



1980

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

ADMINISTRATIVE DECISIONS (JUDICIAL REVIEW) AMENDMENT BILL 1980

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,
Senator the Honourable P.D. Durack, Q.C.)

ADMINISTRATIVE DECISIONS (JUDICIAL REVIEW)

AMENDMENT BILL 1980

Purpose of the Bill

The Administrative Decisions (Judicial Review) Act 1977 - which is not yet in force - provides

- (i) for review by the Federal Court of Australia of decisions taken under statutory powers, other than decisions of the Governor-General; and
- (ii) for persons affected by such a decision to be given, on request, a statement of reasons for the decision.

This Bill amends that Act in the following respects:

- (i) it excludes certain classes of decisions both from review by the Federal Court and from the obligation to give reasons;
- (ii) it excludes certain other classes of decisions from the requirement to give reasons;
- (iii) it extends the 14-day period within which a statement of reasons must be furnished to a maximum period of 28 days;
- (iv) it provides protection against disclosure in a statement of reasons of confidential personal or business information; and
- (v) it makes a number of other amendments to facilitate the operation of the Act.

Clause 1 : Short Title

Clause 1 is a formal clause.

Clause 2 : Commencement

Clause 2 provides for the Act to commence on the date fixed for the commencement of the Principal Act.

Clause 3 : Interpretation

Paragraph 3(a) amends the definition of "decision to which this Act applies", contained in sub-section 3(1) of the Principal Act. The definition in the Principal Act provides that the phrase means a decision -

(a) of an administrative character;

(b) made or proposed to be made under an enactment, other than a decision by the Governor-General. The effect of the amendment is that the classes of decisions set out in Schedule 1 are not within the operation of the Act.

Paragraph 3(b) provides for the addition of three further sub-sections to section 3 of the Principal Act.

New sub-section 3(7) provides that a reference in a Schedule of the Bill to another Act or to a provision of another Act is to be taken to include a reference to any regulations or by-laws in force thereunder. Thus, for example, the reference to decisions made under the Conciliation and Arbitration Act 1904 in Schedule 1 is to be read as including a reference to decisions made under the Conciliation and Arbitration Regulations.

New sub-section 3(8) ensures that a reference in either of the Schedules to a decision made by a person or body includes a decision made by a delegate or a person authorized to make decisions on behalf of that person or body, or by some person acting in place of the person referred to.

New sub-section 3(9) includes definitions of terms used in the Schedules. The terms "air force law", "military law" and "naval law" are given the same meaning as in the

Courts-Martial Appeals Act 1955. "Commonwealth authority", which is used in paragraphs (r), (t) and (u) of Schedule 2 of the Principal Act is defined as any body established under an enactment. This includes bodies established under A.C.T. law. The term 'enactment' is defined in sub-section 3(1) of the Principal Act as meaning

- (a) an Act of the Parliament, other than the Commonwealth Places (Application of Laws) Act 1980;
- (b) an Ordinance of a Territory, other than the Northern Territory; or
- (c) an instrument made under such an Act or Ordinance.

Clause 4 : Limitation of Jurisdiction of State Courts

Section 9 of the Principal Act excluded the supervisory jurisdiction of State courts over decisions taken under Commonwealth statutory authority, or actions of Commonwealth officers, as that term is defined in section 75(v) of the Constitution. The jurisdiction which is excluded is review by way of the prerogative writs, or the remedies of injunction or declaration, or like remedies.

Clause 4 amends section 9 in three respects. In the first place, it would exclude from the jurisdiction of State courts decisions taken under Commonwealth statutory power only where the decisions are taken after the Act comes into force. Paragraph 4(a) inserts a new paragraph in sub-section 9(1) to this effect. This provision is necessary to overcome a lacuna in the Principal Act, since that Act provides for review by the Federal Court only of decisions made after the Act comes into force.

