Administrative Review Council

ADMINISTRATIVE DECISIONS (JUDICIAL REVIEW) AMENDMENT BILL 1980

REPORT No 9

This report has been retyped - 7 July 1997
ADMINISTRATIVE DECISIONS (JUDICIAL REVIEW)
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Report to Attorney-General

1. On 9 April 1980 the Attorney-General wrote to the Chairman of the Council, informing him that the Government had completed its consideration of the Council's report on exclusions from the *Administrative Decisions (Judicial Review) Act 1977*. He enclosed a copy of a Bill which proposed amendments to the Act consequent upon that consideration, and noted that he hoped to introduce it into Parliament in the following week.

2. On 5 June 1980 the Attorney-General informed the Chairman that the Bill had been introduced into the Senate on 21 May on the basis that it was to stand over to the next sittings to allow its provisions to be fully considered. In his Second Reading speech, the Attorney had said that the Government would be pleased to consider any suggestions for improvements to the Bill which might be made in consequence of the opportunity thus afforded for parliamentary and public scrutiny of its provisions. In these circumstances, he wrote to say that he would welcome any views which the Council may wish to express on any provisions of the Bill dealing with matters which had not previously been the subject of advice from the Council. The advice of the Council is set out below.

The Council's Study

3. The Council makes no comment upon those elements of the Bill which implement or are contrary to the recommendations in its report on exclusions from the *Administrative Decisions (Judicial Review) Act 1977*, including its recommendations in paragraphs 29 and 30 of that report concerning the undesirability of separating the right to reasons from the other provisions of the
Act. The Council recognises that different issues may arise when considering exemptions solely from the obligation to give reasons pursuant to section 13, as is now proposed by the Government.

4. The Council was informed that consideration may be given to a different drafting approach to the Bill’s scheme of excluding decisions from the operation of section 13 by means of the list in the Second Schedule. In particular, a proposal is under examination for substituting a general description for many of the particular decisions now in the list. The Council would have no objection to this approach, provided that it would not further circumscribe the decisions for which reasons may be required.

Variation by Regulations of the Schedules to the Act

5. The Bill does not contain a clause which would authorise regulations to remove classes of decisions from the Schedules to the Act. It follows that the possibility of bringing classes of decisions presently excluded (by inclusion in the Schedule) within the beneficial operation of the Act is made more difficult because a specific Act of Parliament would be necessary in every case. The same is true of Schedule 2 exclusions from the duty to give reasons.

6. The Council therefore recommends that section 19 of the Act and clause 13(8) of the Bill be amended to empower regulations to delete classes of decisions from the Schedules to the Act.

Exclusions

7. There are in the two Schedules to the Bill a number of decisions which were not the subject of recommendations by the Council, since they had not been suggested by Departments as appropriate for exclusion from the Act.
They are listed in the next paragraph. The Council has not had the time to conduct the necessary consultations in order to make recommendations upon them. It does, however, note that some of them appear on a tentative examination to be inconsistent with the bases of the Council's previous recommendations based on the previous form of the Act.

8. The following decisions were not the subject of recommendations by the Council:

SCHEDULE 1

(Classes of decisions what are not decisions to which the Act is to apply)

(e) decisions making, or forming part of the process of making, or leading up to the making of, assessments or calculations of tax or duty, or decisions disallowing objections to assessments or calculations of tax or duty, or decisions amending, or refusing to amend, assessments or calculations of tax or duty, under any of the following Acts:

- Coal Excise Act 1949
- Customs Act 1901
- Customs Tariff Act 1966
- Excise Act 1901
- Pay-roll Tax Assessment Act 1941
- Pay-roll Tax (Territories) Assessment Act 1971
- States Receipts Duties (Administration) Act 1970
- Wool Tax (Administration) Act 1964;

(f) decisions of Taxation Boards of Review;

(1) decisions of the National Labour Consultative Council;
(m) decisions of the National Companies and Securities Commission made in the performance of a function, or the exercise of a power, conferred, or expressed to be conferred, upon it by any State Act or a law of the Northern Territory;

