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TELEFAX TRANSMISSION SHEET

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IF THERE IS ANY PROBLEM WITH THIS TRANSMISSION PLEASE TELEPHONE THE OPERATOR AT JOHANNESBURG (011)403-2765.

Miriam

Please circulate the enclosed to the different members of the ad hoc committee on fundamental rights in order that they may have an opportunity to look at the materials before our meeting tomorrow.

Thank you

HALTON CHEADLE

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TO: **THE MEMBERS OF THE AD HOC COMMITTEE ON FUNDAMENTAL RIGHTS**

FROM: **HALTON CHEADLE**

re: **THE RIGHT TO ADMINISTRATIVE REVIEW**

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1. Enclosed are samples of comparative text on administrative review. I enclose examples from Australia, Namibia and the United States.

2. We identified two concerns in importing the test of reasonableness in our law of administrative review: the expansion of the grounds on which administrative review could be sought and the consequent increase in the level of litigation and its effect on effective government; and the implicit shift in onus (i.e., the shift from the applicant demonstrating gross unreasonableness to the respondent having to demonstrate reasonableness) and all the consequences that that might have in paralysing decision making.

3. Everyone on the committee supported the principle that administrative decisions should be reasonable. The question was whether by expanding our grounds of administrative review that that would improve the quality of administrative decision making. The prospects of a proliferation of litigation and the extended burden of justifying the reasonableness of the decisions, particularly complex polycentric decisions, has led to certain members of the ad hoc committee fearing that the introduction of the new test would not simply amount to the avoidance of just bad decisions but the avoidance of good ones as well, i.e. no decisions.

4. In order to find common ground between the desire to encourage reasonable administrative decisions and the fear of paralysing administrative decision making, the draft clause submitted by Tony Leon sought to do the following:

4.1 shift the test from "reasonableness" to the concept of "justification";

4.2 define justification in terms of plausibility and require a rational connection between the reason and the decision;

4.3 require a deferential review of decisions made in the interest of good government.

5. It appears to me that these formulations go a long way to meeting the concerns raised. However, it is my view that there should be an additional element, namely that the applicant bear the burden of demonstrating that the decision is unjustifiable or unreasonable.

— US : Administrative Procedure Act (1946)

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(A) and (E) are mutually exclusive alternatives, applicable in different contexts

Appendix A

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Administrative Decisions (Judicial Review) Act (Australia) 1977

The Act also attempts to spell out as fully as possible the grounds on which a decision may be reviewed, as follows:

'(a) that a breach of the rules of natural justice occurred in connection with the making of the decision;

AUSTRALIA

(b) that procedures that were required by law to be observed in connection with the making of the decision were not observed;

(c) that the person who purported to make the decision did not have jurisdiction to make the decision;

(d) that the decision was not authorized by the enactment in pursuance of which it was purported to be made;

(e) that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made;

(f) that the decision involved an error of law, whether or not the error appears on the record of the decision;

(g) that the decision was induced or affected by fraud;

* (h) that there was no evidence or other material to justify the making of the decision;

(j) that the decision was otherwise contrary to law' (s5(1)).

Review may be sought on any one or more of these grounds. Note the omnibus nature of sub-section (j), clearly indicating the intention to leave the door open for the development by

(from CORDER)

(K) NAMIBIA

As most South African lawyers know, Namibia's Constitution (1990) contains two important provisions relating to administrative law, which are set out here for ease of reference. Article 18 (Administrative Justice):

> 'Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.'

from CORDER