The second purpose of Clause 4 is to ensure that State courts have supervisory jurisdiction over decisions by the National Companies and Securities Commission and its staff and delegates when exercising powers under State Companies law under the new Companies and Securities Scheme. Paragraph 4(d) inserts a new sub-section 9(3) for this purpose.

The third purpose of the amendments made by clause 4 is to preserve the jurisdiction of State courts under the Bankruptcy Act 1966, under s. 32A of the Federal Court of Australia Act 1976 and in respect of any matter pending before a State court at the commencement of the Act. New sub-section 9(4) is consequential upon the amendment made by paragraph 4(a). Paragraph 4(c) is consequential upon the amendment made by paragraph (a) of clause 3 of the Bill. The effect is that the supervisory jurisdiction of State courts is to be excluded both in respect of decisions which are reviewable under the Administrative Decisions (Judicial Review) Act and in respect of decisions excluded from review under that Act by their being specified in Schedule 1.

Clause 5 : Manner of making Applications

Clause 5 makes a consequential amendment to section 11 of the Principal Act. The amendments to be made to section 13 and by the insertion of section 13A require a change to the provisions in section 11 relating to the time limits for applying to the court for review of a decision.

Clause 6 : Reasons for Decisions may be Obtained

Paragraph 6(a) of the Bill makes a number of amendments to section 13 of the Principal Act by omitting sub-sections (1)-(4) and inserting new sub-sections (1)-(4A).

Section 13 of the Principal Act provides for the furnishing, in certain circumstances, by a person who has made a decision to which the Act applies, of a statement of reasons for the decision. Although conveniently described as a statement of reasons, the statement must not only give the reasons for the decision, but must also set out findings of material questions of fact and must refer to the evidence or other material on which those findings are based. A person who is entitled to make an application to the Federal Court of Australia for an order of review of a decision may apply to the decision-maker for a statement of reasons under section 13 and the decision-maker is required, except in certain cases, to furnish the statement within 14 days of receiving the request. The principal purpose of the amendments so made is to provide that the obligation to furnish such a statement does not apply in relation to -

- (a) the classes of decisions specified in Schedule 2; and
- (b) any classes of decisions which may be excluded from the operation of section 13 by regulations made under the Act.

New sub-section 13(1) provides for the furnishing of a statement of reasons. It changes the previous provision so that the obligation to furnish a statement of reasons only applies to decisions to which section 13 applies and not, as before, to all decisions subject to judicial review by the Federal Court under the Act. That is, not all decisions subject to review by the Federal Court will now give rise to an obligation to furnish a statement of reasons.

New sub-section 13(2) provides that a statement of

reasons is to be furnished by the decision-maker as soon as practicable, and in any event within 28 days after receiving the request, instead of the 14 day period under the Principal Act.

New sub-section 13(3) provides for the case where the decision-maker considers that the person who requests a statement of reasons is not entitled to do so. In such a case the decision-maker may, within 28 days after receiving the request, either notify the person concerned of his opinion or apply to the Federal Court under new section 13(4A). Under existing sub-section 13(3) it was arguable that the decision-maker might not refuse to supply a statement of reasons if he believed the applicant not to be entitled to a statement unless he had a Federal Court order in his favour, no matter how clear it might have been that the applicant had no standing.

New sub-section 13(4) provides that, where the decision-maker gives a notice under new sub-section 13(3) or applies to the Federal Court under new sub-section 13(4A), he is not required to give a statement of reasons unless the Court declares the applicant to be entitled to a statement. If the Court does so declare, the decision-maker is required to furnish the statement of reasons within 28 days after the Court's decision.

New sub-section 13(4A) entitles the Federal Court, on the application of the decision-maker or the person seeking a statement of reasons, where the decision-maker has given a notice under new sub-section 13(3), to make an order declaring whether or not a person is entitled to request a statement of reasons.

Clause 6(b) inserts 4 new sub-sections at the end of section 13 in the Principal Act. New sub-sections (8), (9)

and (10) provide for the making of regulations to declare that certain classes of decisions, in addition to those set out in Schedule 2, are not to be subject to the obligation to furnish a statement of reasons under section 13 of the Principal Act. New sub-section 13(9) provides for the form in which classes of decisions may be specified in the regulations. New sub-section 13(10) provides that regulations so made only apply prospectively.

