

THE KERR REPORT OF 1971: ITS CONTINUING SIGNIFICANCE

INAUGURAL WHITMORE LECTURE

Delivered by The Hon. Sir Anthony Mason AC KBE

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Introduction

It is a great honour and privilege to be invited to deliver the Inaugural Harry Whitmore Lecture.

Professor Whitmore

It was my good fortune to meet Harry Whitmore in 1960-1964 when we were Lecturers at Sydney University Law School. Harry lectured in Administrative Law and I lectured in Equity. He has been described by one of his students, Justice Downes of the Federal Court, as “a charismatic lecturer”.¹

We became good friends. Our friendship continued after I moved to Canberra as Solicitor-General in 1964 and he was appointed to a Chair at the ANU the following year. He was at the ANU 1965-1972 and later at UNSW 1972-1983.

Before he studied law after serving in World War II, he served in the British Civil Service and the NSW Public Service, so he had experience working for government.

He was the leading academic administrative lawyer of his day and was co-author of the principal textbook *Administrative Law in Australia*. I hasten to add that when I use the word “co-author”, I do not use it in its reduced sense, in what is known as “the Andrews variation”.

In his account of his contribution to administrative law reform, Harry Whitmore said that he was greatly influenced by Professor Alexander Bickel when he studied at Yale University, by Professor Stanley de Smith, the author of *Judicial Review of Administrative Action* and by the United States administrative law experience.² Harry was a member of both the Kerr Committee and the Bland Committee. He is chiefly remembered for his work on the Kerr Committee where he did most of the work on merits review.

¹ “Why does Australia have a General Review Tribunal”, Address to the New Zealand Chapter of the Council of Australasian Tribunals, Wellington, 7 October 2005.

² “Administrative Law Reform: A Personal Recollection”, (2001) 8 Aust. Jo. of Administrative Law, 144 at 144-145.

The Kerr Committee and the need for reform

The establishment by the Attorney-General Mr N.H. Bowen QC of the Kerr Committee on 29 October 1968 to undertake a wide-ranging consideration of review of administrative decisions arose out of a proposal which I made to him when I was Solicitor-General. The proposal had its genesis in the fragmented and confused state of review of administrative decisions in Australia in the 1960s. There was then no merits review, judicial review was beset with all the technicalities associated with the prerogative writs and there was a myriad of statutory discretions and ill-assorted tribunals over which there hovered a dark cloud in the form of the *Boilermakers' Case*. The Report of the Kerr Committee (consisting of Mr Justice Kerr, myself, Harry Whitmore and Mr R.J. Ellicott QC, my successor as Solicitor-General), does not deal at any length with the need for reform because the need for major reform was widely accepted, notwithstanding very strong resistance from senior administrators who were unwilling to recognise that there could be any advantage involving heightened review of their decisions.

Let there be no mistake about this. There was 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,³ and Mr John Stone, Secretary of the Treasury, were implacable opponents of the reforms.

The most convincing account of the need for reform was that given by Mr Ernst Willheim, Secretary of the Bland Committee and later Special Counsel in the Justice Division of the Attorney-General's Department. His account of his experience, before the reforms, working as a legal adviser in the "one man" sub-office of the Immigration Department,⁴ is illuminating. On his first day, he was required to initial a bundle of deportation orders, his signature being taken to indicate that the orders were legally correct. On investigation, he found that almost all the orders were defective for various reasons. After he provided reasons for his view, the head of the deportation unit bluntly informed him "... you don't seem to understand that it's your job to initial these", pointing out that, unless they were initialled, the Minister would not sign them, adding "we want these people out".

In his account, Mr Willheim points out that officers of the Department lacked any real familiarity with the legislation, with the statutory requirements and criteria. There was a culture of disdain for notions of validity and legality. Implementing government policy was all that mattered.

³ Cole, "The Public Sector: The Conflict between Accountability and Efficiency", *Aust. Jo. of Public Administration*, September 1988, at 223.

⁴ "Recollections of an Attorney-General's Department Lawyer", (2001) 8 *Aust. Jo. of Administrative Law*, 151 at 152.

