

POLICY REVIEW REVIEWED: THE PUBESCENT STATE OF THE 'NEW' ADMINISTRATIVE LAW.

By

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1. Introduction

During the 20th century, the exponential growth of the bureaucracy has posed significant threats to individual rights and to our theory and practice of government. The dominant Diceyan theory of liberal constitutionalism failed in providing a basis for control of the pertinacious administration through the rule of law. The apparatus of administrative law inherited from England was costly, antiquated and inefficient. Parliament lost its ability to review and the judiciary limited its role to formal supervision of legality and procedures in individual cases. In the mid 1970's Australia made a unique contribution to the theory and practice of government by resettling the balance between the organs of government with a legislative package creating a 'new' form of administrative law.

A pivotal role is accorded to the Administrative Appeals Tribunal and the conferral upon it of power to review administrative decisions, including those based on policy, on their merits. This novel and innovative reform has placed the Tribunal in an ambiguous position and its very existence has been thought to conflict with the principles of responsible government. This paper attempts to review the Tribunal's role in policy review as it reaches adulthood. It has survived initial concerns for its legitimacy and is now an established body moving into its maturity but in achieving adulthood, it has had to accommodate a fine balance in undertaking review on the merits.

Whilst a number of criticisms can be levelled at the Tribunal and its place in the 'new' administrative order, the radical experiment has largely been successful and the Tribunal has established for itself a permanent and significant role in permitting citizen grievances against defective administrative decisions at the federal level to be aired and, where necessary, redressed. The revolution has been a quiet one and the Tribunal has reached adulthood without the magnitude of its significance being fully appreciated or perhaps today, even remembered.

2. Responsible Government, Accountability and the Rule of Law

The English approach to control of government was through law and was dominated in recent times up to the middle of the 20th century by Diceyan liberal constitutional theory under which a dual system of review was thought to accommodate citizen grievances against defective administrative decisions. The citizen's first avenue of review was through parliament. Under constitutional theory, a Minister was responsible for his or her Department and review on the merits could be pursued by a constituent through the local member with access to the Minister, or directly with the Minister.

Whilst parliamentary supremacy over the executive had become a reality by the time Dicey wrote in 1885, the opportunities for the citizen to engage the attention of a Minister responsible to the supreme body, to review the merits of a case, were dwindling.

The only additional check upon the executive proposed was that going to the legality and form of discretionary decisions. Under the theory of judicial review espoused by Dicey

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and his successors, the rule of law was enshrined in English constitutionalism, particularly through the use of the prerogative writs from the 17th century. The supplementary role of the courts to review legality, but not the merits, was necessary because “wherever there is discretion there is room for arbitrariness”¹ and the rule of law required “equal subjugation of all classes to one law administered by the ordinary courts”.²

The Australian experience was modelled on the English in this, as in other matters, subject only to the complications arising from federation and a written Federal Constitution. Even in the Federal Constitution the model of responsible government was implied by s. 64 and that of judicial review in ss. 75 (iii) and (v). Unlike its English model, it gave rise to judicial review of legislative action as well as executive action.

Under the dominant theory of the 19th century, parliamentary review gave the opportunity for review on the merits through access to a Minister either directly or in the course of parliamentary processes such as question time or debates. The Minister was responsible to parliament and accountable in that forum and if the Minister, or indeed the Government itself, rejected accountability, a vote of no confidence or the withholding of supply would enforce accountability or an election.

The supplementary role of judicial review under English common law occurred as part of the normal business of the common law courts and not as part of any distinct system of public law.³ Such treatment of case by case consideration in a forum in which private and property rights dominated had a limiting effect, though it can often be made to sound more grand: a vision of citizens enjoying “the great inherited privileges of freedom and justice under the protection of an independent judiciary”.⁴

Dicey’s criticism of the separate system of administrative courts under the French *droit administratif* was of lasting influence, and despite the apparent success of the French *Conseil D’Etat*, meant the Anglo-Australian experience was left without a comparative perspective in dealing with the growing problems of the gulf between the theory and practice of responsible government. Relegating the emergence of constitutional (and administrative) principles to the process of “judicial decisions determining the rights of private persons, in particular cases before the courts”⁵ meant the imposition of judicial methodology (the adversary setting and all) as the appropriate system for the redress of defective administrative action by the dubious analogy with protection of private, particularly property, rights.

In the focus upon individual rights and liberties, protected from illegality by judicial review, two other results emerged. Firstly, its negative, non-interference approach⁶ engendered the idea that the law merely placed technical restraints on executive action rather than being viewed as an instrument by which policy could be actively developed and implemented. Dicey’s liberal philosophy was “red light” rather than “green light” in the terminology of Harlow and Rawlings⁷ and it accorded to law a less active role than might otherwise have been the case. Secondly, its association with individual rights prevented a wider

1. A. Dicey, *Introduction to the Study of the Law of the Constitution* 10th edn 1959 at 188.

2. *Ibid.* at 193.

3. Goldring compares the Roman Law system and the early cases which came before the common law courts — *Dr Bonham’s Case* (1609) 77 ER 646 and *Bagg’s Case* (1615) 77 ER 1271. See J. Goldring ‘Public Law, and Accountability of Government’ (1981) AULSA Conference Paper 1 at 9.

4. *Building Construction Employees and Builders’ Labourers Federation of New South Wales v. Minister for Industrial Relations* [1986] 7 NSWLR 372 at 382 per Street C.J.

5. *Supra* n.1 at 195.

6. L. Lustgarten ‘Socialism and the Rule of Law’ (1988) 15 *Journal of Law and Society* 25 at 29.

7. C. Harlow and R. Rawlings *Law and Administration*, Weidenfeld & Nicolson, London, 1984.

perspective being taken of other interests such as those discussed by McAuslan⁸ — interests of collective consumption, addressing distribution of wealth and power, and collective and commercial interests, as well as private ones.

Writing in 1962, Professor Wade concluded:

The vast powers of modern government had no place in Dicey's scheme of things and he felt little concern with the great problem, as we now see it: how far is power to be controlled by law?⁹

Nevertheless, the influence of the theory stretched well into the 20th century, not least of all into law school teaching.¹⁰

3. Collapse of the Diceyan Myth

Changes this century to both parliamentary and executive activity have ousted the influence of Diceyan theory in the face of its inability to cope with reality. The changes have concerned the executive, the workings of responsible government and the blurring of the boundaries between the functions and personnel of the branches.

First and foremost has been the growth of activity of the executive. In 1971 the Kerr Committee Report noted:

In recent times in Australia, as in other countries, there has been a considerable expansion in the range of activities regulated, and in the volume and range of services provided, by government and statutory authorities for the benefit of the public. This expansion has been accompanied, as it must be, by a substantial increase in the powers and discretions conferred by statute on Ministers of the Crown, officers of the administration and statutory authorities. The exercise of these powers and discretions involves the making of a vast range of decisions and recommendations which affect the individual citizen in many aspects of his daily life.¹¹

Parliament's ability to control the entity is marcescent.¹² It cannot supervise all administration, even if that was a role recognised as a serious competitor to major legislative initiatives and politics. Parliamentary democracy in England and Australia has been dominated this century by the party political system and that system leaves little room for parliament to fulfil its role as Dicey's bulwark against unjust intrusion upon individual freedom by the increasing threat from the executive.

The party system means in practice that government measures are passed and government weaknesses rarely probed. Individual Ministers now view themselves as responsible, if at all, only for personal fault, and Cabinet solidarity has meant that Cabinet dictates to Ministers, and even the courts acknowledge this reality.¹³ Too much exposure of ministerial or government fault by an opposition may cause the dissolution of the House at the behest of the government at a time inconvenient to the opposition. With the affairs of parliament devoted to politics, individual cases seem inappropriate for review in that forum.

As the role of parliament as a review mechanism in individual cases or groups of cases has declined, the potency of the executive has increased, though it tends to the belief that the public interest is best served "by that which serves the interests of the government of the day",¹⁴ thereby supplementing the politicisation of parliament with a similar trend in

8. P. McAuslan "Administrative Law, Collective Consumption and Judicial Policy" (1983) 46 MLR 1.

9. H.W.R. Wade 'Law, Opinion and Administration' (1962) 78 LQR 188 at 189.

10. J. Goldring, 'Administrative Law: Teaching and Practice' (1986) Melb. ULR 489 at 495.

11. Report of the Commonwealth Administrative Review Committee, August, 1971. Parliamentary Paper No. 144 para. 15.

12. Constitutional Commission, First (Interim) Report, April, 1988 at 141.

13. *F.A.I. Insurance Ltd v. Winneke* (1982) 151 CLR 342 at 373-4.

14. L.G. Curtis 'A New Constitutional Settlement for Australia' (1981) 12 FLR. 1.

the policy thrust of the executive. The political nature of policy roles of politicians and officials, especially those at or near the top, has been observed for some time¹⁵ and the image identified by Aberbach as the “pure hybrid”,¹⁶ in which the careers and roles of politicians and bureaucrats overlap, has become not uncommon and is particularly evident e.g. in the Department of Prime Minister and Cabinet and the Prime Minister’s private office staff, including minders,¹⁷ under the Hawke government.

Changes in the form of legislation have contributed to the decline in parliamentary control of implementation of its policies. Some pieces of legislation, particularly in the social security and taxation fields, have become so complex that even the public servants charged with implementing them are unable to follow them and so resort to preparation of manuals and guidelines to be relied upon in place of parliament’s directions. At the other end of the spectrum, legislation is provided as a mere framework, leaving the details to be fleshed out by the executive in its own policy-creation activities.

All this is not to say that parliament plays no useful role in the review process. Members of the lower house do make representations on behalf of constituents and question time may provide exposure and potential media publicity. The committee systems, particularly Senate Standing Committees, do provide a forum for review. But these are of limited impact.

4. Artificial Separation Within the Trichotomy of Powers

Under the traditional system of division of functions amongst the constitutional organs of government, the boundaries were perceived as fixed: rule-making was the province of the legislature or its delegates, the application or implementation of rules was for the executive, and rule-adjudication (going to legality and form but not merits) was for the judiciary. In western democracies, the legislature was the reflection of and assessed in accordance with the concept of participatory democracy and provided the mechanism by which a citizen could have defective executive action reviewed on the merits. The executive was assessed according to its efficiency in implementing legislative will and remained subject to parliament’s will and subject to the judiciary’s supervisory control restricted to matters of form and legality. The limited role of the judiciary was to review the legality of executive action — that was the limit of its dispensation of individual justice in public law.