New sub-section 13(11) defines the decisions to which section 13 applies; that is, those decisions in respect of which the decision-maker may be required to supply a statement under sub-section (1). The sub-clause defines 'decision to which the section applies' as those decisions to which the Act applies, that is, those decisions reviewable under section 5 of the Act, but excluding certain decisions. The decisions so excluded are:

- (a) those decisions in respect of which there is an obligation to furnish a statement of reasons under section 28 of the Administrative Appeals Tribunal Act;
- (b) those decisions that include or are accompanied by a statement satisfying the requirements of sub-section 13(1); or
- (c) those decisions set out in Schedule 2

Clause 7 : Certain Information not Required to be Disclosed

Clause 7 inserts a new section 13A, the purpose of which is to ensure that the obligation to provide a statement under section 13 does not require the disclosure of personal or business information which has been supplied in confidence or under a statutory duty, or which is subject to a secrecy

provision in some other legislation.

Sub-section 13A(1) defines the category of information to which the new section 13A relates. This is information which relates to the personal or business affairs of a person (including a body corporate) and -

- (a) which has been supplied in confidence;
- (b) which constitutes a trade secret;
- (c) which has been furnished in compliance with a duty imposed by a law of the Commonwealth or of the Australian Capital Territory; or
- (d) the furnishing of which to the person requesting the statement under section 13 would be a breach of a statutory duty of secrecy imposed by another enactment.

Sub-section 13A(2) provides that information of the kind specified in sub-section 13A(1) is not required to be included in a statement furnished under sub-section 13(1). If the omission of that information would make such a statement false or misleading, then there is no obligation to furnish that statement.

Sub-section 13A(3) requires a person requesting a statement under sub-section 13(1) to be informed, in a case where he is furnished with a statement omitting personal or business information to which section 13A applies, that the information has been omitted and of the reason why it has been omitted. If the statement is not to be furnished because the omission of the personal or business information would make it false or misleading, the person requesting the statement is to be told that it will not be furnished and why it will not be

furnished.

Sub-section 13A(4) provides that new section 13A does not affect the power of the Federal Court to make an order for the discovery of documents or to require the giving of evidence or the production of documents to the Court. That is, the new section deals only with the content of a statement under section 13, and leaves to the ordinary law the question whether confidential personal or business information is required to be disclosed under an order for discovery or a subpoena.

Clause 8 : Certification by Attorney-General concerning the disclosure of Information

Clause 8 makes two separate amendments to section 14 of the Principal Act. Section 14 provides that a statement under section 13 need not include information to which a certificate given by the Attorney-General relates. Such a certificate might be given on the ground that the disclosure of the information would be contrary to the public interest

- (a) by reason that it would prejudice the security, defence or international relations of Australia;
- (b) by reason that it would involve the disclosure of deliberations or decisions of Cabinet;
- (c) for any other reason which could form the basis of a claim by the Crown in judicial proceedings that the information should not be disclosed.

The amendment made by paragraph 8(a) to sub-section 14(1) relates to the grounds upon which the Attorney-General might certify that the disclosure of information concerning a specified matter would be contrary to the public interest.

Paragraph 14(1)(c) of the Principal Act provides for a certificate to be given on the ground that the disclosure of information would be contrary to the public interest for any other reason that could form the basis for a claim by the Crown in the right of the Commonwealth in a judicial proceeding that the information should not be disclosed. Paragraph 8(a), by omitting the words "by the Crown in the right of the Commonwealth", is intended to make it clear that this ground is not limited to the traditional Crown privilege grounds, but extends to any ground, including legal professional privilege, on which privilege might be claimed for a document in judicial proceedings.

Paragraph 8(b) amends sub-section 14(2) to correct an error in the Principal Act.

