Internship report for the IASAJ Judge Exchange Programme:

Judge :

Name: Dr. Thoma
First name: Markus
Nationality: Austrian
Jurisdiction: Supreme Administrative Court
Functions: Reporting Judge
Length of service:
Ordinary Judiciary 1983 – 2000,
(Supreme) Admin. Court since 2001

Exchange :

Hosting jurisdictions:
a) Administrative Appeal Tribunal
b) Federal Court of Australia
Country: Australia
City: Sydney
Dates of the exchange: Sept. 2nd – 13th 2019

I. Introduction – Presentation of the jurisdiction and the progress of the internship:

a. Programme of the exchange:

The exchange programme comprised two juducial bodies,

aa) the Administrative Appeals Tribunal (from September 2nd to 6th) and

bb) the Fédéral Court of Australia (from September 9th to 13th),

both at their sites in Sydney[1].

b. Presentation of the hosting jurisdiction:

[1] Administrative Appeals Tribunal Levels 6 - 14/83 Clarence Street, Sydney NSW 2000,
Federal Court of Australia 184 Phillip Street, Sydney NSW 2000

aa) The **Administrative Appeals Tribunal (AAT)** was established by the Administrative Appeals Tribunal Act 1975 and commenced operations on July 1st 1976.

On July 1st 2015 the Migration Review Tribunal, Refugee Review Tribunal and Social Security Appeals Tribunal were amalgamated with the AAT.

Under the scope of the Australian legal system the AAT is not a court of law but an independent administrative authority within the portfolio of the Attorney-General.

The members of the AAT, consisting of the President, Senior Members and Members are appointed for a term up to seven years with reappointment possible, but without any claims on pensions or remunerations after retirement; the President of the AAT has to be a Justice of the Federal Court of Australia (at present Pres. Thomas J).

The AAT has offices (registries) in all states and the Australian Capital Territory (Canberra).

Entrance to 83 Clarence Street, Sydney NSW 2000, where the AAT is lodged

Only if a law states that the decision can be reviewed by the AAT, the AAT is competent.

The AAT conducts independent merits review of administrative decisions made under Commonwealth laws and a small number of Norfolk Island laws. It reviews decisions made by Australian Government ministers, departments and agencies and, in limited circumstances, decisions made by state government and non-government bodies.

The most common areas of decisions relate to taxation, visas (inclusive migration and asylum), and visa-related decisions, social security, industrial law, corporations and bankruptcy, child support, but also passports and security assessments by the Australian Security Intelligence Organisation.

In some cases, there has been already an internal review of the primary decision or review by a specialist body like the Veterans' Review Board.

The General Division can also conduct a second review of certain decisions that have been reviewed in its Social Services & Child Support Division.

The AAT reviews decisions on the merits; it is generally 'standing in the shoes' of the original decision-maker. It reviews the relevant facts as well as the law and policy and takes a fresh reconsideration of the case. The AAT can affirm a decision, vary it, set aside a decision and substitute a new one, or remit a decision to the authority for reconsideration.

Court room at the AAT (barristers of the appellant, the appellant and the respondent authority are seated vis-á-vis the justices)

bb) When the Commonwealth of Australia was founded in 1901, federal courts were set up additional to the courts existing already in the independent Australian states (it is said that the states with their Supreme Courts objected against a Supreme Court on the federal level, so that there is 'only' a High Court in the Commonwealth not exceeding the reputation of the Supreme Courts by the title).

The **Federal Court of Australia** was established by the Federal Court of Australia Act 1976 and started on February 1st 1977. The Act provides that the court consist of a Chief Justice and other judges as appointed. The Chief Justice is the senior judge of the court and is also responsible for court management.

The judges of the court are appointed by the Governor-General (Her Majesty's representative in the Commonwealth of Australia) by commission and may not be removed except by the Governor-General on an address from both Houses of Parliament.

Judges (other than the Chief Justice) may hold more than one judicial office (see e.g. the president of the AAT); all judges have to retire at the age of 70.

