

Reflections on a general administrative appeals tribunal*

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Dit is 'n groot voorreg en eer om 'n bydrae te mag lewer tot die huldiging van my studieleier, mentor, kollega en vriend, Sas Strauss. Hy het die belangrikste bydrae gelewer tot my vorming as juris, veral op die gebied van regsnavorsing. Dit het hy gedoen deur volgehoue aanmoediging, bystand en veral deur die ideale voorbeeld wat hy gestel het.



INTRODUCTION: JUDICIAL REVIEW AND APPEAL

Judicial review is applied by the courts to control the legality of administrative actions. But if an administrative body, in the lawful exercise of its discretion has arrived at a decision which, 'although not totally unreasonable, is one which is demonstrably less preferable in the circumstances than some other decision'¹ it is regarded as not being the business of judicial control through judicial review. In short, judicial review cannot be applied to control the 'wisdom' or 'merits' of an administrative decision.²

Although the distinction between legality and merits is not actually as rigid as the above remarks would seem to suggest³ and is to some extent manipulable because courts themselves define the legal limits which are imposed upon discretionary power,⁴ it is nevertheless maintained in principle. Courts have repeatedly disclaimed any right of intervention in the merits of administrative

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¹Curtis 'A new constitutional settlement for Australia' 1981 *Federal Law Review* 1 2.

²The concept of merits is seldom defined. According to Brennan ('The purpose and scope of judicial review' in Taggart (ed) *Judicial review of administrative action in the 1980s. Problems and prospects* (1986) 18 30) the merits of a case are constituted by the facts and policies on which an administrative body acts, while Evans ('Administrative appeal or judicial review: a Canadian perspective' 1993 *Acta Juridica* 47 64) regards an appeal on the merits as one which requires the appeal body to determine whether the primary decision-maker found the facts and law correctly and to substitute its view on the proper exercise of any discretion.

³The dividing line has become somewhat blurred: Wade *Administrative law* (6ed 1988) 36-9.

⁴Craig *Administrative law* (3 ed 1994) ch 10; Baxter *Administrative law* (1984) 306.

decisions when such decisions are subject to judicial review.⁵ Furthermore, courts' powers do not in principle extend beyond setting aside the decision in question: they do not step into the shoes of the administrative body in order to remake the decision.⁶ These factors have been viewed as the fundamental shortcomings of judicial review.⁷ Dissatisfied citizens have been expected to seek their remedies within the administrative-political processes of government. Since these remedies have also been found wanting,⁸ the focus of attention has shifted to the potential of administrative appeals.

An administrative appeal is a process whereby the wisdom or merits of an administrative decision are reconsidered and redetermined another decision-maker at the request of an aggrieved person. The aim of this article is to explore the potential of a general administrative appeals tribunal (GAAT), as exemplified by the Australian Commonwealth Administrative Appeals Tribunal (AAT), against the background of administrative appeals generally.

⁵*Sbidjack v Union Government (Minister of the Interior)* 1912 AD 642, 651-3; *Golden Arrow Bus Services v Central Road Transportation Board* 1948 (3) SA 918 (A) 926, *Tberon v Ring van Wellington van die NG Sendingkerk in Suid-Afrika* 1976 (2) SA 1 (A) 43H.

⁶Such a function is regarded as administrative in nature. Besides moving beyond their area of expertise, the courts would breach the doctrine of separation of powers if they should usurp the function which the empowering legislation entrusted to the administrative body concerned.

⁷For a more detailed discussion of the shortcomings of judicial review, see Rabie 'Aspects of administrative appeals to environmental courts and tribunals' 1995 *Stell LR* (November). The Australian Report of the Commonwealth Administrative Review Committee, known as the Kerr Report (Parliamentary Paper 114/1971 para 58 (cf also para 11) identified the fundamental issue as follows: 'The basic fault in the entire structure [of judicial review] is, however, that review cannot as a general rule, in the absence of special statutory provisions, be obtained 'on the merits' — and this is usually what the aggrieved citizen is seeking.'

The recommendation of the South African Law Commission's Report on investigations into the courts' powers of review of administrative acts (1992) Project 24, para 3.12.38, that the existing system of administrative appeal tribunals should be retained and that reform should be effected through an expansion of the grounds of judicial review fails to address these or the many other shortcomings of judicial review as a remedy to rectify administrative decisions deemed incorrect on their merits. (Cf also Govender 'Administrative appeals tribunals' 1993 *Acta Juridica* 76-87.) Even if the expansion of the grounds of review would encompass the unreasonableness of the administrative action in question, as the Law Commission's recommendations imply (cf clause 3(1)(f) of its proposed Bill) and the Constitution of the Republic of South Africa Act 200 of 1993 (s 24(d)) probably provides (see Mureinik 'A bridge to where? Introducing the interim bill of rights' 1994 *SAJHR* 31 38-43), this still falls far short of the powers of a GAAT.

⁸Important shortcomings of such remedies, mainly parliamentary control and internal review, have been found in the incapacity of Parliament or its members effectively to attend to individual challenges of administrative acts and the lack of independence of the body that conducts an internal review. Reform of parliamentary control through the establishment of an ombudsman has brought much relief, but an investigation by the ombudsman — in contrast to a direct appeal to a tribunal — is of a more paternalistic and surrogate nature and, besides, the ombudsman cannot remake the decision in question.

CATEGORIES OF APPEAL

Since the availability of all appeals is dependent upon a legislative basis, the nature and scope of any appeal are likewise determined by the legislation concerned. The following are some of the categories of appeal, representing a broad spectrum of potential jurisdiction, which may be distinguished:

- A comprehensive appeal on the merits which involves a *de novo* reconsideration of the matter as if there had not been a previous decision, with no restrictions on the material which the appeal body may consider and no restriction on the type of decision which that body may make. This kind of appeal, usually referred to in South Africa as a 'wide appeal', and in Australia as 'merits review', is explained as follows:

A right to a full merits review of a decision is the right of an applicant to put any relevant material whatsoever before a review body which has the power to substitute its own decision for that of the original decision-maker. The substitution may occur because, on the material before it, the review body:

- (a) comes to a different view of the facts from that taken by the original decision-maker;
- (b) considers that the law or policy should be applied in a different way to the decision; or
- (c) considers that there is a preferable way of exercising the statutory discretion'.⁹

Such an appeal amounts in effect to substituting the appeal body for the original decision-maker. The latter's findings may be taken into account like any other relevant consideration, but the appeal body attaches no particular weight to such findings. This is the type of appeal powers applicable in respect of many South African administrative appeals to the Supreme Court and to a variety of administrative tribunals.¹⁰ Australian administrative appeals tribunals also exercise such powers.

- A partial appeal on the merits where the scope of the appeal is confined in the sense that limitations are imposed on the material which the appeal body may consider in that only the material which served before the primary decision-maker may serve before the appeal body. Such a limitation would imply that more weight will be given to the primary decision-maker's fact-finding and exercise of discretion than would be the case if no limitations were imposed on the submission of fresh material. It nevertheless is a merits appeal in that a fresh decision on the merits may be made.
- An appeal along the same lines as that of the previous category in that restrictions are imposed on the material which the appeal body may consider, but where restrictions are imposed also on the type of decision which that body may make. In this regard three further categories may be

⁹Report on review of appeals from administrative decisions Electoral and Administrative Review Commission of Queensland Vol I (1993), hereafter referred to as EARC Report para 2.67.

¹⁰See Rabie 'Administratiefregtelike appelle' 1979 *De Jure* 128 129 ff and 141 ff.

distinguished:

- (a) An examination of the primary decision in order to ascertain whether it was correct or reasonable on the material before it, without the power to make a fresh decision on the merits in substitution for the original decision, but with the power only to affirm or set aside that decision. Several such appeals are encountered in South African law.¹¹
 - (b) A similar power to that referred to in (a) but with the additional power to refer the decision back to the primary decision-maker, accompanied by recommendations of the appeal body.
 - (c) A decision which involves the power to make recommendations only.¹²
- Whereas all the above appeals are aimed at the merits of the primary decision, another category of (severely restricted) appeal may be distinguished i.e. that relating not the merits but only to questions of law. Examples of such appeals exist in South African law.¹³

Appeals which are concerned with proving the primary decision-maker right or wrong may be termed judicial appeals, while a true administrative appeal involves an appeal body whose role it is to decide what decision it itself should make rather than what decision should have been made by the primary decision-maker.¹⁴

If the object of merits appeal is to arrive at the most preferable decision and not merely to prove the primary decision-maker right or wrong, it does not make sense to limit the appeal body to the evidence available to the primary decision-maker. In order to arrive at the most satisfactory decision, the appeal body should be able to take account of any relevant evidence. There are several reasons why a primary decision-maker will not have relied on all relevant evidence: 'This may happen because the fact-finding methods are deficient, the sheer volume and time for processing applications prevents any more than cursory fact-finding, or because applicants very often have not provided the full story. They may not have appreciated what factual material is relevant to and required for the decision. Also in many areas of decision-making, particularly in areas of volume decision-making, decisions are often made on the basis of information supplied in standard form documents'.¹⁵ Another factor is that primary decision-makers often do not

¹¹Rabie n 10 136 *ff.*

¹²One can hardly speak of an appeal in these circumstances. An example would be the Board of Investigation which the Minister of Environment Affairs must appoint in terms of the Environment Conservation Act 73 of 1989 to assist him in the evaluation of any appeal (s 15).

¹³Rabie n 10 139.

¹⁴*Cf* EARC Report n 9 para 5.51.

¹⁵EARC Report n 9 para 5.35.

possess adequate skills to test conflicting evidence and generally to ensure procedural fairness.

An appeal — even if it is aimed at a reconsideration of the merits — which would result in recommendations only, would be unsatisfactory for the following reasons:

- it would coincide with the functions of the ombudsman and, to some extent, with those of commissions of inquiry;
- no real external, independent control would be provided if the appeal body's findings are not binding;
- public faith in an appeal body cannot be established or maintained if it can make recommendations only, which recommendations may be rejected by the decision-maker.

If the appeal body should have the power to consider questions of law only, its function would be very similar to that of judicial review. This would not only render the body overly legalistic, but would result in unjustified duplication while the need of merits appeal would not be addressed. It would also be inappropriate to limit an administrative tribunal — which is not a court — to dealing only with questions of law.

APPEAL BODIES

As far as the appropriate appeal body is concerned, the following are some of the most important options that have been applied:

Courts of law

Supreme Court

The Supreme Court can be designated to hear appeals against specific decisions of administrative bodies. Some examples of such appeals exist in South Africa.¹⁶

Administrative Division of Supreme Court

An administrative division of the Supreme Court could be established as was done, for example, in New Zealand with the promulgation of the Judicature Amendment Act 1968, following on recommendations of the Public and Administrative Law Reform Committee in its First Report.¹⁷

Specialist courts

Specialist courts, equal in status to the Supreme Court, can be created to hear appeals against administrative actions related to particular fields. Australian

¹⁶Rabie n 10 129 ff.

¹⁷Appeals from Administrative Tribunals (1968) paras 35–40. It was also recommended in 1982 by the Law Reform Commission of Western Australia (Report on Review of Administrative Decisions. Part I — Appeals Project 26 (1982)). However, in 1992, the Royal Commission into Commercial Activities of Government and Other Matters in its Second Report recommended for Western Australia that a GAAT replace the proposed administrative law division of the Supreme Court.

examples of such a type of court are the Land and Environment Court of New South Wales¹⁸ and the Environment, Resources and Development Court of South Australia.¹⁹ A specialist court need not be created as a separate court, but can also be established as a division of an existing court. For instance, in Queensland, the Planning and Environment Court²⁰ has been established as a division of the District Court. The Labour Appeal Court²¹ and the Land Claims Court²² are South African examples of specialist courts.

Characteristics which favour courts as appropriate adjudicatory bodies are their established independence and prestige as well as their powers to enforce their decisions. However, the principal objections against conferring upon a court the power of reviewing administrative actions on their merits, are the following:

- The courts' legalistic approach is reflected inter alia in strict and formalistic procedural and evidentiary rules, rendering adjudication expensive, inflexible and time consuming and therefore relatively inaccessible to the average citizen.²³
- It goes beyond the traditional function and expertise of the judiciary and obliges a court to exercise an administrative function for which it is not uniquely qualified.²⁴ This feature is particularly troublesome where the review of government policy is concerned: Should the courts be bound by government policy then they are subordinated to the executive and that is unacceptable. It would be equally unacceptable should they be empowered to reject such policy and to substitute their own policy.²⁵
- It amounts to breaching the doctrine of the separation of powers and as a consequence the judiciary's reputation for impartiality may be compromised.²⁶

¹⁸Established by the Land and Environment Court Act 1979 (NSW).

¹⁹Established by the Environment, Resources and Development Court Act 1993 (SA).

²⁰Established by Local Government (Planning and Environment) Act 1990 (Qld).

²¹The court is for certain purposes deemed to be a division of the Supreme Court in terms of the Labour Relations Act 28 of 1956 (s 17(21A)(d)).

²²Restitution of Land Rights Act 22 of 1994.

²³These problems are sought to be overcome by the establishment of specialist courts, such as the New South Wales' Land and Environment Court, which do not rely upon the above strict rules.

²⁴*Cf Publications Control Board v William Heinemann Ltd* 1965 (4) SA 137 (A) 156 G-H. Again, specialist courts usually are composed of a panel which reflects some degree of appropriate expertise.

²⁵Taylor 'May judicial review become a backwater?' in Taggart (ed) n 2 153 170. Orr, in his minority view as regards the First Report of the Public and Administrative Law Reform Committee of New Zealand n 17 Appendix p 39, holds a similar view and contends that the courts' involvement in value judgments on policy matters will detract from their impartiality.

²⁶The South African Law Commission n 7 para 3.12.35, suggests that a general right of appeal against administrative decisions, to the Supreme Court would in any case overload the court.

Administrative appeals tribunals

Specialist administrative appeals tribunals

The most common technique for accommodating appeals against administrative decisions has been to establish specialist administrative appeals tribunals (SAAT). The usual reasons for resorting to a tribunal as an adjudication mechanism are the speed, informality, cheapness, accessibility and expertise which it can provide. By and large such tribunals have been created at different times, in isolation, and *ad hoc* as a response to a particular problem, or set of problems, without any underlying principles or an integrated plan. Their structure and powers depend mainly on the particular inclinations of the bodies responsible for their introduction at the time. In fact, no rational or consistently applied criteria exist according to which it is decided whether a right of appeal should be introduced. In the result, no coherent system can be discerned, obscurity, untidiness and arbitrariness being features of the system, if such it can be called. Moreover, this piecemeal and patchwork approach has tended to favour the proliferation of ad hoc specialist tribunals. This, basically, is the position prevailing in South Africa²⁷ and the following remarks made in the report of the Public and Administrative Law Reform Committee of New Zealand²⁸ in respect of the position prevailing in 1968 seem apposite to South Africa: '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.' A similar position prevailed in the UK before the promulgation of the Tribunals and Inquiries Act 1958 and in Australia (at federal level) before the establishment of the AAT in 1975. Evans²⁹ submits that unless existing South African tribunals cannot satisfactorily be adapted to the new constitutional and administrative regimes, continued reliance should be placed on the familiar, functioning structure. The South African Law Commission³⁰ has also recommended that in principle, the present system of administrative appeals should be retained.

