FOREWORD TO "PROMOTION AND DISCIPLINARY APPEALS IN GOVERNMENT SERVICE" by Geoff Cahill

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FOREWORD

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PROVIDING A KEY

Many long years ago, when at the Bar, I received a brief before the predecessor to the Government and Related Employees Appeal Tribunal ("the Tribunal"). In the days of the Crown Employees Appeals Board there was no practitioners' text to lead the unwary advocate through the mysteries of the relevant law. True it is, a few cases were reported in the *State Reports* and the *Industrial Arbitration Reports*, as is the case today. But the flowering of jurisprudence which occurred within the Board was virtually unknown to the majority of people appearing before it. Moreover, it was almost totally unknowable. No key was provided to practitioners and other advocates to unlock the treasure chest.

Enter Miss Bradshaw. She was the associate to the Chairman of the Crown Employees Appeals Board. She had held this position for many years. She had computer-like knowledge of every conceivable decision handed down by that Board, stretching back to the time between 1944 and 1953 when Clancy J. (later Sir John Clancy) held office as Chairman. A call on Miss Bradshaw was the essential prerequisite for any young barrister venturing for the first time into the uncharted waters of employee appeals.

So helpful was she to me, so assiduous was my research (to say nothing of the meritorious claim of my client) that I succeeded in that first appeal. It was a promotion appeal. My colleagues at the Bar, who could always be counted upon for a cynical remark, urged me to abandon any hopes of building a practice before the Board where I had achieved such a forensic triumph. "You have had your life's measure of success", they claimed. In those far off days, success was rumoured to be rare.

This book provides today's generation of advocates before the Tribunal with a latter-day equivalent to Miss Bradshaw. It also provides (in Appendix E) some preliminary results on the outcome of appeals to the

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Tribunal. These suggest that, at least in the statistics derived from decisions in the 12 months ended December 1983, the prospects of replicating my supposedly unique achievement were comparatively high. Of the appeals conducted according to the formal mode during that time, 24.2 per cent succeeded in overturning the appointment under challenge. In those hearings conducted according to the informal mode, the success rate was approximately half that figure, i.e. 12.5 per cent.

Such figures must be approached with caution. It is not clear that they represent a sampling of all decisions, as they are derived from the sample of formal decisions. Furthermore, they refer to the analysis of 1983 cases and the book demonstrates that the case load of the Tribunal is growing rapidly. But it seems fair to assume that success before the Tribunal is no longer (if it ever was) a reason for the advocate to retire to other pastures. Whilst this book does not purport to collect and annotate all of the multitude of decisions of the Tribunal since its creation (and thus does not compete with the service offered by Miss Bradshaw in yesteryear), it does collect the numerous key decisions of the Tribunal and unreported decisions of the higher courts. In particular, decisions of the Court of Appeal are usefully called to attention, including, in a number of cases, unreported decisions which might otherwise be overlooked.

All litigation involves elements of chance. But litigation before a specialist tribunal, key decisions of or affecting which are unavailable, involves the risk of unfairness. Repeat players, who know, or can find access to, the decisions enjoy a decided advantage. In a body such as this Tribunal, that may mean an advantage to the representatives of employing authorities who will tend to show less turnover than will typically be found in the representation of the appellants. Accordingly, this book is a helpful corrective to that risk of unfairness. It is a "key" by which the interested practitioner will find his way into an interesting, important and growing field of legal practice. The practitioner may or may not be a lawyer. The Tribunal itself is sometimes chaired by a Member without legal qualifications. That makes it all the more important to have at ready access a practice book with the statutes, the regulations and ready reference to court decisions where the legislation is elaborated and elucidated.

