THE FUTURE OF PUBLIC LAW— THE AUSTRALIAN ADMINISRATIVE APPEALS TRIBUNAL

THE HONOURABLE MR JUSTICE BRENNAN*

The following paper was presented by Mr Justice Brennan at a seminar entitled "Current Trends and Developments in the Law—Looking Towards the Next Hundred Years" held by the Otago District Law Society on 23 June 1979 to mark the centenary of the founding of the Society.

This seminar is concerned with future developments in the law and their implications for lawyers. I suppose our forecasting must assume that, during the next 100 years, the nature of man will not change much, and that legal controls and rules will be required to order the society in which he lives. Is there likely to be a significant change in the interests of lawyers who will be required to advise upon and operate those controls and rules? The answer turns largely upon the kind of society which we develop and the ethos of its people. For example, if the institution of marriage does not retain a central place in the organisation of society, changes in the laws of succession, real property, criminal law, infants' custody and protection as well as in the law relating to marriage and divorce could be foreseen. There have been developments in public law which are likely to produce new kinds of legal structures, and it may be of interest to describe briefly one of these structures — the Australian Administrative Appeals Tribunal (or the AAT as I shall call it) — and to examine this specimen of change in your seminar laboratory.

Before turning to that subject, however, let me say that there are some legal structures which are not, I hope, destined for radical change. One of these is our system of criminal justice, the importance of which lies not only in its ability justly to administer condign punishment to an offender, but also in its maintenance of a free society. The criminal justice system furnishes the essential *raison d'être* of an independent profession, and it is the work of our courts in criminal jurisdiction which attracts the greatest interest of the public and evokes its most profound respect.

Another part of the court's jurisdiction which, though destined for change, will not I trust be diminished, is the jurisdiction judicially to review administrative action. The protection against oppression which this jurisdiction accords to the citizen should not be under-estimated,[1] and the procedural amendments made in New Zealand by the Judicature Amendment Acts of 1972 and 1977 have clearly strengthened the jurisdiction and simplified its exercise.[2] Though the jurisdiction be un-

* The Honourable Mr Justice F G Brennan is a Judge of the Federal Court of Australia and President of the Australian Administrative Appeals Tribunal.

1 As Dr R G McElroy has shown in "The Protection of the Individual against Authority by means of Administrative Jurisdiction" [1978] NZLJ 2.

2 An appreciation of these changes was given in an address by Mahon J to the Auckland Law Society, June 1978, a transcript of which I have had the advantage of reading.

diminished, the question which the AAT would pose is: should it be augmented, extending further the curial supervision of administrative activity? The answer is not self-evident, particularly when the administration is already subject to the penetrating and useful audit of the Ombudsman. His function, pioneered for the common law world by New Zealand, is of the first importance, ensuring that maladministration is kept to a minimum. But the absence of maladministration is not synonymous with the absence of administrative error or injustice, and parliaments have frequently created administrative tribunals designed to improve the quality of administrative justice.

These tribunals are the principal controls upon the exercise of specific statutory powers, supervising the primary administrator and defining the guidelines of administrative activity. Their importance is a function of the importance of the powers encompassed by their jurisdiction.

The growth of public law presents a challenge to lawyers, because we have traditionally been concerned with the creation, protection and enforcement of private rights; now the significance of private rights is diminishing in comparison with the significance of rights and interests which arise under public law. The worth of the title to Blackacre has become a function of planning permission; the production of a farm is affected by quotas; the price of an imported article depends largely on the tariff; the use of capital is controlled by a variety of provisions, which regulate internal and foreign trade and business activity. And, of course, the provision of welfare benefits, on which so many of our people rely, depends entirely upon public funds and the laws which define individual entitlement to benefits payable out of public funds.

The effect of public law, and particularly of licensing law, flows on a making tide into areas of private law. The freedom of contract has been hedged about with proscriptions enacted to safeguard the public interest, from the operation of which exemption is sought not by consent of a contracting party but by consent of a public functionary who has no interest in the contract.

The relationship of the individual, both natural and corporate, to those whose function it is to safeguard the public interest as it is perceived (either by the legislature, the executive or by the functionary himself) is a relationship of great, indeed central, importance in contemporary society. The new thrust of professional interest was suggested by Lord Scarman in the 1974 Hamlyn Lectures. He noted that a legal system which offers only what he calls "distributive justice" is wanting, and that modern legal development will not be securely based on the common law's concepts of "fault, trespass, property, even marriage". His Lordship writes:[3]

> the law is being remaindered—but to what? To death in a forgotten corner? Or is there a new role? Lawyers use a technical term to describe this field of battle—administrative law: and English lawyers tend to treat its problems as technical, ie, the interpretation of statutes and the strengthening of the remedies available to the citizen against the executive arm of government. This is no merely technical problem amenable to a tinker-tailor approach for its solution. Our legal structure lacks a sure foundation upon which to build a legal control of the beneficent state activities that have developed in this country.