(n) decisions of the Ministerial Council for Companies and Securities established by Part VII of the agreement between the Commonwealth and the States a copy of which is set out in the Schedule to the National Companies and Securities Commission Act 1979;

**SCHEDULE 2**

(Classes of decisions that are not decisions to which Section 13 is to apply)

(a) decisions in connection with, or made in the course of, redress of grievances, or redress of wrongs, with respect to members of the Defence Force;

(b) decisions in connection with personnel management (including recruitment, training, promotion and organisation) with respect to the Defence Force, including decisions relating to particular persons;

(c) decisions under the following Acts:

   *Extradition (Commonwealth Countries) Act 1966*

   *Extradition (Foreign States) Act 1966*

(d) decisions under the Migration Act 1958, being -

   (ii) decisions in connection with the issue or cancellation of visas;
(j) decisions of the Federal Police Arbitral Tribunal

(k) decisions of any of the following authorities in respect of their commercial activities:

   Australian Dairy Corporation
   Australian Egg Board
   Australian Honey Board
   Australian Meat and Livestock Corporation
   Australian Wheat Board
   Australian Wool Corporation

(m) decisions in connection with the enforcement of judgements or orders for the recovery of moneys by the Commonwealth or by an officer of the Commonwealth;

(n) decisions of Distribution Commissioners under the Commonwealth Electoral Act 1918;

(o) decisions of the National Director of the Commonwealth Employment Service made on behalf of that Service to refer, or not to refer, particular clients to particular employers;

(s) decisions relating to promotions in accordance with section 53C of the Public Service Act 1922;

Clause 13A
9. **The Ambit of Clause 13A(1)** The Council has been informed that this clause has been proposed to safeguard the confidentiality of the information concerning the personal affairs or business affairs of a person or body which might otherwise be required to be included in a section 13 statement of reasons. The Council had some concern about the width of the descriptions in clause 13(1) of the classes of information which may be omitted from a statement of reasons, or may allow a statement not to be given. While recognising the administrative problems which the descriptions are designed to overcome, the Council recommends an amendment to the clause which will avoid unnecessarily limiting the obligation to provide full statements of reasons being given.

10. The Council considers that information falling within one of more of the classes listed in paragraph 13A(1)(b) should not be withheld where the person making a decision whether or not to withhold that information knows, or ought reasonably to know, that it is otherwise available to the public. The Council recommends that clause 13A be amended to provide that it does not apply in these circumstances.

11. **Level of Decision-Making.** The Council considers that decisions to withhold all or part of statements of reasons pursuant to the proposed section 13A are of sufficient importance to require that they be made at a senior level. Furthermore it is likely, as a matter of administrative practice, that such decisions would generally be made by senior officers. It is undesirable for the statute to confer powers or impose obligations on persons who, in reality, would not be the ones exercising those powers or fulfilling those obligations. The Council therefore recommends that the proposed section 13A should be amended so as to provide that decisions not to include information in statements of reasons, or not to furnish statements of reasons, should be made
or approved only by a Minister, a Permanent Head, or other authorised senior officer.

12. **The Time for Giving Notice.** The Council considers that notices under sub-clause 13A(3) should be given at the time when the section 13 statement is given, or, if a statement is not being given by reason of paragraph 13A(2) (b), as soon as practicable but in any case within twenty-eight days after receiving the request for the statement. This does not appear clearly in clause 13A, and the Council recommends that it be amended to do so.

**Future Review of the Bill**

13  In his Second Reading Speech, the Attorney-General foreshadowed that he would ask the Council to review the operation of the Bill after a period of experience of the working of it. The Council believes it would be desirable that records should be maintained to facilitate this future review. It therefore recommends that the Attorney-General invite all Departments to arrange for appropriate records to be kept of the operation of the Act, and, in particular, of cases of refusal of statements of reasons and of notices given under clause 13A(3).

14 July 1980  
(Retyped 7 July 1997)