



## **VALUES IN ADMINISTRATIVE LAW AND THE ROLE OF THE LAWYER ACTING FOR AN ADMINISTRATOR**

### **Introduction**

1. What I want to do this morning is to share some thoughts about the values of administrative law and about the role of a lawyer acting for an administrator.
2. The neoclassicals among you might well balk at the idea that administrative law has values. The neoclassicals might well join forces with the existentialists to refute the suggestion that a lawyer has any particular role to play in acting for an Administrator. The law is the law. I am a lawyer. Law is what I do. My job is to act within the law to get the best possible result for my client whoever my client happens to be. It is as simple as that.
3. If that sort of response satisfies you now then all I can say is that it is unlikely to satisfy you in the long term. In 50 or 60 years when you are tucked up in your nursing home bed next to the engineer who built the bridge and the teacher who inspired a generation of school children, you might well pause to

ask yourself: What have I built; What have I really contributed? But it is unlikely that you would be satisfied by that sort of response even now. Otherwise you would not have become government lawyers.

4. Administrative law does have values and a lawyer acting for an Administrator does have a particular role to play in upholding those values.

## **History**

5. Let me begin with some personal reminiscences which I want to weave into a story about the development of Commonwealth administrative law.

6. I started law school in 1977. To locate that year within the history of Commonwealth administrative law you have to remember that:

- the *Administrative Appeal Tribunal Act* was enacted in 1975;
- the *Federal Court of Australia Act* was enacted in 1976; and
- the *Administrative Decisions (Judicial Review) Act* was enacted in 1977.

7. Still to come was s 39B of the *Judiciary Act*. It was not enacted until 1983.

8. Before 1977, if someone wanted to commence what we would now regard as a common or garden variety administrative law action to challenge the decision

of a Commonwealth Administrator then that someone would have needed to embark on a rather elaborate and exotic and scary journey. The only place to do it was the High Court. And the way to do it in the High Court was to go before a single justice *ex parte* where you had to show an arguable case so as to get what was called an order nisi; the order nisi would then have to be served on the Administrator and made returnable before a Full Court; the merits of the case and the availability of any substantive relief would then have to be argued out in the first instance before the Full Court of the High Court. It was elaborate. It was exotic. It was scary. It cost a lot. And all of those things added up to meaning that, in reality, it did not happen very often.

9. One of the fairly rare cases in which it happened was in 1977 in the case of *Ex parte Ratu*. Mr Ratu, who was about to be deported, claimed that he had been denied what was then called natural justice in the making of the decision to deport him. He engaged senior and junior counsel. He got his order nisi. He then served it on the Minister and made it returnable before the Full Court. He then had his hearing and was told by five judges of the High Court that natural justice had nothing to do with the making of the decision to deport him.
10. In 1983 I then started work as an associate to one of those judges who had decided the case of *Ratu* a few years before. I happened to be still there in 1985 when the first case under the *Administrative Decisions (Judicial Review) Act* drifted up through the appellate system. The case was *Kioa v West*. You know the story. *Ratu* was left behind and the High Court with only one dissent held for the first time that procedural fairness applied to the making of

a deportation decision and to the making of Commonwealth administrative decisions generally.

11. A couple of years later I found myself a junior officer in the Office of General Counsel which was then part of the Commonwealth Attorney-General's Department. This was in the days before the effects of the administrative law reforms of the late 1970s had begun to be felt. It was also in the days before electronic databases. I was introduced to what was called the "Opinions Room". I'm not sure if the Opinions Room or its contents still exist. What it held was the bound opinions of lawyers in the Attorney-General's Department going back to Federation. Apart from the still fairly small amount of case law that was then beginning to emerge from the Federal Court, if you wanted to know something about the legal constraints on the taking of Commonwealth administrative action, that is where you would look. What you found was a perfectly coherent body of doctrine systematically organised with its own internal system of precedent. The way it all worked was that the Administrator asked the question and the lawyer went into the Opinions Room and came out with an answer. When the Administrator received the answer there was no question but that the legal position as set out in the OGC advice would be followed to the letter. No OGC lawyer set out in those days to please their clients. The thought and even the terminology would never have entered their heads. Their job, as they saw it, was to give legal answers to legal questions.
12. The obvious design flaw in the system was that it relied on the Administrator to ask the question. If there was no question, then OGC didn't give an answer.