The Federal Court of Australia sits in all capital cities and if required in other locations in Australia from time to time.

Court Building 184 Phillip Street, Sydney NSW 2000
(also domicile of the Supreme Court of NSW)

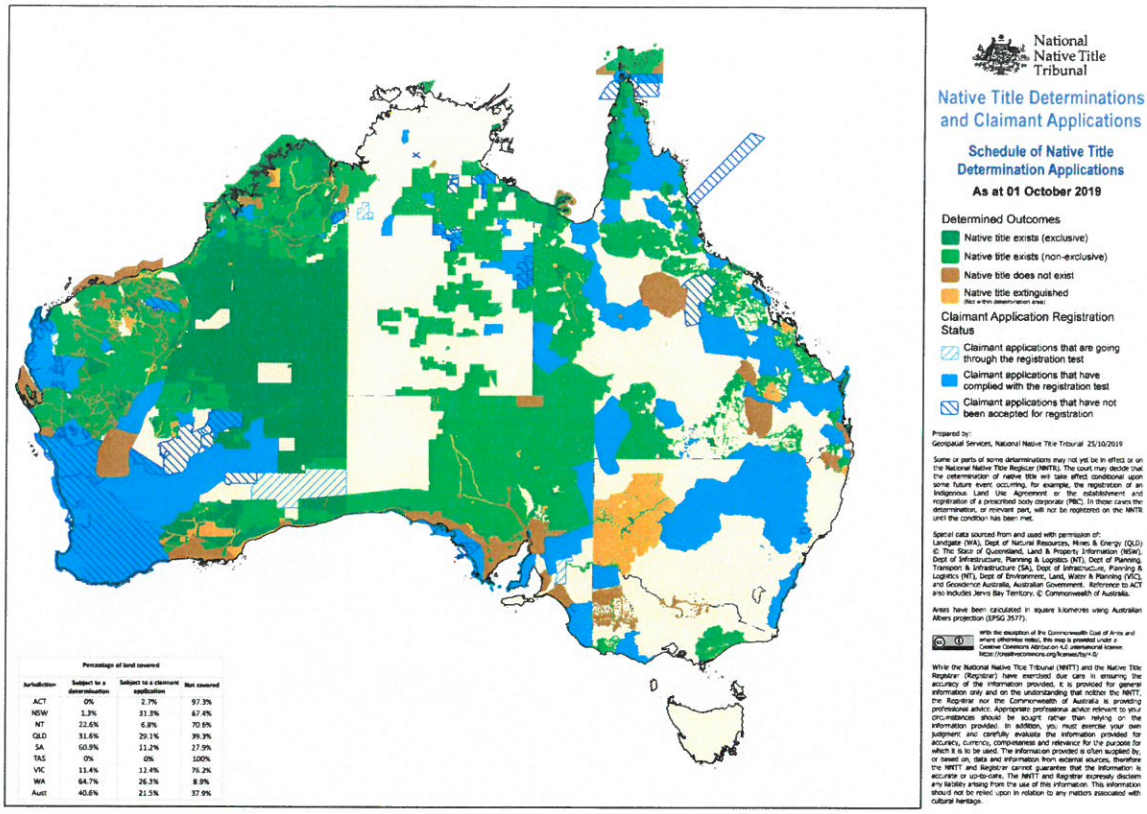
The Court's jurisdiction is broad, covering almost all civil matters arising under Australian federal law and some criminal matters. The Court has jurisdiction to hear applications for judicial review of decisions by officers of the Commonwealth and under the Administrative Decisions (Judicial Review) Act 1977 (ADJR Act) which provides for judicial review of most administrative decisions made under Commonwealth enactments on grounds relating to the legality, rather than the merits, of the decision. The Court also hears appeals on questions of law from the Administrative Appeals Tribunal.

The Court hears taxation matters on appeal from the Administrative Appeals Tribunal. It also exercises a first instance jurisdiction to hear objections to decisions made by the Commissioner of Taxation.

