APPEALS FROM ADMINISTRATIVE TRIBUNALS

FIRST REPORT OF THE PUBLIC AND ADMINISTRATIVE LAW REFORM COMMITTEE OF NEW ZEALAND

Presented to the Minister of Justice in January 1968

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INTRODUCTION AND GENERAL

Public and Administrative Law Reform Committee

1. In July 1966 the Minister of Justice set up the Public and Administrative Law Reform Committee under the chairmanship of Dr J.L. Robson, the Secretary for Justice. The members of the Committee are Professor C.C. Aikman, Dean of the Faculty of Law at the Victoria University of Wellington; Mr A.C. Brassington, a barrister and solicitor of Christchurch; Mr R.B. Cooke, one of Her Majesty's Counsel; Mr E.L. Greensmith C.M.G., a former Secretary to the Treasury; Dr R.G. McElroy, a barrister and solicitor and Mayor of Auckland; Professor J.F. Northey, Dean of the Faculty of Law at the University of Auckland; Mr G.S. Orr, Senior Crown Counsel; and Mr D.A.S. Ward C.M.G., Counsel to the Law Drafting Office. The Secretary of the committee is Mr C.W. Ogilvie, Advisory Officer of the Department of Justice.

2. The matters for our investigation under a programme approved by the Law Revision Commission included appeals from administrative tribunals, the constitution and procedure of such tribunals and the judicial control of administrative acts. After some preliminary consideration it became clear that the last of these matters is less urgently in need of review than the others. Accordingly discussions and recommendations about certain administrative tribunals and rights of appeal form the main subject of this first report.

Administrative Tribunals in New Zealand

3. In New Zealand as in other developed countries the vast increase in the activities of government, both central and local, in the twentieth century has inevitably given rise to new categories of disputes or to a much greater number of disputes in categories already familiar. Some of these disputes are between individual citizens on the one hand and the State or a local authority on the other. Some, while basically originating from State regulation of certain areas of economic or social activity, are between individual citizens on both sides or are occasioned immediately by clashes of interest between different sections of the community. In all of them, the public interest or the well-being of the

community as a whole is involved. It is natural to assume, in a democratic country accustomed to the rule of law, that so far as reasonably practicable these disputes should be settled by adjudication. That is to say, by common consent what is called for is a process which will enable the facts to be ascertained; the differing points of view or arguments to be effectively presented; all the relevant points to be weighed with manifest care; and an impartial and informed decision to be made. Perhaps this can be summed up more simply as the need for a fair hearing.

4. To illustrate those somewhat abstract propositions by concrete examples, we mention a few of the disputes that come before some of the main tribunals considered later in our report. To carry out their increased functions government departments and other public bodies must acquire land; it is recognised that fair compensation should be paid to individuals whose property is taken; and disputes as to the amount go before local Land Valuation Committees. From their decisions there is a right of appeal to the Land Valuation Court, which is at present the final arbiter in New Zealand between the citizen and the State in this major field. Again, control of the use of land is essential for the economic and social welfare of the community - hence the existence of town and country planning and the Town and Country Planning Appeal Boards. These boards determine appeals from decisions of local authorities or their planning committees. Such disputes may be between citizens objecting to a proposed use of land by fellow citizens or between a local authority, formulating a restrictive plan, and citizens whose properties will be affected thereby. As a last example, economic and social experience has led to the regulation of the transport industry by a licensing system; disputes about the grant and the scope of licences are ultimately determined by the Transport Licensing Appeal Authority, but the bulk of the work is disposed of at first instance by the various District Licensing Authorities.

5. As those examples indicate, the disputes accompanying the modern surge of governmental activity are often of great importance to the persons immediately concerned and to the general public. As a broad group these disputes may be said without exaggeration to affect the lives of more people than most of the issues dealt with at present by the older-established courts. These courts - "the ordinary courts", as they are often

conveniently called by lawyers and others - exist for the very purpose of adjudication. They are manned by judges and magistrates whose experience, capacity and training are likely to make them better equipped than other persons to carry out the responsible and exacting work of determining disputes. Yet, as the examples we have mentioned also indicate, these courts have often not been chosen by the legislature to determine disputes produced by the control of present-day society. Jurisdiction has been vested instead in a diverse collection of specialised courts or tribunals, which for convenience can broadly be described as administrative tribunals. We think it necessary to examine the reasons for this.

6. There are several reasons for the creation of administrative tribunals as adjudicatory bodies in addition to the ordinary courts. In considering these it is as well to bear in mind the differences between jurisdiction at first instance and appellate jurisdiction. At first instance the volume of administrative adjudication and the relative unimportance of a good deal of it would make the use of the ordinary courts impractical. Obviously the ordinary courts could not cope, unless transformed, with every land valuation, town and country planning or transport licensing dispute in New Zealand or with the multifarious other disputes that come for their first (and usually final) hearing before administrative tribunals of one kind or another. Nor is there any need to suggest such a transformation. Most disputes are solved at first instance, more or less to the satisfaction of the parties and relatively cheaply and expeditiously. Apart from the volume of work, other factors which have justifiably played some part in the creation of administrative tribunals of first instance are the need for relative informality; the avoidance of unnecessary expense; and on occasions a desire for special qualifications in at any rate some members of the tribunal.

7. Not all the points just mentioned apply to all administrative tribunals. Nevertheless, as stated in the United Kingdom by the Committee on Administrative Tribunals and Enquiries (the Franks Committee):

> Reflection on the general social and economic changes of recent decades convinces us that tribunals as a system for adjudication have come to stay. The tendency for issues arising from legislative schemes to be referred to

special tribunals is likely to grow rather than to diminish.(1)

8. We accept that administrative tribunals are a valuable, and indeed an essential, part of the constitutional machinery of a modern democratic state such as New Zealand. Our attention has therefore been directed towards improvements in the present system. Although some of our recommendations relate to the first instance level, it is at the appellate level that we believe improvements can chiefly be made at this stage.

9. As to the appellate level, the reasons that can be advanced for not making use of the ordinary courts, and the Supreme Court in particular, are in our opinion either unconvincing or capable of being met by the changes we recommend. The nature of the appellate work demands legal qualifications, as has been recognised by Parliament in requiring that various appellate tribunals which have been set up should either consist of or be presided over by barristers or solicitors of (usually) seven years practice or standing. This is similar in terms to the qualification laid down for appointment to the Supreme Court, but there has been a tendency to set up a special tribunal rather than to make use of the Supreme Court.

10. One reason for this is probably that the different jurisdictions have been constituted by statute at different times, as a need has been felt, without any integrated plan and often without regard to the wider constitutional implications of the particular statute. Thus to take a few leading illustrations, the Land Valuation Court was created in 1948; the Town and Country Planning Appeal Board was created in 1953, though its origin may be traced to 1926; the Transport Licensing Appeal Authority was created in 1949, though a somewhat similar appeal authority had been constituted in 1941 and there had been provision for Appeal Boards previously, going as far back as 1931; the Trade Practices Appeal Authority was created in 1958; and the Price Tribunal was created in 1947, though in large measure replacing a jurisdiction established under emergency regulations during the second world war. Administrative tribunals, even at appellate level, are no new thing; but only comparatively recently have they attracted any marked attention, as the growth in their numbers and the importance of their work have come to be appreciated.

(1) Report of the Committee on Administrative Tribunals and Enquiries Cmnd. 218 (1957) para. 37.

11. The fact that the Supreme Court has not in the past played as full a part in this field as we think it should play in the future has been contributed to by the attitude of the legal profession itself. At times there has been a lack of interest in the comparatively new subject of administrative law and a reluctance on the part of judges to become involved in its problems. The former Solicitor-General, Mr H.R.C. Wild Q.C., who advocated increased use of the courts in administrative matters, has himself conceded that the profession's own attitude has contributed to the increasing reliance on administrative tribunals(2):

> ... the organised profession has shown too little readiness to tackle the problem of adapting legal institutions to modern requirements... The view that detachment from politics should not be prejudiced by requiring a decision on what is a question of policy and not a justiciable issue is one thing, but unwillingness on the part of a judge to use his resourcefulness in applying a new piece of social legislation is quite another. The insistence of some judges on the letter rather than the object of legislation has encouraged the tribunal system just as in the past, in New Zealand, reluctance that the Supreme Court should be given new jurisdictions led to the establishment of special courts.