In Australia and other federations with written constitutions, the judiciary has the additional function of assessing legality under the constitution of legislative, as well as executive, action. High Court interpretation of the Commonwealth Constitution has elevated the doctrine of separation powers into a highly technical and artificial constitutional concept, for in interpreting Chapter III, and s. 71 in particular, the “judicial power of the Commonwealth” has been made a category of power mutually exclusive of the others and reserved for s. 71 bodies.¹⁸ Further, holders of office of s. 71 bodies are prohibited from exercising non-judicial powers.¹⁹ The necessary constitutional division between judicial and non-judicial power is achieved without recourse to any single test capable of delineating the boundaries. Recourse must be had to historical considerations, comparison of traditional characteristics, and whether the characteristics of a body have been associated traditionally

15. P.H. Partridge ‘An Evaluation of Bureaucratic Power’ (1974) 33 Aust. J. of Public Admin. 99.

16. J.D. Aberbach et al *Bureaucrats and Politicians in Western Democracy* Harvard Uni Press, Cambridge 1981 at 17.

17. J. Walter *The Ministers’ Minders*, Oxford Uni Press, Melb 1986 at 85.

18. *R v. Kirby; ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254 (HC); (1957) 95 CLR 529 (PC) though with exceptions limited to ancillary matters: *R v. Joske; ex parte Shop Distributive and Allied Employees’ Association* (1976) 135 CLR 194.

19. *Ibid.*

with judicial bodies or are vested in a judicial body in the particular case.²⁰ “It has never been possible to frame a definition that is at once exclusive and exhaustive”.²¹

The reality is that the division is dysfunctional.²² An overlap between the administrative functions of the executive and the functions of judicial bodies, including federal judicial bodies, is the reality.²³ Administrative bodies do exercise discretions, apply rules to facts, and come to decisions concerning rights in circumstances in which the rules of natural justice apply.²⁴ Yet the doctrine of separation of powers prohibits administrative agencies from determining rights conclusively. Such bodies may consider legal, including constitutional, matters and may give opinions in decisions on such legal matters, and on the merits. Unless the High Court overturns 30 year old authority,²⁵ federal judicial bodies cannot review individual cases on the merits except in the course of an exercise of the judicial power of the Commonwealth.

Not only does the artificial constitutional or legislative²⁶ separation of powers fly in the face of the reality of the “multifunctionality”²⁷ of the structures, but it has relegated the role of the judiciary, as a member of the trichotomy, to a largely formalistic role, reserving the substantive review on the merits in public law cases to organs which are unable or unwilling to act. Lord Scarman noted with regret almost 15 years ago, in his 1974 Hamlyn Lectures, this lacuna and the diminishing role of the judiciary in the governance of society.²⁸ He charged that the abdication by the judiciary amounted to a betrayal of common law tradition, for it meant that rights and obligations could exist and be determined (on the merits) without review by the ordinary courts of the land. This withdrawal solved the problem of public law “...by the expedient of leaving it alone for so long as it does not trespass outside its territory”²⁹

His proposed solution was radical: a new “constitutional settlement” realigning the balance between the powers by revitalising the role of the judiciary such that the rule-adjudication function would extend beyond formal legality. The judiciary would “...use the rule of law in resolving the conflicts that will arise between the citizen and the state in the newly developed fields of administrative-legal activity upon which the quality of life in the society of the twentieth century already depends”³⁰

The need for the abandonment of the traditional boundaries between judicial and administrative bodies and for a more active role of the judiciary in review on the merits was taken up in Australia by Mr Justice Brennan, the first President of the Administrative

20. *Ridge v. Baldwin* [1964] AC 40; *Farbenfabriken Bayer A-G v. Bayer Pharma Pty Ltd* (1959) 101 CLR 652; *R v. Trade Practices Tribunal; ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 394; *Evans v. Friemann* (1981) 35 ALR 428.

21. *R v. Davison* (1954) 90 CLR 353 at 356.

22. *Evans v. Friemann supra* n.20.

23. Recognition of the grey areas by the introduction of the term ‘quasi’ decades ago confirms the reality.

24. *Federal Commissioner of Taxation v. Munro* (1926) 38 CLR 153; *Shell Co. of Australia Ltd v. Federal Commissioner of Taxation* [1931] AC 275; *R v Trade Practices Tribunal; ex parte Tasmanian Breweries supra* n.20 at 397.

25. *Supra* n.18. See also E. Campbell ‘The Choice between Judicial and Administrative Tribunals and Separation of Powers’ (1981) 12 FLR 24 at 28.

26. The surprising use made by the draftsman in s.3 (1) Administrative Decisions (Judicial Review) Act, attempting to limit the Federal Court’s jurisdiction to “decisions of an administrative character”, an attempt which quite properly has failed in the light of expansive Federal Court interpretation: *Hamblin v. Duffy* (1981) 34 ALR 333; *Evans v. Friemann supra* n.20.

27. The views of Professor Vile, *Constitutionalism and the Separation of Powers* (1967) at 318 cited in *Evans v. Friemann, supra* n.20 at 435.

28. *English Law — The New Dimension* 1974 at 41.

29. *Ibid.* at 50.

30. *Ibid.* at 75.

Appeals Tribunal, a decade ago.³¹ The significance of the intended fundamental resettling of the balance of power within the trichotomy cannot be stressed too highly. It is often overlooked a decade on, with the new entities functioning with their own rules and searching for their own jurisprudence within a hierarchy. But the intent and significance remain quite clear — adjudicative tasks of administration and an entire body of new law “...meaning thereby the rules which protect against administrative injustice would grow and be so moulded as to cover the empty spaces of discretionary power”.³²

5. Limits to the Judiciary’s Contribution to any Renaissance³³ of Administrative Law

The exhortation by bold spirits within the judiciary for activism in controlling the exercise of administrative discretion has had little direct impact in expanding the limited supervisory role of the courts. The rule of law, though capable of recognition in wider terms of institutional morality³⁴ has in practice over the centuries been viewed in a narrow, formal way by the judiciary. The traditional, formal, negative or ‘red light’ approach is entrenched in precedent and the judiciary as a group is incapable of moving collectively to create rapid change in response to urgent need. Dixon J. confirmed the traditional role:

But courts of law have no source whence they may ascertain what is the purpose of the discretion except the terms and subject matter of the statutory instrument. They must, therefore, concede to the authority a discretion unlimited by anything but the scope and object of the instrument conferring it. This means that only a negative definition of the grounds governing the discretion may be given. It may be possible to say that this or that consideration is extraneous to the power, but it must always be impracticable in such cases to make more than the most general positive statement of the permissible limits within which the discretion is exercisable and is beyond legal control.³⁵

The supervisory role of the courts which had evolved over the centuries was limited to formal review of administrative discretion under the principles of error of law, jurisdictional error, ultra vires, natural justice and fraud. The rules as to standing were narrow and complex. The prerogative and equitable remedies were technical and discretionary. Mandamus lay to compel performance of public duties; certiorari permitted the quashing of decisions made in abuse or excess of jurisdiction or contrary to natural justice or where an error of law was evident on the face of the record; prohibition prevented bodies from acting in excess or abuse of jurisdiction or contrary to natural justice. The highly technical nature of the rules surrounding the prerogative remedies resulted in a tendency in litigants and the judiciary towards a preference for the simpler declaration:

I know of no limit to the power of the court to grant a declaration except such limit as it may in its discretion impose upon itself; and the court should not, I think tie its hands in this matter of statutory tribunals. It is axiomatic that when a statutory tribunal sits to administer justice, it must act in accordance with the law. Parliament clearly so intended. If the tribunal does not observe the law what is to be done? The remedy by certiorari is hedged round by limitations and may not be available. Why

31. Eighth Wilfred Fullager Memorial Lecture, ‘New Growth in the Law — The Judicial Contribution’ (1979) 6 Monash University Law Review 1.

32. *Ibid.* at 22, thereby demonstrating the “ageless vitality of the common law tradition”.

33. H. W. R. Wade ‘Constitutional Fundamentals’, 1980 Hamlyn Lectures cited in Mr Justice M. D. Kirby’s paper ‘Administrative Review : Beyond the Frontier Marked “Policy — Lawyers Keep Out”’ (1981) 12 FLR 121 at 122.

34. J. Jowell “The Rule of Law Today” in J. Jowell (ed) *The Changing Constitution* 1985 at 19.

35. *Swan Hill Corporation v. Bradbury* (1937) 56 CLR 746 at 757-8.

then should not the court intervene by declaration and injunction? If it cannot so intervene, it would mean that the tribunal could disregard the law, which is a thing no one can do in this country.³⁶

In addition to other procedural fetters, behind the whole system lay the practical requirement that the challenger have sufficient funds to purchase a ticket in the forensic lottery falling short of any review on the merits.³⁷ The inability of the judiciary, in its traditional role, to contribute to reform was recognised in 1971 in the Kerr Committee Report:

It is generally accepted that this complex pattern of rules as to appropriate courts, principles and remedies is both unwieldy and unnecessary. The pattern is not fully understood by most lawyers; the layman tends to find the technicalities not merely incomprehensible but quite absurd. A case can be lost or won on the basis of choice of remedy and the non-lawyer can never appreciate why this should be so. The basic fault of the entire structure is, however, that review cannot as a general rule, in the absence of special statutory provisions, be obtained 'on the merits' — and this is usually what the aggrieved citizen is seeking.³⁸

The Committee noted that a review of the uniform experience of common law countries demonstrated that the courts were incapable of introducing necessary change and for that reason supplementary action was required.³⁹

What defences are available to the judiciary in rebutting the charge of its betrayal of common law traditions in this significant area? It would be argued by some that innovative courts have always been able to manoeuvre within the prescribed limits to overturn defective administrative decisions. *Anisminic Ltd v. Foreign Compensation Commission*⁴⁰ might well be cited as an example. But there is a degree of pretence associated with such examples:

the traditional manner of opinion writing in public law thus involves a considerable degree of intellectual dishonesty; that is, what the English call 'humbug', for judges frequently purport to find the results in the application of logic to precedents, whilst in reality they sometimes find the results to a considerable extent in their own ideas about policy.⁴¹

The pretence may have been unnecessary if a different attitude had been adopted to an available means of review which required no intellectual dishonesty but nevertheless permitted a review on the merits. That means was that a supervisory court operating within the traditional limits could rule the application of a discretionary policy in a particular case was so unreasonable that no reasonable authority could ever come to it.⁴² But the traditionalist view of non-intervention on the merits meant this legitimate means was rarely availed of⁴³ and even if it had been it still reflected the negative approach of knocking out a defective decision without offering positive alternatives. In a significant and successful test case taken to the High Court concerning a self-created policy denying school leavers

36. *Barnard v. National Dock Labour Board* [1953] 2 Q.B. 18 at 41 and see *Pyx Granite Co. Ltd v. Ministry of Housing and Local Government* [1960] A.C. 260.

37. Examples of judicial refusal to address the merits are *R v. War Pensions Entitlement Appeal Tribunal; ex parte Bott* (1933) 50 CLR 228; *Local Government Board v. Arlidge* [1915] AC 120.

38. *Supra* n.11 at para.58.

39. *Ibid.* para.5.