3 *Hamlyn Lectures* (1974) 71.

And he adds some advice for lawyers:[4]

> As the traditional business of the civil court falls away (a movement which is inevitable as the importance of merely distributive justice diminishes), the business of the so-called administrative tribunals, which guard the citizen where the administrator has taken over from the law, is certain to increase. Unless the legal profession adjusts its practice to this new forensic world, its own place in society will become unsure, and the relevance of the law and lawyers to the solution of modern problems suspect.

This advice emphasises the point which Lord Denning made in his maiden speech in the House of Lords upon the Report of the Franks Committee:[5]

> it contains and reaffirms a constitutional principle of first importance—namely, that these tribunals are not part of the administrative machinery of government under the control of departments; they are part of the judicial system of the land under the rule of law.

In New Zealand, the courts have long been vested with a jurisdiction to determine on the merits certain appeals from administrative tribunals. After a simmering interest in tribunal reform, in 1968 the Public and Administrative Law Reform Committee reported upon a number of innovative proposals, and an Administrative Division of the Supreme Court was created, with jurisdiction to hear and determine administrative appeals or other proceedings specified by other enactments.[6] The jurisdiction to hear and determine appeals against tribunal decisions on the merits was conferred with caution[7] but the Royal Commission on the Courts found that the jurisdiction was usefully conferred:[8]

> We believe the High Court has a vital and important role to play in this regard. We appreciate that, to some extent, this may involve the court in matters of policy as well as law, and that in theory there are some risks involved. We believe, however, that the protection of the citizen is of paramount importance and that the successful operation of the Administrative Division to date has demonstrated how well the judges are able to cope with the problems.

In Australia, a different solution has been essayed by the Commonwealth Parliament, and jurisdiction to review a significant and broadening range of administrative decisions on the merits has been conferred upon the AAT. The choice as to whether this jurisdiction should be vested in a court or in a non-curial tribunal was not made by reference to the considerations which were debated in New Zealand,[9] but was determined by constitutional constraints.[10] Chapter III of the Constitution was thought to preclude the vesting in a court of jurisdiction to review administrative decisions on the merits; but the creation of a tribunal with certain curial features was conceived to be a constitutionally valid manner of achieving much the same result. Although the

4 Ibid at 71-72.
5 Lord Denning, *The Discipline of Law* (London 1979) 83.
6 Judicature Amendment Act 1968.
7 For an early analysis of the problems of this kind of jurisdiction, see Keith, "Appeals from Administrative Tribunals" (1969) 5 VUWLR 123.
8 *Report of Royal Commission on the Courts* (1978) p 93, para 312 (d).
9 *First Report of the Public and Administrative Law Reform Committee* (1968) entitled *Appeals from Administrative Tribunals.*
10 *Report of Commonwealth Administrative Review Committee* (1971) (the *Kerr Report*).

same constitutional constraints do not operate upon the several States, the New South Wales Law Reform Commission has recommended the creation of a Public Administration Tribunal, similar to the Administrative Appeals Tribunal.[11] However, none of the States has thus far created a tribunal intended to exercise a broad jurisdiction in administrative matters.

The Administrative Appeals Tribunal Act 1975 came into operation on 1 July 1976, and the AAT then came into existence. At that time I was its only member. It has grown during the three years of its existence. Its case load was 49 applications for review in the first year, 275 in 1977-78 (including 121 rating valuation cases), and 249 (including 105 rating valuation cases) in the eleven months ended May 1979. The Tribunal now has five presidential members, all of whom are judges of the Federal Court of Australia, two full-time senior members, two part-time senior members and eighteen part-time ordinary members. Its jurisdiction is increasing. As at 1 February 1979 sixty-four different appellate jurisdictions have been conferred on the AAT and the vesting of two large-volume areas of jurisdiction are waiting upon the expansion of the Tribunal's personnel and premises: social security cases, and cases arising under the Export Expansion Grants Act 1978.

To hear a case, a Tribunal may be constituted by a presidential member sitting alone or with two non-presidential members; or by a senior member sitting alone or with two other non-presidential members. The full-time senior members are each experienced lawyers, and the two part-time senior members have wide experience, each having served first as a lawyer in government and later as a judge of the Supreme Court of Papua New Guinea. The part-time ordinary members are experts of distinction in their respective fields and they are appointed in order to equip the AAT with the expertise and authority which it requires to deal with diverse and technical areas of its jurisdiction. Thus, men of distinction in the insurance industry or in air navigation sit on cases appropriate to their special skills. The persons who are to constitute the Tribunal for a given case are appointed by the President, or, as happens in practice, by the Deputy President who controls the internal administration of the Tribunal.