12. We believe that the attitude referred to is by no means generally prevalent today, either on the Supreme Court bench or in the legal profession. It is true, however, that a degree of specialisation and consistency of approach is important in the determination of appeals from administrative tribunals. This would be more difficult to attain if a case might come before any one of the Supreme Court judges. One of our purposes in recommending, as we do in this report, the establishment of an Administrative Division of the Supreme Court is to overcome that difficulty.

13. It appears to us that we should aim at preserving the advantages of an administrative tribunal system and eliminating its disadvantages as far as possible. The advantages we have already outlined. The main disadvantages are connected with the quality of the adjudication involved in such a system. The tribunals cannot always be comprised of persons especially well-equipped to adjudicate. In consequence the decision may be incorrect or - equally important - the parties may not be

(2) See 'Social Progress and the Legal Process,' 27 N.Z.J.P.A., March 1965, 1.

satisfied with the hearing they have received. We have come to the conclusion that the two-fold aim we have mentioned can best be achieved by (i) providing the best possible rights of appeal, and (ii) making certain improvements as regards the personnel and procedure of administrative tribunals at first instance.

Types of Tribunals

14. We have not yet considered tribunals regulating the entry into or expulsion from a profession or trade, or domestic tribunals such as those set up by sporting bodies. But apart from these there are over sixty administrative tribunals in New Zealand. Some of them meet but rarely, others are in almost constant session. Some deal in relatively unimportant matters, others have jurisdiction over matters as important either directly to the parties or to the community as a whole as almost anything that is dealt with by the Supreme Court.

15. Administrative tribunals can be classified in a number of ways, depending on what is to be emphasised. One classification referred to in "The British Commonwealth : New Zealand"(3) edited by J.L. Robson is according to their distance from political control:

(i) Those tribunals which consist of public servants who by virtue of some statutory office are called upon to exercise their powers in a judicial manner. Examples are the Commissioner of Patents and the Registrar-General of Land.

(ii) The intermediate type of organ which lies outside the orthodox government department, having members recruited as a rule from outside the regular public service. There are many such instances, for example the Air Services Licensing Authority and the Crimes Compensation Tribunal.

(iii) Bodies designated as special courts. These are the Court of Arbitration, the Land Valuation Court, the Compensation Court and the Maori Land Court.

(3) Published by Stevens : First edition p.103.

Tribunals can also be classified according to their function. Some have power to make legislative orders, that is, orders in general terms which govern the action of classes of persons. Some conduct hearings and make orders or decisions which affect only the parties concerned. Some exercise executive or administrative functions where policy considerations predominate. Some tribunals, for example the Price Tribunal, exercise all these functions at different times.

16. A further alternative classification is according to subject matter :

> Tribunals concerned with licensing (e.g. cinematograph films, transport, liquor, milk), tribunals concerned with trade (e.g. restrictive trade practices, prices), tribunals concerned with health and social security (e.g. medical advertisements, invalid benefits), those concerned with land (e.g. land settlement, land vluation, town and country planning), those concerned with local government and those concerned with State Services employees.

17. Whatever classification is used, administrative tribunals in New Zealand show a rich variety. In undertaking the investigation our dominant purpose has been to find the structure and arrangement which will achieve the best decisions in the particular field of each tribunal. Subject to that, we have attempted to discover whether in respect of this variety of consistent, coherent pattern of constitution, procedure, appeal rights and so on, could be achieved.

18. As Mr G.S. Orr has pointed out, no very rational principles underlie the formation and composition of many administrative tribunals. Their structure and powers largely depend on the particular inclinations of the Minister responsible at the time, and there may or may not be a right of appeal in part or in whole.(4) This right of appeal lies in some cases to the ordinary courts but in most cases it is to a further administrative body, the ordinary courts exercising control only on jurisdictional issues or where an error of law appears on the face of the record. "The Citizen and Power", published by the Department of Justice in 1965, lists the tribunals from which a right of appeal exists, and to what body the appeal lies.

(4) "Report on Administrative Justice in New Zealand" (1964).

Criticisms of existing system

19. Features of the existing system have been criticised. A special committee set up by the New Zealand Law Society to consider appeals from administrative tribunals said :

> We think there is little doubt that the chief cause of dissatisfaction with the prevailing system, if such it can be called, of administrative justice is the inability to have decisions of tribunals on questions of fact, or the exercise of their statutory discretions, reviewed in the ordinary courts. In a measure, we suspect, this sort of dissatisfaction is superficial, in that it can be not much more than a mask for dissatisfaction with the policy or principles of the legislation administered by the tribunal. But, over and above this, we believe that there is quite a deep-rooted feeling in the community that justice administered by bodies other than the ordinary courts tends, from the point of view of fairness and care, to be an inferior brand of justice. We do not think this view wholly without foundation, although we recognise that at times administrative tribunals attain a high standard and we are far from making any universal criticism of them.

20. The Law Society committee recommended that provisions be enacted for conferring rights of appeal on questions of law to the courts of law from all statutory tribunals, with certain very limited exceptions of which the most important is the Court of Arbitration. Indeed, they went further and recommended that decisions of statutory tribunals on issues of importance should be subject to appeal to the ordinary courts on questions of fact or discretion except where there are special reasons to the contrary.

21. In a paper delivered to the Commonwealth Law Conference in Sydney in 1965, the then Solicitor-General of New Zealand, Mr Wild, took much the same view. He considered that all tribunal decisions should be reviewable in the courts on points of law, and where appropriate on the merits also. He said -

> This is not merely a question of the dignity and status of the courts. It is a question whether the really important decisions affecting the citizen are being made by the men best qualified by training and experience to make them; whether the community is losing the benefit of the influence of the courts in moulding the law in action.

He said further -

> ... there should always be a right of general appeal except where the tribunal's jurisdiction is very limited in value or where an expert body is dealing with a non-justiciable issue. In particular, it is the choice of the appeal authority that needs review. In some measure this must depend on the subject matter, and in some cases an appellate tribunal will be appropriate. But where, as at present in the important areas of trade practices

> and road and air transport licensing in New Zealand, it is thought right to give an appeal from a non-expert tribunal to an authority with legal qualifications, it is better that the appeal should go to a court.

22. These then are some of the criticisms of the present system. It must be pointed out however that there are other persons, for whose opinion respect is due, who consider that the present system works reasonably satisfactorily and are doubtful of the wisdom of giving any increased jurisdiction to the courts. They would nevertheless agree that the present system could be improved in certain ways.

23. His Honour Judge Archer, who has had considerable experience with a number of tribunals, said in a paper to the Australia and New Zealand Association of Law Students Conference in Wellington in May 1967 :

> What is wrong, in so far as anything is wrong, is with the particular tribunals which make up the system, with the statutory provisions constituting these tribunals, and with the persons serving on tribunals. There are no doubt tribunals with powers too wide to be generally acceptable, and tribunals set up for purposes for which an administrative tribunal is not a suitable instrument. These are matters for which the Legislature is responsible and which the Legislature could readily correct. It is said we have too many administrative tribunals, but surely the only sound test of this is whether any of them can with advantage be dispensed with.

24. Judge Archer argued in the paper against any suggestion that a right of appeal from the present appeal tribunals to the ordinary courts should be given on fact and discretion. Nevertheless he favours appointment of the judges of the Arbitration and Compensation Courts to the Supreme Court bench and, to that extent, a measure of integration.

25. The Committee obtained the views of the permanent heads of those departments which were involved with administrative tribunals. Their general opinion was that the present arrangements were largely satisfactory.

The Committee's approach

26. No-one would deny that, whether or not any particular criticism can be justified and whether or not any particular tribunal can be said to be working reasonably satsfactorily, there is a need to review the working of the administrative tribunal system just as there is need to review other aspects of our law. The Minister of Justice in "The Law in a Changing

Society" stated :

> The purpose of the law is to do justice and to secure the order of society. To achieve these things it provides rules and standards governing some of the multifarious relationships of men with one another and of men with the organised community which we know as the State. As these relationships increase, develop and alter, so must the law. The complex nature of advanced societies calls for a complex law, and a changing society requires a law that will respond to changing needs and demands. To the extent that ways of thought and life alter, the law must change if it is to be in touch with life, work justice and command respect.

27. This of course applies to administrative law, and to administrative tribunals, no less than to other branches of the law. We have therefore the opportunity - and indeed the duty - to assess the adequacy of the present system in the light of first principles. As far as we are aware no Government-appointed body in New Zealand has before been given the task of thoroughly and systematically investigating the administrative tribunals of this country. We consider that our responsibility is to recommend more than makeshift or piecemeal reforms, and that we are expected to suggest a system which we regard as best ensuring that the needs and aspirations of today's citizens are met.

