



RETIREMENT SPEECH
SPECIAL SITTING OF THE ADMINISTRATIVE APPEALS TRIBUNAL
TUESDAY 15 MAY 2012

The Hon. Justice Garry Downes AM
President of the Administrative Appeals Tribunal

Chief Justices, judges, colleagues and friends.

Thank you, Mr Gageler, Mr Catanzariti and Mr Coles for your kind, if flattering, remarks. It is an additional pleasure for me to see you here today because I know each of you very well.

I want to thank everyone here for coming this morning. I must particularly mention Chief Justice Keane, Chief Justice Bathurst, President Allsop, Chief Federal Magistrate Pascoe, Chief Judge Preston, my colleague judges from the Federal Court, judges of appeal and judges of the Supreme Court, judges of the Federal Magistrates Court and judges of the District Court. I must particularly thank Chief Justice Keane and the judges of the Federal Court for permitting the Administrative Appeals Tribunal to use this magnificent court.

Those who have done me the honour of coming today cover virtually the whole of my life. I must mention Dennis Scott from Dawson Waldron Edwards and Nicholls (as I still think of it) who went to Mosman Preparatory School with me. Paul Menzies QC was at Newington College with me. My Colleague Justice Emmett and former Attorney-General Philip Ruddock, were with me in the Faculty of Law at Sydney University. John Harris and Hugh King were there as well. There are also many

colleagues here from my 35 years of practice and 10 years on the bench. There are friends and family from outside the law.

I would particularly like to mention representatives and friends from the Council of Australasian Tribunals, the Union Internationale des Avocats, the Anglo-Australasian Lawyers Society and the Presbyterian Church.

I have been very lucky in my career. I was an articled clerk at Dibbs, Crowther and Osborne with Peter Everett. DC&O was a highly regarded middle sized commercial firm which provided an excellent opportunity for me to learn and gain experience.

To my great fortune I then spent three years as Sir Garfield Barwick's associate. What I learned from him has guided me through the rest of my career. I said at my welcome, more than ten years ago, that it is not possible to exaggerate the influence Sir Garfield had on me. That is just as true today as it was then. My ten associates have had to endure my constant references to the way he did things. Chief Justices Keane and Black and four Attorneys-General have had to endure my old fashioned forms of address in letters, learned from him.

The important areas of his influence were not, however, so trivial. Not all of his influences are obvious – they are associated with a philosophy of the law. I guess the most important thing I learned from him was to develop a confidence in identifying propositions of law which will resolve issues without the process becoming overwhelmed by the detail of individual cases. Confidence was, and is, I think, the key.

While this approach was easier for Sir Garfield, at the apex of our legal system, than for me, in the middle, I believe I have been well served by recognising the limitations of precedent and the unhelpfulness of trying to use the opinions of other judges in different cases with separate facts to determine the outcome of the case in hand. The confident approach draws on principle, rather than different cases, to arrive at the correct determination.

Sir Garfield also taught me the importance of internationalism and its more down to earth companion, travel, which has been much mentioned this morning. Nationalism has its place, but the world would be better off if internationalism had been more prominent in the past. Modern developments in transportation and communication have led to increasing and continuing examination of issues from an international perspective. This is a good development which, hopefully, will continue. Australia, however, unlike the United States, has never placed undue emphasis on nationalism.

There is an inevitable tendency sitting on the bench in this magnificent courtroom - one of the legacies of Chief Justice Black – to reflect more upon a career on the bench and as President of the Administrative Appeals Tribunal than at the bar; yet 35 years of practice remains the dominating part of my working life.

Most of my time at the bar was spent on the Seventh Floor of Wentworth Chambers with Bill Prestley, Murray Gleeson, John Clarke, Bob Stitt, Chris Gee, who is sadly no longer with us, and many others here today. I must specially mention David Jackson with whom I had a close professional relationship after he succumbed to the attractions of practising in New South Wales. I look back on my period at the bar with great affection.

I count myself exceptionally lucky that I was one of the last appointees to the bench under the non-transparent “tap on the shoulder” system. I am not suggesting that the transparency and fairness of advertising and committees do not have their place, but I am very glad that I did not have to make a formal application. I dare say that there are some today who would make excellent judges but who are not prepared to do so. The bench in the past has been criticised for its lack of representativeness but not, I think, with only the rarest of exceptions, for its quality.

My own appointments as Judge of the Federal Court and President of the Administrative Appeals Tribunal were, of course, made at the same time. The Government’s then policy was to replace the Administrative Appeals Tribunal with an Administrative Review Tribunal. There was, however, a prospect that the proposal would not proceed. In this uncertain state of affairs there was much to be done at the time of my appointment even though that appointment was as acting President.

From the outset, the bulk of my work was in the Tribunal. The role of President is really a full time job. I was, however, appointed four times as acting President, before, in 2005, after the Government had abandoned its proposal to create the Administrative Review Tribunal, I was appointed full time President for a term of seven years, ending today, on this international day of changing presidents.

The Attorney-General at the time of my first appointment was Daryl Williams. The Attorney-General with whom I dealt, when the Government was reconsidering the role of the Tribunal, was Phillip Ruddock, who I welcome here today. I am also pleased to see Julian Leaser, his senior officer at the time, who I saw much of, mostly in connection with interviews for appointment to the Tribunal.