Curiously enough, despite the advances made in the intervening years, the recent Reports by Mr Mick Palmer and Mr Neil Comrie into the cases of Cornelia Rau and Vivian Alvarez (Solon), and the Report last month by the Ombudsman into the 247 cases referred to him, revealed a systemic tendency in the Department to subordinate human rights considerations to the perceived superior demands of policy. It is not going too far to say that, at both times, there was a culture of disrespect for the rule of law, even more pronounced in the early 1970s than in recent years. The Secretary of the Department has, however, recently committed the Department to wide-ranging reform, including reforms recommended by the Ombudsman.

The Kerr Committee recommendations

The principal recommendations of the Kerr Committee were for

- (1) clarification of the grounds of judicial review;
- (2) the establishment of a general merits review tribunal (later called the Administrative Appeals Tribunal (“the AAT”));
- (3) the introduction of an obligation on the part of the decision-maker to provide a statement of findings of fact and reasons at the request of a person affected by the making of the decision,⁵ there being no such general obligation at common law;⁶
- (4) the introduction of an obligation to disclose relevant documents;
- (5) the establishment of a Counsel for Grievances (later transformed by the Bland Committee into the office of the Ombudsman); and
- (6) the establishment of the Administrative Review Council (“the ARC”) with a continuing role to overview and monitor the new system.

Later, commentators suggested that the Committee’s Report gave very strong emphasis to the need for protecting individual rights but had very little to say about the need to protect government interests or the working of government. The implication seemed to be that this imbalance should be redressed. The criticism strikes me as an exercise in revisionism with a view to justifying some alteration in the system which would give more protection to government interests.

The criticism was unfounded in so far as it suggested that we had not taken into account government interests. Indeed, our concern for those interests had led us to recommend that membership of the AAT in a particular case should include a representative of the Department or agency whose decision was under appeal. This recommendation was rightly rejected by the Bland Committee.

We were at all times conscious of the need to make concessions to the public interest viewpoint on some points lest the proposals should excite opposition which would result in their rejection by government. The exclusion of appeals from decisions

⁵ Administrative Decisions (Judicial Review) Act 1977 (Cth), s. 13; Administrative Appeals Tribunal Act 1975 (Cth) s. 28.

⁶ See *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656.

made by Ministers and our view that the AAT should review the application of policy, but not policy itself, were manifestations of our concerns on this question.

Indeed, your Committee Member, Judge O'Connor, has reminded me that, in the heady days of his youth, in an article in the *Melbourne University Law Review*,⁷ he commended the Committee's recommendations. In his article, however, he rightly criticised the proposal for inclusion of a departmental or agency representative on the tribunal on the ground that it would prejudice public confidence in the tribunal. As I remarked earlier, this recommendation was rejected by the Bland Committee.

The Kerr Committee favoured a general tribunal over a series of separate individual tribunals. The establishment of such a tribunal, we thought, would lead to the development of a coherent body of principles and greater consistency of decision-making. It would facilitate understanding by lawyers and administrators of administrative law and familiarity with uniform procedures. Indeed, one of the recommendations was that legislation be introduced to prescribe minimum standards to be followed by all Commonwealth tribunals. In this respect the Committee's recommendation was closer to the US Administrative Procedure Act (which, however, prescribed an elaborate process code) than to the Franks Committee which left each tribunal in the United Kingdom to prescribe its own procedure.

The Committee provided for legal representation and clearly contemplated that the Tribunal would follow court-like procedures. It has been said that Harry Whitmore at first envisaged the AAT as a "shopfront reviewer of administrative decisions in the large volume as well as the small volume areas, righting the wrongs suffered by individual members of the public".⁸ That view of the AAT was not practically possible and did not prevail. It was the quasi-judicial model that was reflected in the subsequent legislation and has been followed since. Of course, some tribunals have adopted a more inquisitorial approach.