It is submitted that the manifestly obvious shortcomings of uncoordinated pluralism which this fragmented approach involves, detract substantially from any proposal to adhere to the status quo. Moreover, its main advantage, being the specialist nature of the tribunals involved, is not a unique feature and can be shared also by a GAAT. Further remarks concerning specialist and general tribunals follow shortly.

Supervisory council on specialist tribunals

A further variant on the theme is exemplified by the creation of a supervisory

²⁷Rabie n 10 146-8; Baxter n 4 266.

²⁸n 17 Para 32(i).

²⁹n 2 66-07.

³⁰N 7 para 3.12.38.

body whose task it is to oversee the specialist tribunals in a consultative and advisory capacity, recommending inter alia the coordination and amalgamation of existing tribunals and the standardisation of procedures, where practicable. This is the model which obtains in the UK through the Council on Tribunals, established by the tribunals and Inquiries Act 1958 and consolidated in the tribunals and Inquiries Act 1971. Govender³¹ seems to favour this option for South Africa.

It was noted by the Kerr Report³² that the adoption of a similar approach to that of the UK 'would involve endorsement of the practice of having an ever growing body of specialist tribunals as the best system for the review on the merits of administrative decisions and adoption of the idea of setting up a supervisory council whose main task would be to review their constitution and working and to see that their procedures were fair and proper'.

However, concern has been expressed as regards the effectiveness of the British Council on Tribunals,³³ mainly on account thereof that it is ill equipped to fulfil its limited functions, and that it lacks a power base. It is a part-time body which operates on a shoestring budget.³⁴ The Council's weakness is demonstrated by its inability to achieve even the limited reforms which it has recommended. Its powers are only advisory and reliance must be placed upon the government for the implementation of its proposals - and it appears that too little attention is paid to its recommendations.³⁵ Furthermore, the Council has no statutory power to be consulted about the creation of new tribunals and therefore cannot effectively resist the trend towards further proliferation through the establishment of unnecessary new tribunals. Also, the Council is not empowered to survey those areas of decision-making which are currently not subject to appeal to a tribunal. This important task is accomplished in Australia by the Administrative Review Council.³⁶

The British experience with a supervisory body which exercises advisory functions only is not inspiring. It might be argued that the shortcomings are due not so much to the institution as such but to its defective implementation. Nevertheless, the British experience indicates that a mere advisory body is unlikely to succeed in having the necessary reforms effected. The conclusion of the Law Reform Committee of South Australia³⁷ is that this option might at the most be useful as a first step, while a more comprehensive system is

³¹N 7 87.

³²N 7 para 279.

³³See generally Harlow & Rawlings *Law and Administration* (1984, reprint 1988) ch 4; Wade n 3 920.

³⁴Harlow & Rawlings n 33 167-9.

³⁵*Cf* Administrative justice. Some necessary reforms. Report of the Committee of the JUSTICE — All Souls Review of the administrative law in the United Kingdom (1988) para 9.72.

³⁶Section 51(1)(a) and (b) of the Administrative Appeals Tribunal Act 1975 (Cth).

³⁷*Eighty-second Report relating to Administrative Appeals* (1984) p 15.

being implemented.

General administrative appeals tribunal

Finally, provision can be made for the establishment of a GAAT, along the lines of the Australian Commonwealth AAT. The creation of such a tribunal for South Africa is supported by Baxter,³⁸ Boule, Harris and Hoexter³⁹ and Viljoen.⁴⁰ The South African Law Commission,⁴¹ Evans⁴² and Govender⁴³ argue against such a tribunal, mainly on the grounds that its establishment would not be cost-effective nor practicable, having regard to the much larger scope and volume of work performed by existing tribunals.⁴⁴

General or specialist appeals tribunals: some comparative considerations

Before proceeding to a discussion of a GAAT, reference is made to some considerations which may be taken into account in assessing the respective advantages and disadvantages of SAATs and GAATs.⁴⁵ Ison⁴⁶ warns, however, that a universally valid conclusion should not be sought since the cogency of the relevant considerations is bound to vary from one subject area to another.

Expertise

One of the main reasons why appeals to administrative tribunals are favoured above appeals to courts of law, ie their expertise, has been relied upon to argue in favour of SAATs rather than a GAAT. It seems obvious, especially in complex, technical areas, that an appeal body should be constituted by experts who are able to grasp and evaluate the underlying issues. Moreover, it has been argued that it would make no sense and would be paradoxical if primary decision-making is specialised, but appeals are heard by a non-expert generalist body.⁴⁷

On the other hand, Taylor⁴⁸ contends that the argument implying that specialists must be reviewed by even more specialized persons is an aberration and that it does not apply in the bureaucracy itself: internal appeals, for instance, finally end up on the desk of 'that ultimate generalist', the Minister.

³⁸n 4 267-72.

³⁹*Constitutional and administrative law. Basic principles* (1989) 254.

⁴⁰South African Law Commission Report n 7 para 3.12.32.

⁴¹N 7 para 3.12.27.

⁴²N 2 66.

⁴³N 7 87.

⁴⁴These arguments were also raised by the Report of the Committee of the JUSTICE — All Souls Review n 35 para 9.77. For other, less persuasive, arguments see also the Report of the Committee on Administrative Tribunals and Enquiries, known as the Franks Report Cmnd 218/1957 paras 121-3 and the Report of the Public and Administrative Law Reform Committee of New Zealand n 17 paras 3-4.

⁴⁵The discussion relies mainly on the EARC Report, n 9 paras 3.78-139.

⁴⁶'Appeals on the merits' 1992 *Osgoode Hall Law Journal* 139, 153.

⁴⁷Ison 'The sovereignty of the judiciary' 1986 *Les Cahiers de Droit* 503, 508. This argument was also used by the Franks Report n 44 para 121 in its rejection of a GAAT.

⁴⁸N 25 169.

Review by super-specialists may tend to compartmentalise issues and to reveal idiosyncrasies, preconceptions and biases acquired in the very exercise of their expertise. A generalist perspective, on the other hand, is more conducive to gaining a broader perspective on a problem. It is necessary to balance the need for expertise with the need for sensitivity to general values ie 'the ability to relate a particular administrative decision to larger societal and governmental concerns'.⁴⁹

In any case, a GAAT need not be devoid of expertise. There are different ways of ensuring that appeals against specialist decisions are conducted by members of such a body who have the required expertise. This can be done, as in the AAT, through the establishment of sectoral divisions or through the appointment of specialist members even on a part-time basis, to the general tribunal who may then be allocated to hear appeals to which their expertise may relate.

Independence

SAATs seem to be more prone to the phenomenon of 'agency capture', ie the formation of symbiotic relationships between a control body and those subject to its control. Their independence may be threatened by their close attachment to line departments which impose subtle pressure through controls over the appointment of tribunal members and over budgets, as well as the provision or withholding of facilities and support services. For the members of a tribunal to be appointed by the very authority whose decisions are subject to adjudication by the tribunal inevitably undermines their independence, at least in the public's eye.

The immunity of a GAAT to these pressures is likely to be stronger by reason of its acknowledged stature and independence, its relationship with a central supervisory policy department (the Attorney-General's Department in the case of the AAT) and its closer association to the judiciary.

Status

It has been argued that a GAAT which provides access to the whole community is likely to have a more exalted stature than a group of SAATs. A related point is that a GAAT with greater stature and offering a greater variety and range of work will be more likely to attract a higher calibre of appointee than would a SAAT.

Procedure

Another major reason why administrative tribunals are favoured above courts of law has, ironically enough, served as the basis for criticism against a GAAT. In spite of legislative directives to the contrary, the AAT has been perceived as predominantly adversarial, formal and legalistic. Moreover, there is considerable pressure on a GAAT to adopt uniform procedures. A related

⁴⁹EARC Report n 9 para 3.113. Super-specialisation may be particularly counter-productive in relation to cases such as those pertaining to the environment, in which a multi-disciplinary approach is required.

concern is the dominance of the process by lawyers. It has been argued that SAATs are less likely to be subsumed or overawed by mainstream legal culture. SAATs seem to display a superior capacity to tailor their procedures to the subject area in question in order to suit the sensitivities and requirements of their clientele.

However, there is no inherent reason why a GAAT should not be able to adopt a style of dispute resolution that is appropriate to the nature of the individual dispute. In fact, the AAT has achieved considerable success in this regard, especially through the improvement of pre-hearing conferences and through the use of mediation, and the training of its members. Moreover, the contribution which legal culture can make to achieving justice and fairness — important goals in an appeal process — is well recognized.

Access

A GAAT is more likely to have the resources to provide services to regional centres and rural and remote areas than are SAATs which review a relatively low volume of decisions.⁵⁰ A SAAT will almost invariably be obliged to settle in an important urban centre.

Speed

Expert familiarity may enable a SAAT to deal more rapidly with appeals. Also, a GAAT may find it difficult to operate at differing speeds in relation to different subjects. However, much depends on the subject area involved. For instance, if a particular case is one that involves overlaps between systems, Ison⁵¹ feels that a GAAT may be able to deal with it more promptly.

Cost

It seems reasonable to assume that a rationalisation of services and the consolidation of resources, such as can be achieved through a GAAT, should result in the reduction of expenditure. However, Ison⁵² again points out that a satisfactory assessment of this matter can be made only after an intensive and empirical study of the particular subject area involved 'and not by any attempt to develop and then extrapolate from any general principles for the design of appellate structures'.⁵³

Comprehensiveness

A GAAT can serve as a vehicle to accommodate the expansion of appeal jurisdiction by having decisions previously not susceptible of merits review, subjected to its jurisdiction, as and when this is deemed appropriate. It thus provides a residuary tribunal for appeals against administrative decisions for which currently no SAATs exist. A countervailing approach would have to rely upon the establishment of yet more SAATs, if the decision in question cannot satisfactorily be incorporated in the jurisdiction of an existing SAAT.

⁵⁰EARC Report n 9 para 3.11.9.

⁵¹*The Administrative Appeals Tribunal of Australia* (1989) 66.

⁵²N 51 67.

⁵³See also EARC Report n 9 para 3.12503.132.

Another important factor is that the search for criteria to guide the selection of decisions suitable for merits review has been stimulated only with the establishment of a GAAT. Little or no effort has been made to search for such criteria where individual SAATs have been created.

THE AUSTRALIAN COMMONWEALTH ADMINISTRATIVE APPEALS TRIBUNAL

Introduction

The most innovative and far-reaching development in respect of a GAAT occurred in Australia. Following on the promulgation of the United Kingdom Tribunal and Inquiries Act 1958, the Administrative Review Committee was established in 1968 with one of its terms of reference having been to consider the desirability of introducing similar legislation in Australia. The investigation undertaken by this committee led to the Report of the Commonwealth Administrative Review Committee,⁵⁴ known as the Kerr Report, while further investigations by another committee resulted in the Final Report of the Committee on Administrative Discretions,⁵⁵ known as the Bland Report. These Reports⁵⁶ led to major administrative-law reforms at Federal level, collectively known as 'the new administrative law'.

The first component of these reforms is the Commonwealth Administrative Appeals Tribunal (the 'AAT' or the 'Tribunal'). The tribunal — for which there was no precedent in the common-law world — is entirely the creature of statute, the Administrative Appeals Tribunal Act 1975 (Cth) (AAT Act). Other statutes comprising the above reform package deal with the establishment of an Ombudsman,⁵⁷ the revamping of judicial review⁵⁸ and freedom of information,⁵⁹ besides the setting up of an Administrative Review Council.⁶⁰

At State level, GAATs along the same lines as the Commonwealth AAT have been created in Victoria, by the Administrative Appeals Tribunal Act 1984 and the Australian Capital Territory, by the Administrative Appeals Tribunal Act 1989. These tribunals have also been designed to serve as mechanisms whereby the growth of SAATs can be limited and the scope of merits review expanded. Moreover, after a comprehensive survey, the Queensland Electoral and Administrative Review Commission has also proposed the creation of a new merits review body, to be called the Queensland Independent Commission for Administrative Review. This body is to replace most existing

⁵⁴Parliamentary Paper 114/1971, n 7.

⁵⁵Parliamentary Paper 316/1973.

⁵⁶A third report, the *Report of the Committee on Review of Prerogative Writ Procedures*, 1973 (the Ellicot Report) also addressed issues pertaining to administrative-law reform, but did not deal with administrative appeals.

⁵⁷The Ombudsman Act 1976 (Cth).

⁵⁸The Administrative Decisions (Judicial Review) Act 1977 (Cth).

⁵⁹The Freedom of Information Act 1982 (Cth).

⁶⁰By the Administrative Appeals Tribunal Act 1975 (Cth).

tribunals.⁶¹ A similar conclusion was previously reached by the Law Reform Commission of New South Wales,⁶² the Law Reform Committee of South Australia⁶³ and the Northern Territory Law Reform Committee.⁶⁴

Administrative decisions subject to merits review

Jurisdiction

The AAT may review only such administrative decisions made in terms of Commonwealth legislation which are specifically rendered reviewable, either by the AAT Act or by the specific legislation which is the subject of the review. In other words, unlike the courts, it has no general supervisory role as regards the Commonwealth administration, although its powers in respect of decisions which it can review, substantially exceed the courts' power of judicial review. The AAT took over the jurisdiction of tribunals which it superseded, but most of its jurisdiction is novel and is gradually expanding. Whereas the schedule to the AAT Act initially contained only 25 statutes, there are currently approximately 250 statutes which confer jurisdiction on the AAT. This jurisdiction is broad and varied and includes areas such as social security, veterans entitlements, employees compensation, taxation, customs, deportation, civil aviation, freedom of information, bankruptcy, student assistance, corporations, export market development grants and environmental matters.⁶⁵ Although jurisdiction has been conferred on the tribunal under a large number of statutes, its overwhelming case load falls within only a few subject matters. More than 90 per cent of finalised applications during 1992-1993⁶⁶ related to employment and retirement benefits,⁶⁷ social welfare (social security and veterans' entitlements)⁶⁸ and taxation.⁶⁹

Since the tribunal's jurisdiction relates to decisions, it is important to note that 'decision' is defined comprehensively in the AAT Act.⁷⁰

⁶¹N 9 ch 3.

⁶²*Report on Appeals in Administration* LRC 16 (1973).

⁶³*Eighty-Second Report, relating to Administrative Appeals* (1984).

⁶⁴*Report on Appeals from Administrative Decisions* (1991).

⁶⁵A full list of statutes under which decisions may be made that are subject to review is contained in a schedule to the Annual Reports of the AAT.

⁶⁶*Annual Report of the Administrative Appeals Tribunal 1992-93* Appendix 9.