The decision-maker whose decision is under review (whom I shall call the primary administrator) is required to furnish a statement of reasons for the decision.[12]

The procedure of the Administrative Appeals Tribunal is court-like in some respects: submissions are heard from each of the parties, sworn evidence may be called, witnesses are examined and cross-examined, and legal argument is entertained. A criticism of the Administrative Appeals Tribunal has been that it is too legalistic in its trappings, and that some applicants appearing for themselves may be overawed by the court-like atmosphere. The Act requires that the procedures of the AAT be conducted with as little formality and with as much expedition as the relevant legislation and the exigencies of the hearing permit,[13] and the procedures are therefore variable within certain limits. Thus there will be room for more informality in social security cases than in cases deal-

11 *Report on Appeals in Administration* (LRC 16, 1973).
12 See *Palmer* v *Minister for Capital Territory* (1978) 1 ALD 183, noted [1979] NZLJ 24; and cf *Clark* v *Wellington Rent Appeal Board* [1975] 2 NZLR 24.
13 Administrative Appeals Tribunal Act 1975 (Cth) s 33 (1) (b).

ing with the authorisation of insurance companies to carry on business. The Tribunal is not bound by rules of evidence but may inform itself in such manner as it thinks appropriate.[14] It ordinarily sits in public, but there is power to exclude the public, or even a party, and to prohibit or limit the publication of evidence.[15] Representation before the Tribunal varies: sometimes a full array of senior and junior counsel and instructing solicitor on both sides; sometimes an applicant in person and a departmental officer. The length of cases has also varied from a few minutes to 80 sitting days, reflecting the great variation in importance and complexity of administrative decisions.

The Tribunal's powers are set out in section 43:

> (1) For the purposes of reviewing a decision, the Tribunal may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision and shall make a decision in writing—
>
> (a) affirming the decision under review;
>
> (b) varying the decision under review; or
>
> (c) setting aside the decision under review and—
>
> (i) making a decision in substitution for the decision so set aside; or
>
> (ii) remitting the matter for reconsideration in accordance with any direction or recommendations of the Tribunal.
>
> . . .
>
> (6) A decision of a person as varied by the Tribunal, or a decision made by the Tribunal in substitution for the decision of a person, shall, for all purposes (other than the purposes of applications to the Tribunal for a review or of appeals [in accordance with section 44]), be deemed to be a decision of that person and, unless the Tribunal otherwise orders, has effect, or shall be deemed to have had effect, on and from the day on which the decision under review has or had effect.

The Tribunal decides the case on the material before it, which is not necessarily the same material as that before the decision-maker whose decision is being reviewed. It hears the case de novo.[16] The Tribunal's decision must be supported by a written statement of reasons.[17]

The AAT has adequate power to review fully on the merits any decision in respect of which it has jurisdiction. Moreover, the Federal Court held recently that the AAT's powers are exercisable in respect of decisions made in purported, though not valid, exercise of the powers of the primary administrator.[18] The result is that some of the remedies which had to be sought from a court by applications for a prerogative writ may not be needed if the purported decision falls within the Tribunal's jurisdiction. The creation of a tribunal with so wide a power to intervene and to set aside administrative decisions demands a pause to consider the warning which the late Professor de Smith delivered in the opening lines of his treatise on judicial review.[19]

14 Ibid s 33 (1) (c); and see *Re Pochi and Minister for Immigration and Ethnic Affairs* unreported, 24 May 1979.
15 Ibid s 35 (2).
16 *Re Pochi and Minister for Immigration and Ethnic Affairs* supra n 14; *Drake* v *Minister for Immigration and Ethnic Affairs* unreported, FCA, 3 May 1979.
17 Administrative Appeals Tribunal Act 1975, s 43 (2); and see *Sullivan* v *Delegate of the Secretary of the Department of Transport* (1978) 20 ALR 323.
18 *Collector of Customs (New South Wales)* v *Brian Lawlor Automotive Pty Ltd* unreported, FCA, 3 May 1979.
19 de Smith, *Judicial Review of Administrative Action* (3rd ed 1973) 3.

> The administrative process is not, and cannot be, a succession of justiciable controversies. Public authorities are set up to govern and administer, and if their every act or decision were to be reviewable on unrestricted grounds by an independent judicial body the business of administration could be brought to a standstill. The prospect of judicial relief cannot be held out to every person whose interests may be adversely affected by administrative action.