40. [1969] 2 A.C. 147.

41. K.C. Davis 'The Future of Judge Made Public Law in England: A Problem of Practical Jurisprudence' (1961) 61 *Columbia Law Review* 201 at 216.

42. *Hall & Co. Ltd v. Shoreham by Sea U.D.C.* [1964] 1 WLR 240; *Parramatta City Council v. Pestell* (1972) 128 CLR 305.

43. D. Pearce 'Courts, Tribunals and Government Policy' (1980) 11 FLR 203 at 204.

eligibility for unemployment benefits during summer vacation, although the particular decision was declared illegal, the invitation for the court to form its view on the merits was rebuffed in the following way:

Even were I minded to find the necessary facts in her favour, as to which I say nothing, the course suggested is not, I think, one which is open to me. It is to the Director-General or his delegates that the legislation assigns the task of attaining satisfaction and the court should not seek to usurp that function.⁴⁴

A second defence might be to point to examples of judicial creativity in response to the dangers of an uncontrolled executive. For instance, on the question of standing, precedent had tied the necessary locus to interests associated with property and the purse in its requirement of 'special damage', but the Australian courts in the 1980's have been prepared to reduce the standing hurdle faced by challengers by widening the test to 'special interest': *Australian Conservation Foundation v. The Commonwealth*⁴⁶ and *Onus v. Alcoa*⁴⁷.

In the United Kingdom, the need for the judiciary to reconsider the standing requirements became unnecessary after 1977. In that year there was introduced into the Rules of the Supreme Court a new judicial review procedure giving effect to recommendations of the Law Commission on a reference requested by the Lord Chancellor. The Report on Remedies in Administrative Law⁴⁸ resulted in a new Rule 3 (7) of Order 53 which required only "a sufficient interest in the matter in which the application relates". The new standing requirement was interpreted as providing a more liberal approach to standing than the courts had permitted under the traditional rules. It was given statutory force by s. 31 (3) of the Supreme Court Act, 1981. The landmark 'Mickey Mouse'⁴⁹ case in 1982 involved agreement between the revenue authorities and participants in a Fleet Street tax evasion scheme under which casual workers signed paysheets using false names such as 'Mickey Mouse'. In recognising the standing of the applicant pressure group, Lord Diplock stated:

It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the Federation, or even a single public-spirited tax payer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped. The Attorney-General, although he occasionally applies for prerogative orders against public authorities that do not form part of central government, in practice never does so against government departments. It is not, in my view, a sufficient answer to say that judicial review of the actions of officers of departments of central government is unnecessary because they are accountable to Parliament for the way in which they carry out their functions. They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge.⁵⁰

But the common law courts had not yet finished with the matter, for the introduction of the new procedures were taken to have been merely supplementary to the traditional review procedures, thereby creating a dual system under the Rules. In *O'Reilly v. Mackman*⁵¹, the

44. *Green v. Daniels* (1977) 13 ALR 1 at 12.

45. *Boyce v. Paddington Borough Council* [1903] 1 Ch 109.

46. (1980) 146 CLR 493.

47. (1981) 149 CLR 27.

48. [1976] Cmnd 6407.

49. *The National Federation of Self-Employed v. Small Business Limited* [1982] A.C. 617.

50. *Ibid.* at 644.

51. [1983] 2 AC 237.

House of Lords appeared to legislate on the matter by introducing procedural exclusivity. In his judgment, Lord Denning, M.R., said:

...wherever there is available a remedy by judicial review under section 31 of the Supreme Court Act 1981 that remedy should be the normal remedy to be taken by an applicant. If a plaintiff should bring an action — instead of judicial review — and the defendant feels that leave would never have been granted under R.S.C. Order 53 then he can apply to the court to strike it out as being an abuse of the process of the courts. It is an abuse to go back to the old machinery instead of using the new streamlined machinery. It is an abuse to go by action when he would never have been granted leave to go for judicial review.⁵²

That created even further problems in the minds of some, for it was criticised as introducing further technical complexity⁵³ and resulted in the judicial progress being compared to a game of snakes and ladders and the *O'Reilly* case as a fearsome snake.⁵⁴ Senior members of the English judiciary have sought to allay fears by a denial of difficulties arising in practice.⁵⁵

The judiciary's defence of its capacity to change rules would cite other examples as well. Grounds of review have been made available against non-judicial as well as judicial bodies, thereby removing in part a classification barrier.⁵⁶ In England, public bodies performing public duties such as the City of London Take-Over Panel have been brought within the ambit of judicial review, notwithstanding the source of authority, thereby blurring the boundary between public and private law.⁵⁷ There has been a clearly recognised tendency to push jurisdictional error to a point where it will accommodate most errors of law⁵⁸ and stretching the traditional rules in this fashion has upset some traditionalists.⁵⁹

Other examples can be given, but a major problem lies in the uncertainty created by this piecemeal response and the natural tendency for the pendulum to swing back and forth as courts attempt to develop new principles case by case. Embracing the declaration as a useful remedy has still failed to produce a coherent framework in the exercise of discretion e.g. on the question of the appropriateness of prospective rather than retrospective rulings.⁶⁰ The High Court's reconsideration of the doctrine of natural justice provides another example. In *Kioa v. Minister for Immigration and Ethnic Affairs*⁶¹ a greater degree of flexibility was introduced in implying natural justice on the basis of legitimate or reasonable expectations.⁶²

52. *Ibid.* at 258.

53. H.W.R. Wade, 5th Child & Co Oxford Lecture noted in 101 L.Q.R. 180 and quoted by Lord Ackner, 'The English Procedure for Judicial Review — Its Evolvement' (1987) 17 UWALR 173 at 179-180. See also C.F. Forsyth, 'Beyond *O'Reilly v Mackman* : the Foundations and Nature of Procedural Exclusivity' (1985) 44 CLJ 415.

54. A comparison made by Sir Patrick Neill Q.C., Vice-Chancellor of Oxford University and noted by Lord Ackner *ibid* at 180.

55. Lord Ackner *supra* n.53 at 181.

56. See eg. *R v. Toohy* ; *ex parte Northern Land Council* (1981) 151 CLR 170.

57. *R v. Panel on Take-overs and Mergers* ; *ex parte Datafin plc* [1987] 2 WLR 699 demonstrated an innovative extension in the use of certiorari.

58. See eg. *Pearlman v. Keepers and Governors of Harrow School* [1979] QB 56 ; *Re Racal Communications Ltd* [1981] AC 374; *R v. Greater Manchester Coroner* ; *ex parte Tal* [1985] Q.B. 67; and see J. Beatson 'The Scope of Judicial Review for Error of Law' (1984) 4 Ox JLS 22.

59. E.I. Sykes 'Sense and Nonsense in Administrative Law Trends' (1983) 57 ALJ 221 at 222.

60. C. Lewis 'Retrospective and Prospective Rulings in Administrative Law' (1988) PL 78.

61. (1985) 159 CLR 550.

62. The use of reasonable expectation has not been universally embraced and was rejected by Brennan J. It has been relied upon in extending the range of procedural fairness in England in cases such as *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374. See also C. Lewis 'Fairness, Legitimate Expectations and Estoppel' (1986) MLR 251 and the detailed analyses by P.Tate 'The Coherence of "Legitimate Expectations" and the Foundations of Natural Justice' (1988) 14 Monash ULR 15.

But with the swing of the pendulum in *South Australia v. O'Shea*,⁶³ the concept of reasonable expectation and the circumstances giving rise to an implication of natural justice, particularly where matters of high policy are involved, stands in total confusion.⁶⁴

These examples serve to illustrate the limits of the common law evolutionary process. Single cases in an adversary setting have in the past and will continue in the future to make a significant but limited contribution. The treatment is ad hoc and the emphasis remains upon the limited interests in focus in the particular case.⁶⁵ There is uncontested merit in the judicial emphasis in each case upon the facts and the particular statutory context in the traditional supervisory role.⁶⁶ Governments and administrations may look to wider perspectives involving competing priorities of different interests when exercising political judgment or administrative discretion. The haphazard nature of judicial review may provide an insufficiency of particular cases⁶⁷ to permit an appreciation of the broader issues and the nature of matters before the courts is selectively biased towards exposure of defects but not the broad spectrum of the majority of cases, where administrative discretion is effective.

The response to the challenge directed at the judiciary to take a more active role depends upon recognition of the scope to be accorded by judges or significant groups of judges to the creative role in discharge of curial functions. Judges do exercise significant discretion already within the traditional role in sentencing convicted criminals or considering custody applications. Some judges also admit to making law:

Do not let us deceive ourselves with the legal fiction that the Court is only ascertaining and giving effect to what Parliament meant. Anyone who has decided tax appeals knows that most of them concern transactions which Members of Parliament and the draftsman of the Act had not anticipated, about which they had never thought at all. Some of the transactions are of a kind which had never taken place before the Act was passed; they were devised as a result of it. The Court may describe what it is doing in tax appeals as interpretation. So did the priestess of the Delphic oracle. But whoever has final authority to explain what Parliament meant by the words that it used makes law as much as if the explanation it has given were contained in a new Act of Parliament. It will need a new Act of Parliament to reverse it.⁶⁸

But these views are not universal or universal across all areas. Mr Justice Brennan has recognised the limits on the use of judges in the area under consideration:

It may well be unwise to permit judges to make policy decisions which affect the community at large, or the interests of large sections of the population — decisions which are in truth political decisions — under the guise of determining what is “fair” of “just” or “reasonable”. The terms take on a connotation which broadens as the affected interests increase, and judges do not have, or ordinarily are not given, the resources which would feed into the judicial process the mass of information which is required to form a judgment of coercive wisdom.⁶⁹

In advocating the judicial method in adjudicating on issues in the exercise of power conferred by public law, Mr Justice Brennan emphasises⁷⁰ that a court would still focus

63. (1987) 61 ALJR 477 ; and see *Minister for Arts Heritage and the Environment v. Peko-Wallsend* (1987) 75 ALR 218.

64. See the brief discussion by Peter Bayne in (1988) 62 ALJ 225.

65. *Ibid.* at 228.

66. J. Griffiths 'Legislative Reform of Judicial Review of Commonwealth Administrative Action' (1978) 9 FLR 42 at 70.

67. See a brief summary of statistics in Goldring *supra* n.10 at 496-9.

68. Lord Diplock *The Lawyer and Justice* Sweet and Maxwell London 1978 at 270.

69. 'Limits on the Use of Judges' (1978) 9 FLR 1 at 6.