⁶⁷17 per cent.

⁶⁸47 per cent.

⁶⁹30 per cent.

⁷⁰Section 3(3). It includes the

- making, suspending, revoking or refusing to make an order or determination;
- giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
- issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
- imposing a condition or restriction;
- making a declaration, demand or requirement;
- retaining, or refusing to deliver up, an article; and

In addition to the AAT's jurisdiction being limited to reviewing only those decisions which Parliament permits it to review, its jurisdiction may also be limited by the requirement in legislation of a mandatory internal review as a precondition. Moreover, the tribunal's jurisdiction is in general also limited by such legislative constraints as may have been imposed upon the primary decision-maker whose decision it reviews and in whose shoes it steps.

In accordance with the recommendations of both the Kerr Committee⁷¹ and the Bland Committee,⁷² the AAT was designed to stem the familiar tendency to establish specialist tribunals and to transfer jurisdiction from existing specialised tribunals to itself.⁷³ The fundamental purpose of the creation of the AAT was to centralise the review functions of these bodies in a single body with a view to providing effective and independent control by a unified body which could also ensure some degree of consistency of review standards.

A further aim was to create a vehicle for the extension of review powers: powers under existing and new legislation were to be scrutinised with a view to determining whether there should be appeals to the AAT against decisions made in the exercise of those powers. Jurisdiction was accordingly conferred on the AAT in areas where there had never been review on the merits.

Criteria to guide the selection of decisions suitable for merits review

An important question of justiciability which has received rather scant

– doing or refusing to do any other act or thing.

This definition embraces almost any administratively relevant activity that can be imagined. Moreover, the Federal Court has held that even though a decision purported to have been made in the exercise of statutory powers was in fact unauthorised by law, it was nevertheless a 'decision' within the meaning of the AAT Act which the tribunal was authorised to review. (*Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* (1979) 41 FLR 338.)

The definition of 'decision' in the AAT Act cannot determine definitively the meaning of the word 'decision'; it has an ambulatory character and 'it must take its colour and content from the enactment which is the source of the decision itself'. (*Director-General of Social Services v Hales* (1983) 47 ALR 281 305-6.)

⁷¹N 7 para 280.

⁷²N 55 para 123.

⁷³This aim was achieved through the conferral on the AAT of compensation jurisdiction, formerly exercised by the Commonwealth Employees Compensation Tribunal, veterans jurisdiction, previously exercised by the Repatriation Review Tribunal and taxation jurisdiction, formerly exercised by the Taxation Boards of Review. It is ironic that since the creation of the AAT a new tendency towards the gradual proliferation of specialist tribunals at Commonwealth level — some of them admittedly involving two-tier review — has again been discernible. The following tribunals have thus been introduced: the Social Security Appeals Tribunal, the Student Assistance Review Tribunal, the Veterans Review Board, the National Native Titles Tribunal, the Securities Appeals Tribunal, Nursing Homes Review Panels, the Immigration Review Tribunal and the Refugee Review Tribunal.

attention in academic literature,⁷⁴ is the suitability of decisions for appeal, ie the factors or criteria which should be taken into account in considering which decisions should be subject to merits review (appeal).

The matter was raised by the Kerr Committee, which found it impossible itself to examine all the discretions conferred on administrative bodies — even if only at Commonwealth level — with a view to considering the desirability of subjecting their exercise to a right of appeal.⁷⁵ Resolving this matter will be a matter of government policy⁷⁶ but the Committee expected that the area in which it should be permitted would be large and that administrators themselves would appreciate the desirability and the advantages of such an extensive area.⁷⁷

The Bland Committee did not propose any criteria which may assist in deciding which decisions should qualify for merits review, but merely listed some decisions which it deemed appropriate for such review.⁷⁸

With the eventual enactment of the AAT Act a schedule was included which set out the administrative decisions subject to merits review. This schedule was based partly on the recommendations of the Bland Committee, but came into being as a result of a rather hurried and uncoordinated process.⁷⁹ Subsequent additions to the tribunal's jurisdiction have been made on a pragmatic basis, not in the AAT Act's schedule but rather in the legislation in terms of which the decision subject to review is made. The tribunal's jurisdiction thus is the result of a somewhat haphazard process, not supported by principles upon which the identification of those classes of decisions suitable for merits review should be made.

In accordance with the recommendations of the Kerr Committee,⁸⁰ the AAT Act,⁸¹ commissioned the Administrative Review Council with the task of recommending which decisions should be the subject of merits review. The Council has accordingly been engaged in a process of developing guidelines for determining whether the exercise of a decision-making power is appropriate for external merits review.⁸²

⁷⁴For useful contributions, see Ison n 46 144–5 O'Brien 'What decisions are suitable for review?' 1989 *Canberra Bulletin of Public Administration* 86, 91–2; Harris 'There's a new tribunal now'. Review of the merits and the general administrative appeal tribunal model' in Harris & Waye (eds) *Australian studies in administrative law* (1991) 181, 196–8.

⁷⁵N 7 para 283.

⁷⁶N 7 para 225.

⁷⁷N 7 para 360.

⁷⁸N 55 Appendices H and L.

⁷⁹Curtis n 1 4.

⁸⁰N 7 para 360.

⁸¹Section 51(1) (a) and (b).

⁸²The Council's guidelines were initially published in its *Eighth Annual Report 1983–4* and thereafter updated in its *Eleventh Annual Report 1986–87*; the latest consolidated and updated version appears in the Council's *Seventeenth Annual Report 1992–93*, ch 7.

The other major contribution to the development of criteria to be used in selecting the types of decisions which are suitable for merits review, has been rendered by the Queensland Electoral and Administrative Review Commission.⁸³ Proceeding from the basis that not all decisions are appropriate for merits review,⁸⁴ the Commission emphasized the need for criteria: 'To avoid having decisions for merits review being selected at random, or based on the whim of agencies or as the result of lobbying of interest groups, it is essential that there be developed guidelines for selecting the types of decisions for merits review.'⁸⁵ The Commission recommended that the suggested criteria should not themselves be included in legislation to govern tribunal determinations as to which decisions are subject to review: rather, they should be used as guidelines to legislators in order to identify individual decisions which should be subject to merits review.⁸⁶ These decisions could then either

- be specified in each statute in terms of which the decision subject to review is made (as is the case with the commonwealth, Victorian and ACT AATs) or
- be incorporated in the statute which regulates and governs the appeal tribunal in question (as with the New South Wales Land and Environment Court Act 1979 (NSW) and as was initially the case with the AAT Act).

It is not possible within the confines of this article to discuss or even mention the variety of guidelines that have been proposed to determine the appropriateness of issues for merits review. Suffice it to state that they amount mainly to qualifications and exceptions to the basic or *prima facie* criterion that the administrative decision in question will, or is likely to, affect the interests of a person.

Tribunal composition

The composition of the tribunal is deliberately varied to cater for its diverse jurisdiction. It is comprised of a President (Judge of the Federal Court), Presidential Members (Judges of the Federal or Family Courts), Senior Members (persons who hold either legal or other special qualifications) and Members (persons who hold expertise or special skills within the areas of the tribunal's jurisdiction).

Hearings are conducted either by a one member or a three member tribunal. Three member tribunals are generally used to employ the expertise of members. In some cases the constitution of the tribunal is provided for in the enactment by virtue of which the decision under review was made.

In constituting the tribunal the following factors are taken into account

⁸³EARC Report n 9 ch 6.

⁸⁴N 9 paras 6.111-6.116.

⁸⁵N 9 para 6.117.

⁸⁶N 7 paras 6.9-6.37.

- the nature and circumstances of the case;
- the importance of the case to the parties and to the public;
- whether there are difficult or novel questions of law or fact involved;
- the availability of suitable members; and
- the status of the maker of the decision under review.

The Kerr Committee⁸⁷ had recommended that an officer of the governmental body responsible for administering the decision under review should also serve as a member of the tribunal. However, this recommendation was rejected by the Bland Committee⁸⁸ and was not followed in the AAT Act. This exclusion, according to Gardiner⁸⁹ is likely to result in the absence of intra-bureaucratic expertise in the AAT and the consequent loss of balance in according recognition to the administration's interests, but it does serve to strengthen the independent status of the tribunal.

The most controversial aspect of the composition of the AAT is the fact that judges serve on it. Apart from the question whether their involvement in adjudicating upon government policy and other politically sensitive or controversial matters, will reflect adversely on their prestige and impartiality,⁹⁰ the principal objection as far as the AAT is concerned is that a judicial involvement will lead to an over-judicialisation of the tribunal's proceedings. However, Harris⁹¹ contends that judicial skills are indispensable for the satisfactory functioning of the tribunal. These skills are listed by him as the suppression of personal idiosyncrasy; the ability to analyse and to identify cognate principles; industry in the quest for principles; a capacity to reason analogically; highly-developed fact-finding and fact-evaluative skills, sifting the relevant from the irrelevant and making rational inferences.⁹²

The AAT is internally arranged into three divisions ie

- a General Division, which includes matters pertaining to compensation, customs, social security and other subjects such as the environment;
- a Veterans' Division; and

⁸⁷N 7 para 292.

⁸⁸N 55 para 148. The Committee argued that it would lead to an awkward situation if a junior officer were to be sitting in judgment of his or her superior and that it was questionable whether a member of the tribunal should adjudicate upon a decision of his or her own department: para 149.

⁸⁹Policy review reviewed: the pubescent state of the "new" administrative law' 1988 *Queensland University of Technology Law Journal* 123 137.

⁹⁰Harris n 74 192-4.

⁹¹N 74 194-5.

⁹²N 74 195 206.

• a Taxation Division.⁹³

The creation of specialist divisions within the AAT is aimed at facilitating and entrenching the allocation of appropriate expertise amongst the tribunal membership to hear particular types of cases and the development of procedures which are suited to particular types of cases.⁹⁴ On the other hand, a divisional structure may inhibit the AAT's flexibility, especially as regards its geographical dispersion. Moreover, although a divisional structure may promote consistency of decision-making within a division, it may lead to a lack of coherency across divisions.⁹⁵

Making an application

Proceedings in the tribunal are commenced by the lodgment of a written application which must identify the decision sought to be reviewed and must set out the reasons for the application.⁹⁶ There are no requirements as to the degree of particularity or precision with which the above application and reasons must be stated and there are no pleadings by which the issues are defined. Nor does the AAT Act provide guidance on the nature or grounds of review. Barring any legislative provision to the contrary, an applicant is not restricted to relying upon issues which were before the original decision-maker or to the reasons stated by him in his application for review.⁹⁷

Obligation of decision-maker

The administrative decision-maker is then notified of the dispute⁹⁸ and is obliged within 28 days after receiving notice of the application to lodge with the tribunal a statement setting out the findings on material questions of facts, together with the evidence or other material on which those findings were based and the reasons for his or her decision.⁹⁹ Such facts and reasons may also be obtained by anyone who is entitled to apply for review, irrespective of whether an application for review is in fact made.¹⁰⁰ The reasons must be complete and intelligible to a layman¹⁰¹ and a discretion is conferred on the

⁹³The divisional structure originally contemplated by the AAT Act, ie a General Administrative Division, a Medical Appeals Division and a Valuation and Compensation Division, has not in fact operated.

⁹⁴Disney 'The way ahead for tribunals?' in Creyke (ed) *Administrative tribunals: taking stock* (1992) 121-128.

⁹⁵*Constitution of the Administrative Appeals Tribunal* Administrative Review Council Report no 29 (1987) paras 84 and 85.

⁹⁶Section 29(1).

⁹⁷*Re Greenbam and Minister for the Capital Territory* (1979) 2 ALD 137; *Re Metberall and Minister for the Capital Territory* (1979) 2 ALD 246.

⁹⁸Section 29(11).

⁹⁹Section 37(1)(a). Provision is also made for further relevant documents to be submitted: ss 37(1)(b) and 37(2). Cf Tomasic & Fleming *Australian administrative law* (1991) 57-8 for situations where reasons need not be made available.

¹⁰⁰Section 28(1).

¹⁰¹*Re Palmer and Minister for the Capital Territory* (No 2) (1979) 2 ALD 337.

tribunal to order elaboration of the reasons and supporting material lodged with it.¹⁰² The administrative decision-maker may support his or her decision with reasons other than those upon which its decision was based at the time when the decision was made.¹⁰³

The requirement to give reasons for decisions — which is encountered also in the AD(JR) Act 1977¹⁰⁴ — has been described as effecting a 'quiet revolution': 'The Act lowered a narrow bridge over the moat of executive silence ...'¹⁰⁵ The significance of the provisions which postulate the statement of reasons is reflected in the foundation which such reasons provide for the effective invocation of a right of appeal and in 'the psychological conditioning of administrators whose vigilance is likely to be increased by awareness that their reasoning is liable to be subject to critical scrutiny.'¹⁰⁶

Discontinuance and dismissal of applications

The following are among the circumstances in which an application may be dismissed:

- failure of a party to appear at the hearing;
- where an applicant notifies the tribunal that an application is discontinued or withdrawn;¹⁰⁷
- where all parties to an application consent to dismissal;
- where an applicant fails within a reasonable time to proceed with an application or to comply with a direction by the tribunal; and
- where the tribunal is satisfied that an application is frivolous or vexatious.¹⁰⁸

Conferences

When an application is made to the AAT, the President may direct that a conference of the parties and their representatives, if any, be held. This conference is presided over by a member or officer of the tribunal¹⁰⁹ and unless the parties otherwise agree, no disclosure of evidence and statements submitted at the conference may be made at the subsequent hearing before

¹⁰²Section 38.

¹⁰³*Re Jeans and Secretary, Department of Housing and Construction* (1979) 2 ALD 337.

¹⁰⁴Section 13.

¹⁰⁵*Minister for Immigration and Ethnic Affairs v Pochi* (1980) 31 ALR 666, 685–6.

¹⁰⁶Peiris 'The Administrative Appeals Tribunal of Australia: the first decade' 1986 *Legal Studies* 303–319.

¹⁰⁷*Re Queensland Nickel Management (Pty) Ltd and Great Barrier Reef Marine Park Authority* (1992) 16 AAR 319.

¹⁰⁸*Cf* ss 42A and 42B.

¹⁰⁹Section 34(1).

the tribunal.¹¹⁰ Provision is also made for objections to the participation in the subsequent hearing of presiding members of the tribunal.¹¹¹ The effect of these provisions is that the parties' privacy is respected and since the contents of the conference may not become part of any later hearing process,¹¹² parties would presumably be more willing to participate fully in the conference.