If OGC didn't give an answer, then for all practical purposes the Administrator didn't get told.

13. In 1990 I went to the Bar. There I got swept up in the explosion of Commonwealth administrative law which was then just beginning and which was probably to reach its peak a decade or so later. My first brief in an administrative law matter came from a younger, thinner and even more Hungarian Andras Marcus. "I don't really know anything about administrative law", I said. "Don't worry", he said, "You'll pick it up".
14. One of our very best repeat clients in those early days was the Anti-Dumping Authority. I can talk about it fairly freely because it no longer exists. It was a body set up under its own legislation to conduct a merits review of customs decisions to impose dumping duty or countervailing duty on foreign goods whose importation was causing damage to an industry producing similar goods in Australia. The stakes were always high and its decisions were almost always challenged in vigorous and very well resourced actions under the *Administrative Decisions (Judicial Review) Act*.
15. For some reason I never really understood, the senior staff of the Anti-Dumping Authority were almost all Scottish. Some of them had a bit of a temper. But they were highly intelligent and conscientious administrators. The first time one of their decisions was challenged they were angry. The first time one of their decisions was over turned they were positively furious. Then they read the reasons why their decision was over turned and they decided they could learn from those reasons. The next time they made a decision they

were better for having their previous decision challenged. The next time one of their decisions was challenged, they didn't mind the process or the outcome quite as much. It was less of an annoyance and a distraction from their real work and more of an opportunity to appraise the work they had done and to learn from their experience. Indeed, as time went on, they came almost to enjoy judicial review. Where they felt they had been properly shown to be wrong, they corrected their mistakes for the future. Where they felt that they had been misunderstood, they explained themselves in the future more fully and more lucidly. They became tighter and more precise in their reasoning. In short, they got better. As they got better, the number of successful challenges decreased. As the number of successful challenges decreased, so too did the overall number of challenges. Then they got abolished. But that was the choice of the legislature and it illustrates something else that I want to come to.

16. For the moment, what was important about administrative law challenges in the life-cycle of the Anti-Dumping Authority is that having its decisions challenged in the Federal Court made it a better administrator. The legislature had given it a function to perform. Having its processes and reasons open to judicial review helped it to perform that function better.

**The point**

17. That brings me to my main point.

18. It would be possible to catalogue the values of administrative law in fairly general and high-sounding terms: fairness, transparency, legality and the like. You can find lots of lists, including some published by the Administrative Review Council. They are all well and good.
19. But underlying it all is the fundamental point that administrative law is about guiding the administrator to do the job right: to get really as close possible to what is objectively the correct or preferable decision that is to be made in all the circumstances.
20. There is a pretty fundamental difference between the citizen and the Administrator. It translates into a pretty fundamental difference between lawyering for the citizen and lawyering for the Administrator.
21. Under our system of law, every citizen has the right to do whatever is not prohibited by law provided it does not cause actionable harm to others. The lawyer acting for the citizen can therefore legitimately ask: What can my client get away with?
22. Under our system of law, the Administrator is different. The Administrator has no function other than that which is given by law. In many cases, as in the case of the Anti-Dumping Authority, the very existence of the Administrator is legally contingent. The Administrator has no residual right. The Administrator only has a duty to do the job the law requires the Administrator to do.

23. It is simply not legitimate for a lawyer acting for an Administrator to ask: What can my client get away with? The question is always: What is my client legally empowered or obliged to do and how is my client legally empowered or obliged to do it?
  
24. Ultimately, the law and the prophets of government lawyering can, I think, be summed up in a single aphorism which I draw from a highly successful NSW government advertising campaign. Do the right thing!