The adoption of the Report and its consequences

Following the Report, the Bland Committee was set up with Sir Henry Bland, a distinguished public servant as chairman, to review the multitude of Commonwealth discretions and to recommend which of them should be excluded from the Tribunal's jurisdiction. The Bland Committee did a splendid job. Its Report played an important part in creating a positive climate of acceptance of the Kerr Committee proposals. And I should not fail to mention the invaluable efforts of Mr R.J. Ellicott QC who, particularly as Attorney-General, persuaded the then Prime Minister, Mr Malcolm Fraser, and Cabinet to adopt and implement the substance of the recommendations, qualified in respects which I have mentioned.

In the result, the recommendations resulted in the enactment of the Administrative Appeals Tribunal Act 1975 (Cth) and the Administrative Decisions (Judicial Review) Act

⁷ [1972] *Melbourne University Law Review*, 484-492.

⁸ Sir Gerard Brennan, "The AAT - Twenty Years Forward", 1 July 1996.

1977 (Cth), the establishment of the ARC and the office of Ombudsman. The effect of the recommendations was to establish a comprehensive regime of federal administrative justice which in various ways and forms influenced the future development of systems of administrative justice in the Australian States. Indeed, the reforms placed Australia in the front rank of nations leading the way in the field of review of administrative decisions.

The significance of the reforms is perhaps best illustrated by Mr Malcolm Fraser's answer to a question put by Philip Adams in an interview on Radio National on 2 March 2001. The question was:

"Malcolm, what were your greatest achievements?"

Mr Fraser identified four matters in this order: the AAT, the Ombudsman, the Human Rights Commission and multi-culturalism.⁹

It should not be forgotten that the Fraser Government also introduced the Freedom of Information Act 1982 (Cth) which was not a product of the Kerr Committee recommendations but is often linked with them. The Fraser Government has not received the credit it deserved for achieving these important reforms. Contrast its record in this respect with that of the Howard Government which has featured strong reliance on privative clauses and strong criticisms of federal judicial review.

Evaluation of the reforms

With the advantage of hindsight, I think Mr Fraser was right in ranking the AAT and the Ombudsman as the most important of the reforms. Merits review is now an established feature of the administrative law scene and it has contributed more to administrative justice than any other reform, with the possible exception of the Ombudsman. The success of merits review is due in no small measure to the work done by Sir Gerard Brennan, the Foundation President of the AAT.

The success and scope of the Ombudsman's activities have exceeded my expectations. They are due, I think, to the fact that the Ombudsman is responsible to Parliament (not to Government) and to the high quality and work of those who have been appointed to that office. I should make special mention of the present Ombudsman, Professor John Macmillan, whose efforts have been outstanding and who suffered from the handicap that he was my associate shortly after I was appointed to the High Court in 1972.

The availability of both merits review and judicial review has been criticised. Mr Philip Ruddock, in one of his sporadic attacks on the Federal Court, considered that the Federal Court, as well as the AAT, was engaging in merits review. If that allegation was correct, the High Court's decision in *Wu Shan Liang*¹⁰ called a halt to that tendency. Indeed, if one thing is clear in Australian administrative law, it is that judicial review does not entail review on the merits. The Kerr Committee was of the view that the High

⁹ E. Willheim, "Recollections of an Attorney-General's Department Lawyer", (2001) 8 Aust. Jo. of Administrative Law, 151 at 162.

¹⁰ *Wu Shan Liang v Minister for Immigration and Ethnic Affairs* (1996) 185 CLR 259.

Court's conception of judicial power did not extend to review on the merits of administrative decisions. Subsequent developments have not undermined the validity of this view. Professor Peter Cane has challenged this conception of judicial power.¹¹ The decided cases give no support to his challenge.¹² But the time may be approaching when it could be appropriate to take a less restricted view of judicial power.

The co-existence, in Australia, of general merits review and judicial review has unquestionably resulted in maintaining a narrow scope for judicial review. In other jurisdictions, which have an entrenched or statutory Bill of Rights, judicial review is broader in scope and the standard of review is more intensified than it is in Australia. Another influence which has contributed to the narrow scope of judicial review is our emphasis on – some might say obsession with – the separation of powers, whereas in England there is more emphasis on the rule of law.