The inherent flexibility of the entire process allows the person presiding at the conference to structure the conference according to the prevailing circumstances. Complex matters may require more than one conference. Pre-hearing conferences provide parties with an opportunity to resolve their disputes by methods which do not involve a public hearing. They can discuss the real issues face to face or even over the telephone. Good opportunities for negotiated settlements accordingly arise. Should the parties reach an agreement during a conference or, in fact, at any stage of a proceeding for review, such agreement may be given effect to by the tribunal, provided the agreement is within its powers.¹¹³

On the other hand, a conference can serve as a means of defining and clarifying issues in dispute, thereby ensuring that the essential elements of the dispute are identified and that the parties are ready to proceed to a hearing. Although the conference seems initially to have been conceived as a means of thus facilitating the hearing, the emphasis is now on its employment as a mechanism for reaching a settlement, thereby avoiding the necessity of a hearing.

Mediation

Following a successful pilot mediation programme, organised by a consultant, the necessary legislative framework was put in place in 1993. Thereby mediation was introduced as an optional alternative dispute resolution procedure, to be put before the parties at the preliminary conference.¹¹⁴ The recommendations of the consultant's report were largely accommodated ie

- participation to be voluntary;
- the process to be confidential;
- selection of cases on the basis of suitability;
- suitable training and accreditation of Tribunal mediators; and

¹¹⁰Section 34(3).

¹¹¹Section 34(4).

¹¹²Section 34(3).

¹¹³Section 42C.

¹¹⁴Section 34A.

- ongoing evaluation of the mediation process.¹¹⁵

If mediation is successful then either a discontinuance and dismissal of the application¹¹⁶ will follow, or the tribunal may give effect to the terms of the mediated agreement without holding a hearing.¹¹⁷

Should the mediation fail, the matter will proceed to a hearing, but mediators are debarred from participating in any proceedings which they have mediated,¹¹⁸ thereby protecting the confidentiality of the mediation process. Confidentiality is further protected by strict rules relating to the admissibility as evidence of anything said or done at a mediation.¹¹⁹

Some difficulties associated with mediation are that neither Tribunal members nor the parties or their representatives are generally trained in mediation¹²⁰ and that mediation is too much moulded in a legal culture.¹²¹

Hearing

Standing

Any person whose interests are affected by the decision concerned has standing to lodge an application to the tribunal.¹²² Moreover, an organisation or association of persons, whether incorporated or not, is presumed to have interests that are affected by a decision if the decision relates to a matter included in the objects of the organisation or association.¹²³ This provision, nevertheless, does not apply in relation to a decision given before the organisation or association was formed or before its objects included the matter concerned.¹²⁴ This means that if an organisation that wishes to lodge an application, or to seek joinder¹²⁵ has amongst its objects a goal statement that is related to a reviewable decision, the organisation will have standing.

In order to qualify for standing it is not necessary for a person to be able to challenge the decision under review in a court of law, but the phrase 'affected interests' denotes 'interests which a person has other than as a member of the general public and other than as a person merely holding a belief that a

¹¹⁵Mill 'Mediation of environmental disputes by the Administrative Appeals Tribunal' 1993 *Queensland Law Society Journal* 413 417.

¹¹⁶In term of s 42A.

¹¹⁷Section 34A(5) and (6).

¹¹⁸Section 34A(8).

¹¹⁹Section 34A(7).

¹²⁰De Maria 'Mediation and adjudication: friends or foes at the Administrative Appeals Tribunal' 1991 *Federal Law Review* 276 278.

¹²¹De Maria n 120 283.

¹²²Section 27(1).

¹²³Section 27(2).

¹²⁴Section 27(3).

¹²⁵In terms of s 30(1A). The tribunal may, upon application by a party whose interests are affected by a decision, in its discretion effect the joinder of that party.

particular type of conduct should be prevented or a particular law observed'.¹²⁶ Decisions as to whether a person's interests are affected by an administrative decision are made by the tribunal, whose finding is final.¹²⁷

Public access

Hearings are in public, except where the tribunal in its discretion orders otherwise¹²⁸ or where the legislation under which the primary decision is made requires a private hearing.

Representation

A party may appear in person or be represented by some other person who need not be a lawyer.¹²⁹

Presentation of case

The tribunal must ensure that every party to the proceedings is given a reasonable opportunity to present his case, to inspect relevant documents and to make submissions in respect of such documents.¹³⁰ This statutory obligation embodies the core of the rules of natural justice, which the common law would in any event imply.¹³¹

Burden of persuasion

The AAT Act does not impose a burden of proof on the applicant to show that the administrator's decision was erroneous, nor is there an onus upon the administrator to prove that his decision was right.¹³² This is also in keeping with the tribunal's investigative powers and with the AAT Act's provision that the tribunal is not bound by the rules of evidence,¹³³ to which the onus of proof belongs.

However, the Act in terms of which the decision under review was made may allocate a burden of persuasion. Where the tribunal, at the end of the case, is unpersuaded one way or the other, there will of necessity be a burden of persuasion to resolve which will probably be implied in the nature of the proceedings.¹³⁴ Such a burden 'is really no more than that 'as a matter of common sense' ... he who asserts, or he who seeks a result, must prove'.¹³⁵

¹²⁶*Re Control Investment Pty Ltd and Australian Broadcasting Tribunal (no 1)* (1980) 3 ALD 74, 79.

¹²⁷Section 31.

¹²⁸Section 35.

¹²⁹Section 32.

¹³⁰Section 39.

¹³¹*Sullivan v Department of Transport* (1978) 20 ALR 323, 342.

¹³²*Re Ladybird Children's Wear Pty Ltd and the Department of Business and Consumer Affairs* (1976) 1 ALD 15; *McDonald v Director-General of Social Security* (1984) 6 ALD 6 10-11.

¹³³Section 33(1)(c).

¹³⁴*Minister for Health v Thompson* (1985) 60 ALR 701, 712.

¹³⁵*Re Holbrook and Australian Postal Commission* (1983) 5 ALN No 35 N47.

The standard of proof is on a balance of probabilities.¹³⁶

Procedure and evidence

Procedure

The procedure of the tribunal is largely within its own discretion¹³⁷ and provision is made for the holding of a directions hearing and the giving of directions in relation to proceedings.¹³⁸

Proceedings are to be conducted with as little formality and technicality and with as much expedition as the circumstances and any relevant legislative requirements permit.¹³⁹ A considerable degree of procedural flexibility and informality is permitted, leaving the AAT free to adapt its procedures to the circumstances of each case. This is also in line with the widely divergent jurisdiction conferred upon the tribunal. It is important to note that the relevant provision of the AAT Act does not demand an absence of formality and technicality. 'It is a balancing provision, directing a degree of formality and technicality which is appropriate in the particular case.'¹⁴⁰

The experience of the tribunal has been that, given the wide variety of issues which arise for decision, there is no one level of formality or informality which is appropriate for all cases.¹⁴¹ The tribunal in effect varies the degree of formality according to the approach adopted by the parties and the nature and importance of the issues involved. To some extent the parties are allowed themselves to establish the degree of formality with which a hearing will be conducted. For instance, less formal proceedings are usually adopted if the applicant is unrepresented.¹⁴² The considerable degree of flexibility which the AAT Act allows has enabled the tribunal to explore new mechanisms for facilitating the expeditious and less costly resolution of disputes. Where circumstances permit, use has, for instance, been made of teleconference and telephone hearings.

Evidence

The tribunal is not bound by the rules of evidence; pleadings form no part of the tribunal's procedure¹⁴³ and it may inform itself on any matter in such

¹³⁶*Re Letts and Secretary to the Department of Social Security* (1984) 7 ALD 1,4; *Minister for Immigration and Ethnic Affairs v Pochbi*: (1980) 4 ALD 139, 160.

¹³⁷Section 33(1)(a).

¹³⁸Sections 33(1A), (2), (2A) and (4).

¹³⁹Section 33(1)(b). See generally Gill 'Formality and informality in the Administrative Appeals Tribunal' 1989 *Canberra Bulletin of Public Administration* 133.

¹⁴⁰Balmford 'The life of the Administrative Appeals Tribunal — Logic or experience?' in Creyke (ed) n 94 50 64.

¹⁴¹*Re Hennessy and Secretary, Department of Social Security* (1985) 7 ALN N113, N117.

¹⁴²Budgen 'Administrative law, tribunal review and the public benefit' in McMillan (ed) *Administrative law: does the public benefit?* (1992) 122 126.

¹⁴³*Re Greenham* n 97.

manner as it considers appropriate,¹⁴⁴ subject to the requirement of 'substantial justice'.¹⁴⁵ Provision is made for allowing the participation of persons in directions hearings, conferences or mediation by telephone, closed-circuit television or other means of communication.¹⁴⁶ The AAT may summon any person to give evidence and to produce documents.¹⁴⁷ The tribunal thus may take an active part in directing or suggesting evidence to be called or even in calling evidence itself. In fact, where the evidence before the AAT is unsatisfactory, the tribunal has a responsibility to seek such further evidence which may be required to reach the right and proper decision.¹⁴⁸ The tribunal is free to take into account, not only material in existence at the date of the decision in dispute but not considered by the decision-maker, but also material which has come into existence since the date of that decision.¹⁴⁹

Although the tribunal is not bound by the rules of evidence and regularly accepts evidence (eg hearsay) which is legally inadmissible, it will not be justified to rely upon evidence which has no rational probative force.¹⁵⁰ The tribunal still works within the broad framework of rules which have been developed in the context of courts of law, but such rules are applied with a flexible touch.¹⁵¹ Nevertheless, the tribunal may itself choose the circumstances in which it may wish to depart from or resort to the rules of evidence.¹⁵² That choice, it seems, will be determined, inter alia, by the subject matter of the review, whether or not the parties are legally represented and generally upon the form which the hearing assumes.¹⁵³ There is no restriction with regard to matters which may be addressed by the tribunal in the exercise of its jurisdiction.¹⁵⁴

An adversarial or inquisitorial process?

(a) Introduction

An inquisitorial approach is characterised by an active role by the decision-maker in determining the course of evidence-gathering and in eliciting information. By way of contrast, an adversarial process relies upon the contending parties for the presentation of evidence and information, the decision-maker's role being limited to that of an umpire.

¹⁴⁴Section 33(1)(c).

¹⁴⁵*Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 33 41.

¹⁴⁶Section 35 A.

¹⁴⁷Section 40.

¹⁴⁸*Adamou v Director-General of Social Security* (1985) 7 ALN N203 N207.

¹⁴⁹*Re Repatriation Commission and McCartney* (1986) 9 ALD 441 449.

¹⁵⁰*Re Pochi* n 145 41.

¹⁵¹Kneebone 'The Administrative Appeals Tribunal as a fact-finding body' in McMillan (ed) n 142 400 401.

¹⁵²Todd 'Administrative review procedure before the Administrative Appeals Tribunal — a fresh approach to dispute resolution Part II' 1981 *Federal Law Review* 95 106.

¹⁵³See generally Todd n 152 95-107.

¹⁵⁴*Re Kuswadama and Minister for Immigration and Ethnic Affairs* (1981) 35 ALR 186.

An appeal tribunal belongs to the system of administration because it performs the same administrative function as the primary decision-maker. It may nevertheless also be viewed as part of a system of adjudication and accordingly of the machinery of justice.¹⁵⁵ This latter consideration has led to its having been dominated by lawyers and the judicial paradigm with its emphasis on an adversarial approach has exerted a dominant influence on proceedings. This has happened in spite of the AAT Act which contains several provisions which clearly provide for the application of inquisitorial techniques and of the Federal Court's instruction that the tribunal must at all times be ready to intervene in the proceedings before it.¹⁵⁶ It is also worth noting that the Bland Committee recommended that since the tribunal should function as part of the administrative process, the investigative or inquisitorial process would in most cases be more appropriate.¹⁵⁷ It accordingly also recommended that the chairmen of the tribunal, although legally qualified, should not be judges who would be addicted to the adversary process.¹⁵⁸

Actually, inquisitorial and adversarial features are almost evenly represented in the provisions of the AAT Act,¹⁵⁹ but, as Allars¹⁶⁰ indicates, the Act gives little express guidance on how a clash between these different approaches should be resolved in the application of the provisions concerned. It is the task of the tribunal in individual cases to effect the appropriate balance between the adversarial and inquisitorial approaches. Since in most cases the applicant is legally represented, the balance would tend to favour an emphasis upon adversarial features.¹⁶¹ In fact, the AAT process as it has developed has been described by Ison¹⁶² as being 'almost indistinguishable from the adversary system in the ordinary courts'. Allars¹⁶³ nevertheless contends that a less adversarial procedure could be employed, at least at the stage of the preliminary conference. Since the tribunal's senior appointments come from the legal profession and legal representation of parties is the rule rather than the exception, it is almost unavoidable that a legalistic approach and mode of operation will be adopted. The judicial paradigm is reflected in the hearing process resembling a court process, although it is more simplified and informal. The procedure that is adopted is essentially adversarial and Tribunal reasons resemble regular judgments of the courts. Tribunals, although not

¹⁵⁵According to the *Report of the Review of the Administrative Appeals Tribunal* Administrative Appeals Tribunal (1991) para 2.18 the AAT is a quasi-judicial body.

¹⁵⁶*Re Kuswardana* n 154; *Minister for Health v Chavid Pty Ltd* (1986) 10 ALD 124.

¹⁵⁷N 55 para 172(j).

¹⁵⁸N 55 para 136.

¹⁵⁹Allars 'Administrative law. Neutrality, the judicial paradigm and tribunal procedure' 1991 *Sydney Law Review* 377 410.

¹⁶⁰*Ibid.*

¹⁶¹Allars n 159 411.

¹⁶²N 51 16.

¹⁶³N 159 411.

twins of the courts, have been described as siblings.¹⁶⁴ For all its potential advantages, the tribunal remains primarily adversarial in its operation.¹⁶⁵

(b) Shortcomings of the adversarial process and advantages of an inquisitorial approach

- An adversarial process tends to reinforce the inequality of the parties, especially in the case of unrepresented applicants. Even if an individual is represented, there remains an inequality of resources since the administrative body has the full power of the State at its disposal.¹⁶⁶ An equitable result in terms of the adversarial system is ideally attainable only where the respective parties are on an equal footing and have the same access to resources.
- Adversariness is conducive of a confrontational atmosphere, where one party wins and the other loses.
- Adversarial procedures can confuse and intimidate witnesses and expose only such evidence that is confined to witnesses' responses to questions. Moreover, the demand is often made that the witness answer the question 'yes or no', with no explanation.¹⁶⁷
- The administrative body involved in a dispute is not — or at least should not be regarded as — an adversary.¹⁶⁸ Since the tribunal aims at arriving at the correct or preferable decision, this should also be the concern of the administrative body whose decision is under review.¹⁶⁹
- An adversarial procedure tends to be more prone to excessive formality and legalism, which, in turn may lead to delay, excessive cost and an over-technical approach.¹⁷⁰
- One of the most serious disadvantages of a reliance upon adversarial techniques is that it has resulted in proper evidence concerning the public interest being neglected or not at all articulated; even worse, it has at times been deliberately suppressed.¹⁷¹ An adversarial approach relies upon the skills and resources of the respective parties to provide the necessary evidence for the resolution of the dispute in question. However, there is no

¹⁶⁴Esparraga 'Procedure in the Administrative Appeals Tribunal' in McMillan (ed) n 142 396.