28. Although we have concentrated throughout on the need for a reassessment of the administrative tribunal system so as to keep up with the changing needs of society, we believe that the ordinary judicial system should likewise be reviewed from time to time in the light of current needs. Such a task is not within our terms of reference except in so far as it impinges on the problems of administrative law.

29. From the outset we were satisfied that it would be wrong to approach our terms of reference by trying to devise some ideal pattern for an administrative tribunal system and then trying to fit or force various tribunals into that pattern. Our method of working has been intended to be a more practical one. It has not been based on any preconceived idea. What we have done has been time-consuming but, we think, rewarding. We have examined in detail a number of tribunals of different types and functions and we have consulted various people closely associated with them. Apart from those consulted, some members of the Committee have had considerable experience of appearing before most of the tribunals studied

and could therefore speak with first-hand knowledge. The tribunals so far studied are :

(1) The Land Valuation Court;
(2) The Town and Country Planning Appeal Board;
(3) (The Transport Licensing Authorities;
(The Transport Licensing Appeal Authority;
(4) The Transport Charges Appeal Authority;
(5) (The Trade Practices & Prices Commission;
(The Trade Practices Appeal Authority;
(6) The Price Tribunal.

30. Among those consulted in relation to these tribunals were: Judge K.G. Archer, Judge of the Land Valuation Court and former Transport Licensing Appeal Authority; Mr J. Bruce Brown, Valuer-General; Mr W.L. Ellingham, barrister and solicitor; Mr A.E. Hurley, barrister and solicitor; Mr J.W. Kealy S.M., Chairman of the Town and Country Planning Appeal Board; Mr P.L. Laing, Commissioner of Works; Mr J.H. Luxford S.M., Transport Licensing Appeal Authority; Mr R.J. McLachlan, Director-General of Land; Mr M.J. Moriarty, Secretary of Industries and Commerce; Mr M.J. O'Brien, barrister and solicitor; Mr R.J. Polaschek, Commissioner of Transport; Mr W.G. Smith, barrister and solicitor; Mr P.C.M. Straubel, barrister and solicitor; Mr A.B. Thomson, City Solicitor, Wellington City Council; Mr J.W.P. Watts, Chairman of the Special Town and Country Planning Appeal Board.

We acknowledge our indebtedness to all those who kindly gave us the benefit of their experience in each particular field.

31. The result of our mode of approach has been interesting. As we have moved over the ground, passing from one tribunal to another and not infrequently retracing our steps to obtain a second or a third view, the varying and tentative views held by the members of the Committee at the beginning have gradually come closer together and at the same time crystallised. A genuine and almost unanimous consensus has emerged. Our main recommendation, concurred in by all members of the Committee save one, is that an Administrative Division of the Supreme Court be established to hear appeals from certain administrative tribunals. We are satisfied that this step would offer the best assurance that the very important issues arising in such appeals are decided justly. It would be the best means of satisfying the public that each case receives a fair and

thorough hearing and a carefully-considered decision.

32. In reviewing the merits of the present system of administrative justice at the appellate level, the Committee considered a number of alternatives. One was the preservation of the status quo, a view which, as we have pointed out, is not without support, despite the criticisms levelled at it. The Committee considered, however, that many of the criticisms were justified. We now mention some of the unsatisfactory features of the present situation -

(i) Taking the broad view, there seems little justification for the inconsistency of the present arrangements. There is a bewildering variety of appeal rights (or lack of them), of types of appellate bodies, of constitutions, procedure and jurisdiction. The present complexity appears to have been unplanned, or possibly the result of different plans at different times. We think it would be difficult to argue that it is justifiable or that a more simple, rational system could not be devised without attempting to force particular jurisdictions into a theoretical straitjacket.

(ii) We have been impressed with the criticism made by one of our members, Mr G.S. Orr, of the constitution and status of the present appeal authorities. While no-one questions the ability of the persons holding office as the appeal authorities, it is clear that their status is not readily understood and this tends to create a wrong impression in parties to the proceedings. No matter what may be the quality of the decision, some of those involved think they have received less than justice.

(iii) It should be recognised that in order to give the administrative tribunal system the importance it deserves, New Zealand must provide more settled and attractive terms of appointment for those called on to decide questions in these fields. The Committee have noted the hand-to-mouth arrangements and haphazard appointments of appellate authorities. Appointment is made "during pleasure" or at the most for a limited number of years. In the circumstances recruitment becomes difficult, and it is surprising that New Zealand has been as well served as it has been.

Often the appointments have been held by the judges of the Land Valuation Court and of the Compensation Court, since the work of these Courts did not wholly occupy the judges. Reallocation of appointments becomes necessary when the judge retires or dies or no longer has the time available.

33. The second alternative considered by the Committee was the giving of a general right of appeal from administrative tribunals to the Supreme Court analogous to the general right of appeal from Magistrates' Courts to the Supreme Court. This was considered to have certain disadvantages. Primarily the disadvantages centre on the questions of expertise and of specialisation. While the value of special knowledge and experience can be exaggerated in this context, we have no doubt that real advantages are to be gained by ensuring that administrative appeals are dealt with by a limited number of judges specialising inter alia in the field of administrative appeals. This would make for consistency of judicial policy and approach and for the ready acquisition of skill and experience in dealing with the problems of administrative law. It would also make for economy of effort.

34. A third alternative was the creation of an Administrative Court, separate from the Supreme Court but intended to have in its own field a status akin to that of the Supreme Court. The arguments for this alternative were fully put to us, during our deliberations, by Mr Orr and are stated by him in an appendix to this report. After careful consideration, however, we find ourselves unable to accept them. Our main reasons are as follows -

(i) Whether or not a new Administrative Court was deemed by statute to have the status of the present Supreme Court, many would inevitably regard it as inferior. Its status in fact would tend to be little higher than that of the present appeal authorities. There would be difficulty in attracting suitable persons to sit as judges of the Court. Members of the public involved as parties would continue to suspect, rightly or wrongly, that they had been accorded second-class justice. Appeals from administrative tribunals raise issues of first-class importance in modern society. So far as humanly possible, they should

be dealt with, and manifestly be seen to be dealt with, by a court of appropriate stature both in fact and in theory.

(ii) In an attempt to meet the difficulties just mentioned, the suggestion has been made of appointing the judges of an Administrative Court as judges of the Supreme Court but entirely separating the two courts in theory and almost entirely separating the judges of the two courts in fact. This strikes us as a clumsy and rather transparent device, especially in New Zealand conditions. With a population of the size of ours we do not think there is room for more than one truly Supreme Court in the commonly accepted sense. It cannot be right, we think, to appoint to that court persons who are only nominal members of it. All the members should be Supreme Court judges in the fullest sense, although those assigned to the proposed Administrative Division would, among their other functions, specialise in the work of that Division.

(iii) The establishment of a separate Administrative Court would raise problems as to its relationship with the Supreme Court. If an attempt were made by statute to give it theoretically equal status, there would be a danger that the two courts would give conflicting and irreconcilable decisions. To endeavour to prevent this, unless yet a third court in the nature of a tribunal de conflits were brought into play, it would be necessary that one of the two courts should have the final word as to the respective jurisdictions of each. In the upshot the Administrative Court would be bound, we think, to occupy a somewhat subordinate position; so that the difficulties of status to which we have already referred would not be removed. At present the Supreme Court has a supervisory jurisdiction over all other courts in New Zealand except the Court of Appeal. It might well be difficult to draft a provision which would totally oust that jurisdiction in respect of any new court.

(iv) Administrative law is far from being limited to appeals from administrative tribunals. There are for example the common law remedies of certiorari, prohibition and mandamus (often collectively called the prerogative writs) whereby the Supreme Court ensures that tribunals of limited jurisdiction and other public bodies act within their powers. Moreover many cases involving

the interpretation of statutes may fairly be said to come within the field of administrative law. In general it is obviously desirable that all administrative law cases at a certain level should be dealt with by the same group of judges. For example, the court which hears the statutory appeals should also in general hear the prerogative writ applications. We are not prepared to recommend that the latter jurisdiction, which goes to the very root of our constitutional system and is a valued protection of the rights of citizens, should be taken away from the Supreme Court and vested in a new type of court.