There is, at least in theory, the possibility that the AAT could become a kind of judicial duplicate of the bureaucracy, dealing for a second time with each question which arises in the making of a reviewable decision. There have been some areas of jurisdiction which, being vested in unrestricted terms, might have been thought to open the floodgates. For example, jurisdiction under the Superannuation Act 1976, s 154, is conferred in respect of all decisions made by the Commissioner for Superannuation under that Act (though the first step in the review procedure requires the Commissioner to reconsider the challenged decision). Yet the floodgates have not opened, and—with one exception—only a modest trickle of litigation has flowed under each head of jurisdiction. The exception relates to appeals against the valuation of land for rating purposes in the Australian Capital Territory.

Although both theoretical and logistical problems have been encountered in establishing the AAT, the significance of this innovation must be assessed in practice. Views may differ, but I am comforted by the opinion of Mr Justice Kirby, the Chairman of the Australian Law Reform Commission and a member of the Administrative Review Council (ARC), who wrote a generous review of the first eighteen months' work of the AAT. He concluded that "[t]he civilising value of an independent, external critic and supervisor such as the AAT cannot be underestimated. As the role of government increases, this value will expand."[20]

I should mention what I see as the strengths and the difficulties of this kind of review. Ordinarily I should be inhibited in engaging in a discussion of this kind which inevitably requires some evaluation of the Tribunal over which I preside, and of the jurisdiction which it has or may acquire, and the expression of some philosophy as to the way in which it approaches the decision of cases before it. But the inhibition is only partial, for it is relieved by two circumstances: first, the President of the AAT is ex officio President of the ARC and in the latter capacity participates in discussions of those matters and in the making of recommendations to the Attorney-General. Those recommendations are published in the Council's annual report to the Parliament. Secondly, it is possible to deal with some of the issues by reference to decided cases, and extra-curial (or extra-tribunal) expressions of intent are unnecessary to further the discussion.

The objective of administrative review on the merits is to improve the quality of decision-making, both in the particular case and, by precept, generally. But the "quality of decision-making" requires definition, particularly when the decision is made in the exercise of a discretionary power. It has to do with the ascertainment of the facts of a case, the application of law to the facts as found, and where appropriate, the sound exercise of a discretion.

20 "Administrative Law Reform in Action" (1978) 2 UNSW Law Journal 203, 241.

Fact Finding

In the great majority of cases where an administrative decision has been set aside by the AAT, the facts have been found to be significantly different from the facts presented to the primary administrator. The reason is not hard to determine. The AAT uses the relevant papers in a departmental file[21] merely as its starting point, and it then hears the cases submitted by the applicant and the respondent Minister, Department or agency. It has, whilst the primary administrator usually does not have, power to compel the production of evidence. The applicant, who sees the AAT appeal as his day in court, musters his evidence and stimulates a response from the respondent. Often the factual position changes entirely at the hearing. There is no doubt but that the curial processes of fact finding are superior to the administrative processes, and much of the administrative injustice of which complaint is made is the product of unavoidable lack of knowledge by the primary administrator.

So the quality of administrative justice can be improved by adopting curial procedures for finding facts. Those procedures are adversarial, however, and there are many cases where the individual and the government are not well-matched adversaries. The solution, it is said, is to adopt an inquisitorial procedure where the finding of facts depends upon the decision-maker ferreting out the facts for himself, and not merely sitting back to determine where the truth lies in the evidence which the parties choose to present to him.[22]

Whichever procedure is adopted, it is clear that the ability to find the facts of a case makes an important contribution to the quality of justice. Where an adversarial procedure is adopted, the parties do the fact gathering for the tribunal; where the inquisitorial procedure is adopted, the tribunal must use its own resources. In either case, the facts have to be gathered or fact finding is defective.

These reflections lead to two questions for the future of the profession in public law matters. First, if an adversarial procedure is adopted in a given class of case, skilled representatives of the parties will be required to gather the facts for a decision-maker; if an inquisitorial system, skilled assistants will be required by the decision-maker. The employment opportunities in private practice or in public agencies are reciprocally affected. Second, a question arises whether the cost of adequate fact finding in a given class of case is warranted by the improvement in administrative justice thereby conferred.

Whether an adversarial procedure can be adopted may depend upon the willingness of the public purse to bear the cost of private representation. This is a question of social and political priorities, and of competition for the limited resources available for distribution between applicants for assistance in the traditional curial or other jurisdictions.

If private representation of a party is not available, the gathering of the facts must be undertaken by the Tribunal itself. That duty may be difficult to discharge. In comparison with the primary administrator, the Tribunal may have few resources. One of the supposed advantages of tribunals over courts is the simplicity and low cost of their procedures, but I suspect that that advantage sometimes consists in making do with whatever facts an applicant presents, without attempting to ascertain

21 Administrative Appeals Tribunal Act 1975, s 37.

22 See the debate in (1975) 49 ALJ 428, 439, 685 as to the advantages and disadvantages of the inquisitorial and adversarial systems.

other facts which would be explored in an adversarial procedure. That method of fact finding is common in primary administration, but unless a superior method is adopted by a review tribunal, there is no assurance that the tribunal's fact finding will be of higher quality.