¹⁶⁵Sandford 'Environmental dispute resolution in Tasmania: alternatives for appeals systems' 1990 *Environmental and Planning Law Journal* 19 21.

¹⁶⁶Dwyer 'Overcoming the adversarial bias in tribunal procedures' (1991) 20 *Federal Law Review* 252 256-7.

¹⁶⁷Dwyer n 166 260.

¹⁶⁸Cf *McDonald v Director-General of Social Security* (1984) 6 ALD 6 19.

¹⁶⁹Curtis 'Crossing the frontier between law and administration' 1989 *Canberra Bulletin of Public Administration* 55 57. He concludes (58) that so long as proceedings before the AAT appear as a confrontation between the appellant and the administrative body, the form of adversarial procedures will persist.

¹⁷⁰Harris n 74 213-4.

¹⁷¹Whitmore 'Commentary' 1981 *Federal Law Review* 118.

guarantee that the public interest - which is fundamental in public law - will be articulated: the individual per definition does not represent the public interest and it cannot be assumed that the administrative body concerned will automatically and necessarily further the public interest. An inquisitorial process is more sensitive to such public interests that are poorly or not at all represented in an adversarial process.

- Flowing from the preceding point is the inadequate basis which an adversarial approach provides for a fully informed decision by the tribunal. An inquisitorial approach can be more accommodating to multiple interests, particularly to interests that are not represented by one of the parties to the adversarial process.¹⁷² This is the more unsatisfactory since AAT decisions are supposed to provide guidance to administrative bodies generally and thus to lead to improved administrative decision-making: 'One erroneous decision by an administrative review body may affect many other people in a similar position. It seems inappropriate that such a result should follow from an inequality between adversaries in one matter.'¹⁷³ When the tribunal is obliged to rely almost entirely upon the respective parties for its informational base, weak representation by the parties would, as a 'transmissible disease' be reflected in the ultimate Tribunal decision.¹⁷⁴
- The adoption of an inquisitorial approach can avoid the common adversarial phenomenon of partisan evidence, with experts for the opposing parties contradicting each other. Dwyer¹⁷⁵ contends that an expert appointed and paid by the tribunal would not only save expense but would also improve the quality of expert evidence.
- Delays brought about by adjournments during hearings in order to obtain additional evidence may be avoided if an investigative approach is followed, especially at preliminary conferences.¹⁷⁶ In any case, it has been suggested that even if an inquisitorial procedure should cause delay, such delay may lead to a better decision since additional relevant evidence would have been taken into account.¹⁷⁷
- While an adversarial role is likened to umpiring a contest, an inquisitorial approach is more appropriate if the AAT is to play an investigative role aimed at an enquiry into the merits of a case. Although the AAT, in fulfilling an adjudicative function, in many ways resembles a court of law, its role is fundamentally administrative since its primary task is to inquire.¹⁷⁸

¹⁷²Ison n 46 156.

¹⁷³Dwyer n 166 259.

¹⁷⁴De Maria 'The Administrative Appeals Tribunal in review: on remaining seated during the standing ovation' in McMillan (ed) n 142 96 101.

¹⁷⁵N 166 263.

¹⁷⁶Dwyer n 166 260.

¹⁷⁷Dwyer n 166 261.

¹⁷⁸*Ladic v Capital Territory Health Commission* (1982) 5 ALN 45, N60.

(c) Towards the adoption of an inquisitorial process

• Ample powers

The AAT Act confers ample powers on the tribunal to adopt an inquisitorial approach. It has been shown above that the tribunal can determine its own procedure; it may inform itself on any matter in such manner as it considers appropriate; it is not bound by the rules of evidence; it may summon persons to give evidence and produce documents; it may require the lodging of additional material and it may direct the holding of a conference. The reluctance of the AAT to exercise its inquisitorial powers in order to fulfil its duty to fully inform itself has in fact led to criticism by the Federal Court.¹⁷⁹

• Resources

A significant factor which has inhibited the AAT from adopting a more investigatory approach is its lack of resources to do so: It is accordingly of decisive importance that adequate resources be made available to the tribunal in order to support the required inquisitorial infrastructure. For instance, the Kerr Committee¹⁸⁰ envisaged that the tribunal would be assisted by a small research staff. The value and contribution of the AAT can be satisfactorily determined only after it has been given the opportunity to make the most effective use of its inquisitorial powers.¹⁸¹

• Legal skills

Since legal skills are associated with the adversarial system, it may be questioned whether lawyers have any role to play in a Tribunal which will employ an inquisitorial process.

Although legal representation has been mainly responsible for the entrenchment of an adversarial process in the AAT and the suggestion has thus been made that an inquisitorial tribunal should be designed to operate without advocacy,¹⁸² it has been claimed that it would be counter-productive to exclude altogether legal representatives from the process: legal and forensic skills, properly harnessed and regulated, may actually assist in the successful implementation of an inquisitorial process,¹⁸³ although special attention will have to be given to the unrepresented applicant.¹⁸⁴

Objections to the use of judges on the AAT because of their traditional orientation towards the familiar adversarial system have influenced Ison's

¹⁷⁹*Adamou* n 148.

¹⁸⁰N 7 para 292.

¹⁸¹Osborne 'Inquisitorial procedure in the Administrative Appeals Tribunal — a comparative perspective?' 1982 *Federal Law Review* 150 181.

¹⁸²Ison n 51 53, who feels, nevertheless, that lawyers should be allowed to participate.

¹⁸³Harris n 74 214.

¹⁸⁴Harris n 74 215.

contention¹⁸⁵ that experience in the adversary system should be a disqualification or at least be seen as a handicap in establishing the qualifications for membership of the tribunal. Harris¹⁸⁶ nevertheless contends that judges do have some experience of an inquisitorial approach through their participation in commissions of inquiry and that a reorientation towards an inquisitorial approach is not beyond their reach. Indeed, their skills and experience in ensuring procedural fairness, traditionally associated with the judiciary, and of significance also in an inquisitorial context, are important attributes, as are their skills and experience in fact-finding and in eliciting the validity or 'truth' of conflicting evidence. The latter, however, would have to be reoriented from a passive acceptance of evidentiary material supplied by the parties to an active gathering of evidence.

- Impartiality

An important challenge for the AAT, if it were to rely more upon its inquisitorial powers, is the maintenance of impartiality, which is essential for the adjudicative role it must perform. Dwyer¹⁸⁷ suggests that if the tribunal adheres to the basic principles of natural justice and adequate resources are allocated to it, an inquisitorial approach would not militate against its impartiality.

- Natural justice

Ensuring natural justice, or an even-handed proceeding, seems naturally to presuppose a hearing at which each party should have an equal opportunity to present its case. A hearing is commonly associated with an adversarial approach and the tribunal would be faced with the need to test the evidence and the submissions of the respective parties. The challenge for supporters of an inquisitorial process is to accommodate the above needs within that process.¹⁸⁸

It has been contended that the adoption of too great a degree of informality may positively inhibit the orderly conduct of a strongly contested case and that it may impede the proper presentation by the parties and consideration by the tribunal of the relevant issues.¹⁸⁹ In fact, the experience of the AAT has demonstrated that a degree of formality serves to confer, and not to detract from the equality of treatment to which applicants, particularly unrepresented applicants, are entitled.¹⁹⁰ After all, the tribunal is engaged in law-based decision-making which affects the rights of the parties

¹⁸⁵N 51 19, 53.

¹⁸⁶N 74 215-7. See generally Brennan 'Limits on the use of judges' 1978 *Federal Law Review* 1 ff.

¹⁸⁷N 166 275.

¹⁸⁸*Report of the Review of the Administrative Appeals Tribunal* n 155 paras 4.5-4.10.

¹⁸⁹Hall 'Administrative review before the Administrative Appeals Tribunal — a fresh approach to dispute resolution Part II' 1981 *Federal Law Review* 71 93.

¹⁹⁰*Re Hennessy and Secretary, Department of Social Security* n 141.

concerned. 'Principles of natural justice, equity between the parties, efficiency in the disposition of matters and a commitment to the testing of evidence so as to enable assessment of and a decision about the relative merits of each party's case before the tribunal dictate that there be certain formalities, procedures and legalities in any Tribunal process, particularly in the hearing process.'¹⁹¹ The more informal the process becomes, the more difficult the challenge is to avoid compromising judicial fairness and detachment.¹⁹²

● Intervention and inquisition

Although an inquisitorial approach may be preferable and the AAT is in any case obliged to adopt an interventionist role, a warning has been sounded that '[t]here is ... a chasm between intervention and the adoption of 'inquisitorial' procedures if by that expression is meant anything like European systems having that quality'.¹⁹³ An interventionist role should not simply be equated with the wholesale transplantation of the European inquisitorial process.

Tribunal decisions

Powers and duties

The tribunal may exercise all the powers and discretions of the person who made the original decision and must either affirm, vary or set aside the decision under review. Where the decision is set aside, the tribunal may either substitute its own decision or remit the matter for reconsideration in accordance with its directions or recommendations.¹⁹⁴ However, the statute which confers jurisdiction on the AAT may restrict its powers. For instance, the tribunal's powers in terms of the Migration Act 1958 (Cth) are either to affirm the Minister's decision or to remit the matter for reconsideration in accordance with any recommendations of the tribunal; it has no power to set aside the Minister's decision.¹⁹⁵

As far as its review powers are concerned, the tribunal is bound neither by the grounds upon which the applicant bases his or her case¹⁹⁶ nor by the reasons supplied by the primary decision-maker.¹⁹⁷

Where the parties at a conference, during mediation or at any other stage of the proceedings, reached agreement as to the terms of a decision, the tribunal

¹⁹¹ *Report of the Review of the Administrative Appeals Tribunal* n 155 para 4.45.

¹⁹² Balmford n 140 67.

¹⁹³ *Report of the Review of the Administrative Appeals Tribunal* n 155 para 4.22.

¹⁹⁴ Section 43(1).

¹⁹⁵ Section 66E(3). Other strategies whereby the tribunal's powers may be confined include the following: a provision in terms of which the tribunal may determine only whether the decision-maker acted on reasonable grounds or a provision authorising a Minister to certify that a particular decision not be subject to AAT review.

¹⁹⁶ *Re Greenbam* n 143.

¹⁹⁷ *Re Jeans* n 103.

is obliged to make a decision in those terms, provided certain formal requirements have been met and the decision is within the powers of the tribunal.¹⁹⁸

Following a hearing the AAT must give its decision in writing and must give reasons for this decision, either orally¹⁹⁹ or in writing.²⁰⁰ The tribunal's written reasons must be accompanied by its findings on material questions of fact and a reference to the evidence or other material on which those findings were based.²⁰¹

A decision by the tribunal to vary a decision or to substitute it with its own decision is deemed to be a decision of the original decision-maker.²⁰²

Nature and grounds of review

The AAT Act is silent both as to the nature of the review and the grounds which would justify it. As will become apparent, the 'review' bears no similarity to judicial review and in fact constitutes an appeal in the fullest sense of the word. It would have been more accurate and in accordance with the title of the Act had the remedy been called an appeal rather than a review. The review relates to the following aspects of an administrative decision:

- its legality
- its factual correctness
- whether, in the exercise of a discretionary power, the preferable decision has been made.

It has been held that the AAT has an independent discretionary power to determine whether or not the decision subject to review was the 'correct or preferable' decision in the circumstances.²⁰³ 'Correct' seems to refer to the legality and factual basis of the decision, while the 'preferable' decision would probably encompass those decisions where matters of discretion are involved.²⁰⁴

The tribunal - in contra distinction to a court of law - is primarily concerned with the merits of decision-making, although that process almost invariably involves some consideration of the legal framework which determines the decision subject to appeal. Although the AAT is authorised to pronounce upon

¹⁹⁸Section 42C.

¹⁹⁹In which case written reasons may be requested by a party within a limited period: s 43 (2A).

²⁰⁰Section 43(2). See generally Smith 'The obligation of the Administrative Appeals Tribunal to give adequate reasons' 1992 *Public Law Review* 258 ff.

²⁰¹Section 43 (2B).

²⁰²Section 43(6).

²⁰³*Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60; ((1979) 24 ALR 577). In *Re Becker and Minister for Immigration and Ethnic Affairs* (1977) 1 ALD 158, 161; ((1977) 15 ALR 696, 699-700) reference was made to the 'right or preferable decision'.

²⁰⁴Hall n 189 80.

the law,²⁰⁵ its determinations in this respect have no final and binding effect, but amount, in effect to opinions.²⁰⁶ It has been contended that the AAT should give some weight to the administration's interpretation of the law.²⁰⁷

The tribunal reconsiders the decision as if it had never been made. The process therefore resembles a *de novo* reconsideration rather than a traditional appeal. The tribunal thus essentially performs an administrative act. The AAT Act, however, offers little guidance on the criteria and rules which the tribunal is to apply in deciding whether or not the decision subject to appeal was the correct or preferable decision. Nevertheless, the tribunal is not at large in the exercise of its powers since it has to conform to the same legal constraints as those that apply to the administrative body whose decision is under review.²⁰⁸

Although it is often said that the tribunal steps into the shoes of the administrator,²⁰⁹ such a view would compromise the notion that the tribunal has the power independently to determine for itself what the 'correct or preferable' decision is. The Federal Court in *Drake v Minister for Immigration and Ethnic Affairs*²¹⁰ pointed out that there is a fundamental difference between judicial and administrative review: 'In that [administrative] review, the tribunal is not restricted to consideration of the questions which are relevant to a judicial determination of whether a discretionary power allowed by statute has been validly exercised'. 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.

The question for the determination of the tribunal is not whether the decision which the decision-maker made was the correct or preferable one on the material before him. The question for the determination of the tribunal is whether that decision was the correct or preferable one on the material before the tribunal.'

The court emphasised²¹¹ that it is not open to the tribunal merely to satisfy itself that the decision of the administrator was one which an administrator

²⁰⁵*Drake n 203 64.*

²⁰⁶*Re Adams and The Tax Agents' Board* ((1976) 1 ALD 251).

²⁰⁷*Bayne Tribunals in the system of government* Papers on parliament no 10 (1990) 7-16.

²⁰⁸*Re Callaghan and Defence Force Retirement and Death Benefits Authority* (1978) 1 ALD 227; *Drake n 203 69.*

²⁰⁹*Eg Re Costello and Secretary, Department of Transport* (1979) 2 ALD 934 943.

²¹⁰N 203 68.

²¹¹At 77.

acting reasonably might have made, because to do this would be to review the reasons for the decision rather than the decision itself: 'The duty of the tribunal is to satisfy itself whether a decision in respect of which an application for review is duly instituted is a decision which in its view, was objectively, the right one to be made. Merely to examine whether the administrator acted reasonably in relation to the facts, either as accepted by him or as found by the tribunal may not reveal this.'