Administrative Division of Supreme Court

35. Consideration of the various alternatives has led us, as already mentioned, to the firm conclusion that an Administrative Division of the Supreme Court is the logical and acceptable solution in New Zealand. We think that anything that might be achieved by a separate Administrative Court is more likely to be achieved by an Administrative Division. The Division would hear appeals from certain administrative tribunals, and we shall indicate hereinafter particular rights of appeal which we recommend. It would also exercise the present jurisdiction of the Supreme Court in administrative law. It would have the desirable attributes of status and specialisation. This recommendation would meet the major criticism of the present system that the Executive has kept justiciable issues outside the jurisdiction of the ordinary courts. The conferment of the appellate jurisdiction on the Supreme Court (in the modified form we have indicated) would inspire greater public confidence, by reason of the higher status of the appellate body.

36. It is important to make clear what we regard as implicit in our recommendation of an Administrative Division.

Membership of Administrative Division

(i) The judges of the Administrative Division of Supreme Court should be assigned by the Governor-General to the Division, and as Supreme Court judges they would also perform other Supreme Court work when required. Without making a hard-and-fast recommendation as to numbers, we suggest that at this stage a Division of three or four judges would be adequate.

Qualifications of Judges

(ii) Persons appointed to the Administrative Division should have a full appreciation of the need to give effect to the economic and social policies the legislation was designed to implement. It is perhaps hardly necessary to add, but to avoid any possible misunderstanding we do so, that they should also possess the other qualities appropriate to Supreme Court judges.

Lay Members

(iii) There should be no bar to the appointment of lay members or assessors to sit with the Court if and when desirable.

Expense

(iv) The proceedings in the Administrative Division should not be more expensive than proceedings before the present appellate administrative tribunals.

Informality

(v) The atmosphere should not be more formal than that of appellate administrative tribunals.

Consistency

(vi) It is clearly desirable that there should be a degree of specialisation among the judges so that the virtue of consistency is not lost. The judges would handle throughout New Zealand the matters assigned to the Division and would when necessary travel to appropriate hearing places. In cases of special importance we envisage that a full court (probably comprised of three judges) of the Administrative Division could sit.

37. In these ways we are aiming to retain the advantages of the present appellate structure while adding advantages which we deem crucial, namely, the greater consistency, coherence and authority an Administrative Division would bring. In our view the synthesis of these virtues is perfectly feasible and would fit New Zealand conditions ideally.

38. While it would not be possible for Supreme Court judges without special assignment to sit in the Division, we consider there are a number of judges who would be most suited to the task and who could be invited to accept membership of the

Division. Thus recruitment could be either direct from the present bench or from the bar.

39. Our recommendation is not a radical one, inasmuch as it is essentially a proposal to adapt and improve existing institutions. This seems to be the way in which progress is usually made in English-speaking countries. Our proposal for some degree of specialisation on the Supreme Court bench in one field is probably in conformity with a general tendency. As population and the total volume of work increase, it is no doubt inevitable that a certain amount of specialisation will take place among the judges. The reconstitution of the Court of Appeal in 1957 may be regarded as one manifestation of this tendency. Irrespective of our recommendations, we think it is likely to continue.

40. Where an appeal on a point of law from the Administrative Division is appropriate it would lie to the Court of Appeal. This would add to the public confidence which we expect to follow from the setting up of the Administrative Division. As a natural and single step the highest New Zealand court would become the ultimate appeal body in New Zealand where important legal questions are involved, just as it is now in regard to cases which are heard by the courts in the ordinary way.

Meaning of "Point of Law"

41. The application of the phrase "point of law" or "question of law" is not always clear. As Professor Northey pointed out in a paper prepared for the Committee, in various contexts errors of law could fall under one or more of the following heads -

(1) Excess or want of jurisdiction;
(2) Error of law on the face of the record;
(3) Misconstruction of a statute, regulation or document;
(4) Non-compliance with the relevant legislative provisions;
(5) Some errors concerning evidence;
(6) Determinations based on irrelevant considerations or so unreasonable as to amount to a failure to exercise the power of decision;

(7) Some instances of refusal to exercise jurisdiction;

(8) Breach of the principles of natural justice.

Professor Northey suggests that in providing for an appeal on law Parliament should reduce the uncertainty by enacting an inclusive definition. We wish to give further consideration to whether or not such a definition is practicable or desirable. As the question does not affect the substance of our general recommendations it need not be discussed at this stage.

Membership of tribunals

42. In addition to the basic recommendation for the establishment of an Administrative Division of the Supreme Court, we recommend certain changes in relation to particular tribunals of first instance and to particular appellate tribunals which, in our view, should not be absorbed into the Administrative Division. As the Franks Committee has stated, the general standard of adjudication of administrative tribunals depends on the degree of competence of members of the tribunal. We recognise that in New Zealand the reputation and public acceptability of a particular administrative tribunal has often depended much on the calibre of its members. There are general principles which should be observed as to the qualifications of members of these tribunals, and as to the method of their appointment -

(i) The chairmen of all appellate tribunals should be legally qualified.

(ii) In general it is desirable that the chairman of a tribunal of first instance - including a single member where the tribunal consists of a single member - should be legally qualified. This, however, may not always be possible or appropriate. In that event he should at least be disinterested and possessed of qualifications and experience that equip him for membership of the tribunal concerned, having regard to its status and functions.

(iii) Any other members of appellate tribunals and tribunals of first instance should also be disinterested and possess qualifications and experience equipping them for membership of the tribunal concerned, having regard to its status and functions.

(iv) In principle, particular interests ought not to be specifically represented on administrative tribunals.

(v) Appointments to administrative tribunals should be made by the Governor-General acting on the advice of the Minister concerned. The Minister should, however, be required to consult the Minister of Justice before tendering his advice. We regard this point as particularly important. As well as helping to ensure that the appointee is suitable, it should dispel any illusion that the department of state administering the tribunal may be exercising undue control over its personnel.

(vi) Members of administrative tribunals should be appointed for a term of not less than three years and there should be standard grounds for removal.

PROPOSALS RELATING TO EACH TRIBUNAL SO FAR CONSIDERED

LAND VALUATION

32. The present system so far as tribunals are concerned is this:

Land Valuation Court

This Court consists of three members appointed by the Governor-General in Council, one of whom is the Judge of the Court. He must be a barrister or solicitor of seven years' standing. The Judge holds office during good behaviour, the other members are appointed for five years. No particular qualifications are laid down for the other members. In practice, we understand at present one is regarded as an expert in rural and the other in urban valuation. The present Judge has held the office since the setting up of the Court in 1948. The Judge of the Court may on the application of any party to the proceedings, or of his own motion, state a case for the opinion of the Court of Appeal on a question of law, but the decisions of the Land Valuation Court are not otherwise reviewable except on jurisdictional grounds. The section empowering the Judge to state a case on a question of law has the defect common to several similar sections in the statute books in that power can be exercised only before the decision is given. Frequently parties will not know in advance of a decision whether they will desire to question it on a point of law.

Land Valuation Committees

44. These consist of such number of persons (not exceeding three) as the Governor-General, who appoints the committees, thinks fit. They hold office during pleasure. There are twenty Land Valuation Committees throughout New Zealand, the chairman being invariably a Magistrate. Most applications filed in the Land Valuation Court are first referred to a Committee, and the decision of the Committee, if not appealed from to the Land Valuation Court, becomes a decision of the Court. An appeal from a decision of a Committee will lie only to the Court and the proceedings or decisions of Committees may not be called into question by any other body. The prerogative writs would of course lie for absence of excess of jurisdiction.

Recommendations

45. The Committee recommend that :

(i) The jurisdiction of the Land Valuation Court be absorbed into the proposed Administrative Division of the Supreme Court and be exercised by that Division. We envisage that lay members could continue to sit with the Court if and when desirable.

(ii) With the leave of the Administrative Division or the Court of Appeal an appeal should lie to the Court of Appeal on fact, law and merits. It seems anomalous that there is a right of appeal to the Court of Appeal in respect of virtually all issues before the Supreme Court, but none in respect of land valuation matters, although these matters often involve very important or valuable rights. It is true that the Court may state a case for the Court of Appeal on a point of law, but we think this does not go far enough. The issue could be one of fact or discretion yet of such moment that it would be unreasonable to deny the parties any possibility of seeking the ruling of the highest court in New Zealand.

46. Two objections may be raised to giving this further opportunity of appeal. First it may be suggested that it runs against the principle that an appeal should not lie from experts to non-experts, and that decisions on land valuation matters require specialised knowledge. This general argument might dissuade us from recommending an appeal to the Court of Appeal in respect of certain other fields. Our reply here is that the social and economic policy content and the technical aspects of land vluation matters are not so great or so esoteric as to prevent the Court of Appeal from giving a satisfactory decision. Secondly, it may be suggested that to give further appeal rights would add to the cost of proceedings and would unduly delay matters. The requirement that leave be obtained should ensure that the only cases to go to the Court of Appeal would be those where the importance of coming to the correct decision or the obvious justice of permitting the appealwould outweigh

the extra cost and delay.