HISTORICAL ANACHRONISMS

The Tribunal, and its predecessor, seek to graft onto Crown service a body of administrative law which reflects modern notions of

accountability and fairness. Whilst the ambit of the jurisdiction of the Tribunal is wider than the traditional area of Crown service, that body — the home civil service in the State of New South Wales — is the core of its concern. Many legal rules have developed both within the Crown's prerogative and by the common law to ensure that the Crown can mobilise its employees to the best service of the people. For that purpose, the employment of government employees is seen by the law and controlled by a body of rules which include a "heavily entrenched penumbra supported by the tradition, authority and public policy"[1] attaching to the traditions of Crown service. Before legislation such as that which established the Tribunal was enacted, the employment of such employees was at the will of the Crown. Statute apart, the Crown was entitled to dismiss employees at any time without notice, to promote or demote them, to transfer them or, in any way considered appropriate, to utilise their services as the Crown considered best served the public.[2]

These features of government employment have been much criticised over the years.[3] In a recent case, the Court of Appeal had to consider the extent to which this general rule could be abrogated, not only by statute but by contract.[4]

There is no doubt that recent beneficial developments of public law have been used, even in the field of government employment, to insist upon fair procedures. Some of the methodology of "Crown" employment has succumbed to the withering scrutiny of the courts to the realities involved in the deployment of staff.[5] But there remains an important issue of public policy which provides a background to decisions concerning government employees. It is a background which may sometimes be relevant to the determinations by the Tribunal of the jurisdiction reposed in it. I refer to the very special place which public employment necessarily enjoys in our community. The service of public, at least in some key activities, might occasionally be deemed too important to admit of inhibitions upon redeployment, where the

1. See per Wilson J. in *Coutts v. Commonwealth of Australia* (1985) 59 A.L.J.R. 548.
2. Hogg, *Liability of the Crown*, 155; *Deynzer v. Campbell* [1950] N.Z.L.R. 790. See also *China Navigation Co. Ltd v. Attorney-General* [1932] 2 K.B. 197 at 214.
3. See, for example, D. W. Logan, "A Civil Servant and His Pay" (1945) 61 L.Q.R. 240 at 255; Mitchell, "Limitations on the Contractual Liability of Public Authorities" (1950) 13 M.L.R. 318 at 320; Richardson, "Incidents of the Crown-Servant Relationship" (1955) 33 Canadian Bar Rev. 424 at 427; Rideout, *Principles of Labour Laws* (3rd ed.), 17.
4. *Suttling v. Director-General of Education* (1985) 3 N.S.W.L.R. 427. Special leave granted by the High Court.
5. *Council of Civil Service Unions v. Minister for Civil Service* [1985] 1 A.C. 528.

requirements of resolute and democratic government are insistent. Otherwise, our democracy is a mere shibboleth. Incoming governments with innovative and creative programmes could be effectively frustrated from reflecting the People's will by a regime which was too unresponsive or inflexible.[6]

ACCOUNTABILITY AND REASONS

As I have said, this Tribunal and the legislation which establishes it, provide guarantees of administrative fairness which may be more effective and decisive than the other avenues available (such as complaints to politicians or to the Ombudsman) and more sensitive and effective than those hitherto available in the courts (pursuant to the prerogative writs).

Running through the remarkable developments in administrative law of the past two decades is a common theme. It is the demand for real accountability. With the growth of the size and importance of government employment, it became plain that the old instruments of accountability were often ineffective, inaccessible and imprecise. In practical terms they were often unavailable. That is why we have seen such a remarkable growth of administrative law in recent years. In the federal sphere in Australia, the development has been astonishing, with the creation of the Administrative Appeals Tribunal, the Commonwealth Ombudsmen and the Federal Court, with its enhanced powers of judicial review.[7] Freedom of Information legislation is in place.[8] Privacy legislation is promised. The Administrative Review Council is even considering the long postponed question of damages for wrongful administrative action.