Another significant part of the Court's jurisdiction derives from the Native Title Act 1993 (NTA). The Preamble of the Act states the intention to ensure that Aboriginal peoples and Torres Strait Islanders receive the full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire. The purpose of this law is to provide a national system for the recognition and protection of native title and for its co-existence with the national land management system. Native title recognises the traditional rights and interests to land and waters of Aboriginal and Torres Strait Islander people. These traditional rights are not comparable with property, ownership or a right to possession.

Under the NTA, native title claimants can make an application to the Federal Court to have their native title recognised by Australian law. The Court has jurisdiction to hear and determine native title determination applications, to be responsible for their mediation, to hear and determine revised native title determination applications, compensation applications, claim registration applications, applications to remove agreements from the Register of Indigenous Land Use Agreements and applications about the transfer of records. The Court also hears appeals from the National Native Title Tribunal (an independent body established under the Native Title Act 1993 as a special measure for the advancement and protection of Indigenous Australians) and matters filed under the Administrative Decisions Judicial Review Act 1977 involving native title.

The following map gives a picture of the extent of claims under the NTA determined and pending all over Australia:



Further important areas of jurisdiction derive from the Admiralty Act 1988, the Fair Work Act 2009, Fair Work (Registered Organisations) Act 2009 and related industrial legislation, including matters to be determined under the Workplace Relations Act 1996 in accordance with the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009.

The Court's jurisdiction under the Corporations Act 2001 and Australian Securities and Investments Commission Act 2001 covers a diversity of matters ranging from the appointment of provisional liquidators and the winding up of companies, to applications for orders in relation to fundraising, corporate management and misconduct by company officers. The jurisdiction is exercised concurrently with the Supreme Courts of the states and territories.

The Court exercises also jurisdiction under the Bankruptcy Act 1966. It has power to make sequestration (bankruptcy) orders against persons who have committed acts of bankruptcy and to grant bankruptcy discharges and annulments. The Court's jurisdiction includes matters arising from the administration of bankrupt estates.

Cases arising under Part IV (restrictive trade practices) and Schedule 2 (the Australian Consumer Law) of the Competition and Consumer Act 2010 constitute a significant part of the workload of the Court. These cases often raise important public interest issues involving such matters as mergers, misuse of market power, exclusive dealings or false advertising.

Since late 2009, the Court has also had jurisdiction in relation to indictable offences for serious cartel conduct. This jurisdiction falls under the Federal Crime and Related Proceedings NPA together with summary prosecutions and criminal appeals and other related matters.

The Court has a substantial and diverse appellate jurisdiction. It hears appeals from decisions of single judges of the Court, and from the Federal Circuit Court (FCC) in non-family law matters and from other courts exercising certain federal jurisdiction. In recent years, a significant component of its appellate work has involved appeals from the FCC concerning decisions under the Migration Act 1958.

The Court also exercises general appellate jurisdiction in criminal and civil matters on appeal from the Supreme Court of Norfolk Island.

The Royal Coat of Arms of Queen Elisabeth II at the entrance to the court house at Macquarie Street

II. Differences and similarities between the legal systems of the country of origin and the host country:

a. Concerning the organization of the legal system:

The differences between the legal systems of Austria and Australia origin less from their different geographical position but from the different historical inheritances: the influences of the civil system on the one hand and the case law system on the other hand, which influenced Australia as well as other former colonies of Great Britain and members of the Commonwealth of Nations worldwide.

Both countries are democracies with constitutions, rule of law and independent judiciaries. While the head of state of Australia is still Her Majesty (represented by the Governor-General), the head of Austria is the President elected by the people.

Both countries have a federal structure: Australia was federated by the former colonies as states, which now still have also their own judiciaries. Austria's federal structure is significantly shaped by the provinces ('Länder'), which have their own legislation, administration and participation at the administrative judiciary.