47. At present most land valuation proceedings are dealt with at first instance by the Land Valuation Committees, although there is a provision enabling some cases to go direct to the Land Valuation Court. We suggest that where all parties so request, any proceedings in this jurisdiction should be heard initially in the Administrative Division. Then only two hearings at the most would be involved in such cases.

48. We have given attention to the criteria which should guide the courts in deciding whether to grant leave to appeal, and recommend an enactment on the following lines: The Court should have regard to -

(i) whether any questions of law or general principle are involved;

(ii) the importance of the issues to the parties;

(iii) the amount of money in issue;

(iv) such other matters as in the particular circumstances the Court thinks fit.

The Court granting leave to appeal should have discretion to impose terms as to costs and other matters.

TOWN AND COUNTRY PLANNING

49. The Town and Country Planning Appeal Boards have jurisdiction under the Town and Country Planning Act 1953 to hear and determine a wide range of planning issues. The following are examples of such issues. Where a local authority has wholly or partly disallowed any objection to a district scheme which has not become operative, or to any variation of a scheme, the objector may appeal to an Appeal Board. An applicant may also appeal to a Board against any refusal of the local body to permit a conditional use under an operative scheme. If, before any district scheme becomes operative, the Council has refused to issue to the owner or occupier of any land a permit for the erection of or alteration to a building or for the formation of any road or the subdivision of any land, the owner or occupier may also appeal to an Appeal Board.

50. An Appeal Board consists of the following: a barrister or solicitor of the Supreme Court, who is chairman; a nominee

of the Municipal Association of New Zealand; a nominee of the New Zealand Counties Association; and one other person. Three members form a quorum. All are appointed for three years. Every member is appointed by the Governor-General on the recommendation of the Minister of Justice. The decision of the Board is declared to be final and conclusive, but the prerogative writs will issue against it. Having the powers of a Commission of Inquiry under the Commissions of Inquiry Act 1908, a Board can state a case on a point of law for the opinion of the Supreme Court, although for reasons already explained this is no substitute for an appeal. Because of a considerable increase in work in recent years there are now two Boards, one of them called the Special Board.

52. After careful consideration, the Committee concluded that it could not deal adequately with the question of hearings at the Appeal Board level without investigating the adequacy of hearings at the local body level. It became apparent that the hearing at the local body level is apt to be far from thorough. There is by statutory regulations a prohibition of cross-examination; the local body does not always give the parties an opportunity of commenting on any report made to it by officers or consultants after the hearing; and no party has the right to apply for an order for discovery or inspection of documents.

53. We considered whether we should recommend that procedural requirements for the hearing at this level be made more judicial in character, but concluded that it would not be practical to do so. The planning committees of local bodies consist usually of lay persons and, where small local bodies are concerned, the staff would not in all cases be sufficiently qualified to guide the committee in conducting a fuller hearing. There is also the general desirability of prompt despatch of business. Moreover councillors in some of the large local bodies could hardly be expected to give this work the time that would be required for more elaborate hearings. We note that in a recent decision the Appeal Board held that unless the local body disclosed any report made to it after hearing the parties, there was no proper "hearing". Thus, according to that decision, the local body must give all parties an opportunity of seeing and commenting on such a report. On the other hand the recent decision of Henry J. in Perpetual Trustees Estate and Agency Co., of New Zealand Ltd v. Dunedin City Council [1968] N.Z.L.R. 19 (on a compulsory

acquisition question) raises some doubt on the point. In our view it would be good practice if local authorities were to disclose such reports, in the interests of preserving public confidence in the impartiality of the Committee.

Recommendations

(1) The Appeal Boards

53. The Committee consider that local body interests seem over-represented on the Boards. Presumably there can be comparatively few cases where representation on the Boards of both the municipalities and the counties is justified. Also it is unsatisfactory that, where only three members sit, two local body representives can outvote the chairman, even on a point of law. Therefore the composition of these Boards requires reconsideration; but we take the point no further, not having heard the views of the Municipal Association or the Counties Association.

54. We discussed the possibility of constituting appeal boards on a regional basis. For example, one board could sit in the South Island and two in the North Island. Such a scheme would more effectively harness the local knowledge of members. Future volume of work may require this but we make no recommendation at present about it.

55. Although the Boards have power to order inspection of documents in matters coming before them, they do not appear to have power to order discovery of documents. And yet this may be the vital first step for a party, since he needs to know what documents exist in another person's hands before he can ask the Board to order that he be permitted to inspect them. So we recommend that the Boards be given full power to order both discovery and inspection in matters before them. We envisage that a Board could order the local body, whether it was a party to the appeal or not, to disclose the nature of relevant documents under its control and to permit inspection. The jurisdiction of the Boards to make such orders would be discretionary and we see no reason to fear the making of orders imposing undue burdens on local authorities.

(2) Jurisdiction of Administrative Division in planning appeals

56. We do not think that the decision of a Town and Country Planning Appeal Board should be final in all cases, especially as the hearing at local body level is so rudimentary that often the Appeal Board is in truth giving the matter its first judicial consideration. An appeal should lie, but only with leave, to the Administrative Division of the Supreme Court.* The criteria already recommended for leave applications in land valuation matters (although there relevant to appeals from the Administrative Division to the Court of Appeal) should also be adopted here. Where leave is granted, the Administrative Division would have full jurisdiction over the case on fact, law and merits. As in appeals from a Magistrate's Court to the Supreme Court, the Administrative Division hearing an appeal from a Board would not normally, we think, rehear the evidence. The usual discretionary power to do so or to admit further evidence should suffice. In this connection we learn that the Boards do not at present have facilities for recording the evidence-in-chief and cross-examination. This should be rectified.

57. Either the Board itself or the Administrative Division should have power to grant leave to appeal to the Division. There should be power to impose terms as to the speedy prosecution of the appeal or any other matters.

58. We do not think there should be a further appeal to the Court of Appeal from the Administrative Division on questions of fact or discretion. Questions of law are in a different category, and in accordance with our general recommendation we would favour a right of appeal to the Court of Appeal on such questions only. But we think the need for resort to this jurisdiction would be rare, as major cases before the Administrative Division would be heard by a full court.

* It is interesting to note that in New South Wales two judges of the Supreme Court among their functions specialise in appeals in town planning matters and their decisions in such cases are included in the New South Wales Reports in the ordinary way.

TRANSPORT

Goods, Passenger, Taxi and Harbour Ferry Licensing

District Transport Licensing Authorities

59. These consist of one person or three persons (in practice one person) appointed by the Minister of Transport. They determine at first instance all applications relating to the licensing of goods and passenger transport services by land and to the licensing of harbour-ferry services. In practice they are appointed for a term of five years. At present there are five such Authorities in New Zealand. There is a general right of appeal to the Transport Licensing Appeal Authority from decisions of Transport Licensing Authorities. Their decisions are reviewable to the usual limited extent by the Supreme Court by way of the prerogative writs.

Transport Licensing Appeal Authority

60. The holder of this office must be a barrister or solicitor of not less than seven years' practice. He is appointed by the Governor-General during pleasure. The Appeal Authority's function is to determine appeals from any decision of a District Licensing Authority. His decisions may be questioned only on the ground of lack of jurisdiction but he may on the application of any party to the proceedings, or of his own motion, state a case for the opinion of the Court of Appeal on any question of law. Our comments about the power of the Land Valuation Court and the Town and Country Planning Appeal Boards to state cases apply here also.

Recommendations

61. The jurisdiction of the Transport Licensing Appeal Authority should be absorbed into the proposed Administrative Division of the Supreme Court and exercised by that Division. It seems to us significant that this office has always been held in the past by a lawyer of standing. To confer the jurisdiction on the proposed Administrative Division would be consistent with the approach adopted in the past, and would also have certain additional advantages. These include the opportunity to have cases of special difficulty or importance heard by a full court and more assurance of

the availability of suitably qualified persons.

62. Fear has been expressed that this proposal would increase costs unnecessarily and cause delay. We do not see why this should be so, bearing in mind that unless new evidence were admitted the Administrative Division would base its decision on the evidence given at the first instance level, just as the Appeal Authority usually does now. The Appeal Authority has a discretionary power to allow fresh evidence on appeal, which is occasionally exercised, and the Administrative Division should be in precisely the same position. If anything our proposal should accelerate the hearing of appeals. It is unlikely to have any material effect on costs one way or the other.