70. *Supra* n.31 at 19-20.

on the individual case and on the particular effect of policy in the particular case, leaving to other bodies an assessment whether the policy is satisfactory in political, economic or other broad terms of assessment. Judicial review on the merits in this sense seems to be less radical than it first appears and well within the common law tradition of doing *individual* justice. But the judicial method of working change is too slow and cumbersome, at least in the United Kingdom and Australia, and little has changed since Mr Justice Kirby commented in 1978:

True it is that the courts have moved of late in the direction of a more vigorous policy of judicial review. The fact remains that judicial review, along orthodox lines, is not really suitable as a means of supervising the plethora of administrative decisions. The courts “are not equipped to act as super-administrators, formulating individual rules to govern the thousands of cases heard daily by agencies”. The courtroom and the forensic medium have distinct limitations as mechanisms for wide-ranging reform and the development of rules of multiple application. The regular judicial machinery is at its best in limiting the exercise of power and preventing unlawful acts. It has proved less able to confine discretion, to structure it and to guide the principles by which it should be applied.

6. The Legislative Package Giving Birth to the ‘New’ Administrative Law

From the turn of the century provision had been made for review of executive action by specialist tribunals outside the court structure. e.g. Public Service Boards of Inquiry, Income Tax Boards of Appeal. France had established a system providing comprehensive review. In 1955 the Franks Committee on Administrative Tribunals and Inquiries considered the need to impose some system on the ever increasing body of tribunals in the United Kingdom. Its report resulted in enactment of the Tribunals and Inquiries Act, 1958, which established a Council on Tribunals to oversee the working of tribunals. The Act also required that reasons be given by Tribunals. That legislative scheme imposed some system upon the disparate collection of tribunals where there had been none before other than the supervisory role of the courts. In 1962, New Zealand made its pioneering contribution through the Ombudsman method of reviewing executive action. In October, 1968, the Federal Parliament established the Commonwealth Administrative Review Committee which reported back to Parliament almost 3 years later, in August, 1971.⁷² Several other related reports followed: Interim and Final Reports from the Committee on Administrative Discretions⁷³ and the Report of the Committee of Review of Prerogative Writ Procedures.⁷⁴

The principal recommendations of the Kerr Committee included traditional supervisory review but by a new administrative or general superior federal court,⁷⁵ a general policy of providing for review of administrative decisions by an Administrative Review Tribunal looking at the merits,⁷⁶ and the establishment of a Council on Tribunals and an Administrative Procedure Act establishing minimum procedural standards for all federal tribunals. The Bland Committee recommended an Ombudsman procedure but took issue with the Kerr Committee by recommending that policy decisions of Ministers and recommendations on policy by officials to Ministers, as well as decisions of officials stemming from policy

71. 'Administrative Law Reform in Action' (1978) 2 UNSWLJ 203 at 206.

72. *Supra* n. 11

73. Interim Report of the [Bland] Committee on Administrative Discretion, Parliamentary Paper 53 of 1973 ; Final Report, Parliamentary Paper 316 of 1973.

74. Report of the [Ellicott] Committee of Review of Prerogative Writ Procedures Parliamentary Paper 56 of 1973.

75. *Supra* n.11 paras 245-6, 390.

76. *Ibid.* paras 58, 89, 90, 225, 289, 306, 348, 390.

determinations of Ministers, be excluded from any form of review.⁷⁷ Bland recommended against any jurisdiction permitting the expression of opinion on government policy.⁷⁸ The Ellicott Committee was in general agreement on judicial review⁷⁹ but noted the impossibility under the Constitution of courts exercising any general jurisdiction to review on the merits because of the likely incompatibility with the exercise of judicial power of the Commonwealth.⁸⁰

In looking back at the genesis of the 'new' administrative law, what remains astounding is the commitment of Parliament, and the government of the day, to implement reform rather than allowing the proposals to "gather dust like so many other proposals to reform Australian law".⁸¹

This paper cannot attempt to consider in any depth the various elements of the mosaic which now forms the 'new' administrative law. This has been done generally⁸² and in respect of the individual components.⁸³ The Administrative Appeals Tribunal Act, 1975, established a high level review tribunal which is now in its teens, and an Administrative Review Council whose continuing active role has kept the 'new' administrative law itself under review. The Ombudsman Act, 1976, provided a different avenue for review by the provision for a Commonwealth Ombudsman, though along more limited lines recommended by the Bland Committee than that proposed by the Kerr Committee. The Administrative Decisions (Judicial Review) Act, 1977, provided for a codified system of supervisory judicial review by the Federal Court. The gestation of Freedom of Information legislation was more protracted.

Access to information is in many ways a lynch pin of the whole scheme and each of the components gives attention to it. In order to review an administrative decision it is necessary to know both that a decision has been made and the basis upon which it has been made. The common law tradition was unable to develop any general obligation upon decision makers to give reasons.⁸⁴ The inherited custom of governments and the bureaucracy has been one of secrecy rather than openness, a custom which is pressed with as much vigour by the Thatcher government in Great Britain as it ever was.⁸⁵

There is of course an appropriate place for confidentiality e.g. under the traditional doctrine of public interest immunity, but even that has been considerably curtailed by the courts in recent times. Ministerial claims to immunity were once conclusive⁸⁶ but that has not been the case since 1968.⁸⁷ In Australia, no class of documents can be said to be entitled to any absolute immunity since 1978.⁸⁸

77. *Supra* n.73 para 97.

78. Interim Report *supra* n.73 paras 105-7.

79. *Supra* n.74 para 19ff.

80. *Ibid.* para 17.

81. G.P.S. Taylor 'The New Administrative Law' (1977) 51 ALJ 804.

82. *Ibid.*; Curtis *supra* n.14.

83. Griffiths *supra* n.66; G.D.S. Taylor 'Administrative Appeals Tribunal Act' (1976) 3 Monash LR 69; D.C. Pearce 'The Australian Government's Administrative Review Tribunal' (1976) 1 UNSWLJ 196; L.J. Curtis 'Judicial Review of Administrative Acts' (1979) 53 ALJ 530; A.N. Hall 'Aspects of Federal Jurisdiction: The Administrative Appeals Tribunal' (1983) 57 ALJ 389.

84. *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] AC 997; *R v. Gaming Board of Great Britain; ex parte Benaim and Khaida* [1970] 2 QB 417.

85. Illustrated by the embarrassing lengths to which it went in seeking unsuccessfully to retain the secrecy of the Spycatcher material. Even in the age of judicial review under Order 53, the government has sought to retain secrecy by issuing warnings to Departments in a pamphlet "The Judge Over Your Shoulder" noted in [1987] PL 485; [1988] PL 1.

86. *Duncan v. Cammell, Laird & Co. Ltd* [1942] 1 AC 624.

87. *Conway v. Rimmer* [1968] AC 910.

88. *Sankey v. Whitlam* (1978) 1 42 CLR 1 and see *Harbours Corporation of Queensland v. Vessey Chemicals Pty Ltd* (1986) 67 ALR 100.

The Freedom of Information Act, 1982, was passed only after the powerful Senate Standing Committee on Constitutional and Legal Affairs had considered the matter in detail.⁸⁹ The Act creates a legally enforceable right to obtain non-exempt documents. The exemptions are extensive, including contrariety to public interest and disclosure of deliberative processes.⁹⁰ The exemptions are strengthened by the conclusive certificate provisions. The Administrative Appeals Tribunal (AAT) is given the general task of review, subject to appeal to the Federal Court on questions of law. In balancing public interest, the Federal Court has tended to use similar methods to those employed for the claim to public interest immunity:

In evaluating where the public interest lies in the present case it is necessary to weigh the public interest in citizens being informed of the processes of their government and its agencies on the one hand against the public interest in the proper working of government and its agencies on the other (see *Sankey v. Whitlam* (1978) 142 CLR 1; *Commonwealth v. John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 52)).

The tendency of the AAT has been towards non-disclosure of policy matters protected especially by ss.33, 33A and 36.⁹² The issue of conclusive certificates removes the matter to the political arena as the AAT may not review the decision to give a certificate.⁹³

The right to access to information extends into the other components of the legislative package — the Administrative Appeals Tribunal Act⁹⁴ and the Administrative Decisions (Judicial Review) Act⁹⁵ each provide an obligation to provide reasons when requested. This quiet revolution has been commented upon in the following terms by Deane J.:

The Administrative Appeals Tribunal Act 1975 did not directly impose upon decision makers, whose decisions it made subject to review, any substantive or procedural obligations to be observed in the making of such decisions. It did, however, effect a quiet revolution in regard to such decisions. The Act lowered a narrow bridge over the moat of executive silence in that, subject to limited exceptions, it conferred upon a person entitled to apply to the Tribunal for a review of a decision, the right to be supplied with a statement in writing prepared by the person who made the decision and setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based, and giving the reasons for the decision (s.28).

One final element of the mosaic has been found, to date at least, unnecessary. The recommendation for an Act to regulate minimum procedural standards for all tribunals has not been pursued. Having regard to the extensive jurisdiction acquired by the AAT, its aspirations to develop into a general tribunal of final review on the merits appear to have been realised. There are few independent tribunals being established since the AAT was set up, the Optometrical Services Review Tribunal (1977), the Security Appeals Tribunal (1979), and the Document Review Tribunal, being exceptional.

The significance of the revolution is perhaps passing into history as each of the components

89. Senate Standing Committee on Constitutional and Legal Affairs *Freedom of Information* Canberra, 1979.

90. S.36(1)(b) as defined in s.36(1)(a). Others include s.33 and 34A, and in particular the damage to relations category: *Re Rae and Department of Prime Minister and Cabinet* (1986) 12 ALD 589; *Arnold v. Queensland* (1987) 64 AR 463.

91. *Harris v. Australian Broadcasting Corporation* (1983) 78 FLR 236 at 246.

92. *Re Howard and the Treasurer of the Commonwealth of Australia* (1985) 7 ALD 62; *Re Bartlett and Department of Prime Minister and Cabinet* (1987) 12 ALD 659.

93. S.58 in combination with s.43; *Re Peters and Department of Prime Minister and Cabinet* (1986) 11 ALN N.33.

94. Ss. 28, 37.

95. S.13.

96. *Minister for Immigration and Ethnic Affairs v. Pochi* (1980) 31 ALR 666 at 685-6.

develops its position within the system. At the time of its introduction, it was viewed by outside jurisdictions as “an awesome leap toward changing its whole structure with regard to public administration”.⁹⁷ That is not to say that there were no vocal critics, not least of all directed to the cost of establishing a further bureaucratic structure on top of the rapidly growing bureaucratic structure.⁹⁸

7. The Ambiguous Position of the AAT and Concern for its Legitimacy.

The establishment of the Tribunal posed the problem of its legitimate place under the system of responsible government. Under the accepted theory, members of parliament are elected under a process of participatory democracy. Parliament forms policy which the executive, through the bureaucracy, implements. The Tribunal is not elected but is given the significant function of being a final reviewer of policy,⁹⁹ policy which the representative government may have been elected to carry into effect.¹⁰⁰ There is the possible harm also if the views of the Tribunal differ markedly from those of government, that the responsibility of the bureaucracy may be divided between the political master and the Tribunal.