One consequence of this difference is that our courts have not made good use of legal concepts which have proved useful elsewhere, especially proportionality. There is, of course, no reason why State tribunals and courts engaged in merits review should not use at least some of these concepts, including proportionality. The States, certainly New South Wales, are not affected by the strict federal separation of powers.

One development the Kerr Committee did not foresee was the extensive use of privative clauses later made by the Federal Parliament. This development has had the effect of endowing s. 75(v) of the Constitution with greater importance than it would otherwise have had. We now have a dual system of federal judicial review consisting of review under the ADJR Act and review under s. 39B of the Judiciary Act 1903 (Cth) and s. 75(v). In addition, we have renewed emphasis on jurisdictional complexities because privative clauses cannot protect an administrative decision from review on the ground of jurisdictional error.¹³

Beyond the federal system

The recommendations of the Kerr Committee had an influence beyond the federal system. In various respects the federal model which implemented the Kerr Committee recommendations was followed in the States, subject to variations. To take one example, s. 49 of the Administrative Decisions Tribunal Act 1997 (NSW) introduced an obligation to give reasons similar to s. 28 of the AAT Act.

There have been cases which have qualified the universality of the rule recognised in *Public Service Board (NSW) v Osmond*¹⁴ that an administrative decision matter is

¹¹ See P. Cane, "Merits Review and Judicial Review: The AAT as a Trojan Horse", (2000) 28 Federal Law Review 213.

¹² Anthony Mason, "Judicial Review: A View from Constitutional and Other Perspectives", (2000) 28 Federal Law Review 331 at 333-337.

¹³ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

¹⁴ (1986) 159 CLR 656.

under no obligation to give reasons, but this is not the occasion to discuss these cases. Instead, I shall discuss three questions of topical interest.

The devolution of federal jurisdiction to State tribunals

A major problem has arisen with respect to the capacity of State tribunals to decide matters of federal law, particularly when a party seeks to present an argument based on the Constitution or on federal law. If the State tribunal is a “court” for the purposes of ss. 71 and 77(iii) of the Constitution and s. 39(2) of the Judiciary Act 1903 (Cth), no difficulty arises. But if the tribunal is not such a court, then it is not a repository of federal jurisdiction.

There are conflicting authorities on the question whether a State tribunal is a court in the relevant sense. The conflict arises out of competing views about the criteria to be applied in this context in determining whether a tribunal is a court. On the one hand, according to the NSW Court of Appeal in *Skiwing*,¹⁵ the Administrative Decisions Tribunal (ADT) is not a court of a State for the purposes of the Constitution and s. 77(iii) of the Judiciary Act and is not invested with jurisdiction under the Trade Practices Act 1974 (Cth), s. 86(2), to hear a matter arising under that Act. The basis of the Court’s decision was that it is an essential feature of a court as that word is used in Ch. III of the Constitution that it be an institution composed of judges.

On the other hand, Heerey J, in *Commonwealth v Wood*,¹⁶ held that the Tasmanian Anti-Discrimination Tribunal is a court of a State for the purpose of the receipt of federal jurisdiction. In reaching this conclusion, Heerey J stated:¹⁷

“[t]he critical test is whether, if the tribunal is to be a court exercising the judicial power of the Commonwealth, it be and appear to be independent and impartial: *North Australian Aboriginal Legal Aid Service v Bradley*¹⁸.”

I do not think that his Honour expressed this test as an exhaustive or absolute test. He was simply expressing an indispensable condition which a “court” must satisfy. He was not saying that a body which simply makes recommendations or does not arrive at its determination by judicial method is a court. Determination of rights by reference to judicial method or process are essential requirements of a Ch. III court, as well as the requirements of independence and impartiality. Nor do I think that the suggestion that a Ch. III court must be composed of “judges” throws much light on the question. It simply opens up an inquiry as to what we mean by “judges”. The expression must include magistrates who do not enjoy the protections generally associated with superior court judges. And presumably it would include members of a tribunal who determine the rights of parties by a process akin to judicial method, even if they are not called “judges”.

