



Speech by

JEFF SEENEY

MEMBER FOR CALLIDE

Hansard 7 October 2003

COMMERCIAL AND CONSUMER TRIBUNAL REGULATION 2003
Disallowance of Statutory Instrument

Mr SEENEY (Callide—NPA) (Deputy Leader of the Opposition (9.47 p.m.): I move—

That the Commercial and Consumer Tribunal Regulation 2003 (Subordinate Legislation No. 144 of 2003) tabled in parliament on 19 August 2003 be disallowed.

When the Minister for Fair Trading, Merri Rose, introduced this regulation on 19 August 2003 she sought to subvert the capacity of her newly created Commercial and Consumer Tribunal to independently and impartially render judgments. Under this regulation Minister Rose proposes to subject all members of the tribunal to performance agreements, either with herself directly or with 'the minister'—whoever is in that position—directly or with the tribunal.

The question this parliament must consider when it considers this disallowance motion is: how can a member of a tribunal independently and impartially determine a dispute and be an arbitrator between the parties when they have to worry about whether they are meeting the obligations of a secret performance agreement? That is the question that is at the core of the consideration of this regulation and the subsequent motion to disallow it.

What obligations are the members of this tribunal to be under if they are to be subject to an annual performance review by the minister? Are they to favour one party or other? Are they to be influenced in their decision making? Are they to process matters in accordance with time lines that prevent fair consideration of all matters? Are they to take into account matters which may not meet the minister's approval and may not meet with the approval of the government?

This is yet another fundamental attack upon the independence and impartiality of a quasi-judicial body in Queensland. No person can have confidence in the capacity of a tribunal to fairly determine the matters of dispute with this level of control by this minister or any other minister and with this level of control by her appointed chair of members of a tribunal.

Let us look at the background to this issue. The tribunal was created by the Commercial and Consumer Tribunal Act 2003. It replaced the Queensland Building Tribunal, the Property Agents and Motor Dealers Tribunal, the Retirement Villages Tribunal and the Liquor Appeals Tribunal. So it took on the responsibility of a number of former bodies. It took on a wide-ranging scope of work. It took on responsibility for a wide range of areas that are traditionally the subject of dispute between parties. Its job is not an inconsequential one. It is designed to play an important role in the protection of consumer rights in Queensland.

It commenced operations on 1 July 2003. Its stated objective is to deal with matters in a just, fair, informal, cost-efficient and speedy manner. The tribunal consists of one, two or three persons chosen by the chairperson, and the structure of that tribunal is set down in section 6 of the act. Section 11 of the act also sets down that the chairperson is to be a full-time appointment. It is a professional, full-time appointment. It is an important role that that chairman will play. The other members are either full or part-time, and the conditions of their appointment are also set out in section 11(2) of the act.

The members must be lawyers of five years standing or a higher level of experience and have an extensive knowledge of the business and industry. The act itself stipulates that. The act stipulates that because it recognises that this is not an inconsequential body. This is a tribunal with extensive responsibilities and it requires members with the capacity to handle those extensive responsibilities. Members are arguably of quasi-judicial status. The responsibilities that they have arguably give them that status. Sections 12 through to 14 of the act reinforce the standing that the members of this tribunal have. The chairperson has roles that are specified in section 15 of the act, which includes subsection (e), which states that one of the chairperson's roles is—

... managing the overall performance of members.

So we have a person who is a full-time appointment, one of whose roles is managing the overall performance of the members of that tribunal. The members themselves have to be people with five years standing or a high level of experience and knowledge of business and industry. All of this reinforces the point that is at the heart of the debate here tonight—this is a tribunal that has standing in the community, that is of quasi judicial status and that is deserving of recognition in that way.

The regulation-making power in section 155 allows for a regulation to provide for the appraisal of the performance of members of the tribunal. It is under that section that this regulation before the House tonight was made by the minister. If we look at the regulation, section 3 requires each member to enter into a performance agreement. It requires the chair to enter into a performance agreement with the minister, and it requires other members to enter into performance agreements with the chair. The agreement has to be in writing. The wording of subsection 3 of the regulation I think is important. On entering into a performance agreement it states—

- (1) As soon as practicable after a member is appointed, the member must enter into a performance agreement with—
 - (a) if the member is the chairperson—the Minister; or
 - (b) for another member—the chairperson.
- (2) The agreement must be in writing and signed by—
 - (a) the chairperson and the Minister; or
 - (b) the member and the chairperson.

