THE ADJR ACT AND PERSONNEL MANAGEMENT

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This paper considers the impact of the Administrative Decisions (Judicial Review) Act 1977 (Cth) ("the Act") in the area of personnel management in the Australian Public Service (the"APS"). It is written from the perspective of a lawyer, rather than that of a public administrator.[1]

The paper is in four parts, dealing with: the place of personnel management in the "new administrative law"; developments in the area of review of personnel decisions since the Act came into force; the reasons for these developments, and the extent to which they may be attributed to different aspects of the Act; and assessment of the changes that have occurred.

1 PERSONNEL DECISIONS AND THE NEW ADMINISTRATIVE LAW

The proposal that personnel management decisions should be excluded from the ambit of the proposed reforms to arrangements for review of administrative decisions appears to have had its origins in the Report of the Ellicott Committee.[2] The Committee proposed that consideration be given to excluding decisions relating to employment from the general right to seek reasons for administrative decisions under the then proposed statutory scheme for judicial review. The Committee stated:

> It should be a cardinal rule that all officers and tribunals should act according to law. Nevertheless, it will be necessary to consider whether there are some decisions of public servants, authorities and tribunals which, because of their nature, should be excluded from judicial review. For instance, it might be desirable that decisions relating to employment, given by way of example earlier in this section, might be excluded. In this connection, it is to be remembered that where a decision is subject to judicial review, a person making a decision can be required to state in specific terms the reasons for the decision.[3]

This view was implemented in relation to the Ombudsman by means of an express exclusion in s 5(2)(d) of the Ombudsman Act 1976 (Cth) of the power to investigate action taken in relation to "employment, including action taken with respect to the promotion, termination of appointment or discipline of a person ...". The Administrative Appeals Tribunal Act 1975 (Cth) required the express inclusion of particular classes of decision by that Act or another enactment. No classes of decision relating to employment have yet been included.

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* Barrister, NSW. Revised version of a paper presented at the Conference "Ten Years of the Federal Administrative Decisions (Judicial Review) Act" in September 1990.

1 This paper is based on a thesis by the author on a similar topic: N Williams, *Review of Personnel Decisions in the Australian Public Service under the Administrative Decisions (Judicial Review) Act 1977*, July 1989, a thesis submitted in partial fulfilment for the Degree of Master of Public Law of the Australian National University.

2 *Report of Committee of Review of Prerogative Writ Procedures*, PP No 56 of 1973.

3 *Ibid* 7.

The Judicial Review Act, however, contained no exclusion of personnel decisions, except in relation to the obligation to give reasons under s 13. The right under s 13 of the Act to seek reasons for decision has been described as "the fundamental improvement or reform effected by the Judicial Review Act".[4] However, paragraph (q) of Schedule 2 to the Act excludes the operation of s 13 with respect to personnel decisions of a policy nature which do not relate to a particular person. In addition, paragraph (r) of that Schedule excluded decisions relating, broadly, to promotions and transfers from the operation of s 13 for a period of twelve months after the commencement of the Act, or for such longer period as was prescribed.

After the expiration of a period of twelve months, a further period was prescribed, but an attempt to prescribe a further period of twelve months was disallowed by the Senate on 23 March 1982. However, the right to reasons in promotion and transfer matters was removed by Parliament in the Public Service Legislation (Streamlining) Act 1986 (Cth).

2 DEVELOPMENTS SINCE THE ACT CAME INTO FORCE

A The Surge of Litigation

Soon after the Act came into force, there was a dramatic upturn in applications for judicial review of decisions concerning personnel matters in the APS.

Between 1980 and 1984 there were 39 reported cases concerning such applications compared with 23 between Federation and 1979.[5] Not all of the applications after 1980 were brought under the Act. Two significant decisions related to pre-Act decisions, and were brought under s 39B of the Judiciary Act 1903 (Cth).[6]

Since 1984, the number of applications has dropped off markedly, with less than 20 reported decisions since then.

