

administration. As Telecom gave no indication within the stipulated time that it proposed to implement the Ombudsman's recommendation, he reported to the Prime Minister on 18 October 1990, under section 16 of the Ombudsman Act, that Telecom had not taken adequate and appropriate action within a reasonable time in respect of the matters and recommendations included in the Ombudsman's report.

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A D M I N I S T R A T I V E   L A W   W A T C H  
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**The High Court decision in Australian Broadcasting Tribunal v Bond (1990) 94 ALR 11**

This important decision of the High Court explains the distinction between 'decision' and 'conduct' in the Administrative Decisions (Judicial Review) Act 1977, ('AD(JR) Act') and the meaning of 'error of law' in that Act. It should result in fewer premature applications for judicial review and a corresponding decrease in disruption to administrative proceedings.

The facts

The facts of the case are complex and are set out in full in the law reports. In essence, the Broadcasting Act 1942 allowed the Australian Broadcasting Tribunal ('ABT') to suspend or revoke a commercial television licence if the licensee was 'no longer a fit and proper person to hold the licence': sections 85 and 88(2). The licences were owned by companies associated with Mr Bond. Prior to making any decision to suspend or revoke the licences, the ABT held an inquiry into various matters, ruled that Mr Bond was guilty of improper conduct under the Act and accordingly determined that he, and the licensee companies (which the ABT held he controlled) would not be found to be fit and proper persons to hold broadcasting licences. Neither ruling was itself the ultimate decision under the Broadcasting Act that the licensees were not fit and proper persons. Bond and the licensees sought a review of these actions and findings.

The Decision

The AD(JR) Act allows judicial review for

- . 'a decision to which this Act applies' - section 5
- . 'conduct [engaged in] for the purpose of making a decision to which this Act applies'- section 6.

The Act defines neither 'conduct' nor 'decision' although other provisions of the Act include certain actions as 'decisions' or conduct.

In Bond a majority of the High Court (Chief Justice Mason, with Justices Brennan and Deane concurring on this point) held that generally speaking:

- . the term 'decision' in the AD(JR) Act entails a substantive determination which is final, operative or determinative of the issue or fact to be ascertained under the relevant statute; but that conversely
- . the word 'conduct' in the AD(JR) Act, refers to action of a procedural nature which may be taken as a step on the way to a decision. However, such action may amount to a 'decision' under the AD(JR) Act if the relevant statute provided for a finding or ruling at that intermediate stage.

The majority of the High Court held that the finding that the licensees were not fit and proper persons was a substantive determination required to be made under the statute prior to the ultimate decision and was thus a reviewable 'decision' under the Act. However, finding Mr Bond (not himself a licensee) not to be a fit and proper person, was not such a 'decision'. It was merely a step along the way to a decision. It was not a substantive determination contemplated by the Broadcasting Act. The finding could not be attacked as 'conduct' as the challenge did not relate to the conduct of the proceedings engaged in before the making of a 'decision'.

#### Error of Law

The ABT also found that Mr Bond controlled the licensee company and so, because Mr Bond was not a fit and proper person, neither were the licensees. A majority of the High Court held that the finding of fact concerning the licensees was a 'decision' under the AD(JR) Act since it was made on a matter of substance for which the Act required a finding before making the ultimate decision.

The High Court refused to interfere with this finding as, even if the reasoning which had led the ABT to the finding was faulty, there was certainly some basis for the ABT's inference and so there could be no error of law. In short, want of logic or insufficient evidence did not amount to an 'error of law' under section 5(1)(f) of the AD(JR) Act.

#### The importance of the decision

There have been complaints from time to time that administrative proceedings are unnecessarily and (in the light of the extensive appeal procedures which are usually available) prematurely disrupted by some judicial review applications. The Administrative Review Council adverted to this problem in its report 'Review of the Administrative Decisions (Judicial Review) Act 1977 - Stage One' (No. 26) and recommended that the Federal Court's powers be extended and clarified, so that the Court could stay or refuse to grant applications for review.

The Administrative Decisions (Judicial Review) Amendment Bill 1987 went further than these recommendations by putting the onus on an AD(JR) applicant with alternative rights of review to satisfy the Court that the interests of justice required the Court not refuse to grant the application. The Senate Standing Committee on Legal and Constitutional Affairs recommended against the provision placing the onus on the applicant becoming law. The Government disagreed and the Senate then rejected the Bill.

In 1989 the Council published Report No.32 'Review of the Administrative Decisions (Judicial Review) Act; the Ambit of the Act'. The Council considered the views of the Senate Committee and recommended that where:

- (i) an application is made under sections 5, 6 or 7 of the AD(JR) Act,
- (ii) an alternative review is available, and
- (iii) the Court considers that it is desirable to refuse to grant the application in order to avoid interference with the due and orderly conduct of the proceedings referred to in (i), or for the reason that, in all the circumstances the balance of convenience so requires, the Court shall refuse to grant the application if it is satisfied, having regard to the interests of justice, that it shall do so. (The underlined words were those suggested by the Council. This recommendation has not yet been acted upon).

As the Chief Justice pointed out in Bond, the decision in that case ought not prevent review during the conduct of administrative proceedings where those proceedings are improperly conducted, for example where there is a denial of natural justice, nor will it prevent review of a 'decision' of a substantive or determinative nature. Such decisions would normally be made at the final conclusion of, or at the end of a distinct part of proceedings. It should also be borne in mind that under section 16 of the AD(JR) Act the Court retains a discretion whether or not to grant any remedy to the applicant. It will be interesting to observe the application of the test formulated by the High Court in Bond in subsequent cases.

#### Freedom of Information Annual Report

The eighth Annual Report on the Commonwealth Freedom of Information Act 1982 was recently published by AGPS. It costs \$11.95. The Report noted that:

- . The number of FOI requests continued to fall. In the year to 30 June 1990 there were 23,453 requests bringing the total number of requests since 1982 to nearly 200,000. Of those requests nearly 75% were responded to within 30 days.
- . The overall cost of administration of the Act was about \$10.5 million, FOI charges received were about \$309,000.
- . Of the FOI access requests determined 75% were granted in full, 21% in part and only 3% refused.
- . As in previous years a small number of amendments to personal records were made under the FOI Act.
- . The FOI Act provides for a two tier system of review. There were over 200 applications for internal review, from those 73 applications were lodged with the AAT and for the year ended 30 June 1990 there had been 14 decisions by the AAT and 3 by the Federal Court. The Report notes that the decline in appeals may be attributable to the settling of cases at preliminary conferences in the AAT.