In theory and in practice there is no problem for responsible government posed by the existence of the Tribunal. It was parliament, the representative body, which established it to overcome defects in the system concerning grievance mechanisms for citizens in respect of defective administration. As Goldring¹⁰¹ points out, it always lies within parliament’s will to withhold material from it, reverse a decision or abolish it or for the political arm of the executive to stack its membership. At a practical level, there has been no major collision between the Tribunal and government policy. There have been many skirmishes, particularly in the deportation area, but the direct collisions have been between the Tribunal and policies formulated within the bureaucracy. The question of Tribunal response to Ministerial policy will be taken up at greater length in 10. *infra*.

In any event, there is an accepted practice in Australia of conferring discretionary powers on independent tribunals, albeit in limited areas. Authority has been conferred on bodies to exercise discretion on matters of policy concerning business,¹⁰² economic policy¹⁰³ and the media,¹⁰⁴ without upsetting our precepts of responsible government.

What is a problem, is coming to terms with the ambiguous position of the Tribunal having regard to our traditional classification of constitutional organs. Is its place with the judiciary or the executive? Judges and others with legal backgrounds are appointed to Presidential and Senior Membership positions and its practices more often than not give the appearance of curial deliberation. Some have regarded this aspect as an exercise in judicial imperialism.¹⁰⁵

On the other hand, the conferral of an obligation to review policy in coming to the right or preferable decision, a conferral recommended against by the various Committees,¹⁰⁶ injects the Tribunal into the executive structure.¹⁰⁷ It is still coming to terms with that ambiguous

97. The often quoted view of the Canadian Law Reform Commission in its Seventh Annual Report (1977-8) at 14 see L. Katz ‘Australian Federal Administrative Law Reform’ (1980) 58 Can BR 341.

98. B. Jinks ‘The ‘New Administrative Law’: Some Assumptions and Questions’ (1982) 41 AJPA 209.

99. G. Reid ‘Responsible Government and Ministerial Responsibility’ (1980) 39 AJPA 301.

100. J.M. Sharpe *Administrative Appeals Tribunal* Law Book Co. Melb 1986 at 44.

101. *Supra* n.3 at 19.

102. The Trade Practices Commission and Tribunal.

103. The Conciliation and Arbitration Commission.

104. The Australian Broadcasting Tribunal.

105. G. Reid ‘The Changing Political Framework’ (1980) 150 Quadrant vol. 24 at 12.

106. e.g. Kerr Committee *supra* n.11 at para 300.

107. J. Goldring ‘The Accountability of Public Administrators and the Rule of Law in Australia’ (1981) 1 Lawasia NS 326 at 339.

role. Its appropriate formal location carries with it significant constitutional implications of the kind discussed in 4 *supra*. It is clear that the Tribunal does not exercise the judicial power of the Commonwealth. Its functions are primarily executive in nature but it is an independent administrative decision-maker, standing removed from the normal structures of the bureaucracy. Many interesting problematic implications arise from this unique placement. To take but one which has received attention, the Act¹⁰⁸ requires the Tribunal on review to step into the role of the primary decision-maker, yet at the same time, to exercise its discretion independently. Primary decision-makers are subject to Ministerial direction, so it might be argued that the Tribunal in stepping into those shoes should likewise be subject to direction. Whilst the Tribunal continues to stress its independence, in cases of actual Ministerial policy, the implication of the substitution has not been removed totally.¹⁰⁹

8. The AAT's Operational Framework

As a preliminary to consideration of the Tribunal's role in policy review it may be appropriate to consider the basic features of its operational setting. The membership provisions¹¹⁰ were designed obviously to attract a certain prestige to the Tribunal for it ranges across Judges as presidential members,¹¹¹ the Deputy Presidents must be legal practitioners,¹¹² and the Senior and other memberships draw heavily, though not exclusively, on a legal background also.¹¹³ The appointment of Federal Court judges to the Presidency and Presidential membership represents appointment in their personal capacities and poses no difficulty for the separation of powers doctrine:

The general argument that it was constitutionally impermissible for Mr Justice Davies to be appointed a Deputy President of the Tribunal confuses the appointment of a person, who has the qualification of being a judge of a court created by the Parliament, to perform an administrative function with the purported investing of a court created under Ch. III of the Constitution with functions which are properly administrative in their nature. Mr Justice Davies' appointment as a presidential member was a personal appointment. Before he could be validly appointed as a presidential member, it was necessary that he hold one of a number of designated qualifications. It so happened that the qualification which he held was that he was a judge of this Court. The appointment was of him to the office of Deputy President of the Tribunal and not a conferring of functions or duties on the court of which he was already a member.¹¹⁴

The Kerr Committee had recommended the inclusion of Departmental officers¹¹⁵ but this was rejected by the Bland Committee on the ground that inferior officers might have to review policy decisions of their superiors. A likely result of this exclusion is the absence of intra-bureaucratic expertise of the appointed members and the consequent loss of balance in according recognition to the administration's interests.¹¹⁶ The membership reinforces the curial approach because of the traditional capacity of the judicial model to cope without

108. S.43(6).

109. See J. Goldring 'Responsible Government and the Administrative Appeals Tribunal' (1982) 13 FLR 90. In the only state counter-part, the Victorian legislation removes the difficulty by making the Tribunal subject to Ministerial policy.

110. S.6.

111. S.7(1).

112. S.7(1A).

113. S.7(1B).

114. *Drake v. Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 634.

115. *Supra* n.11 at para 292.

116. Goldring *supra* n.3 at 25-6; Sharpe *supra* n.100 at 123.

the need for the decision-maker to be expert. It also injects a degree of caution in approaching policy review.¹¹⁷

The primary function of the Tribunal is also its most novel one — to review administrative decisions before it. Its jurisdiction is limited to reviewing those decisions which parliament permits it to review.¹¹⁸ ‘Decisions’ are defined in such a way as to give extended meaning.¹¹⁹

The ability to withhold classes of decision is a potential limit to the breadth of its jurisdiction but there have been exponentially growing conferrals since the initial scheduled list of 25 and the number stretches into the hundreds today. Whilst the increase is encouraging for the long-term prospects for the Tribunal’s existence, its jurisdiction has the appearance of a haphazard collection of accretions and there appears to be no guiding principle upon which conferral is or is not withheld. Practical considerations such as restraint on government spending to keep the case load within resource limits are likely to have had a significant impact rather than any rationale.¹²⁰

Parliament may impose pre-conditions to review also e.g. the requirement of a mandatory internal or other review such as that before the Social Security Appeals Tribunal. This has the advantage of reducing the Tribunal’s case load but increases the hierarchical tendency of the review process. The Tribunal’s jurisdiction is limited also by such limits as may exist upon the primary decision-maker whose decision is being reviewed.¹²¹

The capacity of the Tribunal to make its own decisions on questions of law,¹²² including preliminary jurisdictional matters, adds to its judicial appearance. A decision by the Tribunal that a primary decision-maker has failed to make a decision authorised by law will not deprive the Tribunal of its jurisdiction.¹²³ The Tribunal’s decisions on matters of law are not conclusive and are subject to the Federal Court’s supervisory jurisdiction. It may also refer questions of law to the Federal Court.¹²⁴

The Tribunal’s legislative framework extends the range of applicants who may apply for review well beyond the common law limits of standing. Section 27 merely requires that the applicant be a person whose interests are affected by the decision.¹²⁵ Interests are not restricted to private or proprietary rights.¹²⁶ Nor must the decision adversely affect the applicant’s interests.¹²⁷

A liberal attitude¹²⁸ has also been adopted, for the most part, to applications by third parties to be joined.¹²⁹ The liberal test under the statute has permitted a range of pressure groups to be joined ranging from a Gay Solidarity Group¹³⁰ to groups interested in kangaroo

117. *Ibid.*

118. S.25.

119. S.3(3).

120. Mr Justice F.G. Brennan ‘The Anatomy of an Administrative Decision’ (1980) 9 Syd LR 1 at 3.

121. *Supra* n.6 at 68-9; *Re Callaghan and Defence Force Retirement and Death Benefits Authority* (1978) 1 ALD 227.

122. *Supra* n.6 at 68. These include the formation of opinions on constitutional validity: *Re Adams and Tax Agents’ Board* (1977) 12 ALR 239.

123. *Collector of Customs (NSW) v. Brian Lawlor Automotive Pty Ltd* (1979) 24 ALR 307.

124. S.45.

125. See also ss 30(1A), 31.

126. *Re McHattan and Collector of Customs (NSW)* (1977) 1 ALD 67.

127. *Re Phillips and Secretary Department of Transport* (1978) 1 ALD 341; *Re Saint-James and Defence Force Retirement and Death Benefits Authority* (1981) 3 ALN/N92.

128. *Re Buckett and Minister for Immigration and Ethnic Affairs* (1979) 2 ALN 541; *Re Ang and Minister for Immigration and Ethnic Affairs* (1980) 2 ALD 785; *Re Akuhata — Brown and Chesley and Minister for Immigration and Ethnic Affairs* (1981) 3 ALN 55.

129. *Re Control Investments Pty Ltd and Ors and the Australian Broadcasting Tribunal (No.1)* (1980) 3 ALD 74.

130. *Re Gay Solidarity Group and Minister for Immigration and Ethnic Affairs* (1983) 5 ALD 289.

conservation.¹³¹ Nevertheless, there are occasions when tests reminiscent of the common law resurface e.g. in *Re Control Investments Pty Ltd and the Australian Broadcasting Tribunal*,¹³² the President framed the test for locus standi as equivalent to that of 'special interest' in seeking a prerogative writ.

The legislation provides no guidance on the nature or grounds of review. In its review, the Tribunal may exercise all the powers and discretions that have been conferred on the primary decision-maker.¹³³ The Tribunal may affirm, vary, set-aside, make a substitute decision or refer a matter back. The power is a plenary one to review on the merits and the Tribunal decision is deemed to be that of the primary decision-maker,¹³⁴ thereby confirming the Tribunal's location within the executive branch. As previously indicated, not only is the review one which goes to the merits, but it extends to the novel review of decisions embodying policy.¹³⁵

In reviewing a decision, including a decision based on policy, the Tribunal is bound neither by the grounds which the applicant contends for¹³⁶ nor the reasons given by the primary decision-maker,¹³⁷ though caution is both evident and necessary in departing from ministerial policy.¹³⁸ It nevertheless asserts its independence:

It is one thing for the Minister to apply his own policy in deciding cases; it is another thing for the tribunal to apply it. In point of law the tribunal is as free as the Minister to apply or not to apply that policy. The tribunal's duty is to make the correct or preferable decision in each case on the material before it, and the tribunal is at liberty to adopt whatever policy it chooses, or no policy at all, in fulfilling its statutory function.¹³⁹

The omission of any legislative guidance concerning the influence to be accorded to ministerial policy has been regarded as a "grave omission"¹⁴⁰ by some.