Further Appeal

63. The Committee consider that there should not be a right of appeal on fact or discretion to the Court of Appeal, and that the right should be restricted to a point of law only. We do not think a further appeal, whether by right or with leave, against a discretionary decision is warranted in this specialised field. Occasionally an appeal on a point of law will no doubt be appropriate, but, as already mentioned, the ability of an Administrative Division to sit as a full court should reduce the need for this.

Qualifications of District Transport Licensing Authorities

64. The Committee considered the question of the qualifications of members of the District Licensing Authorities. Our general recommendations (para. 42) discussed earlier pertain here also.

Procedure of Transport Licensing Authorities

65. There are one or two aspects of the procedure which we think could be improved.

(i) The Licensing Authorities have no general power to order the production of documents or to compel attendance of witnesses. They have such power only when they conduct public inquiries into the conduct of a transport service. We can see no reason why the power should be withheld. Other

tribunals of first instance have the power. It seems a necessary feature of a judicial proceeding and at least a desirable feature of a quasi-judicial proceeding.

(ii) The Licensing Authorities should be able to order the payment of costs in special cases. Such power would be useful where, for example, an objection is thought to be frivolous. Other tribunals have this power by virtue of being Commissions of Inquiry.

(iii) An objector should be required to give notice of his objection before the hearing, but the Authority should be empowered to waive this requirement in special cases.

Other matters

66. The Committee considered who should provide the secretariat for transport licensing authorities. At present the Transport Department fully services the Authorities by appointing the secretary and providing the accommodation. In our opinion this practice should be discontinued. The Tranpsort Department appears as a party in many proceedings and should therefore not be connected with the secretariat. An appearance of complete independence is called for in relation to administrative tribunals just as much as with the ordinary courts. In the Department of Justice publication "The Citizen and Power" there is the suggestion that if a department normally appears as a party before the tribunal it should not supply the premises at which the tribunal sits nor should the secretary be an officer of that department. We think this suggestion should be adopted wherever economically practicable. A precedent exists in section 9 (1) of the Sale of Liquor Act 1962, which provides that "There may from time to time be appointed under the State Services Act 1962 a Secretary of the Licensing Control Commission and such other employees as may be necessary for the efficient carrying out of the functions of the Commission ..." While attached to the Department of Justice for pay and disciplinary purposes the Secretary carries out the Commission's instructions and is not subject to departmental directions in the ordinary performance of his duties.

Transport Charges

67. At first instance the charges for transport are prescribed either by a local body (where the transport service is owned by a local body) or by the Commissioner of Transport. There is a right of appeal to the Transport Charges Appeal Authority and no doubt a decision could be questioned in the Supreme Court by way of the prerogative writs on grounds going to jurisdiction.

Transport Charges Appeal Authority

68. The constitution of this Authority is very similar to that of the Transport Licensing Appeal Authority and does not require separate description.

Recommendations

69. Except in the case of public transport charges, the Commissioner of Transport fixes charges administratively in the first instance, with a full right of appeal to the Transport Charges Appeal Authority. We recommend no change in the first instance procedure, which seems to us reasonably satisfactory. Later in the report we suggest that a proposed Controller of Prices be empowered to refer a case directly to the Price Appeal Tribunal. We make no similar recommendation in regard to transport charges. The system appears to have worked well and we see no reason to disturb it.

Mr W.G. Smith has suggested to us that all price-fixing bodies might well be merged with the Arbitration Court into a Commission. The Commission, he considers, should be adequately staffed by experts to carry out the necessary economic research. As a result of his experience Mr Smith has formed the view that often insufficient background information is available to price-fixing bodies. We do not recommend this as an immediate step but we think it well worthy of being kept in mind as an ultimate solution.

70. The Committee consider that the fixing of transport charges, being essentially the fixing of prices for services, should be treated as a special case and should not be vested at the appellate level in the Administrative Division. Perhaps at a later stage the function could be combined with the functions of the Price Appeal

Tribunal suggested subsequently in this report.

71. Such a development could occur whether or not there was also merger with the Arbitration Court. However, that again is merely a possibility to be borne in mind for the future. What we stress is that, not being minded to recommend change merely for the sake of change, we are not persuaded that there is at present any need to change the existing system for the fixing of transport charges. We accept that there may be some disadvantage in separating transport charges from transport licensing, but there is already a considerable degree of separation. In any event, although to some extent performance of the two functions would be assisted by the same kind of specialised knowledge, they are rather different functions, called for somewhat different approaches and skills.

TRADE PRACTICES

Trade Practices and Prices Commission

72. This body consists of a chairman (appointed by the Governor-General on the recommendation of the Minister of Industries and Commerce) and the ordinary members of the Price Tribunal. All hold office during pleasure. The principal function of the Commission is to prohibit or control restrictive trade practices which it finds to be contrary to the public interest. The relevant legislation is complicated and elaborate. Difficult questions of law, fact or discretion can arise in the exercise of the Commission's functions.

73. The proceedings or decisions of the Commission may not be called into question by any court except on the ground of lack of jurisdiction, but there is a right of appeal to the Trade Practices Appeal Authority.

Trade Practices Appeal Authority

74. The Trade Practices Appeal Authority is appointed by the Governor-General and must be a barrister or solicitor of not less than seven years' practice. He also holds office during pleasure. His function is to sit as a judicial authority for the determination of appeals, and his proceedings or decisions may not be called into question by any court except on the grounds of lack of jurisdiction.

Recommendations

75. We considered the possibility of recommending the upgrading of the Trade Practices and Prices Commission in accordance with the suggestion made by the Law Society in its report, which referred to the Restrictive Practices Court in the United Kingdom presided over by a High Court Judge and having other High Court Judges among its members. We understand that since the Law Society report was made the number of cases coming before the Trade Practices and Prices Commission has fallen off very markedly. No doubt this is due in part to the operation of the 1965 Amendment to the Trade Practices Act, which provides for settlement by consultation between representatives of the industry and the Examiner of Trade Practices.

76. In these circumstances, and provided the appeal rights are adequate, we do not consider there is any need to upgrade the tribunal. We do consider that the chairman should be a lawyer of standing and that the general qualifications for tribunal membership recommended earlier in this report should be taken into account. We think it wrong that the members hold office during pleasure. They ought to be appointed for a minimum term of, say, three years.

77. The Appeal Authority should be absorbed into the proposed Administrative Division of the Supreme Court. The full appeal rights now existing should of course be retained, but in our view there is no need for lay members or assessors to sit with the Division when it hears trade practices cases. The argument that this would continue the present anomalous position whereby an appeal lies from a three-man tribunal to a one-man tribunal is met by our recommendation that the Administrative Division could sit as a full court in important or difficult cases. Most trade practices appeals would probably fall within that category, although, as indicated above, the total number is at present small.

Further appeal

78. Trade practices are an area where decisions have a high discretionary content in implementation of the broad economic and social policies embodied in the Act. In

our opinion an appeal to the Court of Appeal on fact or discretion would not be appropriate. We recommend that a right of appeal on a point of law only should lie to the Court of Appeal from the Administrative Division. At present there is merely a discretionary power in the chairman of the Commission and in the Appeal Authority to state a case on a point of law.

Other matters

79. At present the Examiner of Trade Practices has no right of appeal against a refusal by the Commission to make an order for which the Examiner has applied. There seems no reason why the Examiner should not have the same appeal rights as the industry concerned and we recommend accordingly.

PRICE TRIBUNAL

80. This tribunal consists of a President, one or more ordinary members, and one or more associate members appointed by the Governor-General on the recommendation of the Minister of Industries and Commerce. They hold office during pleasure. At present there are three members of the tribunal, the ordinary members also being the ordinary members of the Trade Practices and Prices Commission. The main function of the Price Tribunal under the Control of Prices Act 1947 is the fixing of prices for such goods and services as, pursuant to Government decisions from time to time, are subject to control.

81. Under a statutory provision and with the consent of the Minister, the Tribunal has delegated to the Secretary of Industries and Commerce wide powers to fix prices. An appealto the Tribunal lies against a decision of the delegate. There is no right of appeal from the Tribunal, but the prerogative writs may be issued against it on jurisdictional grounds, as demonstrated in two leading cases where it was held that the rules of natural justice had not been complied with.

Recommendations

82. The function of price-fixing is in some respects more akin to legislation than to adjudication. Having regard to that characteristic and to the part which policy must play in the function, we do not consider that the

Price Tribunal should be merged with the Administrative Division.