In New South Wales, the legislative progress has been slower and more cautious. But the Tribunal, and the Act which creates it, are important contributions to the process of accountability. The Tribunal provides the public forum in which decisions on the dismissal and promotion of most government employees may be challenged and scrutinised in a careful way. This is a far cry from the arbitrary powers of the Sovereign to deploy Crown servants arbitrarily, at will. There remain certain officers excluded from the jurisdiction of the Tribunal. The author suggests that they should be brought within its ambit, to break down the residual risks of cronyism and nepotism at the "top". Such recognition may require the final burial, at that level, of the notion of

6. See per Kirby P. dissenting in *Suttling* (1985) 3 N.S.W.L.R. 427.
7. See *Administrative Decisions (Judicial Review) Act* 1977 (Cth) esp. s. 13.
8. *Freedom of Information Act* 1982 (Cth).

the "neutral public servant" and the provision of short term contracts to permit greater flexibility. The authors of the television programme *Yes, Minister* have probably finally laid to rest the image of the departmental head as a mechanical functionary of the Minister. But, below the Sir Humphreys of this world, there is a vast army of loyal officers, striving faithfully to implement the policies of the elected government of the day. The provision for them of the assurance of fair promotion decisions, and justice in the event of dismissal, is a proper reciprocation for that loyalty.

Our community is still working its way to the reconciliation of these features of administrative fairness with the demands for rapid deployment where governments or policies change, early retirement, to make way for younger people of promise, and political sensitivity, where the law admits it, to the programme of the government of the day.

REASONS AND INNOVATIONS

After this volume went to press, the High Court of Australia reversed the decision of the Court of Appeal in a case mentioned on a number of occasions in the text. I refer to *Osmond v. Public Service Board of New South Wales*.[9] The case involved an application by Mr Osmond for declaratory relief to require the Public Service Board to give reasons for its decision to dismiss his appeal from the decision of his department head recommending appointment of another applicant to fill the position of Chairman of the Local Lands Board. This was a position not within the jurisdiction of the Tribunal. Whereas by its statute, the Tribunal must give reasons for its decisions, the Public Service Board is not required by statute to do so. A majority of the Court of Appeal held the common law in the circumstances required the giving of reasons. The High Court of Australia upheld the minority in the Court of Appeal.[10] In the circumstances of that case it concluded that reasons were not required either by statute or the common law. The decision of the High Court does not significantly affect what is said in the text, for the obligation of reasons, imposed upon the Tribunal is undoubted, being provided in its statute.[11] But the decision does lend possible weight to the argument of the author concerning the need to reconsider the exclusion of some employees from the jurisdiction of the Tribunal. The provision of accountability and procedures of reasoned administrative

9. [1984] 3 N.S.W.L.R. 477; [1985] L.R.C. [Const] 1041.
10. (1986) 60 A.L.J.R. 209.
11. *Government and Related Employees Appeal Tribunal Act* 1980 (N.S.W.), s. 48(4).

fairness in the case of *lower* ranks but not in the key posts of the *higher* echelon of the public service may strike observers — as it has the author — as anachronistic and anomalous. But it is now for the Parliament, not the courts, to remove the anachronisms and cure the anomaly.

The book has many useful and practical sections on the day to day operations of the Tribunal. It displays the innovations that have been adopted for handling appeals with multiple parties. It recounts the new procedures introduced for written argument and for informal hearings. Inevitably, it will be the first port of call for the advocate venturing upon the Tribunal for the first time. But the collection of references to cases will ensure that it is also a useful text for the seasoned practitioner.

The layout, with its numerous headings, provides helpful guide posts to take the eye through the text. The addition of the statute and regulations as Appendices emphasises the nature of the book. It is a practitioner's tool of trade. It does not pretend to be a work of analytical jurisprudence. To signal this, the text is enlivened with apt cartoons. Professor Peter Wilenski introduced this innovation in his reports on New South Wales Government Administration. So far, texts on Equity and Wills have resisted the temptation. Perhaps there is less to laugh at in those fields. Perhaps there is less self-criticism.

At a time when dire warnings are given that damages litigation will fade away, divorce be accomplished by the filing of documents, and land title conveyancing fall victim to the computer, lawyers and para-legals do well to scrutinise the field of administrative law. In Australia, it is a growth area for legal practice. And as this book reveals, it is an area where the skills of the lawyer are useful, and often constructively employed.

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