Clause 9 : Change in person holding, or performing the duties of, an office

Clause 9 amends section 17 of the Principal Act by omitting paragraph 17(b) and substituting a new paragraph. As section 17 stands, it provides for the situation where a person who made a decision in the performance of the duties of an office no longer holds that office. In that circumstance, the Act has effect as if the decision had been made by a person for the time being holding, or performing the duties of, the office or, if there is no such person, such other person as is designated by the Minister administering the enactment under which the decision was made. Section 17 does not, however, provide for the situation where a person who has made a decision is temporarily absent from his office. New paragraph 17(b) is intended to provide also for that case.

Clause 10 : New Schedules

Clause 10 of the Bill amends the Principal Act by adding Schedules 1 and 2 at the end of the Principal Act.

Schedule

The Schedule to the Draft Bill contains two Schedules to be added at the end of the Principal Act. Schedule 1 sets out the classes of decisions which are not decisions to which the Act applies and are therefore not subject to judicial review in the Federal Court. Schedule 2 sets out the classes of decisions which are not decisions to which section 13 of the Act applies and in respect of which, therefore, the obligation to furnish a statement of reasons does not apply.

Schedule 1 : Classes of decisions that are not decisions to which the Principal Act applies

Paragraph (a) - This excludes decisions under the Conciliation and Arbitration Act, other than decisions of the Industrial Relations Bureau. The effect is to exclude from judicial review by the Federal Court all decisions of the Conciliation and Arbitration Commission, the Flight Crew Officers Industrial Tribunal and the Industrial Registrar, as well as decisions of the Minister under his statutory powers under the Conciliation and Arbitration Act.

This exclusion does not affect the powers of the Federal Court conferred on it under that Act.

Paragraph (b) - This excludes decisions of the Public Service Arbitrator and the Deputy Public Service Arbitrator under the Public Service Arbitration Act.

Paragraph (c) - This excludes decisions under the Coal

Industry Act, other than decisions of the Joint Coal Board. The effect is to exclude from judicial review by the Federal Court decisions of the industrial tribunals established under the Coal Industry Act.

Paragraph (d) - This excludes decisions under the Australian Security Intelligence Organisation Act 1956, the Australian Security Intelligence Organisation Act 1979, the Telecommunications (Interception) Act 1979 and the Telephonic Communications (Interception) Act 1960.

Paragraph (e) - This excludes decisions affecting the assessment or calculation of taxation, including customs and excise duties. The purpose of this exclusion is to leave these matters subject only to the ordinary procedures for review or appeal provided in the relevant legislation under which the tax or duty is assessed or calculated, and to prevent these procedures being short-circuited by application to the Federal Court for judicial review.

Paragraph (f) - This excludes from review by the Federal Court decisions of the Taxation Boards of Review. An appeal lies to a State Supreme Court and thence to the Full Court of the Federal Court from a decision of a Taxation Board of Review on a question of law. The purpose of this exclusion is to prevent that appeal process being circumvented by an application to the Federal Court for an order of review.

Paragraph (g) - This excludes decisions relating to the issue of tax clearance certificates under the Taxation Administration Act 1953.

Paragraph (h) - This excludes decisions made under the Foreign Takeovers Act 1975.

Paragraph (j) - This excludes decisions made under

the Banking (Foreign Exchange) Regulations which implement the Government's foreign investment policy. The paragraph provides for such a decision to be identified by a certificate issued by the Treasurer.

Paragraph (k) - This excludes decisions taken under the Passport Regulations on the request of a foreign government.

Paragraph (l) - This excludes decisions made by the National Labour Consultative Council.

Paragraph (m) - This excludes decisions of the National Companies and Securities Commission in respect of functions or powers conferred upon it by any State Act or a law of the Territory. The purpose is to ensure that the Commission is not subject to judicial review by the Federal Court in carrying out a State or Northern Territory function under the Co-operative National Companies and Securities Scheme.