The AAT's practice is to pay some attention to the decision under review and to its reasons, and to take account thereof as it does of any other relevant consideration. However, since it is obliged in terms of the AAT Act to come to its own view of the correct or preferable decision and to remake the decision in question, it should not give any weight to the findings of fact made by the primary decision-maker or to the latter's exercise of its discretion. Nevertheless, in cases where the facts serving before the tribunal do not differ materially from those considered by the primary decision-maker, Curtis²¹² contends that it should be open to the tribunal to regard its function as being related to the reasonableness of the administrator's decision: 'The reviewing tribunal does not start with a clean sheet; it begins with the administrative decision under review.'²¹³

Although the AAT functions as an extension of the administrative process and performs an administrative rather than a judicial act, it is also an adjudicative body, concerned with justice in respect of individual applicants. The adjudicative nature of its decision-making role is reflected in its membership, procedure and powers. The tribunal is accordingly required to act according to the requirements of natural justice.²¹⁴ This does not, however, mean that the tribunal is thereby exercising any part of the judicial power of the Commonwealth, by virtue of the Constitution; it makes no final determinations on the law and cannot enforce its own decisions.

Order of costs and damages

In general, the tribunal has no power to award costs and it cannot award damages. The Attorney-General may, nevertheless extend legal aid to an appellant.²¹⁵

It has sometimes been argued that the tribunal should have the power to award costs, but this suggestion has been related only to successful applicants and not to instances where the administrative body was successful. Todd,²¹⁶ however, believes that if a case can be made out in favour of the award of costs, it should apply only in highly exceptional areas and then on a mutual basis. He concludes, nevertheless, that a general power to award costs 'would

²¹²N 1 14-15.

²¹³N 1 15.

²¹⁴*Pochi* n 105 671, 686. See, generally, on the tribunal's obligation to comply with the principles of natural justice, Tomasic & Fleming n 99 85-6.

²¹⁵Section 69.

²¹⁶N 152 109-10.

kill the tribunal for the ordinary citizen'.

In the Report of the Review of the Administrative Appeals Tribunal²¹⁷ it was proposed that the AAT Act and Regulations be amended to provide that in all cases in the tribunal costs be awarded against the respondent/applicant agency if the other party is successful.²¹⁸ The use of the AAT by large corporate clients is, however, causing a problem in this regard.²¹⁹ The Administrative Review Council, nevertheless, has on several occasions expressed its opposition to the principle of costs awards in the AAT, mainly on account thereof that applicants will thereby be deterred from seeking review and that it will render AAT proceedings more court-like and will lead to more formality.²²⁰

No binding precedent

Decisions of the tribunal do not constitute precedents like those of a court of law: '[W]hile consistency may properly be seen as an ingredient of justice, it does not constitute a hallmark of it ... Decision-makers may be consistently wrong and consistently unjust.'²²¹ There nevertheless is a need for consistency. This is so because parties should not be uncertain as to the prospects of successful review and the tribunal's decisions should serve to guide and improve the standard of administrative decision-making.²²² A possible strategy to improve consistency would be the institution of an internal monitoring system.²²³

Questions of law

Although the tribunal's rulings on questions of law are for constitutional reasons not conclusive and binding, they carry considerable persuasive authority, because however it is constituted, the tribunal always includes persons with legal expertise.

The AAT's findings on questions of law are subject to an appeal and to correction by the Federal Court.²²⁴ A right of appeal is probably essential in order to provide for an authoritative judicial decision, especially where the

²¹⁷N 155.

²¹⁸Para 10.13. A further proposal suggested that the tribunal should have a discretionary power to award costs to a party in circumstances where the tribunal considers that the behaviour of the other party in the conduct of the case merits such award: No 45, Appendix 9.

²¹⁹Saunders 'Appeal or review. The experience of administrative appeals in Australia' 1993 *Acta Juridica* 88 101.

²²⁰Administrative Review Council *Sixteenth Annual Report 1991-92* 108. It also expressed some specific concerns about the proposal to make agencies pay the costs of every case they lose (108-9).

²²¹*Nevistic v Minister for Immigration and Ethnic Affairs* (1981) 34 ALR 639 647.

²²²O'Connor 'Future directions in Australian administrative law: the Administrative Appeals Tribunal' in McMillan (ed) n 142 194 199.

²²³EARC Report n 9 para 13.48.

²²⁴Sections 44(1) and 45(1). See, generally, Tomasic and Fleming n 99 132-40 and Sykes, Lanham and Tracey *General principles of administrative law* (3rd 1989) 364-71.

law is uncertain, but it tends to contribute to the over-judicialisation of the AAT. Ison²²³ is of the opinion that 'the existence of this right of appeal may explain why decisions of the AAT are generally much too long, and why they are written in the style of reasons for judgment by an ordinary court'. Moreover, he points out that attempting to render a decision appeal-proof, while also intelligible to the parties may represent inconsistent goals.

Pearce²²⁶ argues that an over-ready determination on appeal that a conclusion reached by the tribunal constitutes an error of law is a self-defeating practice: 'It undermines the confidence of the tribunal in its own decision-making capabilities. It also destroys the confidence of members of the public in the tribunal and indeed in the tribunal system itself. The independent tribunal system will collapse if applicants find themselves caught up in the snakes and ladders of court appeals. This will result in either the abandonment of the tribunal review system as a fruitless exercise, or the by-passing of the tribunals in favour of direct court action.'

Review of government policy

Introduction

The most controversial issue relating to the AAT, and one which has occupied the minds of judges, commentators and others, is its review of governmental policy.²²⁷ The rationale for the adoption by the administration of a guiding policy has been stated in *Re Drake and Minister for Immigration and Ethnic Affairs (no 2)*²²⁸ as follows: 'It can serve to focus attention on the purpose which the exercise of the discretion is calculated to achieve, and thereby to assist the Minister and others to see more clearly, in each case, the desirability of exercising the power in one way or another. Decision-making is facilitated by the guidance given by an adopted policy, and the integrity of decision-making in particular cases is the better assured if decisions can be tested against such a policy. By diminishing the importance of individual predilection, an adopted policy can diminish the inconsistencies which might otherwise appear in a series of decisions, and enhance the sense of satisfaction with the fairness and continuity of the administrative process'.

Control over the influence of policy on administrative decision-making is exercised by the courts through the remedy of judicial review. However, such control is restricted and relates only to the following issues:

- the illegality of the policy in the sense of its being *ultra vires* the powers of

²²³N 51 13.

²²⁶Judicial review of tribunal decisions — the need for restraint' 1981 *Federal Law Review* 167 173.

²²⁷The concept 'policy' reflects different meanings. See Sharpe *The Administrative Appeals Tribunal and policy review* (1986) 33–6.

²²⁸(1979) 2 ALD 634, 640.

the administrative body;

- the inflexible application of policy; and
- acting under dictation.²²⁹

The tribunal may also exercise control over policy along these lines.²³⁰ Since the review powers which have been conferred on the AAT are, however, fundamentally different and much more far-reaching than those of a court, encompassing as they do a determination whether the administrative decision in question was the correct or preferable one on the material before the tribunal, it should follow that the tribunal's power to review policy is more substantial. A question which arises is whether the AAT is bound to apply an established and lawful governmental policy, notwithstanding the fact that the application of such policy results in injustice to an individual. Actually, two factors are relevant to this question ie the substance of the policy concerned and its application in the instant case: do the AAT's powers enable it only to consider whether it is appropriate to apply a governmental policy in the particular circumstances, or to consider the extent to which the policy should be given weight in the decision concerned, or may it go further and reject such policy and even devise its own policy?

Recommendations of Reports

The Kerr Report²³¹ recommended that the proposed general administrative review tribunal should not have the power to review government policy applicable to the decision-concerned, but that it should be empowered to convey an opinion to the appropriate Minister that a particular policy as applied in the case in question is operating in an oppressive, discriminatory or otherwise unjust manner.

The Bland Report²³² took an even more conservative view and recommended that the proposed tribunal should not even be entitled to express opinions on government policy upon which a decision is based; it should do no more than identify such policy.

AAT Act and its interpretation

The issue of policy review is not expressly addressed in the AAT Act. It was therefore the task of the AAT and the Federal Court to grapple with this issue. In a landmark decision, delivered within two years after the establishment of the AAT, the Federal Court made it clear that the tribunal is not inhibited by the AAT Act from reviewing government policy. The proper approach to ministerial policy was stated in Drake²³³ as follows: The policy upon which

²²⁹See generally Pearce 'Courts, tribunals and government policy 1980 *Federal Law Review* 203 203-15.

²³⁰Sharpe n 227 50-6.

²³¹N 7 para 299.

²³²N 55 para 172(g)(iii).

²³³N 203 69-70.

a decision has been based — provided of course that it is consistent with the empowering legislation²³⁴ — is clearly a relevant factor in the determination of an application for review of that decision.²³⁵ However, the tribunal is not, in the absence of specific statutory provision, entitled to abdicate its function of independently determining whether the decision was, on the material before the tribunal, the correct or preferable one in favour of a function of merely determining whether the decision conformed with whatever the relevant government policy might be.²³⁶ Far from being bound by such policy (except where the policy is contained in legislation), the tribunal is obliged in terms of the AAT Act to determine for itself and independently whether the decision under review was the correct or preferable decision. Once it is accepted that the tribunal is obliged to determine independently whether or not the decision subject to review was the correct or preferable decision, and that it is not bound by government policy, it seems to follow that it may review the policy itself. Indeed, as Pearce²³⁷ shows, it may be impossible to differentiate criticism of the decision from criticism of the policy since the decision may flow automatically from the policy.

Although the AAT steps into the shoes of the original decision-maker and the AAT Act²³⁸ confers on the tribunal all the powers and discretions of such original decision-maker, considerable uncertainty surrounds the circumstances in which the tribunal's power independently to review policy will be affected by restraints which may be imposed on an original decision-maker.²³⁹ Relevant considerations in determining this matter would be whether greater emphasis is placed on the independent nature of the tribunal's review powers or on its role as an extension of the administrative decision-making process.²⁴⁰ However, if the tribunal's powers of review should be considered to be more extensive than those of the original decision-maker, the tribunal's role in improving the quality of administrative decision-making may be undermined.²⁴¹

Prior to this decision of the Federal Court, the AAT itself had considered the weight that should be given to policy guidelines. It held in *Re Becker and Minister for Immigration and Ethnic Affairs*²⁴² that a hierarchical distinction should be drawn between policies made at the political level and

²³⁴*Cf Re Drake (No 2)* n 228 640.

²³⁵*Cf also Steed v Minister for Immigration and Ethnic Affairs* (1981) 4 ALD 126 and Sharpe 'Acting under dictation and the Administrative Appeals Tribunal's policy — review powers — how tight is the fit?' 1985 *Federal Law Review* 109 110–4.

²³⁶See also *Re Lob and Minister for Immigration, Local Government and Ethnic Affairs* (1990) AAR 150.

²³⁷N 229 218.

²³⁸Section 43(1).

²³⁹Sharpe n 227 57–65; Sharpe n 235 114–22.

²⁴⁰Thompson & Paterson 'The Federal Administrative Appeals Tribunal and policy review: a re-assessment of the controversy' 1991 *Public Law Review* 243 252.

²⁴¹Sharpe n 227 65.

²⁴²N 203 163.

those forged at the departmental level and between basic policies and policies which 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.' The fact that Parliament had scrutinised and approved policy was also considered to be an important indication of the weight to be accorded to the policy involved.

Notwithstanding the comprehensive powers conferred on the AAT by the AAT Act and the Federal Court's decision in Drake's case that the AAT was not only entitled to review policy guidelines and their application, but that it was obliged to do so, the AAT itself subsequently displayed considerable self-restraint, referred to by Peiris²⁴³ as a 'spirit of qualified withdrawal', and indicated in *Re Drake (No 2)*²⁴⁴ that although it was mindful of its liberty to apply or not to apply the policy in question or to adopt whatever policy it chooses, or no policy at all,²⁴⁵ 'there are substantial reasons²⁴⁶ which favour only cautious and sparing departures from Ministerial policy, particularly if parliament has in fact scrutinized and approved that policy'.²⁴⁷ The tribunal will ordinarily apply a general policy devised by a minister 'unless the policy is unlawful or unless its application tends to produce an unjust decision in the circumstances of the particular case.'²⁴⁸ The AAT has not taken it upon itself to devise its own policy or even to change government policy made at the political level, although it has occasionally declined to apply a policy.²⁴⁹

State legislation and reforms

While the Federal AAT Act is silent on the matter of policy review — and reliance had to be placed on Tribunal and court interpretations — the AAT Act of Victoria expressly regulates this issue: The Victorian Tribunal is obliged to apply a lawful statement of policy provided that the following conditions have been met:

- the Minister must have certified that the policy was in existence at the time of the decision concerned;
- the decision-maker's reasons must assert reliance on the policy; and

²⁴³N 106 307.

²⁴⁴N 228 634.

²⁴⁵642.

²⁴⁶'The tribunal is not linked into the chain of responsibility from Minister to government to parliament, its membership is not appropriate for the formulation of broad policy and it is unsupported by a bureaucracy fitted to advise upon broad policy.' (644)

²⁴⁷644.

²⁴⁸645. See Thompson & Paterson n 240 252-4 for a discussion of the tribunal's internally imposed restraints.

²⁴⁹Eg *Re John Holman & Co Pty Ltd and Minister for Primary Industry* (1983) 5 ALN No 154; *Re Rendeuski and Australian Apple and Pear Corporation* (1987) 12 ALD 280.

- at the time when the decision was made, the policy must have been published in the Gazette or must have been known to the applicant.²⁵⁰

Some law reform agencies at state level have also addressed the question of policy review. In New South Wales a distinction was drawn between policies of the government and policies of other public authorities not linked with Parliament. It was recommended that the tribunal should be obliged to give effect to lawful government policy, but that it should merely have regard to a policy of a public authority, without being bound to give effect to it.²⁵¹ The Law Reform Committee of South Australia were equally divided on whether the New South Wales proposal should be adopted in South Australia.²⁵²

The EARC Report of Queensland recommended the enactment of a provision similar to the Victorian one, although it went further by blending it with a recommendation of the Kerr Committee:

- a statement of policy applicable to a particular administrative decision is to be tabled in Parliament in accordance with the applicable legislation and made available to the public; and
- the tribunal should be obliged to apply that policy to the extent that it is lawful, but should have the power to recommend to the appropriate Minister that he or she waive the application of the policy where it is satisfied that such application will result in injustice to a participant in the proceeding.²⁵³

Arguments against the conferral of a power to review policy

The most important points of criticism against the AAT's power of reviewing policy are the following:²⁵⁴

- If a non-elected tribunal should be entitled to review policy developed at the highest political level, it would amount to a violation both of constitutional limits and democratic principles by a body that is not accountable and not 'linked into the chain of responsibility from Minister

²⁵⁰Section 25(3).