The important thing about the wording of that particular subsection of the clause is the emphasis on the fact that the member must, as soon as is practicable after he is appointed, enter into an agreement with the person who has appointed him. He must enter into an agreement with the person—in this case the minister—who has appointed him that his performance will meet a certain standard. The agreement must be in writing and it must be signed by both parties. This is a quasi-judicial appointment where that person will be asked to rule in a dispute between members of the community and the person who has appointed them. It is not a run-of-the-mill general employment contract between somebody who is performing menial tasks. This person will be acting in a judicial role over disagreements and disputes between the minister or agencies of the government that the minister represents and members of the community.

Section 4 of the regulation requires that there be at least an annual review against the performance agreement for the chair and the members. I will read section 4 into the record—the review of a member's performance against performance agreement. Subsection 1 states—

A member's performance against the performance agreement under section 3—

- (a) must be reviewed at least once each year during the term of the member's appointment; and
- (b) may be reviewed at intervals shorter than 1 year if the chairperson directs, or the member requests, that the member's performance be reviewed.

That in itself introduces another level of control that the minister can exert over members of the tribunal, because the intervals or the concept of an annual review can be shortened if the chairperson directs it. If there is something that he or she is dissatisfied with, they can direct that an immediate performance review be conducted—for no other reason than that they direct it. There are no parameters set on the direction of that special performance review in the regulation. It can, on reading of the regulation, be directed at any time. So any time a member of the tribunal or the chairman makes a decision in the role that they have been given that somehow causes angst or disaffects the minister, or the minister's agent in the case of a member—which would be the chairperson—then they can be subject to an immediate performance review with no other reason needed than that the chairperson or the minister so decided.

Subsection 2 states—

The member's performance against the agreement must be reviewed by—

- (a) if the member is the chairperson—the Minister; or
- (b) for another member—the chairperson.

Once again, it is the very people who appointed them; it is the very people who are likely to be disaffected. After such a review, the agreement must be renewed. This regulation sets up a process that gives the minister almost complete control over the activities of the tribunal. It sets up a process

that allows the minister to, if not direct, substantially control the decisions and the conduct of both the members of that tribunal and the chairperson of that tribunal. That is a completely unacceptable situation, I would suggest, to the members of this parliament. It is completely unacceptable.

Let us look at the difficulties that can arise with these performance agreements. As a quasi-judicial body the tribunal is supposed to adjudicate between individuals and between individuals and state institutions. That is its role. The contents of performance agreements are unknown; they are not publicly available; nor are the reviews undertaken subject to any public scrutiny. It is very much a situation where the minister can exert substantial control without any sort of scrutiny in regard to the methods in which that control is exerted or the pressures that are applied to the members of the tribunal or to the chairman. It is setting up a system where we are being asked to blindly trust the minister.

What guarantees does anyone have who approaches the tribunal seeking justice in their case that the decision in their case will not be affected by what is contained in a performance agreement? We are being asked to trust ministers not to misuse this process. Will performance agreements require that members devote only particular time and effort to individual cases rather than the time and effort necessary to produce a just result? Will performance agreements encourage tribunal members to give decisions that a member believes will encourage their reappointment to the tribunal? Will they be encouraged to produce decisions that will ensure that they get a satisfactory performance agreement?

The whole concept of judicial independence is very important. I want to quote from Sir Gerard Brennan, a former Chief Justice of the High Court of Australia. In an address he made in November 1996 he said—

Judicial independence does not exist to serve the judiciary; or to serve the interests of the other two branches of government. It exists to serve and protect not the governors but the governed. ... There is a lack of awareness of the extent to which the peace and order of our society depend on the maintenance of a strong and independent judiciary as the third arm of government.

...

We have become accustomed to the notion that judicial independence includes independence from the dictates of the Executive Government.

Appearance, no less than the reality, of independence is essential.

Given those comments from Sir Gerard Brennan, former Chief Justice of the High Court of Australia, how can anyone who goes before the Commercial and Consumer Tribunal to have their disputes resolved have any faith in the independence of any tribunal decision when the members comprising the tribunal are subject to performance review, in the case of the chair by the minister and in the case of the members by the chair, who is directly answerable to the minister. If a person is in dispute with a government agency before the tribunal, how can anyone have faith that the tribunal will make a decision contrary to the interests of that government authority when the member's continuation on the tribunal is subject to constant review?

It cannot be argued that the tribunal is not a court subject to judicial independence. It cannot be argued that that judicial independence is critically important to allow the tribunal to fulfil the task that has been set out in the legislation. It cannot be argued that the people of Queensland need a tribunal such as this that is independent from the influence of the minister. This regulation should be disallowed by the parliament and I urge members to support the disallowance motion before the House.

Time expired.