The natural tendency of the tribunal when approaching a decision under review is to concentrate its focus on that decision and without adequate administrative and research support the narrow focus is almost inevitable. The adversary setting throws up two opposing limited interests and only rarely is a wider public interest perspective raised. Located as it is within the executive branch, it should exercise its own discretions *as an administrator* and less as an adjudicator in the judicial sense.¹⁴¹

Another factor which has added to the judicial appearance of the Tribunal is the representation of the parties by lawyers before it. It adds to the adversary tendency. But there is no legal onus and the Tribunal has commented on the dangers of using such terms,¹⁴² though there may be a practical onus:

It is true that facts may be peculiarly within the knowledge of a party to an issue,

131. *Re Fund for Animals Ltd and Minister of State for Arts, Heritage and Environment (No.2)* (1986) 9 ALD 622. See also R.D. Nicholson 'Practice, Procedure and Evidence in the Administrative Appeals Tribunal' (1988) 4 Aust Bar Rev 85.

132. *Supra* n.129 adopting the High Court's test in *Australian Conservation Foundation Inc. v. Commonwealth* *supra* n.46 at 284.

133. S.43.

134. S.43(6) and see *Re Watt and Delegate of the Secretary, Department of Transport* (1978) 1 ALD 242.

135. *Re Becker and Minister for Immigration and Ethnic Affairs* (1977) 15 ALR 696 at 700.

136. *Re Greenham and Minister for Capital Territory* (1979) 2 ALD 137.

137. *Re Jeans and Secretary, Department of Housing and Construction* (1979) 2 ALD 337.

138. In a number of cases the Tribunal has said it would have arrived at a different decision but for ministerial policy: *Nevistic v. Minister for Immigration and Ethnic Affairs* (1981) 34 ALR 639.

139. *Drake supra* n.114 at 642.

140. E.I. Sykes et.al. *General Principles of Administrative Law* Butterworths Sydney 1984 at 288.

141. *Re Winthrop and Smith and Minister for Immigration and Ethnic Affairs* (1980) 2 ALD 873.

142. *McDonald v. Director-General of Social Security* (1984) 6 ALD 6.

and a failure by that party to produce evidence as to those facts may lead to an unfavourable inference being drawn — but it is not helpful to categorize this common sense approach to evidence as an example of an evidential onus of proof. The same may be said of a case where a good deal of evidence pointing in one direction is before the Tribunal, and any intelligent observer could see that unless contrary material comes to light that is the way the decision is likely to go.¹⁴³

The tone of proceedings exhorted by the legislation is one of informality and expedition¹⁴⁴ but fulfilment has been left to the Tribunal itself. There are no pleadings but the applicant must state reasons for the application¹⁴⁵ and the primary decision-maker must provide a statement of findings and reasons¹⁴⁶ in the “pre-trial” phase before the public hearing. An initial task for the Tribunal is to identify the issues “in dispute”.¹⁴⁷ The Tribunal is in theory¹⁴⁸ entitled to take an active and inquisitorial role, including the issue of its own summonses to witnesses.

In practice it has invariably acted like a court — the parties are called upon to provide the evidence and despite the legislative invitation for the Tribunal not to be bound by the rules of evidence, it has found these rules more conducive than the alternative, despite a function different from a court of law:

We should be cautious in trying to apply to procedures and practices operating in an administrative setting those which apply in a judicial setting. This is not to say that an administrative tribunal may not, subject to the regulations governing it, find it convenient or helpful to follow in some respects procedures which over the span of many years have been found by courts of law to be most conducive to the interests of justice. They plainly must be able to accept concessions of fact, but so to express the matter is to confuse their function, which is one of administrative inquiry, without rules of evidence.¹⁴⁹

One Tribunal member has corrected the misconceived interpretation of s.33(1)(c) by “counsel and other representatives of parties in a quite general way as constituting an injunction directed to the Tribunal to set aside the rules of evidence for the purpose of the conduct of all of its proceedings. It is not correct to say that the rules of evidence do not apply. The position is simply that the Tribunal is not bound by those rules.”¹⁵⁰ Many critics would have preferred the misconception to have proved accurate and the rules of evidence abandoned altogether.¹⁵¹

The inevitable and perhaps sensible tendency has been for the Tribunal to vary the degree of formality in response to the approach adopted by the parties in the light of the nature of the decision under review:

The experience of the Tribunal has been that, given the wide variety of issues which arise for decision, there is no one level of formality or informality which is appropriate for all cases. Plainly, a customs tariff classification dispute involving substantial

143. *Ibid.* at 11.

144. S.33.

145. S.29(1).

146. S.37.

147. *Sullivan v. Department of Transport* (1978) 28 ALR 323 at 342.

148. In ‘theory’ because some argue the scheme of the legislation prevents that active and inquisitorial role: M. Aronson and N. Franklin *Review of Administrative Action*. Law Book Co., Sydney 1987 at 237-8.

149. *Re Kuswandana and Minister for Immigration and Ethnic Affairs* (1981) 35 ALR 186 at 199.

150. R.K. Todd (Senior Member) ‘Administrative Review Before the Administrative Appeals Tribunal — A Fresh Approach to Dispute Resolution’ (1981) 12 FLR 95 at 96.

151. H. Whitmore ‘Commentary’ (1981) 12 FLR 112 at 119.

amounts of duty is likely to involve legal representation on both sides and may well require a relatively formal hearing. Cases involving difficult medical questions may require similar treatment. But not all cases attract or require legal representation, and where the nature of the issues allows the Tribunal operates at a less formal level. We are satisfied that a structured form of hearing, ordered, orderly and dignified, leaves plenty of room for informality. Equally, there is room for patience with the difficulties of, and for kindness to, applicants, respondents and their representatives who come before the Tribunal and of whom the Tribunal is servant and not master. Considerable experience has demonstrated that a degree of so-called formality in fact serves to confer, and not to detract from, the equality of treatment to which applicants, particularly unrepresented applicants, are entitled.¹⁵²

Despite attempts to introduce new mechanisms such as teleconferences, it still presents as a court — the “pre-trial” emphasis remains on the parties doing things, there is a right to a public hearing (s.35) at which the presentation of a case and submissions (s.39) by legal representatives (s.32) is contemplated. The Tribunal itself must act according to natural justice¹⁵³ and when it delivers its decision it does so in a form usually indistinguishable from a judgment of a court. Combine these with the focus on the individual case and the legal background of its members, and Whitmore’s comment that most administrative tribunals have struggled hard and long to turn themselves into courts¹⁵⁴ seems prophetically accurate.

9. The Tightrope between Lewis Carroll’s Fantasy and Franz Kafka’s Nightmare and other Fascinating Conundrums.

The Tribunal has now reached its teens and that awkward stage of puberty where it has outgrown its childhood but not yet reached complete and confident adulthood. Its awkward state is evident most clearly in its most significant and novel role — policy review. This role poses a number of problems requiring subtle balance by the Tribunal. The Kerr Committee was mindful of the essential need to achieve balance between the desirability of achieving justice to the individual and the preservation of the efficiency of the administrative process.¹⁵⁵ To the bureaucracy, attainment of administrative efficiency is a dominant objective. To the courts the attainment of justice for the individual is a dominant objective. The Tribunal, in attempting to do both, walks a narrow tightrope. Though part of the administration and capable of implementing rules of policy, it must not pursue consistency at the expense of the merits.¹⁵⁶ Somewhere between Lewis Carroll’s bureaucracy making up rules as it goes along and Franz Kafka’s nightmare bureaucracy lacking power to change rules to do justice¹⁵⁷ lies the fine balance.

Its balancing role also poses another fascinating conundrum:

How does a government confide to an independent tribunal the review of a discretionary power without abdicating to that tribunal the ultimate political power to formulate the policy by which the exercise of the discretion will be guided? To me that has been a fascinating conundrum of the new administrative law. The answer affects the extent to which jurisdiction can be confided to the tribunal and the extent

152. *Re Hennessy and Secretary to the Department of Social Security* (1985) 7 ALN 113 at 117.

153. *Pochi supra* n.96 at 671, 686.

154. *Supra* n.151.

155. *Supra* n.11 para 12.

156. G.A. Flick ‘Administrative Adjudications and the Duty to Give Reasons — A Search for Criteria’ [1978] PL 40.

157. J. Skelly Wright ‘Beyond Discretionary Justice’ (1972) 81 Yale LJ 575 at 597 noted by Kirby *supra* n.71 at 208.

to which the individual can participate effectively and by right in the making of administrative decisions which affect his interests.¹⁵⁸

The Tribunal's function requires that it be part of the executive but an independent part of it but that it not become just another cog in the legal or judicial hierarchy in dispensing individual justice.¹⁵⁹ An appreciation by all, not least the Tribunal, bureaucracy and judiciary, of that difficult balance is necessary if the Tribunal is to grow into healthy adulthood.

10. Policy Review

Many administrative functions involve the exercise of discretionary powers e.g. whether to pay social security benefits to an individual or whether to deport an alien who has been convicted of some criminal offence.

Discretions differ in respect of the call for specialist skills and the extent to which an exercise may affect a significant number of people or in the profundity of its consequences. Discretions may differ also in respect of the functionary to whom the exercise of a discretion is given. The Bland Committee noted that Parliament "has over the years since Federation, followed no readily, identifiable principle in determining who should be the donee of a discretion".¹⁶⁰ Into whose hands the discretion is conveyed depends to some extent upon the period of legislative conferral. The discretion may be vested in a Minister or an official or an instrumentality constituted to discharge some function.

The most controversial area in terms of review arises where some policy is involved in the exercise of discretion. Some discretions involve no more than 'operational considerations'. The operational versus policy distinction arises in a number of areas of law. In the area of liability of public authorities for negligence a clear distinction is made between the two, though the clarity breaks down when detailed analysis seeks to provide a rational basis for the distinction. In the now out of favour *Anns v. Merton London Borough Council*,¹⁶¹ Lord Wilberforce recognised a distinction between policy and operational functions as a means of limiting duty situations. Most, indeed probably all statutes relating to public authorities or public bodies, contain in them a large area of policy. The courts call this "discretion" meaning that the decision is one for the authority or body to make, and not for the courts. Many statutes, also, prescribe, or at least presuppose the practical execution of policy decisions. A convenient description of this is to say that in addition to the area of policy or discretion, there is an operational area.¹⁶² This distinction is not a new one¹⁶³ and was borrowed largely from the American defence of discretionary function.¹⁶⁴ Courts are, or should be, unwilling to regard as justiciable, in terms of assessing reasonableness on the merits, matters involving economics and the allocation of resources to obtain maximum results because they are beyond the resources of this forum to assess properly. It was recognised that there is no precise means of distinguishing between policy and operational decisions:

Although the distinction between the policy area and the operational area is convenient and illuminating, it is probably a distinction of degree...It can safely be said that the

158. Mr Justice F.G. Brennan 'Administrative Law: The Australian Experience' (1981) Paper presented at Conference of Association of Schools and Institutes of Administration, Canberra. Noted in (1981) Reform 124.