The basic tasks of fact gathering and fact finding are labour intensive and costly, and improved fact finding is bought at a price. Can the price be justified? It is likely that the answer will depend upon the class of decision under review. Where the decision is likely to affect the individual in a substantial way (eg cases of deportation), or where the decision is of a kind with significant and wide implications (eg the basis of valuation of goods for customs purposes), the benefit of fully adequate fact finding justifies the cost involved, but in cases of lesser import, an abbreviated procedure for finding facts may have to be accepted.

Where, for reasons of cost or otherwise, a jurisdiction to review on the merits is not vested in a tribunal, errors in fact finding may be rectified by a primary administrator as a result of intervention by the Ombudsman. The Ombudsman is inevitably aware of the facts as his complainant believes them to be, and he may chase out the facts of an applicant's case. He is often a useful conduit of those facts to the administrator whose action he is investigating. This is a real benefit of the Ombudsman's activity. But the Ombudsman does not decide conflicts of fact, and he cannot be expected to do so.

Application of the Law

Under the pressure of administrative business or the growth of statutory material, the administrator is at risk of misconceiving the nature or extent of the powers confided to him. Error in defining his own function is a common and understandable phenomenon. His isolation from legal advice may cause him to stumble from the path of statutory duty and the pursuit of a policy objective may tend to divert his steps entirely from that path.

To improve the quality of administrative justice, a simple procedure for judicial review is desirable. In New Zealand the Judicature Amendment Acts 1972 and 1977 fulfilled this need, but in Australia, the only State to adopt such a procedure is Victoria. The Federal Administrative Decisions (Judicial Review) Act 1977 was passed to effect the same purpose, but that Act has not yet been proclaimed to come into force. Regulations have yet to be made defining the classes of decisions to be exempted from application of the Act. Section 13 of that Act goes beyond the simplification of procedure and requires a decision-maker to furnish reasons for a decision when a person affected by his decision applies for them. This provision is, of course, a dramatic legislative laparotomy upon the closed processes of administration. Yet it is not without precedent. The Knesset enacted such a law for Israel in 1958.[23] The reform has taken effect, however, in respect of decisions reviewable by the AAT, for the decision-maker is required to furnish his reasons in those cases.[24] The requirement of reasons not only exposes error affecting the decision—it demands of the administrator that he defines to and for himself the function which he is appointed to perform.

23 Administrative Procedure Amendment (Statement of Reasons) Law 1958; see (1972) 7 Israel LR 127. For tribunals, see Tribunals and Inquiries Act 1971 (UK), s 12; Administrative Procedure Act 1946 (US), s 8 (b).

24 Administrative Appeals Tribunal Act 1975, ss 28, 37.

Judicial review, however simplified and however assisted by a statement of reasons, may yet be too costly and ineffective a process to be invoked by the individual. An external review on the merits will achieve the same result,[25] and effect not only the setting aside of the erroneous decision but the making of a correct or preferable decision in its place. External review on the merits satisfies the requirements of an individual appellant—but more, it rapidly works those changes in primary administration which are needed to bring it into conformity with the relevant statutory provision. It carries into execution the declaration of the law, and it may thus be more efficient in result than the purely judicial remedy which leaves to the executive the reconsideration of the challenged decision.[26] Decisions will not be made under a misconception of power once effective means are at hand to set those decisions aside, and to substitute a decision which applies the relevant law.

Although the correction of factual error is an important improvement in administrative justice to the individual, the ability to correct legal error and to rectify administrative practice so that it conforms to the law is the most important improvement which external review now effects in primary administration.

The proposition that administrative review is primarily a task for administrators, not lawyers, is valid only if the processes and purposes of review are intended to be similar to the processes and purposes of primary administration. If the review process is intended to be normative, improving primary administration by defining the nature and extent of the administrator's function, the lawyer's contribution is indispensable and salutary. The primary administrator may argue that the insistence on fact finding and on adherence to legal principle will require the administration to judicialise its procedures.[27] Not so. The required changes are not in the forms but in the substance of decision-making, and the example of the courts is not to be found in mere procedures but in the objectives which their procedures serve. Public confidence in courts has been built and maintained by fairness, patience and detachment in fact finding and rigorous adherence to legal criteria in reaching decisions. Where an administrative decision turns principally on questions of fact or law, the practice of the curial virtues most securely guarantees an improvement in administrative justice.

Perhaps I should add, ex abundanti cautela, that curial virtues may be practised without wig and gown, sitting as well as standing, at table as well as on a bench, with or without the usual titles of courtesy, with a smile as easily as a frown—though some detachment, physical as well as mental, is desirable withal.