Austria is part of the Council of Europe and of the European Union and thus strongly determined by the European Convention on Human Rights and Union Law (esp. the Charta) and 'under the jurisdiction' of the ECtHR and the ECJ. Contrary to that Australia is not bound by comparable international frameworks with a comparable influence on the legislation, on rule of law and especially on the judiciary.

Australian courts adjudicate cases autonomously from the case law and interpretation given by supranational courts. According to my impression the public conviction that justice is done by Australian Courts, and the peoples trust in the Australian judiciary are not second to European ones.

b. Concerning the competence of administrative jurisdictions:

The competence of administrative judiciary is partly different as the areas of corporations, bankruptcy or child support which are in Austria in the competence of the ordinary judiciary are reviewed by the administrative tribunal in Australia.

c. Concerning the functioning of administrative jurisdictions:

The administrative judiciary enjoys full independence from the administration it controls and exercises full review of administrative decisions by tribunals of first tier (see above about the AAT), but with limited review by the courts of higher tiers by a system to grant leave to appeal.

The structure of the AAT as an independent administrative body was well known in Austria until 2014, the great reform of the administrative judiciary in Austria by establishing administrative courts of first tier for all matters, when ‚unabhängige Verwaltungssenate' (independent administrative panels) as independent administrative authorities had a similar position.

The above mentioned registries of tribunals and courts of law in Australia are of significant more weight than the offices (Geschäftsstellen und Kanzleien) in Austrian courts: the registries in Australia handle the files, prepare hearings and support the judges by Alternative Dispute Resolution (see below). All judges are supported by (legal) assistants preparing hearings and drafting decisions.

d. Concerning applicable procedures and rules of law:

Australia is a democratic federal state with separation of powers and rule of law, but under the tradition of the case law-system which gives the judge commonly a wider margin of appreciation and respects the exercise of appreciation as an outflow of judicial independence.

The administrative proceeding in Australia starts with a non-adversarial system before administrative authorities, followed by the judicial review starting in many cases before the AAT in an adversarial system with an applicant and a respondent party/authority.

As mentioned above the AAT reviews administrative cases standing "in the shoes" of the decision maker, with full cognition of the case, while the review by the courts of law is limited on points of law.

The system of admissibility of appeals by granting a leave to appeal is similar to the Austrian system where the appellant can seek for review by the Supreme Administrative Court.

III. Aspects on which the host country's legal system can be a source of inspiration for the country of origin (« good practice »):

While in Austria a formal settlement of public claims before an (administrative) court is not provided, in other European countries e.g. in Germany an arbitration before court (verwaltungsgerichtlicher Vergleich) is explicitly provided and practiced and in Australia actually a high percentage of administrative cases are settled by 'Alternative Dispute Resolution' (ADR), comprising

- mediation
- conciliation and
- arbitration

Parties can be directed (ordered) by the judges to an ADR. An impartial practitioner (mostly a registrar of the court, but also a mediator from outside) tries (and mostly succeeds) in resolving the disputes with the parties before a court hearing or between hearings and thus saves the high valuable judge's time.

Court fees in administrative matters (inclusive migration and asylum) are – compared to Austria – significantly higher, the remuneration awarded to the winning party before court (also in administrative matters inclusive migration and asylum) can reach several thousand AUD.

In Australia both court fees and remuneration are also in administrative disputes before courts aspects for parties to decide whether to pursue a claim or not.

The system of legal aid as in Austria would be sufficient to equalize unjust barriers for claimants seeking justice.

IV. Personal remark

I highly appreciated the opportunity to visit a foreign jurisdiction to get an insight into tribunals and courts ‚on the other side of the globe' before the background of a profound different legal culture (case law system), but obliged to the same principles (judicial review of administration, independence of judiciary) and values (e.g. fair trial, rule of law) as in Europe – many thanks for this valuable program to AIAJH!

Signature:

Judge:	*President / Chief Justice of the jurisdiction of origine:*
Mai. 2019	29.11.2019