW) v Quin* (1990) 170 CLR 1 (*Quin*), at 35-36 Brennan J stated:

The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power.

Judicial review cannot substitute for a flawed decision what the court thinks to be the correct or preferable decision. That is a step beyond judicial power. Only merits review can achieve that outcome.

In an unpublished paper provocatively titled 'What is the purpose of fairness', Professor Michael Groves of Monash University¹⁰ suggested

¹⁰ Matthew Groves, 'What is the purpose of fairness'. Unpublished paper delivered to a Federal Court of Australia seminar, Brisbane March 2018, page 4.

that shallow criticisms of the limited role Brennan J posited for the courts in *Quin* 'miss the deeper constitutional settlement that [he] began to forge in Australian judicial review'. An unarticulated premise, at least as I understand Matthew Groves' paper, is that Brennan J could be comfortable in assigning a constrained constitutional role to judicial review because he could, as most of us subconsciously do, take for granted the continuing existence of a strong and independent system of merits review in the Administrative Appeals Tribunal (AAT) and its now state and territory counterparts.

This may have contributed to the evolution of Australian constitutional theory in which 'the apparent surrender of Brennan J of jurisdiction over merits is better seen as a tactical retreat' best understood as an aspect of the doctrinal means by which the High Court has affirmed protected jurisdiction of the courts.

If my analysis of what Michael Groves implies is correct, it serves as a timely reminder that tribunal independence is not an optional extra: any lessening of our independence as tribunal members may correspondingly

undermine the foundations of this autochthonous Australian constitutional settlement.

And, assuming there is a relationship between confidence in the integrity of merits review and the scope for judicial review expressed in *Quin* it is even more important not to misunderstand what Brennan J said in *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634 (*Drake No 2*).

Drake No 2 is not authority for what it is most often cited for. *Drake No 2* permits regard to be had to policy where relevant but prohibits crude deference. To the extent an AAT decision can be binding, *Drake No 2* expressly forbids ignoring individual considerations in favour of policy.

It is worth recalling that *Drake No 2* was remitted to the AAT because a full court of the Federal Court of Australia in *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409 had upheld an appeal by an applicant on the ground that the AAT had abrogated its function by

deferring to ministerial policy without making its own independent assessment and determination.¹¹

With the growth of 'soft law' legislation now sometimes explicitly requires a particular policy to be taken into account by the use of expressions such as "shall have regard to" or "regard must be had" to particular guidelines authorized to be published by a specified official.

That is the beginning of analysis not its end. A threshold question is whether policy can fetter what would otherwise be an unfettered discretionary decision provided for by that enactment but, assuming that is not a relevant problem, there is almost always a further question of construction that needs to be addressed. Not all statutory commands to have regard to particular guidelines require decision makers to "... give weight to [each criteria expressed in guidelines] as a fundamental element in making his [or he] determination" Some statutory commands require a decision maker merely "to consider them, rather than treat them as fundamental elements in the decision-making process."

¹¹ For a more detailed analysis of this issue, see Duncan Kerr 'Challenges Facing Administrative Tribunals - The Complexity of Legislative Schemes and the Shrinking Space for Preferable Decision Making' Council of Australasian Tribunals, Victorian Twilight Seminar 18 November 2013

The High Court has repeatedly emphasised the task of statutory interpretation requires attention to the particular words enacted by the Parliament having regard to their context, and with that caveat upfront, Forgie DP's reasons in *Secretary, Department of Prime Minister and Cabinet and Secretary, Department of Infrastructure and Regional Development and Sanderson (Party Joined)* [2015] AATA 361 (27 May 2015) at [118]-[127] are a useful starting point for any tribunal member confronted by this difficult issue.

Enough of theory

As always a significant part of this COAT National Conference is devoted to addressing the practical 'tradedcraft' issues that every tribunal member faces—such as the challenges presented by vulnerable or disadvantaged participants and the role of specialist members of tribunals.

And our Friday afternoon session will give conference participants the opportunity to provide feedback into COAT's project to develop a best practice guide to tribunal appointments. I urge you to stay for that session.

Finally, in light of our hugely successful 2014 National Conference in Auckland, New Zealand, I extend a special warm welcome to our colleagues from New Zealand. You set a very high standard!

Welcome all.

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