Exercise of Discretion

Discretions are conferred on administrators in order that they might balance the public interest against the individual claim, and where the primary administrator falls into no error of fact or law, his appreciation of where the balance should be struck is entitled to weight.

25 See *Re Brian Lawlor Automotive Pty Ltd and Collector of Customs (NSW)* (1978) 1 ALD 167, 178.

26 See Prosser, "Politics and Judicial Review: The *Atkinson Case* and its Aftermath" [1979] Public Law 59; and cf *Green* v *Daniels* (1977) 51 ALJR 463.

27 For the American experience see Davis, "Judicialization of Administrative Law" [1977] Duke LJ 389.

In the first of the deportation cases which came before the AAT, I wrote:[28]

> 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 principled yet flexible decision-making, intervene incongruously to disrupt the due course of administration.
>
> A distinction will necessarily be drawn between policies of different kinds. Some policies are clearly made or settled at the political level, others at the departmental level. In the *Ipec-Air Case* (113 CLR 177 at 202; [1965] ALR at 1080) Menzies J with reference to the factors which might properly affect the exercise of discretionary power, observed that: "There are . . . sound grounds for treating a decision to be made at departmental level as something substantially different from a decision to be made at the political level."
>
> The difference between the factors to be taken into account in the two kinds of policy provides one ground of distinction between them; the difference in parliamentary opportunity to review the two kinds of policy provides another. Some policies are basic, and are intended to provide the guideline for the general exercise of the power; other policies or procedural practices are intended to implement a basic policy. Different considerations may apply to the review of each kind of policy, and more substantial reasons may have to be shown why basic policies—which might frequently be forged at the political level—should be reviewed. There may, of course, be particular cases where the indefinable yet cogent demands of justice require a review of basic or even political policies, but those should be exceptional cases and this is not one of them.

Nevertheless the power to review policy has been conferred upon the AAT, and it evokes an active consideration of the appropriateness of policy in a given case. The Federal Court so insisted in a recent case:[29]

> Except in a case where only one decision can lawfully be made, it is not ordinarily part of the function of a court either to determine what decision should be made in the exercise of an administrative discretion in a given case or, where a decision has been lawfully made in pursuance of a permissible policy, to adjudicate upon the merits of the decision or the propriety of the policy. That is primarily an administrative rather than a judicial function. It is the function which has been entrusted to the Tribunal.[30]

And later:[31]

> [W]here the Tribunal is not under a statutory duty to regard itself as being bound by that policy, the Tribunal is entitled to treat such government policy as a relevant factor in the determination of an application for review of that decision. It would be contrary to common sense to preclude the Tribunal, in its review of a decision, from paying any regard to what was a relevant and proper factor in the making of the decision itself. If the original decision-maker has properly paid regard to some general government policy in reaching his decision, the existence of that policy will plainly be a relevant factor for the Tribunal to take into account in reviewing the decision. On the other hand, the Tribunal is not, in the absence of specific statutory provision, entitled to abdicate its function of determining

28 *Re Becker and the Minister for Immigration and Ethnic Affairs* (1977) 1 ALD 158, 162, 163.

29 *Drake* v *Minister for Immigration and Ethnic Affairs* unreported, FCA, 3 May 1979, per Bowen CJ and Deane J. An application for special leave to appeal to the High Court has been filed by the Minister.

30 Despite the fact that "judicial decisions which call into question the exercise of executive powers cannot fail to arouse complaints and criticisms of undemocratic judicial intervention . . .": Griffiths, "Judicial Review of Executive Power" (1978) 11 MULR 316, 341.

31 *Drake* v *Minister for Immigration and Ethnic Affairs* supra n 29.

> whether the decision made was, on the material before the Tribunal, the correct or preferable one in favour of a function of merely determining whether the decision made conformed with whatever the relevant general government policy might be.

When a case turns upon the application of a policy and the policy applied by the primary administrator is lawful, how is the AAT to decide the case?[32] It may reject the primary administrator's policy. Or it may hold that the application of the policy to the case in hand could not have been intended, or would produce an unreasonable or unjust result, or for some other sufficient reason the policy should not be determinative of the particular case. Mr Justice Kirby observed that:[33]

> The AAT has shown . . . considerable expertise in clarifying legal obligations and entitlements and in ascertaining and articulating facts relevant to administrative decisions, particularly discretionary decisions.
>
> If its hand has been less steady in the review of matters of broad policy, this is scarcely a matter of surprise. The jurisdiction is new and there are no sure guide-posts showing the way in which it should be exercised. Opinions would appear to differ within the AAT as to whether it should simply accept and apply a Minister's statement of policy. The better view is that it need not. A clearer refusal to abide by plainly stated Ministerial policy could not be had than in the last case of this series [*HCF* case]. It is this novel function of the AAT that will command the greatest attention of those who are following closely the development of this significant and untried Australian experiment in administrative law reform.

