

Review of Administrative Decisions: Appeals

Terms of Reference

In 1971 the Committee was asked to recommend the principles and procedures that should apply in Western Australia in relation to the review of administrative decisions both by way of appeal and by way of the supervisory jurisdiction of the Supreme Court.

Background of Reference

The conduct of this reference was taken over by the Commission when it was formally established to replace the Committee in January 1973. The Commission decided to deal with the matters raised by the terms of reference in three parts. Part I deals with the principles and procedures that should apply in relation to existing administrative appeals and Part II deals with review by way of the supervisory jurisdiction of the Supreme Court. Part III, now withdrawn, was to involve a consideration of the principles that should govern the question whether a right of appeal should be created from various decisions not presently subject to appeal.

The project initially arose out of a submission to government by the Law Society of Western Australia. The Society was concerned about the lack of coordination in the existing appellate arrangements in the administrative law area. There are a number of important generic reasons for reform of this kind: the rise in the volume of litigation; pressure in the funding of courts in comparison to the with the volume of work done; the need for courts to show that they provide value for money in servicing the legal needs of the public; the heightened scrutiny of courts as public institutions delivering measurable incomes within the framework of the legal system; and pressure for greater accountability and transparency.¹

In November 1978 the Commission published a survey of those Western Australian statutes in force as at 31 December 1977 that made provision for appeal from an administrative decision. The survey was accompanied by a working paper, which discussed various methods of rationalising the existing law. At the time of the survey there were approximately 257 administrative decisions that were subject to a statutory right of appeal to more than 43 appellate bodies. The working paper noted that the existing division of appellate review of statutory boards and tribunals has no logical consistency. The proliferation of boards and tribunals has occurred with a lack of uniformity and a confusing variety of both internal operational procedures and appeal rights to the courts.² It was also noted that the nature of an appeal by way of re-hearing from a board or tribunal, as opposed to an appeal in the “strict sense”,³ is not uniform and depends upon the legislative context in which it arises. In each case in which a right of appeal is created by a statute, the ambit of the appeal and the powers of the appellate body depend on the terms of that statute.

Another defect with the existing appellate arrangements identified by the Commission was that in many cases the legislation did not provide for questions of law to be determined ultimately by the Supreme Court. There was also concern expressed about the procedures for appeals to the various appellate bodies, varying widely and that there was no procedure at all for appeals to the Local Court. Order 65 of the *Rules of the Supreme Court 1971 (WA)* provides a code of procedure for administrative appeals to the Supreme and District Courts from certain statutory boards and tribunals, but it does not apply to other appellate bodies and recourse must be had to the Act creating the right of appeal or the regulations made under that Act. If an Act in which a right of appeal to the Local Court is created does not provide for the

¹ See generally, B Opeskin, *Appellate Courts and the Management of Appeals in Australia* (2001).

² See Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia*, Project No 92 (1997) ch 32, which deals with appeals generally.

³ An appeal in the “strict sense” refers to an appeal to a court that simply determines whether the decision in question was right or wrong on the evidence and the law at the time.

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procedure to be followed, it is necessary for the Court to contrive its own procedure in that particular case.

Nature and Extent of Consultation

The working paper was distributed widely and submissions were received from numerous individuals and bodies including: the City of Melville; the Commissioner for Corporate Affairs; Department for Community Welfare; the Law Society of Western Australia; the Local Government Association of Western Australia; the Main Roads Department; D McColl; the Commissioner of Public Health and Medical Services; Dr GDS Taylor; the Town of Albany; JAD Treloar; and the Hon RL Young, MLA, Minister for Health.

The Commission also discussed certain matters raised by the working paper with Professor HWR Wade, Master of Gonville and Caius College (Cambridge), and Professor DC Pearce of the Australian National University. The Commission submitted its final report to the Attorney-General in January 1982.⁴

Recommendations

The Commission made 13 recommendations that may be conveniently summarised as follows:

- An administrative appeal system should be developed which should consist of the Full Court of the Supreme Court, an administrative law division of the Supreme Court and of the Local Court and a limited number of specialist appellate bodies. Where there is an appeal in the first instance to the Administrative Law Division of the Local Court or to a specialist appellate tribunal there should be a further appeal on points of law to the Administrative Law Division of the Supreme Court. Appeals to the Full Court should be restricted to appeals on questions of law.
- Provision should be made for the appointment of lay members of the Administrative Law Divisions by the Chief Justice or the Chief Stipendiary Magistrate in appropriate cases.
- The appellate bodies should have power to exercise all of the powers and discretions conferred on the original decision-maker and should have power to: affirm the decision; vary the decision, or; set aside the decision and substitute a decision of its own; or remit the matter for reconsideration with or without direction or recommendations from the appellate body. A judge of the Administrative Law Division of the Supreme Court should have the power, either on his or her own motion or on application of a party to an appeal, after giving parties the opportunity to be heard in chambers, to remit a matter from the Administrative Law Division of the Local Court or vice versa.
- Each party should bear its own costs, subject to any special reasons for the appellate body to order one party to pay the costs of the other.
- A code of procedure for the appellate bodies should be developed. The Commission suggested that the appellate bodies should not be bound by the rules of evidence, there should be provision made for preliminary conferences in appropriate cases, and a person entitled to appeal against a decision should be able to require the decision-maker to furnish written reasons, which include findings of material questions of fact, with reference to the evidence.
- An ongoing review should be established to review rights of administrative appeal and appeal processes.

A comprehensive list of recommendations may be found in chapter eight of the Commission's final report. The Commission's recommendations as to the rights of appeal initially to be conferred upon the

⁴ Law Reform Commission of Western Australia, *Review of Administrative Decisions: Appeals*, Project No 26(I) (1982).

Administrative Law Division of the Supreme Court, the Administrative Law Division of the Local Court, and specialist appellate bodies are listed in appendices II and IV of the final report respectively.

Legislative or Other Action Undertaken

There has been no legislative action to date; however, the *Report of the Royal Commission into Commercial Activities of Government and Other Matters Part II* (1992) para 3.4.8 recommended that the reforms contained in the Commission's final report should be implemented forthwith, subject only to the observations in para 3.5.2 about the establishment of an Administrative Appeals Tribunal.⁵

Currency of Recommendations

The recommendations should prudently be considered in light of the more recent recommendations made by the Commission in its *Review of the Criminal and Civil Justice System in Western Australia* ("Project No 92"). In that report the Commission made 26 recommendations that were directed to the review of the structure of boards and tribunals and the administrative appeals process. The key recommendations of Project No 92 as they relate to this reference are that:⁶

- A Western Australian Civil and Administrative Tribunal (WACAT) should be established to amalgamate the adjudicative functions of existing boards and tribunals, except in industrial relations and Workcover areas.
- The WACAT jurisdiction should extend beyond administrative review or appeals, to other adjudicative functions currently determined by tribunals, including the Small Claims Tribunal, the Residential Tenancies Tribunal and the Small Disputes Division of the Local Court.
- Administrative decisions of boards and tribunals should be subject to review by the WACAT rather than a court.
- An appeal to the Supreme Court from an administrative review or appeal determination by the WACAT should be established only upon grounds of questions of law; the complexity of the case; or when in the public interest.
- Jurisdiction should be conferred on the WACAT by legislation relating to the subject matter of the decision or complaint where appropriate.

These recommendations have prompted a further reference from the Attorney-General to the Commission. This reference, *Judicial Review of Administrative Decisions* ("Project No 95") is aimed at comprehensively reforming the law and procedures pertaining to the review of administrative decisions on their merits. The Government has further appointed a Civil and Administrative Review Tribunal Taskforce to assist and advise the Government and liaise with the Commission on this subject. The Commission's final report on Project 95 is expected to be submitted early in 2002. The Commission's recommendations in Project No 26(I) should therefore properly be regarded as subject to the more recent recommendations of the Commission in Project No 92 and its imminent and more detailed recommendations in Project No 95.

⁵ The failure to implement the report was also criticised by the Commission on Government in its *Report No 4* (1996) para 5.2. See also Western Australia, *Parliamentary Debates*, Legislative Assembly 18 November 1997, 8004 (Dr G Gallop); Western Australia, *Parliamentary Debates*, Legislative Assembly, 23 December 1998, 5794 (Mr E Ripper representing the Attorney-General and Mr K Prince, Minister for Police).

⁶ Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia*, Project No 92 (1999) ch 33.