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Chairman of the Australian Law Reform Commission

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The Australian Law Reform Commission has received an important reference from the Commonwealth Attorney-General to inquire into and report on the Lands Acquisition Act *1955 of the Commonwealth and the law and practices relating to injurious affection arising from Commonwealth operations. A seminar on the Commission's tentative proposals was held in Brisbane on 16 June 1978 and was addressed by the Chairman of the Commission, Mr. Justice Kirby, and the Commissioner in charge of this reference, Mr. Murray Wilcox Q.C. The Commission's suggestions for reform are contained in its discussion paper No. 5* Lands Acquisition Law : Reform Proposals. *In the course of his opening remarks at the seminar, Mr. Justice Kirby outlined important reforms in administrative law which have been introduced by successive governments at a Commonwealth level. In this note, prepared by his Honour, some of the more important innovations are described and explained.*

LAND ACQUISITION PROPOSALS

When the Commonwealth Attorney-General asked the Australian Law Reform Commission to review the Commonwealth's *Lands Acquisition Act* 1955, he committed to an independent body the obligation of bringing forward advice on new laws and procedures to govern the compulsory acquisition of property by the Commonwealth. Unlike most modern constitutions, the

Australian Constitution contains little high-flown language and few references to the "rights" of citizens. One of the few exceptions is the specific provision which requires the Commonwealth to acquire property "on just terms". The Law Reform Commission must therefore test its reform proposals against this constitutional obligation. What are just terms and just procedures in 1978?

The Commission has put forward a number of innovative proposals and has invited the opinion of ordinary citizens and experts, including lawyers, valuers and real estate practitioners. The most important reforms proposed are four :

* *A pre-acquisition inquiry.* In the event of a disputed acquisition, the property owner should be entitled to require a public inquiry to scrutinise the needs for acquisition, any alternatives and, possibly, environmental implications.
* *Procedural reforms.* New informal procedures, utilising the Commonwealth's Administrative Appeals Tribunal, should be introduced to permit speedier and cheaper resolution, particularly of small claims.
* *New compensation formula.* A new formula is proposed on the basis of full indemnification of financial loss and other benefits including a solatium for intangible losses not presently compensated.
* *Injurious affection.* A limited entitlement to compensation arising out of injurious affection is proposed, without the necessity, in every case, of proving actual acquisition.

These are undoubtedly important reform measures. But they are not written on a blank page. They must be considered and understood against the background of the important reforms that have been pioneered by successive Commonwealth Governments during this decade. These reforms have not been accompanied by much publicity or popular debate. They are still not fully understood. When they become known, they will work a peaceful revolution in the relationship between the citizen and the machinery of government. The changes have been called the

"new administrative law". It is important that all citizens should understand it. It is particularly important that those who have to deal with the Commonwealth Government and its agencies should know of the changes that have already occurred and be alert to other important changes on the horizon. Some of the reform measures are paralleled in developments in State Governments. Others are entirely novel and are, as yet, found nowhere else in the English-speaking world. Clearly, in time, the Commonwealth's reforms will have an impact upon all government administration in Australia. At their heart is a recognition of the growing importance and power of governmen in our society, the need to control and discipline such power and the demand of an increasingly well educated community that bureaucratic procedures be fair and open.

MOVES FOR REFORM

The growth of the role of government this century and the dangers this growth entails for the ordinary individual were recognised by the 1930s when Lord Hewart wrote *The New Despotism*. In 1957 the United Kingdom Parliament received an important report from the Franks Committee which recommended the establishment of a Council on Tribunals to keep administrator in check. Such a Council was established in 1958. It attracted scarcely a mention in Australia. We were just not interested. In the late 1960s a series of committees were established to consider modern procedures for the review of bureaucratic decisions. Following their reports, legislation was introduced during the Whitlam Government and the initiative continues vigoro under the present Administration.

The recurrent themes of the committees were three :

* The development of a comprehensive structure of indepen institutions to supervise the bureaucracy.
* The avoidance of the haphazard growth of government bodies and the provision of basic rules of fair conduct.
* Ensuring that the system actually worked by providing that the citizen could secure access to government information to make sure that decisions by government made on that evidence and affecting him were fair and right.

THREE ACTS, A BILL AND MORE TO COME

Since 1975 three Acts have been passed which will certainly produce big changes in Commonwealth Government procedures and decision making. The Acts are :

* *Administrative Appeals Tribunal Act* 1975.
* *Ombudsman Act* 1976.
* *Administrative Decisions (Judicial Review) Act* 1977.

Further legislation is promised as part of this package designed to reform the relationship between citizen and government.

* A Freedom of Information Bill, 1978, has already been introduced into Parliament by the Attorney-General, Senator Durack. Although there has been some criticism of the exemptions provided for under the Bill, the fact remains that it is the first attempt in a Westminster system to reverse the general rule. Until now the rule has been that a citizen seeking documents from the government can normally not have them. The principle has been one of bureaucratic secrecy. The Bill asserts for the first time that any person seeking such information from the Commonwealth in the future will generally get it, unless bureaucracy can establish that it falls into one of the exemptions.
* Comprehensive privacy legislation has been promised by the government, following receipt of the report from the Law Reform Commission.
* Important reforms of procedures of Commonwealth tribunals have been promised, to lay down a code of minimum requirements to ensure that natural justice and fairness are observed in such tribunals.