Paragraph (n) - This excludes decisions of the Ministerial Council for Companies and Securities established by Part VII of the agreement between the Commonwealth and the States for the Co-operative National Companies and Securities Scheme.

Paragraph (o) - This excludes decisions made in the course of defence force discipline.

Schedule 2 : Classes of Decisions that are not decisions to which
Section 13 applies

This Schedule specifies classes of decisions in respect of which a statement of reasons is not required to be given under section 13 of the Act. It should be noted that additional exclusions may be made by regulation - see new sub-section 13(8) inserted by clause 6 of the Bill.

Paragraph (a) - This excludes decisions in the course

of the redress of grievances or redress of wrongs procedure in respect of members of the Defence Force.

Paragraph (b) - This excludes decisions relating to personnel management within the Defence Force.

Paragraph (c) - This excludes decisions made under the legislation providing privileges and immunities for foreign diplomatic and consular officers in Australia, and under extradition legislation.

Paragraph (d) - This excludes certain decisions under the Migration Act. Except in the cases specified in sub-paragraphs (iii) and (iv), the paragraph does not exclude decisions under section 6 of that Act relating to a person who has entered Australia within the meaning of the Migration Act. Nor does it exclude decisions under that section at the point of entry relating to persons who hold a visa that is in force or who have their travel documents endorsed for return to Australia. The exclusions in sub-paragraphs (iii) and (iv) are decisions which impinge upon Australia's international relations and, for that reason, are excluded.

Paragraph (e) - This excludes decisions relating to the administration of criminal justice.

Paragraph (f) - This excludes decisions relating to the institution or conduct of civil proceedings.

Paragraph (g) - This excludes decisions under the Appropriation Acts which are made by the Minister for Finance and which relate to the issue of sums from the Consolidated Revenue Fund.

Paragraph (h) - This excludes decisions made under the Audit Act, relating to the withdrawal of money from the Consolidated Revenue Fund or the Loan Fund in accordance with appropriations and the expenditure of money covered by the Advance to the Minister for Finance.

Paragraph (i) - This excludes decisions of the Commonwealth Grants Commission relating to the allocation of funds.

Paragraph (j) - This excludes decisions of the Academic Salaries Tribunal, the Federal Police Arbitral Tribunal and the Remuneration Tribunal.

Paragraph (k) - This excludes decisions of specified statutory authorities which carry on commercial activities in respect of those commercial activities.

Paragraph (l) - This excludes decisions of the Reserve Bank in connection with its banking operations. Decisions taken by the Bank under the Banking (Foreign Exchange) Regulations are not excluded except in so far as they are decisions giving effect to Government policy on foreign investment (in which case they are excluded entirely from the Act by paragraph (j) of Schedule 1).

Paragraph (m) - This excludes decisions in connection with the enforcement or execution of orders or judgments of a court.

Paragraph (n) - This excludes decisions of the Distribution Commissioners under the Commonwealth Electoral Act.

Paragraph (o) - This excludes decisions of the Commonwealth

Employment Service in respect of the reference of particular clients to particular employers.

Paragraph (p) - This excludes decisions relating to aviation safety standards.

Paragraph (q) - This excludes general personnel management decisions in the Australian Public Service or in respect of the staff of a statutory authority. It does not exclude decisions which relate to individual persons.

Paragraph (r) - This excludes, for a period of twelve months from the commencement of the Act, decisions relating to promotion or appeals against promotions and decisions relating to transfers subject to appeal to a promotions appeal committee in the Australian Public Service or the staff of a statutory authority. The period of twelve months may be extended by regulation.

Paragraph (s) - This excludes decisions relating to promotions taken under section 53B or 53C of the Public Service Act.

Paragraph (t) - This excludes decisions relating to the making of appointments to the Australian Public Service or the staff of a statutory authority, the engagement of temporary employees, or the appointment of statutory office holders.

Paragraph (u) - This relates to decisions in connection with the prevention or settlement of industrial disputes or otherwise relating to industrial matters within the Australian Public Service or the staff of a statutory authority.