159. Mr Justice R.W. Fox 'Commentaries' (1981) 12 FLR 182.

160. Interim Report *supra* n. 73 para 17.

161. [1978] AC 728.

162. *Ibid.* at 754.

163. *East Suffolk Rivers Catchment Board v. Kent* [1941] AC 74.

164. P. Craig 'Negligence in the Exercise of a Statutory Power' (1978) 94 LQR 428; M. Aronson and H. Whitmore *Public Torts and Contracts* (1982) at 36-60.

more “operational” a power or duty may be, the easier it is to superimpose on it a common law duty of care.¹⁶⁵

There have been other attempts to suggest factors which might aid the distinction but none seem particularly helpful other than as factors of non-definitive relevance. One suggestion has been based upon a classification of what is ‘inherently’ policy or governmental¹⁶⁶ but that assumes there is some means of determining what is inherently policy, by tests of historical recognition or otherwise, an assumption which is not justified. Again, suggestions have been made that the level of functionary may be determinative of the distinction¹⁶⁷ but that also seems of little use other than as one of the relevant factors.

One of the problems arising from Lord Wilberforce’s formulation of the policy/operational distinction is the ambiguous use he makes of the term ‘discretion’. Although in the passage quoted above¹⁶⁸ he appears to use the term as synonymous with policy, he confused matters by employing it subsequently in another sense of power to select a course of action, for he says that ‘many “operational powers” or duties have in them some element of “discretion”’.¹⁶⁹ In the later sense, its relevance in determining the limits of duty situations is less certain and could not be relied upon by local authorities with the same confidence in excluding liability.

Lord Wilberforce held that in respect of the duty concerning inspection, in that case, if made, it was clearly ‘operational’:

On principle there must surely be a duty to exercise reasonable care. The standard of care must be related to the duty to be performed — namely, to ensure compliance with the by-laws...But this duty, heavily operational though it may be, is still a duty arising under the statute. There may be a discretionary element in its exercise — discretionary as to the time and manner of inspection, and the techniques to be used.¹⁷⁰

The High Court has recently considered the policy/operational distinction in the negligence area in *Sutherland Shire Council v. Heyman*.¹⁷¹ Gibbs C.J. found the distinction between the area of policy and the operational area to be both logical and convenient.¹⁷² The decision in *Anns* could be reconciled only if it could be understood as recognising a duty arising from the statutory provisions to give proper consideration to the question whether it should exercise the powers. The plaintiffs failed in *Heyman* only because they failed to discharge the onus, which is not a light one, that the authority was negligent in failing to consider the exercise of the power.¹⁷³

Mason J. held that there was no reason why a public authority should not be subject to a common law duty of care in appropriate circumstances in relation to failing to perform its functions except in so far as its policy making and perhaps, its discretionary decisions are concerned.¹⁷⁴ However, his Honour did not accept the decision in *Anns* in so far as it imposed a duty for failure to give proper consideration to the question whether the power of inspection should be exercised or not:

165. *Supra* n. 162.

166. *Home Office v. Dorset Yacht Co. Ltd* [1970] AC 1004 at 1066-7.

167. *Takaro Properties Ltd v. Rowling* [1978] 2 NZLR 314.

168. *Supra* n. 162.

169. *Ibid.* at 758.

170. *Ibid.* at 755.

171. (1985) 60 ALR 1.

172. *Ibid.* at 14.

173. *Ibid.* at 19.

174. *Ibid.* at 34. Whilst the distinction was recognised as being difficult to formulate, decisions which involve or are dictated by financial, economic, social or political factors or constraints were held to be beyond the scope of a duty.

...although a public authority may be under a public duty enforceable by mandamus, to give proper consideration to the question whether it should exercise a power, this duty cannot be equated with, or regarded as a foundation for imposing, a duty of care on the public authority in relation to the exercise of power. Mandamus will compel proper consideration by the authority of its discretion, but that is all.¹⁷⁵

Brennan J. expressed a similar opinion in distinguishing a statutory power from a statutory duty, the former giving rise to a duty only where the statute imposes a duty to exercise the power and confer a private right of action. Further reflecting classical orthodoxy, it was: ...not open to the court to remedy a supposed deficiency by superimposing a general common law duty on the council to prevent any damage that future purchasers of property might suffer in the event of a non exercise or a careless exercise of the statutory powers. To superimpose such a general common law duty on a statutory power would be to “conjure up” the duty in order to give effect to judicial ideas of policy.¹⁷⁶

Finally, Deane J. also classified the relevant powers and functions as of a routine administrative or operational nature.¹⁷⁷

Whilst it was open to parliament in conferring jurisdiction on the Tribunal to exclude review on the merits of policy, or high policy such as Ministerial policy, as has occurred with the Victorian Tribunal which is bound by certified Ministerial policy,¹⁷⁸ no such limitation has been attempted and it has been left to the Tribunal to come to terms with review on the merits of policy as well as the less controversial operational discretions.

The Tribunal itself has created its own policies in respect of reviewing policy decisions. The policies adopted by the Tribunal reflect a mature balancing of relevant factors. First and foremost is the nature of the policy as laid down by legislation. If the legislation defines the basis of exercise of a discretion then both the primary decision-maker and the tribunal are bound by parliament’s dictates.¹⁷⁹ A second factor concerns the level of the repository of the discretion within the hierarchy. It may be conferred on a subordinate official within a Department or it may be conferred at the highest level upon a Minister. The Tribunal in its earliest days in 1977 was prepared to accept Ministerial policy:

[Such a policy] is subject to parliamentary scrutiny, and ultimately to parliamentary control. Under the Westminster system of government, a Minister is politically responsible to the Parliament for the policy adopted to guide the exercise of his discretionary power, and he should be left to formulate that policy in whatever manner he thinks appropriate from time to time. Administrative policies are necessarily amenable to revocation or alteration on political grounds, and they are best formed and amended in the political context.¹⁸⁰

Accordingly, the greater the parliamentary or other public consideration of and approval for policy, the more reluctant the Tribunal should be in departing from the policy.

Another reason given for accepting Ministerial policy is that it is more likely to involve broad policy, an area that the Tribunal, concentrating on individual justice, was not suited to address:

Although the practice of giving reasons for decisions inevitably spins out threads

175. *Ibid.* at 31.

176. *Ibid.* at 45.

177. *Ibid.* at 57.

178. s. 25 (3).

179. *Re Hospitals Contribution Fund of Australia and Minister for Health* (no. 2) (1978) 1 ALD 549.

180. *Re Becker and Minister for Immigration and Ethnic Affairs* (1977) 1 ALD 158 at 163; *Re Drake supra* n. 114 at 643-4.

of policy from the facts of the cases, the policy developed in this way originates in the need to ensure that justice is done in individual cases, and it is a different development from a ministerial declaration of broad policy relating to the generality of cases. The Tribunal is no doubt able to refine a broad policy, but the laying down of a broad policy on deportation is essentially a political function, to be performed by the Minister who is responsible to the Parliament for the policy he adopts.¹⁸¹

A policy generated purely for purposes of a Tribunal hearing may be given virtually no weight at all e.g. in *Re Johns Homan & Co. Pty Ltd and Minister for Primary Industries and Australian Apple and Pear Growers' Association*¹⁸² no general policy relating to the granting of export licences was in existence at the time of primary decision-making but one was produced at the hearing and regarded as inadequate by the Tribunal. Occasionally there may be multiple policies in contention e.g. in *Re Central Investments Pty Ltd and Australian Broadcasting Tribunal (No. 3)*¹⁸³ the Tribunal was faced with alleged policies of the A.B.C. and the government.

The Tribunal has indicated its reliance upon departmental assistance in explaining policy. In *Re Becker*¹⁸⁴ Brennan J. stated:

But it is neither necessary nor desirable here to define exhaustively the circumstances in which the Tribunal will review or will refuse to review a decision on policy grounds. The working out of those criteria should await the accumulating wisdom of future experience. The importance of departmental assistance in the review of policy is not easily overstated. Whenever the review of a decision involves consideration of policy, it is essential that the Tribunal be fully informed as to the policy and the reasons for it. Otherwise the decisions of the Tribunal may, instead of providing a rational analysis of policy and assisting to develop principles yet flexible decision-making, intervene incongruously to disrupt the due course of administration.¹⁸⁵

The principal object of review on the merits is to enhance decision-making, in each case, and by building upon the sound exercise of discretion in each case to form a coherent whole. Accordingly, it would be an abdication of the Tribunal's purpose for existence to avoid its contribution to the development of consistent policy, both its own and Ministerial policy:

The general practice of the Tribunal will not preclude the Tribunal from making appropriate observations on ministerial policy, and thus contributing the benefit of its experience to the growth or modification of general policy; but the practice is intended to leave to the Minister the political responsibility for broad policy, to permit the Tribunal to function as an adjudicative tribunal rather than as a political policy-maker, and to facilitate the making of consistent decisions in the exercise of the same discretionary power.¹⁸⁶

In the same case in the Federal Court Bowen C.J. and Deane J. indicated the degree of balancing required:

It is not desirable to attempt to frame any general statement of the precise part which government policy should ordinarily play in the determinations of the Tribunal. That is a matter for the Tribunal itself to determine in the context of the particular case and in the light of the need for compromise, in the interests of good government,

181. *Re Drake* *ibid.* at 644.

182. (1983) 5 ALN 119.

183. (1981) 4 ALD 1.

184. *Supra* n. 180.

185. *Ibid.* at 162-3.

186. *Re Drake* *supra* n. 114 at 645.

between, on the one hand, the desirability of consistency in the treatment of citizens under the law and, on the other hand, the ideal of justice in the individual case.¹⁸⁷

The balancing act has arisen most often in the highly political area of criminal deportation. In that area, the Tribunal can only make recommendations to the Minister but the Hawke Government has adopted a policy that the Minister should reject a recommendation only exceptionally and give reasons in Parliament for so doing. Criminal deportation is highly political because it involves international treaty obligations, including those concerning human rights, protection of the domestic community, and the rights of third parties, including family.

The balanced intrusion of the Tribunal into this area spans several successive ministerial policies and has already been the subject of detailed analysis.¹⁸⁸

The position up to 1981 was summarised by Mr Justice M.D. Kirby as follows:

The sample is small. The facts of particular cases are different in significant respects. But enough may have been recorded to show that there is a degree of ambivalence among the Deputy Presidents of the AAT concerning the precise way in which the ministerial statement of policy is to be considered. Each refers to it. Each takes it "into account". None applies it uncritically. None specifies precisely the weight he has assigned to it, though Davies J. comes closest in *Nevistic* in his statement that but for the policy, he should not have concluded in favour of deportation. The enthusiasm of the Deputy Presidents for the policy statement in its generality clearly varies, ranging from apparent endorsement of its terms by McGregor J. to scepticism about the effectiveness of its major premise on the part of Fisher J. and denunciation of aspects of it as "Draconian" by Smithers J. Perhaps no greater degree of consistency can be expected in the business of individualised justice performed by a tribunal, constituted by judges accustomed to resolute action, strong opinions strongly expressed, and the traditions of judicial independence.