83. We recommend that the Department of Industries and Commerce should not draw its authority as in effect it does now from delegated power, but rather that a statutory office should be created, the holder of which could be called the Controller of Prices. This officer would be given responsibility by statute to fix prices in the first instance. He would act administratively, as the Department does now; but the conferment of the decision-making power on a named statutory official would provide some individual responsibility and independence from the Department, while still leaving him in a position to have regard to Government economic policy.

84. If the foregoing recommendation is adopted the Price Tribunal should be renamed the Price Appeal Tribunal, since its function would be to sit as an appeal authority from decisions of the Controller of Prices. The appeal rights would be comprehensive, covering fact, law and discretion, although few questions of law are likely to arise in this particular field. The Controller of Prices should himself have the right to appear as a party to the appeal. A full rehearing should be given, unless the parties consent to the case being dealt with on the evidence that was before the Controller.

85. While recommending the basic pattern just outlined, we consider that there must be cases that would more appropriately be dealt with by the Price Appeal Tribunal in the first instance - for example, cases where the subject matter has widespread implications, or where the sums involved are very large, or where difficult questions of fact arise. To meet this situation the Controller of Prices should have the right to have a case heard by the Price Appeal Tribunal in the first instance. Also the industry concerned should be able to ask the Price Appeal Tribunal in its discretion to order that a case be heard by it in the first instance. Again, under the present system the prices of some controlled goods fall outside the authority delegated to the Department by the Price Tribunal, so that any application in respect of those goods is dealt with by the Price Tribunal directly. In the case of these goods also, the matter could under our

proposal be dealt with by the Price Appeal Tribunal.

86. As the control of prices is of much importance, not only to the immediate parties, but to the community generally, it is essential that the Appeal Tribunal should be strongly constituted and that a legally qualified person be chairman. The general recommendations set out earlier in this report, paragraph 42, are in point.

87. Finally we consider that the Controller of Prices and the Price Appeal Tribunal should normally give reasons for their decisions as a matter of course, and that they should be required to do so if a party requests. We understand that at present reasons are often not given, but the giving of reasons makes for sound adjudication, whether or not there is a right of appeal, and also occasionally facilitates the salutary exercise of the Supreme Court's supervisory jurisdiction. (The latter jurisdiction would be exercised by the Administrative Division under our proposals). The United Kingdom Tribunals and Inquiries Act 1958 requires the tribunals to which it applies to give reasons if called upon by a party. We intend to explore the practicability of introducing a similar general provision in New Zealand. Whether or not that proves desirable, we think it especially important that reasons be available where there is no right of appeal to the courts, as would be the position in this particular field.

88. SUMMARY

1. Legislation concerned with the ever-increasing activities of the State and public authorities gives rise to many disputes which have to be adjudicated upon. These are often very important to the citizens directly concerned and to the general public, but until recently little or no attention has been given to working out the best machinery for their decision. A multitude of administrative tribunals, appeal authorities and special courts has grown up with no consistent pattern.

2. We have endeavoured to approach the subject in a practical way, seeking first the best system for determining disputes in each particular field rather than beginning with a theory and looking at the facts under its influence.

3. In this spirit we have examined the adjudication systems at present applying in the fields of land valuation, town and country planning, transport licensing, transport charges, restrictive trade practices and price control.

4. As a result we are satisfied that at first instance the administrative tribunal system in these fields is working reasonably well and has real merits. We do not recommend any major general changes at this level, but we do recommend general principles which should be observed in the appointment of members of tribunals. In addition we have made particular recommendations for improvements in all but one of the fields mentioned: see as to the Land Valuation Committees, paragraph 47; as to town and country planning committees of local bodies, paragraph 53; as to District Transport Licensing Authorities, paragraph 64-67; as to the Trade Practices and Prices Commission, paragraph 76; and as to the proposed creation of a Controller of Prices, paragraph 83.

5. Although New Zealand has been fortunate in having some most capable appeal authorities, we are convinced that major improvements can be made at the appellate level. The existing machinery is not, in our opinion, appropriate to the importance of the work. In particular the possibility of securing in these fields the services of assigned Supreme Court judges has been largely neglected. In the past the Executive has at times seemed unwilling to entrust the Supreme Court with the task of adjudicating in these new fields; and similarly some judges have at times seemed unwilling to exercise resourcefulness in

these fields. Progress is only possible if all those concerned approach the tasks unimpeded by outworn concepts and attitudes.

6. As regards most of the fields already mentioned we have formed the opinion that it would be clearly advantageous to provide for rights of appeal to an Administrative Division of the Supreme Court. Consequently the main recommendation in this report is that such a Division should be set up to hear certain appeals and also to exercise the present jurisdiction of the Supreme Court in administrative law. Further particulars as to the constitution and procedure of the Administrative Division we envisage are contained in paragraphs 35-40.

7. In the fields we have studied, the recommended appellate jurisdiction of the Administrative Division may be briefly stated as follows:

(i) It would replace the Land Valuation Court (para. 45);

(ii) It would hear appeals, in cases where leave was granted, from the Town and Country Planning Appeal Boards (para. 56);

(iii) It would replace the Transport Licensing Appeal Authority (para. 61);

(iv) It would replace the Trade Practices Appeal Authority (para. 77).

8. The Administrative Division would have no appellate jurisdiction in the fields of price control or transport charges. Approaching these fields in the way already described, we see no reason to recommend any change in the present methods of fixing transport charges (para. 71); and as to price fixing we recommend that the Price Tribunal be reconstituted as a Price Appeal Tribunal (para. 84).

9. Our approach also leads us to conclude that, when an appeal lies to the Administrative Division, the decision of the Division should normally be final on all questions of fact and discretion. The land valuation jurisdiction has special features which in our view warrant provision for leave to appeal to the Court of Appeal on such questions in that field (para. 45).

10. On a question of law there should generally be a right of appeal from the Administrative Division to the Court of Appeal, as the latter Court is and should remain the highest authority in New Zealand on all questions of law. We do not think, however, that this right would be very frequently exercised,

because one of the advantages of the Administrative Division is that it would sit as a full court when appropriate. Appeals from a full court to the Court of Appeal are naturally rare.

11. In arriving at the conclusions summarised above we have considered and rejected various alternatives. One of these - the creation of a separate Administrative Court - is favoured by one of our members, Mr Orr, whose views are set out in an appendix. We wish to make it clear that we do not regard the whole problem as simply a choice between an Administrative Division and an Administrative Court. Even if an Administrative Division were not set up, we would not be in favour of a new Administrative Court, for the reasons indicated in para. 34.

89. MATTERS FOR FUTURE CONSIDERATION

We shall have to consider more fields. We propose to approach them in the same way. In some the Administrative Division may well have a part to play. In others the status quo may be satisfactory with or without modification. Nonetheless, the conclusions we have reached with regard to the fields already covered make it plain, in our view, that in those fields alone the Administrative Division would be fully justified.

(Signed) J.L. Robson
C.C. Aikman
A.C. Brassington
R.B. Cooke
E.I. Greensmith
R.G. McElroy
J.F. Northey
D.A.S. Ward

(5.1.68)

APPENDIX

MINORITY VIEW

AN ADMINISTRATIVE COURT

1. While being whole-heartedly in favour of a rationalisation of the present system I consider the setting up of an Administrative Division of the Supreme Court to be unwise. Such a Division will inevitably take on the colour of the Supreme Court substantially as it now exists. Yet the widely acknowledged unsuitability of courts such as the Supreme Court as an appellate body from administrative tribunals has been the main reason over the years for setting up special courts and other appellate authorities both here and throughout the Commonwealth.

2. The proposal of the majority involves the rejection of this widespread experience and practice. Clearly reasons of the most compelling kind are needed by way of justification. In my view they do not exist. The proposal constitutes a radical innovation in preference to the more pragmatic solution involved in setting up an Administrative Court. Such a court would be essentially a consolidation of the present appellate bodies in one body in a way which retains their many advantages and at the same time eliminates their defects.