Although the Presidency of the Tribunal is a full time job I did find time to sit regularly in appeals in the Federal Court. Some of them were important to the future of the

Tribunal. The Administrative Appeals Tribunal Act requires the President to be a Federal Court judge. This requirement was reaffirmed by amendments to the Act in 2005 which had bipartisan support in the Parliament. I believe that it is an important requirement. I believe that it should be honoured in substance as well as in form.

The Tribunal is now a well-respected independent instrument of government which contributes much to the Australian way of life. Its ultimate superintendence of decisions relating to revenue raising, through taxation, and the distribution of wealth, through social security, is an important contributor to this role. The Parliament and the Government set the rules and establish policy; the Tribunal ensures that both are implemented fairly and without policy overriding individual justice.

The present stature of the Tribunal is very much the product of the dedicated work of members, conference registrars and staff. It is pleasing to have so many of them here today. I am particularly pleased to have all the executive deputy presidents from each state and the Australian Capital Territory sitting with me. I want to sincerely thank them. I also want to mention Deputy President Tamberlin. We had chambers next to one another on the Eighth Floor of Wentworth Chambers when I started practice. We appeared against one another. We sat on the Federal Court together. We mixed socially. And now he is an important member of the Tribunal. Finally, I must mention the three registrars I have worked with, who are all here today: Kay Ransome, Doug Humphreys and Philip Kellow. They all deserve my sincere thanks for their knowledge, skill and dedication.

Administrative decision-making, which is what the Tribunal does, is not court adjudication. The emphasis is not on lawfulness, but on correctness. The object is not to reach a lawful result, but the best result. The enquiry is not whether the decision under consideration is lawful, but whether it is right. The Tribunal can overrule a decision simply because it does not think it is the best decision. It is bound by legislation, but it is not bound by policy. Policy should not stand in the way of individual justice.

While individual justice should not be forgotten, however, nor should policy. The Tribunal is not deciding a dispute between two parties which will, at most, indirectly affect others. It is making decisions which, in their totality, can affect the culture and economy of Australia. A small social security case, if it affects large numbers, can be as significant as an important decision of our superior courts. Deportation decisions can determine what level of offending should disqualify someone from living here. Along with migration decisions and refugee decisions, these decisions ultimately

contribute to the determination of how the population of Australia should be made up. They have an important influence on Australian society. They can involve the Tribunal overruling Ministers of the Crown or their delegates. They can be controversial. It is for this reason that I think they should, as far as possible, reflect community standards and should be framed to show this. When the Tribunal is exercising a discretion which can influence the Australian way of life it must reflect Australian values: not the values of members of the Tribunal, but the consensus values of the Australian people.

The burden of this decision-making is a heavy one, but it is one that I think the Tribunal carries well, as the acceptance of the Tribunal in the community shows. The Tribunal is the leading administrative tribunal in Australia, at least at the Commonwealth level. It would be appropriate for it formally to be recognised as such.

I have been proud to lead the Tribunal for more than the last ten years. However, whatever I could do for the advancement of the Tribunal and its reputation has now been done and it is time for me to hand over to another to continue the process of constantly striving for change and improvement in response to the demands of society. In this regard I am delighted that Justice Duncan Kerr, who is here today, is to be my successor. His diverse achievements at the bar, as well as in academia and politics, make him an ideal president.

What is the future for administrative decision-making and the AAT? What are the pitfalls to be avoided? The answer I, I think, lies in the onward march of the capacity of computers for resolving complex tasks and their consequent adaptation to decision-making. A complex discretionary decision is still no more than an assessment of the weight to be given to different facts. Provided the right weighting can be assigned to each factor, there is no reason why a computer cannot undertake the exercise. Indeed, computer aided decision-making leads to greater uniformity, which is, itself, a desirable outcome. Uniformity is a constant issue in criminal sentencing. But there are problems with computer aided decision-making. The programming must be right. There must be a means of understanding how the programming works so that it can be audited, especially on appeal. These issues will, I think, provide an important challenge for administrative decision-making and review in coming years. The Tribunal will be able to play an important role in ensuring the best result.

I want to thank my ten associates and my personal assistants. Not all of them are here. A number of the associates are overseas or interstate. Samantha Robson, my current associate, who has been with me for nearly eighteen months and has helped

me organise my departure, is here, before going to work for Dawson, Waldron, Edwards and Nicholls – or is it called Ashurst? Samantha has a great future in the law, as do all my associates. Christina Costello, who has been my personal assistant for 5 years, is also here. I thank both Samantha and Christina and their predecessors, for their skill and ready assistance. I was very pleased to learn that Christina, who worked for Justice Conti, both at the bar and on the Federal Court, will be working for Justice Griffiths.

I cannot go without thanking again all those who have been important in my career, many of whom are here – family, friends and colleagues. I am so pleased that so many of you are here.

But I must particularly now mention those who are dearest to me – my daughters Jacqueline, Nicole and Stephanie of whom I am so proud and my grandchildren Callum, Will and Julia who are a delight to me. Callum was at my welcome in April 2002 – aged two weeks. But most of all I must mention Brenda, who has been my partner for more than fifty years and who has looked after me through all that time. Without her I would not be here today.

The Tribunal will adjourn.