²⁵¹*Report of the Law Reform Commission on Appeals in Administration* LRC 16 (1973), clause 32(1) of the Bill accompanying the Report. The Commission, when explaining the recommendation, said: 'Government must be able, if authorized by law, to have the final say about the legislative aspects of any official action: it is responsible to Parliament for the action and it must be in a position to accept that responsibility. On the other hand, most public authorities are not directly linked with Parliament and their policies do not carry the weight of Government policies.' (159)

²⁵²*Eighty-second Report of the Law Reform Committee of South Australia to the Attorney-General relating to Administrative Appeals* (1984) 30-1. In the event of policy underlying a decision being reviewed, it was envisaged that the tribunal should be composed of members from a panel with expertise in public administration (but not any official of the Department whose decision is under review).

²⁵³N 9 paras 5.134-5.

²⁵⁴See generally Kirby 'Administrative law: beyond the frontier marked 'policy — lawyers keep out' 1981 *Federal Law Review* 121 145 ff. Cf also Harris n 198-9.

to government to parliament'.²⁵⁵

- A second problem, identified by Kirby,²⁵⁶ is the unlikelihood — indeed, the undesirability — of public servants' refusing to comply with ministerial policy directives. Any disparity between the approach to policy taken by the AAT and administrators respectively, will serve to undermine the AAT's normative role in the improvement of primary decision-making. Moreover, he contends that it will not only lead to inconsistency in decision-making, but will stimulate appeals to the AAT aimed at 'the substitution for ministerial policy consistently and faithfully obeyed by officials, of a curial procedure in which such policy is 'taken into account' but independently and critically assessed before any decision is made as to whether or not to apply it in the particular case'. If the AAT is free to depart from policy while the administration is bound by such policy the inevitable resulting dualism may lead to confusion or, worse, would in effect make allowance for exceptions to government policy for those who appeal to the tribunal. There is also the further argument that since the tribunal stands in the shoes of a decision-maker,²⁵⁷ it should likewise be bound by a policy which is binding upon the decision-maker whose decision is under review.²⁵⁸
- It has been shown²⁵⁹ that the AAT Act does not specially provide for the appointment to the tribunal of administrators serving in the department whose decision is subject to review. Moreover, the AAT does not dispose over satisfactory resources to conduct adequate research into government policy matters. Since it is constituted as an adjudicative body, it lacks both the means and the expertise fully to comprehend the policy issues which it purports to review. Another factor is that the laying down of policy is essentially a political function, to be performed by the Minister who is responsible to Parliament for the policy he adopts, while the independence of the tribunal demands that it be apolitical.²⁶⁰ Furthermore, the tribunal's procedures are adapted to resolving ad hoc disputes between the parties before it. These factors lead Kirby²⁶¹ to conclude that the AAT is singularly ill-equipped to perform an independent and wide-ranging review of government policy 'except in a superficial way and then only at the margins and in the circumstances presented by and illustrated in particular

²⁵⁵*Re Drake (No 2)* n 228 644. Cf Kirby 'Effective review of administrative acts: the hallmark of a free and fair society' 1989 *SAJHR* 321 334.

²⁵⁶N 254 147-9. It should be borne in mind, of course, that, in the absence of legislation to the contrary, policy guidelines cannot be entirely binding, even on the administration; it is a well-established legal rule that an administrative body may not submit to dictation by another and that it must itself exercise a discretion which has been conferred on it. See generally Sharpe n 235 110 ff.

²⁵⁷Section 43 of the AAT Act.

²⁵⁸Cf Curtis n 169 63.

²⁵⁹Para 4.3.

²⁶⁰*Re Drake (No 2)* n 228 644.

²⁶¹N 254 150.

litigation.' Even if the tribunal should conclude that the consequences of applying a particular policy are unfair or unjust to the applicant, it is ill-equipped 'to determine whether those consequences may, nevertheless, have to be accepted as conducive to the general good'.²⁶² And what is in the public interest cannot be determined in the confines of adjudication of a particular case.²⁶³

- Since judges regularly serve on the AAT, concern has been expressed that their involvement in controversial matters of public policy may result in the diminution of judicial prestige and in potential damage to community confidence in the judiciary.²⁶⁴
- A further point of criticism, although raised by both Curtis²⁶⁵ and Ison²⁶⁶ in the context of the judiciary, is also relevant to administrative appeals tribunals: they contend that intelligent policy making cannot be undertaken by a tribunal whose interventions in a system are intermittent and haphazard, and even then, not of its own choice, but dependent upon the willingness and ability of applicants to challenge the decisions in question. Policy making often requires co-ordination with budgeting and with actions of other agencies. It is an on-going and long-term activity for which tribunals are not suitable.
- Taylor²⁶⁷ suggests that the process of policy-making is highly unjusticiable and that if it should be reviewed, then this should be done by a body like an ombudsman, whose recommendations would not be binding.

Some responses to criticism against policy review

- The AAT is essential for the reason that the unrestrained exercise of discretion — manifested in the devising and application of policy — may lead to injustice in respect of an individual.
- The argument that democratic principles are violated by policy review can apply only to policy developed by the Cabinet or by a minister. It does not apply to policy forged at departmental level by unselected administrators. Moreover, Harris²⁶⁸ points out that 'the chain of democratic responsibility for correcting administrative injustice — department, minister, parliament — has too many weak links to ensure the effective supervision of the exercise of power and its policy elements, especially policy formulated within the bureaucracy itself.'

In a strictly literal sense, even though its members are unselected, the AAT does not operate in an undemocratic fashion, since it was established by an

²⁶²Curtis n 169 60. Cf also Curtis n 1 10.

²⁶³Ibid.

²⁶⁴Kirby n 254 151-3.

²⁶⁵N 1 10.

²⁶⁶N 47 508.

²⁶⁷N 74 199.

²⁶⁸N 74 199.

elected body ie Parliament. Moreover, Parliament can always abolish the tribunal or curtail its jurisdiction, either by removing altogether a particular policy matter from its power of review or by determining that its decisions are to be framed in the form of recommendations. Another strategy would be for the policy concerned to be promulgated in the legislation in question (or in regulations issued by virtue of that legislation).²⁶⁹

- The decisions of the AAT reveal that a great many cases involve little or no element of government policy.²⁷⁰
- Criticism of policy review has been raised almost exclusively with regard to the politically sensitive and controversial issue of deportations in terms of the Migration Act 1958 (Cth). In the great majority of instances in which policy is involved, it will not, according to Kirby,²⁷¹ give rise to such controversy and emotion. In any case, the tribunal has hitherto exercised its acknowledged function of policy review with considerable restraint and has on no occasion ventured to devise an entirely new and different policy. The tribunal has in effect adopted an incremental approach in refining policy, rather than that it has created its own policy. This approach is supported by Thompson and Paterson:²⁷² 'There is no reason why a body which is adequately equipped to review the merits of individual decisions, a function which requires it to consider what is the correct or preferable decision within the context of the applicable statutory framework, should not be able to assess a policy with a view to determining whether or not it operates to produce the correct or preferable decision in a particular case and, if not, how it can be refined so as to do so.' They then point out that the tribunal's track record demonstrates its capacity to undertake this function.
- While it would be unrealistic to expect the formulation of comprehensive policy in an adjudicative arena, 'it is not so preposterous to imagine an adjudicative rejection of policy as either factually ineffective to achieve its stated goals or as morally repugnant.'²⁷³
- The contention that confidence in the judiciary may be threatened on account of judges (as members of the AAT) becoming involved in controversial policy issues, is probably outweighed by the important advantages - referred to above²⁷⁴ - which may be secured through the use of judicial skills. This was also the opinion expressed in the Kerr Report²⁷⁵ in which it was pointed out that although there can be

²⁶⁹However, this would result in a rigid situation which was sought to be avoided by the very conferral of discretionary powers.

²⁷⁰Kirby n 254 145.

²⁷¹Ibid.

²⁷²N 240 259.

²⁷³Aronson & Franklin *Review of administrative action* (1987) 232.

²⁷⁴Para 4.3.

²⁷⁵N 7 para 293.

controversy about decisions of judges in their judicial capacity, it has not undermined respect for the judiciary.

Degrees of control over policy

Different degrees of intensity may be distinguished as far as control over policy is concerned.

- The weakest degree - which in fact constitutes no control - is that suggested by the Bland Report,²⁷⁶ namely that the tribunal should do no more than identify and apply the policy concerned.
- The next degree of control, recommended by the Kerr Report,²⁷⁷ is the identification of policy, accompanied by the expression of an opinion, comments and even criticism.
- A further stage is reached if the tribunal is entitled to examine the policy and to submit recommendations which the administrative body in question is obliged to consider.
- The preceding degree of control can be strengthened if the administrative body concerned is obliged to give reasons in case it rejects the tribunal's recommendations.
- A yet more intensive degree of control can be established if the tribunal may refuse to apply a certain policy.
- Such control will be further intensified if the tribunal, in addition to rejecting a certain policy, is empowered to refine, reform or modify the policy concerned.
- The most extensive degree of control is reached if the tribunal is authorised to devise its own policy in substitution for that of the administrative body in question.

Towards a realistic role for the tribunal

The AAT performs an administrative function in that it can substitute its decision for that of the administrative body concerned. In the process it may, according to the Federal Court, examine, reject, reform and even substitute the policy upon which the administrative body relied.

Being an adjudicative body, citizens justifiably expect the tribunal to cure administrative injustice. The essential problem, as Harris²⁷⁸ indicates, is to maintain an effective role for the tribunal in the review of decisions with a policy component 'while at the same time preserving its legitimacy as an essentially adjudicative body, given the paramount responsibility of the executive/administrative branch of government to formulate policy and carry

²⁷⁶N 55 para 172(g)(iii).

²⁷⁷N 7 para 299.

²⁷⁸N 74 208.

it into effect according to perceived political need.'

Both extremes of the degrees of control over policy, referred to above, would be unacceptable. Kirby²⁷⁹ rightly rejects the recommendation of the Bland Report 'that the AAT should be reduced to a mute body completely unable to express opinions on government policy, silent in the face of injustice'. But even if the tribunal's role should be viewed as encompassing the criticism of policy and the making of recommendations, this would not go far enough. It will unreasonably frustrate applicants who are successful before the tribunal but find that its recommendations are not followed and it will adversely affect the status of the tribunal and its members.²⁸⁰ On the other hand, the AAT would exceed the limits of its capacity and its legitimacy if it were to engage in attempts to formulate its own policy in the place of a government policy which it has rejected. It has neither the competence and resources nor the constitutional and democratic legitimacy to do so.

The AAT has in fact carved out for itself a practical approach to the review of government policy. In keeping with the approach by courts of law to similar problems arising in respect of judicial review of administrative actions, it seeks to balance the need for consistency (as exemplified in policy guidelines) with the potentially conflicting need for individual justice. Unlike the courts, however, the AAT has been given the role to review administrative decisions on their merits. A need is also identified for a 'proper constitutional relationship between the AAT and the executive in terms of the former not interfering inappropriately with the latter's pre-eminent responsibility for making and implementing lawful policy'.²⁸¹

The AAT's approach accordingly acknowledges the role of policy guidelines in structuring discretionary powers because '[i]nconsistency is not merely inelegant: it brings the process of deciding into disrepute, suggesting an arbitrariness which is incompatible with commonly accepted notions of justice'.²⁸² However, it is conceivable that the application of policy guidelines — although established to aid consistency, and, thereby, ultimately general or distributive justice — may in an individual instance lead to an unjust result. This then is the occasion for the AAT to come to the aid of the individual by refusing to apply the policy 'for consistency is not preferable to justice'.²⁸³

Although the AAT's composition, powers and procedures seem to be unsuited to devising broad policy, it can nevertheless play a realistic and meaningful role in the incremental refinement and improvement of policy, by engaging in effect in a constructive dialogue with the bureaucracy. The tribunal's contribution would consist primarily in scrutinising individual applications of

²⁷⁹N 254 147.

²⁸⁰Sharpe n 227 100.

²⁸¹Harris n 74 209.

²⁸²*Re Drake (No 2)* n 228 639.

²⁸³*Re Drake (No 2)* n 228 645.

general policy guidelines, thereby bringing its unique adjudicative skills to bear in identifying shortcomings in such policy guidelines and leading to their fine-tuning by the bureaucracy. The AAT's power to review government policy, if exercised with the necessary caution and restraint, can have a beneficial influence on the policy concerned. The tribunal's reasoned judgements may lead officials and ministers towards modifying or even abandoning the policy in question. A symbiotic relationship may in the course of time develop between the tribunal and administrators, to the benefit of citizens and to the cause of justice.

It also seems sensible to distinguish, as the EARC Report does,²⁸⁴ between policy determined by Cabinet or the responsible Minister and departmental policy in the form of agency guidelines. This approach is similar to that of the AAT in *Re Becker*²⁸⁵ and *Re Drake*²⁸⁶ (No 2) in which a distinction was drawn between ministerially determined policy and departmentally determined policy, with greater weight being accorded to the former.

On the whole, then, merits review of government policy has had the following beneficial consequences:

- (a) the existence of a policy guideline, previously often shielded from the public, can now be revealed and exposed;
- (b) the contents of policy may, after scrutiny, be clarified and even reformed, and
- (c) review by the tribunal may ensure that the application of policy in a particular instance does not ensue without a satisfactory consideration of the circumstances of the individual case on its merits.

It is advisable for Parliament more clearly to delineate the AAT's role in the review and application of government policy. Should a satisfactory compromise agreement not be struck, the following reactions are foreseeable:²⁸⁷ Parliament may enact legislation to overrule the effect of a decision by the AAT deemed unacceptable by the bureaucracy. Actually, reliance need not even be placed on amending parliamentary legislation every time the administration is dissatisfied with a Tribunal decision. A more subtle and more effective approach would be for Parliament to confer upon the Minister concerned a power to make policy through regulation. This would effectively shield such policy — now having the status of law — from the AAT's review and would oblige the tribunal to apply the policy in question. However, such a strategy would bring about the undesirable result that it removes discretions and replaces them with rigid rules. This would largely preclude decision-makers to take account of the complexity of the

²⁸⁴N 9 paras 5.94-6.

²⁸⁵N 203.

²⁸⁶N 228.

²⁸⁷*Cf* Kirby n 254 156.

circumstances of individual cases and would frustrate the AAT's normative role in guiding administrative decision-making.²⁸⁸ Another, and perhaps more likely response is that Parliament may be disinclined to commit jurisdiction involving important policy questions to the AAT. It may also employ the less drastic device of allowing the AAT to make only recommendations in respect of the issue concerned.

Improved administrative decision-making

The ultimate aim of the AAT is that it should perform a normative function in respect of primary administrative decision-making, often far beyond the parameters of the instant case. This role flows naturally from the tribunal's function of remaking the decision subject to appeal, which renders it part of the chain of administrative decision-making. Two relevant aspects can be identified in this respect ie improving the administrative fidelity to the law and improving fact-finding by the administration.