¹⁵ *Trust Company of Aust. Ltd (t/as Stockland Property Management) v Skiwing Pty Ltd* [2006] NSWCA 185; see also *Attorney-General (NSW) v 2UE Sydney Pty Ltd* [2006] NSWCA 349.

¹⁶ [2006] FCA 60.

¹⁷ *Ibid* at [69].

¹⁸ (2004) 218 CLR 146 at [29].

Another critical question, however, is whether a State tribunal which is not a “court” for Ch. III purposes can consider and decide for its own purposes a constitutional or federal law question. My inclination has been to answer this question “Yes”, on the footing that the State tribunal should have regard to the entirety of the law (Constitutional, Federal and State) in ascertaining the limits of its jurisdiction and powers. The tribunal must take account of covering cl. 5 of the Constitution. The tribunal should arrive at an opinion on the federal question if it is necessary to do so for the purpose of ascertaining the limits of its jurisdiction and powers, though it cannot give a definitive or authoritative answer to the federal question.¹⁹ It has, for example, no power to make a binding declaration of constitutional invalidity.

Despite what is said by the Court of Appeal in *2UE Sydney*, I do not understand how, in the case of a State tribunal which is not a court, any question of federal jurisdiction can arise. Neither the Constitution nor the Judiciary Act 1903 (Cth) is concerned to vest federal jurisdiction in State tribunals which are not courts. A State tribunal owes its existence, its jurisdiction and powers to State law, not to Commonwealth law. The tribunal is exercising non-federal State jurisdiction and, in the exercise of that jurisdiction, is bound to have regard to the Constitution and federal law, unless there is a valid federal law prohibiting it from exercising that non-federal State jurisdiction. There is no such federal law. In the field of State tribunals, there is nothing that corresponds to s. 39 of the Judiciary Act in its application to State courts.

A State tribunal which is not a court cannot be said to be exercising federal jurisdiction unless its authority to exercise jurisdiction proceeds in some way or other from a federal statute. No such authority can be identified. Assuming the ADT is not a court, it stands in the shoes of the decision-maker who derives his decision-making authority and powers from State, not Commonwealth law. Unless restricted by State law in some relevant respect – and no relevant State law restriction has been identified – both the decision-maker and the ADT should have regard to the Constitution in ascertaining the limits on their powers.

It is often overlooked that, until s. 39 of the Judiciary Act authorised the exercise of federal jurisdiction by State courts and made it exclusive, State courts exercised non-federal State jurisdiction, in which they took account of and decided questions of federal law. That situation continues to prevail in the case of State tribunals which are not courts, though they cannot give a definitive or authoritative decision on such a question.

In *Re Adams*, Brennan J suggested as a counsel of prudence there was much to commend President Lincoln’s dictum that an official should act on the footing that a statute is constitutional.²⁰ While I agree that an official should be reluctant to act on the

¹⁹ See *Re Adams and Tax Agents Board* (1976) 12 ALR 239 (Brennan J); *Re Boulton; ex parte Construction, Forestry, Mining and Energy Union*, (1998) 73 ALJR 129 at [22], (Kirby J). I do not accept that the tribunal is precluded from arriving at a view on a constitutional question, although it may be undesirable to arrive at a conclusion of invalidity in the absence of strong reasons supporting that conclusion; see para. 39 *infra*.

²⁰ (1976) 12 ALR ...

basis that a statute is invalid except in a clear case, there are, I think, grounds for saying that an administrative decision-maker and a tribunal should act on the basis that the legislative intention is that the relevant powers are to be exercised in conformity with law. The alternative view is that they should proceed on the footing that the legislative intention requires them to treat the statute as valid unless it is held to be invalid by a court.

In the result, there are reasons to doubt the correctness of the reasoning in the decisions of the NSW Court of Appeal on the two questions I have identified, namely (1) what are the relevant criteria to be applied in deciding whether a State tribunal is a court for the purpose of Ch. III and s. 77(iii); and (2) is there any federal obstacle to the consideration by a State non-court tribunal of federal law in ascertaining the limits of its jurisdiction and powers. In expressing this view, I broadly agree with the view taken by your President in the ADT in *Skiwing*.