For obvious reasons I should not wish to define in advance of particular cases the course which the Tribunal will take. But I venture to suggest that it is in the review of discretionary decisions that the greatest utility of the AAT will be found.[34] It cannot be, of course, the maker of high policy in areas where the government of the day is exercising its constitutional and political power to govern; but where those high policies are defined, the AAT may be a sensitive buffer to ensure that their application to individual cases is tempered by considerations of justice acceptable to contemporary society. It will be necessary to develop principles to regulate the occasions when the Tribunal should intervene, else it may whimsically frustrate the due process of administration. Those principles are emerging, tentatively and with a growing appreciation on the part of the Tribunal and government. The ministerial statement of policy on deportation focuses upon the "best interests of Australia". The Tribunal, constituted by Smithers J, placed a gloss on the policy in *Re Chan and Minister for Immigration and Ethnic Affairs*:[35]

> The expression "the best interests of Australia" leaves much open to judgment. It is my view that in the application of policy as stated that expression is to be understood not in a narrow and restricted sense, but as extending to such interests broadly regarded, and embracing, on occasion and according to circumstances, the taking of decisions by reference to a liberal outlook appropriate to a free and confident nation.

Broad policy concepts may be given a more precise denotation by the Tribunal as cases arise for applying a policy. The AAT has not hitherto rejected a policy in the sense of refusing generally to apply it, but in

32 See Galligan, "The Nature and Function of Policies within Discretionary Power" [1976] Public Law 332.
33 Kirby, "Administrative Law Reform in Action" supra n 20 at 242.
34 But note the warning of Mahon J, supra n 2 at 8, 9.
35 (1977) 1 ALD 55, 56.

one case, where the application of one ministerial policy would have affected the carrying out of another applicable ministerial policy,[36] it did not apply the former policy.

The Parliament has shown an awareness of the need to preserve to Ministers the responsibility for making and declaring important policies. The Dairy Industry Stabilisation Amendment Act 1978 provides for publication by the Minister of "a statement of appropriate principles" for the determination of quotas for payments out of the Dairy Products Stabilisation Trust Fund, and empowers the AAT to review a quota. Section 24A (2) provides that the published principles, in accordance with which the Minister is required to act in determining a quota "are the principles in accordance with which the Administrative Appeals Tribunal shall act in reviewing the quota. . ."

The solution to this difficult problem may be found in maintaining the government's power to make policy, while reposing in the AAT a discretion as to its application. This division of function, however imprecise the dividing line may be, may permit the AAT to relieve in particular cases any harshness in the application of broad policies.

An Evaluation

I have presumed upon your time to speak of the AAT because it contains the seeds of a development which will, I think, engage the attention of lawyers to an increasing extent. As our society grows more complex, the growth of public law is to be expected. The limits of judicial review in their traditional forms would leave without adequate supervision large areas of decision-making which affect individual interests. The power so to affect individual interests is reposed, for the most part, in the bureaucracy which, under the Westminster system, is answerable to a Minister. The orientation of administrative action is towards a purpose ministerially defined.

A system of external review, regarded as part of the judicial arm of government and independent of the executive, can hold the balance between the purposive activity of the bureaucracy and the individual interests of the citizen.

It is an area fit for participation by lawyers, though not their exclusive preserve.

There are clear limits to the use which can be made of a system of external review. It has no place in the formation of matters of high policy in which the interests of individuals are not immediately and directly affected. Thus, the level of tariffs in general, the extent of budget deficits (or may we contemplate surpluses?), the priorities of government expenditure, are matters which lie beyond the proper competence of external review. But the exaction of duty imposed under the tariff on particular goods, the assessment of a citizen to tax or an entitlement to bounties are cases where political decisions are made specific in their application to the individual. It is the specific application of broad policies which both justifies the creation of a system of external review, and which liberates a government from the concern that wise and desirable policies may be insensitively administered.

But even when a specific application of a policy affects the interests of an individual, the kind of decision may not be suitable for external review. If the external review tribunal follows the curial model and, a

36 *Re HCF and Minister for Health* (No 1) (1977) 1 ALD 209.

fortiori, if it is a court, it would be appropriate to vest only those kinds of jurisdiction where the decision turns mainly on questions of fact or law and where the policy content is relatively small. The grant of landing rights to a foreign airline may be a particular application of government policy, but it is an application which turns principally upon policy —the merits of the decision are, in essence, a political matter unfit for judicial or quasi-judicial determination.