B Changes Arising from the Litigation

The litigation of the last decade has produced, directly or indirectly, substantial changes to the procedures of the APS in several areas of personnel practice. The most notable have been in the area of promotion appeals. Changes have also occurred in the area of disciplinary procedure.

The procedures to be followed by promotion appeal committees were set out in guidelines issued by the Public Service Board in 1981. When the decision in *Finch v Goldstein*[7] was handed down, the Board sought advice from the Attorney-General's Department by memorandum dated 27 October 1981 on the changes to procedures which would be necessary as a result of the decision.

The Grievance and Appeals Bureau of the Public Service Board took the view at that time that the decision in *Finch* required the disclosure of referee reports to the parties.[8] As it turned out, events overtook the request for advice as the

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4 R Gyles QC, "Commentary" (1983) 14 F L Rev 182, 184.

5 N Williams, *supra* n 1, 18-20.

6 *Dixon v Commonwealth* (1981) 61 ALR 173 and *Ansell v Wells* (1982) 43 ALR 41.

7 (1981) 36 ALR 287.

8 PAC Chairmen's Circular, 1982/1, 25 January 1982.

decision at first instance in *Ansell*,[9] which held that referee reports need not be disclosed, was handed down in January 1982, before the advice was received. Nevertheless, the decision in *Finch* caused continuing uncertainty, with decisions, in particular promotion appeals, being withheld pending receipt of advice from the Attorney-General's Department.[10]

In its annual report for 1981-1982, the Public Service Board devoted almost two pages of its review of major developments to an attack on the decision in *Finch*, focussing on the issues of privacy, efficiency of decision making and the effect of the decision on harmonious relations in the workplace. The Board remarked that it "does not believe that, in general, there is a compensating benefit in terms of better promotions".[11]

Alarm at the possible implications of the decision in *Finch* was not restricted to those directly involved in administering the promotions appeal process. Referring principally to the decisions in *Finch* and in *Hamblin v Duffy (No 2)*,[12] the then Research Director of the Administrative Review Council, Dr Geoffrey Flick, warned in November 1981 that the procedural requirements imposed on administrative tribunals by recent decisions of the Federal Court "seriously endanger the very reason for establishing specialist administrative tribunals".[13]

New guidelines were promulgated by the Public Service Board on 22 November 1982, following advice from the Attorney-General's Department. The guidelines showed an attempt to set common minimum standards, and to encourage committees to respond flexibly to the circumstances arising in particular cases and to requests for different procedures.[14]

However, in December 1983, the guidelines were again revised to increase the access of the parties to relevant material. The new guidelines extended access to permit all parties to see the written statements of other parties, except referee reports provided in relation to other parties.[15] These changes brought the guidelines into line with the decision of the Full Court of the Federal Court in *Ansell*.[16]

In July 1984, the Public Service Board published guidelines for departmental and union nominees to promotions appeals committees.[17] Those guidelines did not alter in any significant way the procedures set out in the circulars distributed to committee convenors during the previous year. The published guidelines acknowledged their debt to the decisions of the courts regarding PAC procedures:

> The guidelines take account of comments of the Courts in recent judgments relating to PAC processes. Following those judgments, procedures have been amended to ensure that parties to appeals are properly informed about the substance of the case to be met.[18]

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9 *R v Wells; ex parte Ansell* (1982) 55 FLR 281.

10 PAC Chairmen's Circular, 1982/4, 24 March 1982.

11 *Annual Report of the Public Service Board*, 1982, 3

12 (1981) 37 ALR 297.

13 G Flick, *Administrative Tribunals, the Threat of Over-Judicialisation*, unpublished paper delivered to the Repatriation Review Tribunal Conference, 1981, 99.

14 The guidelines were annexed to the PAC Chairmen's Circular, 1982/23, 22 November 1982.

15 PAC Chairmen's Circular, 1983/17, 16 December 1983.

16 (1982) 43 ALR 41.

17 AGPS, Canberra, 1984.

18 *Ibid* v.