Although there is much more that I could say on these questions, time constraints preclude me from doing so.

Combining adjudicative and non-adjudicative roles in the one proceeding

The combination of adjudicative and non-adjudicative roles in the one proceeding can generate problems. Sometimes this takes place pursuant to legislative authority and, in other cases, without such authority. Generally speaking it is considered undesirable that a judge, registrar or court official who has participated in the mediation of a matter should participate in the hearing and determination of that matter in the event that it is not settled. In some cases it is expressly provided that such a person cannot participate²¹ at the trial of the matter. Sometimes, it is provided that such a person can so participate.²² In other cases, the matter is left open. Mediation agreements commonly contain a provision prohibiting the mediator from engaging in a subsequent arbitration should the mediation prove unsuccessful.

At bottom there are three concerns about the combination of functions: first, that in the course of the mediation, the mediator will acquire knowledge which will be prejudicial to one of the parties; secondly, that, whether that be so or not, a party will be concerned that the mediator may have acquired such knowledge and that the mediator has been involved in private confidential discussions with the opposing party, as is the fact; and thirdly, that the mediator's conduct may have compromised his independence or impartiality in the eyes of one or more parties.

The second objection does not have the same force in conciliation proceedings as they are not held in private. But the first and third objections may well apply and cause a party to suspect that the tribunal may have an adverse reaction to his refusal to settle. I should mention that conciliation combined with adjudication was standard practice in Chinese courts a few years ago and may be still is. The parties and witnesses were called

²¹ Supreme Court Rules (SA) r. 56A.01.

²² District Court Act 1991 (SA) s. 32.

and examined and then the parties were asked if they were happy with conciliation or did they want adjudication. Under that procedure, much of the proceedings were common to both conciliation and adjudication. But under that procedure, conciliation and adjudication were presented as alternatives and when the parties or one of the parties opted against conciliation, as happened in the case, to which I was invited, the case simply proceeded as an adjudicated matter. Chinese procedure is inquisitorial rather than adversarial in style, so the transition from conciliation to adjudication is less radical. Under the Chinese procedure, which derives from the civil law, the Court, not the parties, determine the course of the proceedings. The role of the advocate is more restricted than it is under our system.

In the ultimate analysis, there are potential difficulties when a body which first engages in conciliation, then engages in adjudication. These difficulties are present in a system such as the Workers Compensation Commission where the arbitrator is required first use best endeavours to bring the parties to a settlement. Ordinarily, using one's best endeavours to bring about a settlement might well impair one's independence and impartiality in a subsequent arbitration. But it is the evident intention of the legislative scheme that the arbitration will nevertheless proceed despite such shortcomings.

It is of vital importance that the parties are made aware of the change from conciliation to arbitration and of their rights in that respect. Otherwise there may be a denial of natural justice.

The disclosure of confidential information

The circumstances in which confidential or sensitive information should be made available to a party to proceedings is now a matter which frequently arises in legal and tribunal proceedings. It is, of course, of major importance in proceedings involving terrorist suspects where the outcome often depends upon legislative provisions and Bill of Rights provisions in jurisdictions where they apply. Otherwise it is a question of resolving the tension between the requirements of procedural fairness – ensuring that a party is made aware of the case against him – and protecting the confidentiality of the material. Generally speaking, the interests of procedural fairness should prevail so that at least the substance of any credible, relevant and significant material should be disclosed to a party whose interests are affected. Whether more should be disclosed (e.g. an entire document such as a medical report) depends on its contents, its significance to the decision to be made and how the opposing party can respond to it. There will be exceptional circumstances where the consequences of disclosure could cause serious harm. Even in such cases, it may be possible to limit disclosure to a legal representative of the party (if there be one) on an undertaking not to disclose to anyone else, including the client.

Conclusion

In conclusion, I should say that it was a fascinating experience to be a member of the Kerr Committee and to follow all the developments which have taken place and continue to take place in administrative law to this very day.