3. Among the reasons for my apprehension of the majority's proposal are the following:

a) Over-Judicialisation:

The establishment of an Administrative Division would lead to over-judicialisation of the various matters at present deliberately excluded from the Supreme Court's jurisdiction. Thus, proceedings would tend to be assimilated more closely to the adversary system which is not always suited to the adjudication of matters of social and economic policy. Procedures and evidentiary rules would tend to be stricter and relevant statutes less likely to be adequately construed and applied.

b) Less Constructive Decisions:

Judges of the Supreme Court would understandably be less inclined to make decisions which on occasions are necessarily controversial. Instead they would tend to adopt a more passive role in keeping with the tradition of the Supreme Court

rather than implement social economic or industrial policy in a constructive way.

c) Loss of Impartiality of the Supreme Court:

With relatively few exceptions all the powers likely to be vested in the Administrative Division would involve value judgments on matters of social or economic policy. This is at variance with the traditional and invaluable role of the Supreme Court of disinterestedness and impartiality which should be preserved unimpaired.

d) Loss in Informality:

There would be a marked loss in informality and freedom of access to the court and a likely increase in costs to litigants, more of whom would feel obliged to instruct counsel or not appear at all.

e) Less Specialisation:

There is less likelihood of specialisation in particular areas and of the development of consistency in approach.

f) Loss of Flexibility:

The proposal for an Administrative Division is made after an examination of some only of the existing appellate bodies. The Committee has yet to consider how suitable the proposed Division will be for the remaining jurisdictions. Its relative inflexibility limits its usefulness in the wide field of administrative justice.

4. I believe the cumulative weight of the foregoing defects to be such as seriously to raise the question whether, on balance, any significant improvement will be achieved. In any event, these deficiencies can, I believe, be avoided if appellate jurisdiction is vested in an Administrative Court. Such a Court would exercise general appellate jurisdiction over administrative tribunals. The new Court would absorb the Land Valuation Court, the Compensation Court and preferably, the Court of Arbitration. The proposal does not involve a proliferation of courts but rather a reduction. No more judges would be needed than will be required for the same work in an Administrative Division of the Supreme Court. The Administrative Court could sit in a number of Divisions dealing respectively with Licensing in all forms; Industrial affairs; Trade Practices and Prices and Local Government which

would include Town Planning and Land Valuation. In important cases the judges of the Court could, where desirable, sit as a full court. There would be a right of appeal on all questions of law to the Court of Appeal. These proposals are spelt out in more detail in my Report on Administrative Justice in New Zealand(1) and have been amplified in the 1965 K.J. Scott Memorial Lecture(2) and ANZALS address(3).

5. The principal objection of the majority to a separate Administrative Court appears to be that, in its view, such a Court would inevitably be regarded as inferior in status to the Supreme Court. This is very questionable. A single unified court embracing the broad field of administrative justice would readily stand alongside the Supreme Court. The only danger is that it might conceivably overshadow the Supreme Court as some protagonists for enlarging the jurisdiction of the Supreme Court clearly fear. The suggestion of the majority that the status of the Administrative Court would in fact tend to be little better than the present appeal authorities appears to be based on a misconception of the role that such a court would play in the economic, social and industrial affairs of the community. The objection of the majority loses any substance it may have if judges of the Administrative Court are also appointed judges of the Supreme Court. They could, as opportunity arose, assist in certain work of the Supreme Court although the work of the Administrative Court would naturally engross the greater part of their time just as judges appointed to an Administrative Division would be occupied mainly on the work of that Division.

6. Two lesser matters are advanced by the majority as reasons why they cannot recommend the establishment of an Administrative Court. One is an alleged danger that the new court would create parallel but conflicting systems of jurisprudence and, in particular, the possibility is envisaged that the two independent courts would give conflicting and irreconcilable decisions. This criticism entirely overlooks that the two courts would on all questions of law be subject

(1) Government Printer 1964

(2) New Zealand Journal of Public Administration March 1966

(3) Unpublished

to the same higher court, the New Zealand Court of Appeal. Any conflicting decisions would be reconciled on appeal in the same way that conflicting decisions among judges of the Supreme Court are at present reconciled and in precisely the same way that conflicting decisions between judges of the proposed Administrative Division and other judges of the Supreme Court would be reconciled. The other objection relates only to a matter of drafting. It is suggested that it would be difficult to draft a provision which would oust the Supreme Court's supervisory jurisdiction over the Administrative Court. These difficulties are not spelt out. I am confident that the Law Draftsman would not find it a difficult task to draft the single short clause needed to achieve the desirable objective of keeping each Court within its own sphere of jurisdiction.

7. The obvious necessity of preventing the Supreme Court from being involved in controversy over current social, economic and industrial matters inherent in administrative appellate work necessarily imposes limits on both the kind of work which can properly be assigned to it and, as already suggested, the effectiveness with which such work can be performed. The vesting of appellate functions in an Administrative Court would insulate the Supreme Court from the critical comment which decisions in this more controversial area inevitably attract from time to time. So far the Committee has considered a limited number only of appellate bodies. Among those yet to be considered is the Court of Arbitration. No one would question the national importance of the work of this Court. It is difficult to conceive of its being absorbed into an Administrative Division of the Supreme Court. The pungent criticisms which its periodic controversial decisions attract should not be directed at the Supreme Court. In any event its basic function is one of arbitration rather than adjudication in the traditional manner of the Supreme Court. Yet there are obvious advantages in merging the Arbitration Court into one unified court concerned with the wide range of social, economic and industrial matters. This would terminate the present isolation of the Judge of this court from his judicial colleagues, and would allow some desirable diversification of work. I am unaware of any significant impediments to the absorption of this court into the proposed Administrative Court and the advantages are readily apparent. As with other Judges of this court the Judge exercising the jurisdiction of

the former Court of Arbitration could also be a Judge of the Supreme Court. In this way, appropriate status would be secured while at the same time criticism of industrial and economic decisions would be directed at the Administrative Court and not the Supreme Court which should be kept clear of the battle. In the same way the jurisdiction of the various Government Service Tribunals such as the Public Service, Post Office and Railways Tribunals could readily be vested in the Administrative Court. Here again these have not yet been considered by the Committee. They would fit very uneasily indeed in an Administrative Division of the Supreme Court.

8. Quite apart from the Court of Arbitration the proposed Administrative Court could readily absorb the jurisdiction of the Price Tribunal which the majority would re-name the Price Appeal Tribunal and otherwise leave intact. The majority recognise that the work of this Tribunal should not be vested in an Administrative Division of the Supreme Court. Yet this Tribunal is from time to time called upon to make decisions involving millions of dollars. If other Tribunals require to be upgraded so does this Tribunal. This example illustrates the disadvantages inherent in attempting to graft on to an institution designed and accustomed to serve quite different purposes, new jurisdictions for which it is intrinsically unsuited. By absorbing some only of the administrative appellate functions the problem of finding a satisfactory solution for the remainder is correspondingly increased. The majority is already faced with the dilemma of isolating transport charges from transport licensing generally. Anomalies of this kind should be avoided if at all possible.

9. The majority refer to two important corollaries of their proposal for an Administrative Division of the Supreme Court. These relate to the removal in certain cases of the need for the prerogative writs, and the creation of a right of appeal to the Court of Appeal on questions of law. Without going into details it should be stressed that precisely the same advantages would accrue from the establishment of an Administrative Court. The only difference is that since the jurisdiction of the Administrative Court would be more comprehensive than that of the Administrative Division of the Supreme Court, there would be correspondingly less need for the prerogative writs if the Administrative Court was established. They would not extend to any administrative tribunals over which the

Administrative Court had appellate jurisdiction nor, of course to the Administrative Court itself. Since an appeal on all questions of law would lie to the Court of Appeal from the Administrative Court the possibility of conflicting decisions between the Supreme Court and the Administrative Court would, as I have earlier indicated, be satisfactorily resolved.

10. Another serious disadvantage in grafting these appellate functions on to the Supreme Court is that the opportunity is lost of creating an organic body which is capable of growth and development to meet the changing needs of society. The limitations inherent in the concept of an Administrative Division of the Supreme Court are readily apparent from the majority's Report. The proposal is at best a partial and limited solution to present problems whereas the Administrative Court could be moulded and developed to deal satisfactorily with a very much wider area of administrative justice. This is not the place to discuss future possibilities for an Administrative Court some of which are considered in my book and the K.J. Scott Memorial Lecture. Suffice it to say that the concept of a general Administrative Division of the Administrative Court which could adjudicate in an informal way over areas of friction in both central and local government is difficult to contemplate in the context of an Administrative Division of the Supreme Court.

11. For all the foregoing reasons the establishment of an Administrative Court is preferred to an Administrative Division of the Supreme Court.

12. I should make it clear that I am in general agreement with much of the Report of the majority. My dissent is directed almost entirely at paragraphs 35 to 40 inclusive (which relate to the proposal for an Administrative Division of the Supreme Court), and, of course, to those subsequent recommendations in respect to particular tribunals which would direct appeals to the proposed Administrative Division. In my view these, along with price control and transport charges, should all go to an Administrative Court.

(Sgd) G.S. Orr

(5.1.68)

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