Stimulating the administration's obedience to law

Owing to a vastly increased workload and the growth of legislation, an administrator is at risk of misconstruing the nature or extent of his or her powers. The AAT, appropriately infused with legal expertise, has predictably contributed towards administrative decision-making in accordance with the law. This normative role has been fulfilled mainly through clarifying the scope of administrative powers and duties by engaging in the interpretation of the relevant legislation.²⁸⁹ While it is true that judicial review has always been available to control the legality of administrative actions, this remedy in principle results only in the setting aside of the erroneous decision and leaving to the administrative body concerned the reconsideration of the challenged decision without the court being able to replace it with the correct decision. The tribunal, on the other hand, is empowered, in addition to setting aside the erroneous decision, to make the correct or preferable decision.²⁹⁰ Moreover, the tribunal is not, like a court, bound in the material to which it may refer in interpreting legislation and since reviews by the AAT are much cheaper its decisions are likely to be more frequent and more pervasive.

The AAT's decisions in this respect have led to improved administrative decision-making which has been of benefit not only to the immediate parties involved, but has resulted in the government departments involved taking appropriate steps to ensure that future decisions would abide by the law as expounded by the AAT.²⁹¹ Furthermore, the tribunal has on occasion pointed out the need for law reform.²⁹²

²⁸⁸Bayne n 207 12.

²⁸⁹*Cf* generally Bayne n 207 4 *ff*; Kirby n 254 180-9.

²⁹⁰Brennan 'The future of public law in the Australian Administrative Appeals Tribunal' 1979 *Otago Law Review* 286 294.

²⁹¹Thompson & Paterson 'Public benefit: the Administrative Appeals Tribunal' in Mc Millan (ed) n 142 81 85-8.

²⁹²Peiris n 106 316.

Improved fact-finding

Although the AAT is not bound by the rules of evidence and may inform itself in any matter in such manner as it considers appropriate, its judicial composition, as has been pointed out, has led to its adopting an essentially adversarial approach to fact-finding. This has been reinforced by its coercive evidence-gathering powers such as the power to compel the attendance of witnesses and their giving of evidence. Primary administrative decision-making bodies, by way of contrast, follow an inquisitorial and circumstantial process. They lack the tribunal's coercive powers and are obliged to rely upon their own initiative and resources in obtaining the relevant information.²⁹³

Not surprisingly, the AAT, assisted by its superior powers and approach, has frequently set aside administrative decisions on the basis of flawed fact-finding.²⁹⁴ This the tribunal has done not on the basis that it drew a different inference from the facts as found by the administrative body, but because the tribunal determined that the factual situation was different from that found by the administrative body and that additional relevant material has come to light.²⁹⁵ Given the incongruity of the two approaches to fact-finding, it seems that the AAT's supposed educative role in respect of primary decision-making is severely limited.²⁹⁶ And even if the tribunal should follow an inquisitorially-oriented approach — more in keeping with the original decision-maker's techniques — it still has at its disposal the above-mentioned coercive evidence-gathering powers and skills in analysing factual material, over which the administrative body does not dispose. Moreover, the latter body is disadvantaged by inadequate mechanisms and skills for testing the evidence which it has gathered, if such evidence is conflicting or if its truth is challenged. A further problem is that since in many cases, as has been shown, the tribunal relies upon facts which did not serve before the primary decision-maker, it does not have the benefit of such decision-maker's views on those new facts.²⁹⁷

Another factor which may serve to inhibit the AAT's effectiveness in improving primary decision-making is that its involvement in administrative decision-making is often of an intermittent and haphazard nature. It would presumably be only a small minority of dissatisfied persons — and among them only those who are willing and able to launch an application to the AAT — who would approach the tribunal for relief. In other words, the AAT's involvement and experience in reviewing administrative decision-making will often necessarily be limited to a small and partial number of instances. A further consideration is that where primary decision-making is poor, a system of appeals may operate to the detriment of persons who acquiesce in primary

²⁹³Brennan 'The anatomy of an administrative decision' 1980 *Sydney Law Review* 16.

²⁹⁴Kirby n 254 175-6.

²⁹⁵Brennan n 290 292; n 293 6-7; Peiris n 106 316-7.

²⁹⁶Harris n 74 204.

²⁹⁷Curtis n 1 5.

decisions, while favouring those who are willing and able to avail themselves of the appellate process.²⁹⁸

Another issue, raised by Ison,²⁹⁹ is that the provision of merits review may even contribute towards the entrenchment of defective primary decision-making by creating the illusion of a solution. The notion of a *de novo* reconsideration of the matter in question may imply that the tribunal need not be concerned with the manner in which the initial decision was reached and it may not even consider the departmental file. Ison³⁰⁰ concludes that 'the availability of an appeal cannot justify the retention of a system of primary adjudication that is not designed to achieve the right answer in the first place.' And where the basic defects of primary decision-making are inherent in the structure, the provision of an appeal may actually divert the attention away from the fundamental problem.³⁰¹

It should be borne in mind that initial decisions are often made by a relatively junior official under pressure from an enormous volume of work. It would amount to setting up an artificial standard if the primary decision-maker were to be judged by the same high standard which prevails at the AAT level. In the end, the success of administrative decision-making and the degree of justice achieved by the system as a whole, will depend more on the quality of primary decision-making in the overwhelming number of cases than on the review of a small number of cases which receive special attention by the AAT: 'There may be a great deal more to achieve by improving the quality of decision-making at the grassroots processing level than by setting as the absolute priority a system of legally orientated review at the outer ends of the system which aims at perfection in an imperfect world.'³⁰²

Although care must accordingly be taken not to over-emphasise the potentially normative value of merits review, while overlooking the need of directly improving primary decision-making, it is reasonable to assume that adjudicative aspects of the AAT's fact-finding role, such as the holding of a proper hearing, should fulfil an educative role and serve as a model for administrators.³⁰³ In fact, the major shortcoming of primary decision-making is that it is usually based on a bureaucratic model without the basic component of procedural due process.³⁰⁴ Curtis³⁰⁵ is of the opinion that administrative decision-making — with its emphasis on effectiveness, expertise and consistency — has under the influence of merits review become more judicialised. This implies more attention to procedural fairness, taking account

²⁹⁸Ison n 46 143.

²⁹⁹N 51 29-32.

³⁰⁰N 51 31.

³⁰¹Ison n 46 141.

³⁰²Lanigan 'Comments' 1981 *Federal Law Review* 19 22.

³⁰³Harris n 74 205.

³⁰⁴Ison n 51 29.

³⁰⁵N 169 66.

of relevant matters and the giving of satisfactory reasons for decisions.³⁰⁶ There is a good deal of evidence that the exposure of administrative reasoning to critical analysis has served to improve the standard of that reasoning.³⁰⁷ In fact, the mere existence of an opportunity for merits review should lead to more responsible administrative decision-making. Furthermore, analysis by the tribunal of the exercise of discretionary powers has exposed many shortcomings and has led to improvements through clarification and refinement.³⁰⁸ An optimum degree of benefit can be derived when bureaucrats view the tribunal not as a threat but as an aid to management.³⁰⁹

Since the gathering and finding of facts constitute labour intensive and costly tasks, a question which must be determined is whether the ensuing benefits associated with these functions justify the costs involved. According to Brennan³¹⁰ the costs may be justified where the decision involved is likely to affect the individual in a substantial way or where the decision has significant and widespread implications. In cases of lesser significance, however, one may have to be content with an abbreviated procedure.

CONCLUSION

In this article an attempt has been made to highlight some of the salient features of the Australian Commonwealth AAT, as the pioneering and perhaps the best studied GAAT. A meaningful analysis required a consideration of the categories of appeal, the different types of appeal bodies and considerations underlying the choice between a GAAT and SAATs.

The following is a summary of some of the more important general conclusions:

- Judicial review of administrative action, in contrast to appeal, does not amount to comprehensive control because it does not in principle encompass the wisdom or merits of the administrative decision in question, nor does it enable a court to remake the decision.
- Comprehensive control through an appeal should be aimed at arriving at the most preferable decision rather than at merely ascertaining whether the primary decision was right or wrong. Such control accordingly requires the provision of an administrative appeal which involves an appeal body whose role it is to decide — on the evidence before it — what decision it itself should make, rather than of a judicial appeal which relates to an appeal body whose role is restricted to examining the primary decision in order to

³⁰⁶Volker 'The effect of administrative law reforms. Primary level decision-making' 1989 *Canberra Bulletin of Public Administration* 112.

³⁰⁷Curtis n 169 65.

³⁰⁸*Ibid.*

³⁰⁹Budgen n 142 124-5. Volker n 306 113 states that there are very few areas where administrators look over their shoulders and wonder whether their decisions will be overturned by a review body and take the 'soft option'.

³¹⁰N 290 293.

ascertain whether it was correct on the evidence before the primary decision-maker.

- Administrative appeals tribunals are favoured above courts acting as appeal bodies, on account of their expertise, informality, flexibility, speed and cheapness. Moreover, courts would compromise their reputation for impartiality if they should be obliged to become involved in performing essentially administrative acts.
- A GAAT is preferable to the fragmented and haphazard structure presented by multiple SAATs.
- An inquisitorial process is preferable to an adversarial approach but then adequate resources should be made available to the appeal tribunal to effectively pursue an interventionist approach. The tribunal should take care to ensure the maintenance of impartiality and of natural justice.
- An appeal tribunal can play a meaningful role in the control over government policy, mainly through the incremental refinement and improvement of such policy. Such control should lie between the extremes of the tribunal being authorised merely to make recommendations, on the one hand, and, on the other hand, of devising its own policy in substitution of government policy. It is advisable that the legislature should clearly delineate the tribunal's powers in this regard.
- While an administrative appeals tribunal should regard the improvement in primary decision-making as a major goal, it should be realised
 - that its potentially normative role is restricted, mainly on account of the tribunal's superior powers and difference in approach to fact-finding as against that of the primary decision-maker, and because its involvement is often haphazard and only intermittent, and
 - that where the basic defects affecting primary decision-making are inherent in the structure, the provision of an appeal may divert attention away from the basic problem.

The above conclusions are, in a sense, abstract. A decision whether or not a GAAT should be established in South Africa should be based on a comprehensive cost-benefit analysis. Such an analysis is complicated by the fact that the costs are measured largely in financial terms,³¹¹ while an assessment of the expected benefits rests mainly upon intangible factors that cannot readily be quantified. Also, estimates would depend upon uncertainties such as how wide an area will be covered by the tribunal, how extensive

³¹¹The AAT's total running costs for the year ended 30 June 1993 amounted to Australian \$12 681 000, while its property operating expenses amounted to \$5 834 000 (*Annual Report 1992-93 Administrative Appeals Tribunal* (1993) ch 8). The EARC Report (n 9 Tables 15.2 and 15.5) estimates that \$4 100 000 is required to establish its proposed general administrative appeals tribunal, while annual operating costs are estimated at \$3 902 000.

administrative injustice and incompetence are and how much use will be made of the system by individuals.

Besides financial benefits accruing through the elimination or drastic reduction in number of existing SAATs and the avoidance of further proliferation of such tribunals, many other less tangible benefits may be associated with the establishment of a GAAT. Such a tribunal should enjoy an elevated status and greater independence and should be more effective in rendering the administration more open, responsive and accountable, besides inducing a greater respect for and adherence to the law. In turn, greater confidence in and acceptance of administrative decisions may be inspired, also in view of the general experience of the AAT that only about one third of applications received conclude with a decision partly or substantially in favour of the applicant. It would introduce a more streamlined and homogeneous administrative appeals system and would provide improved access to the system. It will stimulate the search for more uniform procedures thus facilitating their use. It would serve as a vehicle for the extension of appeals jurisdiction without requiring the establishment of further tribunals.

It seems that the political climate, with an emphasis on openness and accountability of the administration, is favourable to the establishment of a GAAT in South Africa. Although there are currently many other urgent socio-economic needs in the country, it may be argued — as does the EARC Report³¹² — that it is not a matter of whether the State can afford to pay for an effective administrative appeals system, but rather whether it can afford not to. The Kerr Committee³¹³ opined that costs should not be regarded as a matter of over-riding importance. If the experience proves that there is a relatively small degree of administrative error requiring correction, the cost would be small. If, on the other hand, such error is widespread, the cost — even if considerable — must be met 'because it would be intolerable for citizens to have to bear the consequences of a high degree of administrative error affecting their rights'. And Corder³¹⁴ points out that since large-scale State intervention will be required in the implementation of the Reconstruction and Development Programme, a relatively far-reaching system of administrative control is imperative, regardless of the cost, if South Africans wish to live as responsible and free citizens in a participatory democracy. A GAAT can be phased in incrementally as its jurisdiction is expanded gradually in accordance with needs and with the State's capacity to accommodate them.

Once a decision has been reached to introduce a GAAT, the next issue which arises concerns the selection of decisions which should be subject to appeal. It has been shown that it is mainly in the context of a GAAT that criteria have been devised to guide such a selection, but that such criteria are still in the

³¹²N 9 para 15.95.

³¹³N 7 para 370.

³¹⁴*Empowerment and accountability. Towards administrative justice in a future South Africa* (1991) 44-5.

process of being developed. It is important that such criteria should not take on the form of general principles which are applicable in isolation of the subject area involved. The selection of decisions suitable for appeal should be based on appropriate empirical inquiry.³¹⁵

A major difficulty, revealed through the principal criterion suggested to guide the selection of decisions appropriate for appeal, through the traditional *locus standi* requirement and through what has been regarded as a primary purpose of appeal and, in fact, of judicial review, is the emphasis on the protection of the individual against the State. Both administrative appeal and judicial review are geared primarily towards ascertaining whether the individual's interest has been sufficiently taken into account by the administrative body concerned and whether that body's decision reflects justice towards the individual.

Although it is the obligation — in fact, the very *raison d'être* — of the administrative body in question to advance the public interest, neither appeal nor review provides an assurance that the public interest has indeed been furthered. It is simplistic, as Baxter³¹⁶ indicates, to assume that the public interest is necessarily and automatically represented by the administrative body concerned merely because the latter has been established for this purpose. Another factor is that the public interest is not something which can be satisfactorily determined within the confines of a particular case. Moreover, the commonly applied adversarial techniques are not suited to this purpose.

A further reason why appeal and review are often inappropriate is that they seem to proceed from the tacit assumption that administrative bodies consist of enthusiastic officials who are carried away with excessive zeal in pursuing the public interest regardless of the extent to which they disregarded individual rights and interests.³¹⁷ However, as Ison³¹⁸ explains, '[t]he main problem in public administration is not the excess or abuse of power; it is inertia and under-achievement through the under-use of power; the failure to engage in the conscientious pursuit of public policy objectives.'

The public interest-dimension is one which is obscured and even ignored by a reliance upon the traditional remedies provided by appeal and review. A major challenge is to design a remedy by means of which an assurance may be obtained not only that the individual's interest has been satisfactorily balanced against the public interest but that the public interest has indeed been furthered.

³¹⁵Ison n 51 57-9.

³¹⁶N 4 57.

³¹⁷Ison n 47 505.

³¹⁸*Ibid.*