Indeed, a perusal of the procedures set out for conducting hearings shows that close attention has been paid to the decisions of the Federal Court in preparing the guidelines.[19] A further revision of the guidelines was published in 1988.[20] In some areas, the guidelines go significantly beyond what is required by decisions of the Court.[21]

As well as the extensive changes to promotion appeal committee procedures, guidelines were promulgated in relation to disciplinary procedures following the decision in *Dixon*,[22] and in relation to the procedure for re-employment (while an appeal to the Full Court of the Federal Court was still pending on that issue in *Cole v Cunningham*[23]).

Briefly summarised, the litigation resulted directly in a substantial increase in the standard of procedural fairness afforded to members of the APS in relation to personnel decisions.

While there had been some strong expressions of concern from within the senior ranks of the Public Service about judicial review of personnel decisions during 1983,[24] a substantial measure of acceptance was apparent during 1984. On 7 February, the then Chairman of the Public Service Board, Dr Peter Wilenski, commented in a paper delivered to an administrative law seminar for Permanent Heads of Departments, that the obligation to give reasons provides encouragement to the promotion appeal committees to

> approach their task in an ordered and structured fashion. The personnel management benefit in an unsuccessful applicant being aware of the reasons for his or her non-selection also has to be weighed on the positive side of the scale.[25]

After pointing out that judicial review is available under other mechanisms than the Act and is ultimately guaranteed by the Constitution, Wilenski remarked:

> Given that there is no escape from judicial review, there is much to be said for the codified grounds and simplified remedy provided by the Judicial Review Act rather than the uncertainties and arcane remedies available at common law.[26]

However, in the Senior Executive Service reforms, the Government removed entirely promotion appeal rights in respect of officers of the former Second Division. In 1986, this restriction was carried into the senior ranks of the Third Division by the Public Service Legislation (Streamlining) Act 1986 (Cth).

As a result of these changes, the only appeal rights remaining to officers above the level of Administrative Service Officer, Grade 7, are those provided by the Merit Protection & Review Agency. Briefly summarised, that Agency is restricted to reviewing personnel decisions on the basis of serious defects in the selection process, or breaches of the provisions of the Public Service Act 1922 (Cth) precluding patronage, favouritism and discrimination in the promotion process (s 33).

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19 *Ibid* esp 7-9.

20 *Guidelines on Promotional Appeal Committee Procedures*, (1988).

21 N Williams, *supra* n 1, 107-108

22 *Dixon v Commonwealth* (1981) 61 ALR 173.

23 (1983) 49 ALR 123.

24 See *eg* the *Report of the Review of Commonwealth Administration* (1983), 49 and *Annual Report of the Public Service Board* 1983, 5.

25 P Wilenski, "Administrative Law and the Public Service" (1985) 12 *Rupert Journal* 6.

26 *Ibid* 7.

Thus, it may be seen that the litigation concerning personnel decisions resulted in an increase in the content of procedural fairness in the promotion appeal process. While it has not been publicly stated that the restriction of promotion appeal rights for middle-ranking and senior public servants is the result of the litigation, it would be naive to suggest that the litigation and the increased procedural standards arising from it were not factors in the removal of those rights.

3 RELATIONSHIP OF LITIGATION TO THE ACT

While the developments described above have a close temporal relationship with the coming into force of the Act, it does not necessarily follow that they are a direct product of the passage of the Act. As noted above, two early cases relating to personnel decisions which gave a broad scope and substantial content to procedural fairness were not brought under the Act.[27]

The surge of litigation that occurred soon after the Act came into force was substantially a product of a decision by the Administrative & Clerical Officers' Association to fund challenges to promotion appeal committee procedures.[28] Since most, if not all, of the cases concerning personnel management could have been brought at common law, it is open to speculation that the ACOA may have funded such cases in any event, once the approach of the Federal Court in *Dixon* and *Ansell* became known.

To the extent that the passage of the Act promoted the litigation, one or a combination of factors may have been at play.

First, the Act simplified procedures and overcame technical limitations on the availability of remedies.