NEW INSTRUMENTS TO CONTROL POWER

The legislation already passed introduced four guardians for the citizen in his dealings with the Commonwealth Government and its agencies :

* *Administrative Appeals Tribunal.* A new national general appeals tribunal has been established. It is a quasi-judicial body headed by Mr. Justice Brennan, formerly a leading member of the Queensland Bar. Its functions are to review decisions within its jurisdiction, made by Ministers, subordinate tribunals and administrators. It not only reviews the legality of a bureaucratic decision and the facts upon which that decision was based but also the policy underlying the decision. It is this third power which goes beyond the orthodox functions of judges in the past and permits the tribunal to "flush out" hitherto secret policy directives so that they can be debated and justified in the open.
* *Commonwealth Ombudsman.* This new officer is the recipient and investigator of grievances in matters of administration. Professor Jack Richardson has already received thousands of complaints about bureaucratic delays, insensitivity and indifference. He can report errors to senior public servants, Ministers, the Prime Minister and ultimately to Parliament, in order to ensure good administration and fairness to the citizen. He is now operating most informally and some complaints are being dealt with promptly by telephone.
* *Administrative Review Council.* A general supervisory body has been established to keep the new structure of administrative reforms under review. This body is constantly advising the Commonwealth about additional jurisdiction that should be given to the Administrativ Appeals Tribunal, new methods of reviewing bureaucrati decisions and improved procedures that should be adopted in the Commonwealth's Public Service. It receives and considers suggestions from citizens and reports to the Attorney-General.
* *Federal Court of Australia.* A new system of judicial review has been established, committing to the Federal Court scrutiny of the legality

of administrative decisions. Whereas the old law for judicial review was complicated by antique remedies, the new review involves a simpler and speedier procedure. Moreover, it introduces an important right to have reasons stated. It is this right which is perhaps the most important innovation of all.

THE RIGHT TO REASONS

Both the *Administrative Appeals Tribunal Act* and the *Administrative Decisions (Judicial Review) Act* provide for the giving of reasons to citizens affected by government decisions. Until now, there has been no legal obligation to give reasons. Now, the ground rules are changing. The second-mentioned Act has not yet been proclaimed to commence but it will probably come into operation in 1979. Its provision of a general right to obtain reasons for bureaucratic decisions promises to be the most radical reform in the package described above. When the Act comes into operation (it has already passed through Parliament) it will entitle a citizen affected by a decision of a Commonwealth public servant to obtain a statement in writing :

* setting out the findings on material questions of fact;
* referring to evidence and other material on which the findings were based; and
* giving the reasons for the decision

W.S. Gilbert once declared that it was one of the "happiest characteristics of this glorious country that official utterances are invariably regarded as unanswerable". Now, in the Commonwealth, they will be questionable. The answers given will be opened up to scrutiny by judges. It will not be necessary to commence legal proceedings to secure the statement of reasons. All that will be needed is a request. The Act, when proclaimed, will apply to all decisions of an administrative character made by Commonwealth public servants under an enactment. There will be some exempt decisions but it is not expected that these will be many. The right to get reasons will, it is hoped, ensure that there are reasons for decisions made by public servants. The words "public *servant*" may take on a

YES, BUT DOES IT WORK?

There will be some cynics who will say "It's a great system. It's a bureaucratic dream. But what will it do for John Citizen?"

As in all these things, much will depend upon the enthusiasm, determination and imagination of the people who work the new machinery. The fact is that the Ombudsman is now processing hundreds of complaints. Already he has secured important changes in Commonwealth administrative practices. After a slow start, the Administrative Appeals Tribunal is now extremely busy. It has even scrutinised and reviewed decisions of Ministers. In one case it reversed a decision by a Minister, even though the decision had been referred to Cabinet. The tribunal held that the policy underlying the decision had not been properly applied. In several cases orders for deportation have been reversed. The tribunal has been in the position to examine the decision "on the merits". Ithas had the advantage of seeing the persons affected and considering the policy of the law on an individual basis. Individualised justice is an important element in any system which values the worth of each human being. Many other important decisions have been handed down by the new tribunal. It has a "novel jurisdiction" which will bring out into the open policy directives upon which the decisions of the Commonwealth Public Service are made, affecting us all.

BACK TO LANDS ACQUISITION

What has all this to do with the Law Reform Commission's proposals for reform of the *Lands Acquisition Act*? The administrative reforms that have already been enacted by the Commonwealth Parliament have certain common themes. No longer is the citizen simply an object to be pushed about at the will of government. No longer is he to be defenceless against the stony wall of bureaucratic silence. On the contrary, he is, in the future, to be given access to information, reasons for decisions affecting him and readily available machinery to have external, independent scrutiny of public service decisions. Whether that scrutiny is provided by the Ombudsman, the Administrative Appeals Tribunal or the Courts, its very existence

will, it is hoped, ensure that the initial decision is carefully made,for good reasons and according to law.

All of this is obviously relevant to the Law Reform Commission's thinking on the new rules that should govern what happens when the Commonwealth or its agencies seek to acquire property, under the threat of compulsory powers. The suggestion that the Commonwealth should have to submit to an inquiry into the needs for and alternatives to the proposed acquisition is little more than an extension of what will be the citizen's general right to have a statement of reasons for decisions made affecting him. The entitlement to plain English forms and, possibly, service of the Commonwealth's valuation and comparable sales is little more than the entitlement which s.13 of the *Judicial Review Act* spells out. It requires not only a statement of reasons to be given but a reference to material evidence and a list of findings of fact. The suggestion that the Administrative Appeals Tribunal should be used is in recognition of the reality that a more informal procedure, less intimidating than the courts, may be needed if humble citizens are in practice to get to an "umpire" in their disputes with the Commonwealth over valuations. In many cases it might be expected that the greater informality of the tribunal would obviate the necessity of legal representation.

The Law Reform Commission's proposals are, therefore, not advanced in isolation. They are written against a backdrop of important changes that are only now becoming known and understood throughout Australia. They should be judged according to the new standards which will govern the relationship between the Commonwealth and its citizens.