Though the potential area for useful vesting of jurisdiction is vast, considerations of cost may impose some limits upon the extent to which a right to seek external review is conferred. Large volume jurisdictions are costly to operate on a judicial model and if the decisions turn on the facts of each case, the cost of creating a proposed system of external review will no doubt be weighed against the expected enhancement in the quality of administrative justice. Unless professional or skilled assistance is available to applicants, or unless tribunal resources are enlarged to do the fact gathering required for the doing of administrative justice, priority in vesting jurisdiction may be given to those areas where a relatively few tribunal decisions are likely to effect improvement in the quality of primary decision-making by laying down the norms to be followed.

For lawyers who engage in this new area of activity, new skills will be required. They are already in demand in advocacy before planning appeal boards and the mass of administrative tribunals with which we have become familiar. The presentation of a case where an evaluative judgment has to be made or where a discretionary power is to be exercised is a different task of advocacy from the proving of facts to which an exhaustive and inflexible rule of law applies. And lawyers must learn, and having learnt, will take delight in the grasping of concepts drawn from other disciplines. What makes the exercise fascinating for the lawyer is the way in which he perceives the law in practice to be a true instrument of social engineering, distributing powers in a way in which efficiency and democracy under the Westminster system may coexist, and harnessing expertise to the resolution of problems affecting the individual.

There are large problems yet to be solved: the resolution of the conflict between the publicity which attends a judicial proceeding and the confidentiality properly required to deal with much of the information that comes to administrators; the definition of the dividing line between the power of government to define policy and the power of the tribunal to relieve from its application; the allocation of resources as between primary administration and the provision of external review. These are difficult questions, and they cannot be approached without some assessment of the way in which the Westminster system is developing. The theory of responsibility of the bureaucracy to a Minister and of a Minister to the Parliament does not give an assurance of sensitive administration in the individual case. Ministers and senior officials, beset by the pressures and cares of office, must leave to others the day-to-day administration of their powers. The internal supervision of administration is perforce incomplete and it may be thought desirable to supplement that supervision by providing for external review of some of the decisions made by primary administrators. If that decision is taken, one may foresee the need for lawyers to staff and to service the structures of external review. With the growth of public law, they will be needed in any event at the national, provincial and local levels to advise departments

of government and official agencies, explaining the nature of their powers and ensuring that relevant information is acquired to assist in decision-making. They will be required to advise and represent individuals, explaining the powers, the purposes and the workings of the departments or agencies with which an individual is dealing.

The growth of public law will demand of lawyers a greater knowledge of the bureaucracy which is charged with the administration of that law, and a familiarity with the instrumentalities which can furnish relief in the event of seeming administrative injustice.

At the federal level in Australia, there is still a large number of these instrumentalities, but the simplification of the system focuses on three institutions: the Federal Court to review the lawfulness of decisions, the AAT to review certain classes of decisions on the merits, and the Ombudsman to identify and remedy defective administration. The notion of judicial review and of the Ombudsman's jurisdiction are familiar enough though the Ombudsman is a comparatively recent arrival (1 July 1977) upon the Australian Federal scene.

I referred to one of the purposes of the Australian reforms in a foreword to the Second Annual Report of the Administrative Review Council in 1978 and I presume to repeat it here:

> The review of certain administrative decisions by the Tribunal and scrutiny of administrative action by the Ombudsman are proving to be valuable reforms, civilising the anonymous complexity of modern government. The individual has been furnished with new institutional means of questioning the decisions or actions which concern him.
>
> . . .
>
> [T]he new reforms are intended to ensure that when a decision or a course of conduct affects the interests of an individual, the administrator should be conscious of the effect which his decision or conduct will have, he should know what are the proper limits of his powers and how he is required to exercise them, and he should be able to explain to himself, to the individual concerned and, if need be, to others why he is making that decision or pursuing that course of conduct.
>
> That is not too ambitious an objective to seek, though it requires a sophistication which may not be always attainable. The objective is common to all who have a concern with administration, and in broad measure it must be practicable to achieve it. It would be difficult otherwise to justify Parliament's reposing of power in, or the administration's delegation of power to, functionaries whose decisions and actions change the individual's benefits or burdens, his rights or his obligations.

I trust you will forgive me for spending so much time on an Australian innovation, when your concern is with the future of the law and of lawyers in New Zealand. But I venture to suggest that the experience of the AAT may illustrate some of the benefits and risks of developing a structure for coping with the anticipated growth of public law. It is too early to be definitive as to the future of the AAT, though its experience will certainly provide warnings, or encouragement, or both.

New Zealand has repeatedly furnished initiatives in framing laws to respond to changes in society. I look forward to the stimulus of comments upon the Australian innovation from the lawyers of this country, and I am confident that we shall benefit from those comments as we have benefited from your leadership in the creation of the office of Ombudsman and in the simplification of the procedures for judicial review.

The Otago lawyers have served the people of their area for 100 years principally in the fields of private law. They will continue that service in the century ahead, with growing attention to the relationship between the individual and the institutions of the society in which he lives.