The Minister had declined to follow the Tribunal's recommendations in *Re Pochi*¹⁹⁰ and *Re V. Barbaro*.¹⁹¹ Since that time further ministerial policy has been issued which shows evidence of Tribunal influence on its framing and the approaches of both the Minister and the Tribunal have come closer together though in the deliberations of the Tribunal, the policy is but one of a number of factors e.g. in *Re Gillespie and Minister for Immigration and Ethnic Affairs*, Deputy President Thompson stated:

Over the years a number of statements of policy in relation to the deportation of criminal offenders have been made by successive Ministers for Immigration and Ethnic Affairs. The present Minister's policy was stated by him in May 1983. Provided that the policy is consistent with the Act (see *Re Drake and Minister for Immigration and Ethnic Affairs* (No. 2) (1979) 2 ALD 634), the approach which the Tribunal should adopt is as stated by the President Davies J, in *Re Stone*: 'The Minister's policy is not the law. The law is set out in ss. 12 and 13 of the Migration Act. The Tribunal must fulfil the task which those sections and the conferral upon it of the duty to review the Minister's decision impose upon it. But the Tribunal gives weight to the policy because, in the first instance, the formulation of such a policy is an exercise of political power and a step which is appropriately taken in a political context and,

187. *Re Drake* (1979) 46 FLR 409 at 421.

188. Mr Justice M.D. Kirby *supra* n. 33 at 134-145; Sharpe *supra* n. 100 at 76 ff.

189. *Ibid.* at 145.

190. *Supra* n. 96.

191. (1981) 3 ALN no. 21 But under public pressure revoked both orders.

secondly, because it is just that there be reasonable consistency in decision-making. See the remarks of Brennan J. in *Re Drake* (No. 2) 2 ALD 634 at 638-645. In a particular case, the additional weight which the policy gives to the factors favouring deportation may tip the scales in favour of deportation. See *Re Nevistic* 3 ALN 9.¹⁹²

Of course, criminal deportation is not the only area in which the Tribunal has been called upon to review decisions based on policy. In another area involving the tuna fishing industry e.g. *Re Aston*¹⁹³ the Tribunal held:

There being no special circumstances which affected the Astons, this is pre-eminently the type of matter in which the policy adopted by the primary decision-maker ought to be applied by this Tribunal. The policy affected an industry. It was a policy decided upon at the highest level, being resolved upon by the Australian Fisheries Council comprised of the six relevant Ministers of the States and the Federal Minister for Primary Industry and the Federal Minister for Science and Technology. It was a policy which could only be developed in the political arena after consultation with industry. The Tribunal, which is not accountable politically and which cannot proceed by obtaining industry consensus, must give such a policy great weight.¹⁹⁴

The interplay between the Tribunal's consideration of policy and refinement of policy following Tribunal analysis is a healthy sign that the principal object of review on the merits is being achieved. The integrity of decision-making in particular cases is better assured as a result of decisions being tested against policy and the modification of policy in the light of that testing enhances the quality of the administrative process. As the Tribunal gains experience in a sufficient number of reviews in particular areas, its adjudication in each area will permit a more worthwhile contribution to its own policy formulation and its influence in modifying government or ministerial policy. The record of the Tribunal to date has demonstrated a willingness to avoid an inflexible application of policy, whether of the primary decision-maker or itself, and to have regard to the circumstances of each particular case in reaching the right or preferable decision.¹⁹⁵ It has therefore avoided any accusation which may have been directed to it in the Federal Court concerning rigid application of policy.

Section 44 (1) provides for an 'appeal' to the Federal Court by a party to a proceeding before the Tribunal. The appeal involves an exercise of the judicial power of the Commonwealth on questions of law but not the merits.¹⁹⁶ Although provision is made in the Administrative Decisions (Judicial Review) Act, 1977, for review on the ground of improper exercise of power "in accordance with a rule of policy without regard to the merits of a particular case"¹⁹⁷ the record of the Tribunal in balancing its difficult task provides no scope for criticism on this ground.

Denis Pearce has called for restraint in judicial review of Tribunal decisions¹⁹⁸ for a number of reasons, not the least of which is the possible collapse of the independent tribunal system if applicants find themselves "caught up in the snakes and ladders of court appeals".¹⁹⁹

192. (1984) 5 ALN 528.

193. (1985) 8 ALD 367.

194. *Ibid.* at 380.

195. See Mr Justice M.D. Kirby 'Administrative Review on the Merits: The Right or Preferable Decision' (1986) 6 Monash. ULR 169.

196. *Minister for Immigration and Ethnic Affairs v. Gungor* (1982) 63 FLR 441.

197. Ss.5(2)(f), 6(2)(f).

198. 'Judicial Review of Tribunal Decisions — The Need for Restraint' (1981) 12 FLR 167.

199. *Ibid.* at 173.

There are encouraging signs that the Federal Court is keen to demonstrate that restraint in respect of both primary decision-makers²⁰⁰ and Tribunals:

It is my firm view that this Court when hearing appeals from a tribunal constituted for the purpose of reviewing decisions of this nature, should adopt a restrained approach. Parliament contemplated that only in exceptional circumstances should the decision of the Tribunal not be the final decision.²⁰¹

No doubt, the impact of overlapping membership of the Tribunal and the Federal Court has aided the sympathetic treatment.

11. An Appraisal

There were significant concerns when the 'new' federal administrative law was first introduced. The power to review policy appeared to be inconsistent with our accepted theory of responsible government but upon further analysis, theoretical rationalisation has overcome that problem and it is no longer a threat to legitimacy. We have also grown accustomed to its presence and no longer worry about its theoretical status.

Another concern is the extent to which some administrative discretion still remains outside control. Not only have all the states except Victoria failed to implement any similar reforms but even at federal level some matters remain beyond control.²⁰² One contributory reason for this may lie in the dichotomy which arises when the Tribunal's views on policy diverge from Ministerial views: the bureaucracy is forced to a choice between its political master and the Tribunal and the ensuing resolution can only diminish the value of the Tribunal. The caution displayed by the Tribunal in this sensitive area has prevented any major problems arising. It has also prevented any loss of prestige to the judiciary and its independence as a result of its being embroiled in controversy, and the risk of having the radical machinery disbanded altogether, for there always remains that possibility. One senior public servant has reminded us of the possibility in the controversial criminal deportation area:

Yet another possibility would be to remove this area of decision-making from the jurisdiction of the Administrative Appeals Tribunal. That, of course, is not contemplated *at this stage* but nonetheless it is one of the options that would have to be considered in due course if there were problems.²⁰³

Another concern has been the cost of adding this tier to an already large bureaucracy. The Tribunal has defended itself against this criticism. In 1986 the total expenditure on the Tribunal was a mere \$6.7 million, an amount considerably less than say the Conciliation and Arbitration Commission (\$18.7 mil) and even the Veteran's Review Board (\$7.1 mil).²⁰⁴

One continuing concern for many is the legal atmosphere which pervades the Tribunal and its operations and the danger that a degree of rigidity may creep into the body and isolate it from reality in a fashion similar to the way in which the common law courts removed themselves from an ability to change in response to need. The introduction of fees for most appeals to the AAT and Federal Court may be a further deterrent to exposure of the smaller examples of maladministration.

There are wider defects than those pertaining to the Tribunal e.g. if a citizen seeks

200. *Minister for Immigration and Ethnic Affairs v. Conyngham* (1986) 68 ALR 441.

201. *Blackwood Hodge (Australia) Pty Ltd v. Collector of Customs (NSW)* (1980) 47 FLR 131 at 145. See also *Uranerz (Aust) Pty Ltd v. Hale* (1980) 30 ALR 193.

202. G. Moon 'Beyond Judicial and Ministerial Control' (1985) 10 Legal Service Bulletin 230; G. Craddock 'You Remain my Obedient Servant?' (1985) 10 Legal Service Bulletin 184.

203. D. Volkner, Deputy Secretary, Department of Immigration and Ethnic Affairs 'Commentaries' (1981) 12 FLR 158 at 161.

204. I. Thompson, Deputy President, 'An Appraisal of the Federal AAT' (1988) Law Institute Journal 282 at 285.

compensation for defective administration, there are problems concerning the obtaining of damages. The Tribunal has no jurisdiction (nor is it suggested that it should) and the Federal Court has ruled recently that it has no power to make an award pursuant to s. 16 (1) (d).²⁰⁵ The remedies available are essentially instrumental rather than compensatory.

On the positive side, the Tribunal has provided a mechanism for testing the quality of administration and doing administrative justice where the quality is so low as to be defective. It performs a wider function in assisting administrators to understand legislation and demonstrate appropriate procedures for fact finding upon which a discretion is to be exercised. The Tribunal's exploration of issues and the testing of witnesses enables the Tribunal to develop criteria for the exercise of discretions thereby aiding consistency and public confidence in the administrative process.

Its role in policy review has been the most difficult and significant. Policy aids the process of converting discretion into decisions in individual cases by clarifying the preferred options in arriving at the correct or preferable decision.²⁰⁶ It is true that the Tribunal may not have the expertise and resources to develop broad policy itself but its identification of defective policy in a series of cases in a particular area enables constructive comment upon the policy and a likely modification of it in the interests of effective administration. One positive effect of the Tribunal's involvement in policy review may be its influence in introducing a more overt recognition of policy in the curial setting and the acceptance that judges do make law founded on policy whether in a personal capacity when sitting on the AAT within but independent of the bureaucracy, or sitting in the more traditional curial setting.

For the legal practitioner the 'new' administrative law has created a sunrise industry²⁰⁷ and the multiplicity of mechanisms and avenues ensures a place for the practitioners in seeking the correct or preferable mechanism to achieve a correct or preferable decision.

The Tribunal is a significant component in the structure of government in Australia. It is necessary to remind ourselves from time to time just how significant and the purposes for which its radical role was designed, in order to prevent it becoming just another cog in the system.

205. *Park Oh No v. Minister for Immigration and Ethnic Affairs* (1988) 81 ALR 372. See the general discussion in J.S. Read, 'Damages in Administrative Law' (1988) 14 Commonwealth Law Bulletin 428.

206. D. J. Galligan 'The Nature and Function of Policies within Discretionary Power' [1976] PL 332 at 333.

207. E. Kyrou 'Administrative Law: a sunrise industry for the legal profession' (1987) Law Institute Journal 704.