Secondly, the Act highlighted pre-existing rights to challenge decisions, partly by the definition of the common law grounds of review. That is, the Act may have served primarily an educative function.

Thirdly, the Act may have promoted litigation by providing the Federal Court as a forum for review, instead of the State Supreme Courts. This result could arise if the Federal Court was regarded as a more accessible forum, or if the judges of that Court were more prepared to intervene in discretion by virtue of their closer familiarity with the federal bureaucracy and judicial review of decisions thereof. In this respect, it should be recalled that the Kerr Committee proposed the creation of a specialist Administrative Review Court.[29] Whilst that recommendation was not implemented, it should be recognised that a substantial part of the jurisdiction of the Federal Court of Australia entails review of the actions of Commonwealth bodies and officers.

It seems likely that a combination of these factors was at play in the surge of litigation. While the remedial hurdles in judicial review at common law may not appear as substantial in 1990 as they did to the Kerr Committee, it is apparent that there was a perception both within the Public Service and within the ACOA

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27 *Dixon* and *Ansell*, *supra* n 6.

28 Information obtained from an interview with Mr J Pearce, a lawyer then employed by the ACOA, on 21 March 1989.

29 *Report of the Commonwealth Administrative Review Committee*, pp No 144 of 1987, Ch 11.

that remedial technicalities rendered impractical applications for judicial review of decisions taken in the personnel area.[30]

It also appears that in codifying the grounds, procedures and remedies of judicial review, the Act highlighted pre-existing rights amongst a group of potential litigants who, by virtue of their exposure to the Act as decision-makers, had a high level of appreciation of the availability of judicial review.

4 ANALYSIS OF DEVELOPMENTS

There can be no doubt that the surge of litigation in the personnel area has had substantial costs.

There are the purely monetary costs associated with the litigation, which have been significant in themselves. To the extent to which the cases establish that applicants before promotion appeal committees have a right to access to material put on behalf of other contenders for promotion, there has also been a diminution of privacy in the promotion appeal process. In other areas such as dismissal and re-employment, there has been some loss of flexibility in decision making. In the area of dismissal decisions, to the extent to which cases such as *Dixon* place procedural barriers in the way of dismissal of staff who have committed offences of dishonesty in connection with their employment, there is an inevitable diminution of the probity of the Public Service.

In promoting a more adversarial model for the promotion appeal system, more intensive judicial review may also have had some effect on harmonious work place relations. Most importantly, the more formal procedures in personnel matters which have arisen from more intensive judicial review have inevitably had a significant resource cost.

While these costs of judicial review are undeniable, there have also been very substantial benefits.

There is now a very high level of acceptance among parties to promotion appeal committee proceedings of the fairness and probity of those committees. Fairer procedures and the potential for judicial scrutiny of reasoning has had a substantial beneficial effect on the quality of promotion appeal committee decision making.[31]

What is perhaps most interesting about the spate of litigation, and the changes arising from it, is what can be gleaned about the normative effects of judicial review. It is far from universally accepted that judicial review does influence the future conduct of administrators. Hutchinson, for example, states that the argument that administrative practice will adapt to the dictates of administrative law "places great and unjustified faith in the 'inspirational' impact of law".[32] Whether the changes arising from the litigation in relation to personnel decisions in the last decade are desirable or not is a topic on which reasonable minds may

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0 This view was put in an interview conducted between the author and Mr H Whitton, then of the Merit Protection & Review Agency on 17 February 1989, and with Mr J Pearce, then a lawyer employed by the Administrative & Clerical Officers Association on 21 March 1989.

1 These observations were derived from interviews that the author conducted with Mr S Magee and Mr M Devine, Promotion Appeal Committee Convenors, on 23 February 1989 in Canberra. See also S Magee, "Staff Selection - The Use of Written References" (1988) Canberra Bulletin of Public Administration 145.

2 A C Hutchison, "The Rise and Ruse of Administrative Law and Scholarship" (1985) 48 MLR 293, 316.

differ. What is clear beyond any doubt is that the spate of litigation has changed the nature of personnel management in the APS substantially, and permanently.