F O C U S

'Administrative Law and Practice'
Speech to Australian Administrative Law Institute
by Justice D F O'Connor
President of the Administrative Appeals Tribunal
Canberra - 26 September 1990

The whole area of administrative law and practice as it has developed since the 70s is characterised by rapid change in both ideology and practice.

The Administrative Appeals Tribunal and the other elements of the 'new administrative law' grew out of the recommendations of the Kerr and Bland Committees in the 1970s. I do not propose to detail those recommendations which no doubt are well known to you, but will identify some elements in the philosophical approach, particularly of the Kerr Committee, which led to the establishment of the Administrative Appeals Tribunal. Having done that, I will examine aspects of the Tribunal's operations to see whether it has measured up to the expectations which were placed on it in 1975 when the Administrative Appeals Tribunal Act was passed. We can then perhaps look at the Tribunal for the 1990s - what is its future in an arguably different political and administrative culture to that which existed at its inception?

The Tribunal arose out of the ideology of the late 1960s and early 1970s in the era of the welfare state. The Kerr Committee noted the expansion in the number of activities regulated by government, in the volume and range of services provided for the benefit of the public. This expansion was accompanied by a substantial increase in the powers and discretions conferred on Ministers and public servants. The exercise of these powers and discretions involved the making of a vast range of decisions which affected individuals in many aspects of daily life.

The dominant administrative and political perspective of that era was that of collective provision and consumption of goods and services in the welfare state. The term 'collective consumption' was first used by Castello, a French urban sociologist. It means 'those consumption processes whose organisation and management cannot be other than collective, given the nature and size of the problems'. Some obvious examples are education and health care services, social welfare services, highways and public housing. These services are organised and managed on a collective public basis by government as they are consumed collectively. The criteria for access to the services depend on factors other than market ones and the management of the services is based on non-market considerations.

The expansion of services provided by government was accompanied by an increase in centralised decision-making. The growth of the public sector during the post war period is well

known. As the impact of government upon the citizen grew, so did awareness on the part of the citizen of the possible abuses and excesses of power by administrators. This led to demands for access to government information and greater participation by citizens in government decision-making. The community view was that it needed, as a protection against arbitrariness, avenues in which to challenge governmental decisions.

The predominance of the Diceyan rule of law notion in Australia had meant that the courts were ill equipped to deal with disputes between government and the governed. In addition, the concepts of the separation of powers and ministerial responsibility hampered scrutiny of governmental decisions. Reform was needed in this area but, as the Kerr Committee observed, a solution would not be arrived at easily. In its report, the Committee stated:

> 'The objective fact, in the modern world, is that administrators have great power to affect the rights and liberties of citizens and, as well, important duties to perform in the public interest. When an attempt is made to reconcile the exercise of these powers and the performance of these duties with traditional ideas of justice there is a risk that the proposals which emerge will be criticised as unnecessary in a democracy which enjoys a parliamentary system and responsible government or as barriers to efficiency. We have been well aware of this risk but in a country with the political, intellectual and legal heritage which we enjoy in Australia, a satisfactory reconciliation is inevitable if tensions between the individual citizen and the administration are to be minimised.'

Part of the solution in a package designed to redress the imbalance between citizen and state was the Administrative Appeals Tribunal. In an era of open government where access and equity were the champions, the Tribunal was to provide, as stated in the Second Reading Speech, 'machinery to ensure that persons are dealt with fairly and properly in their relationships with the government'. Of fundamental concern was the accountability of administrators exercising broad discretionary powers.

The distinguishing feature of the Tribunal is, of course, that it reviews decisions on the merits as well as the law. The Tribunal is not a court, although a number of its presidential members are judges. The Tribunal is charged with reaching the correct and preferable decision on the material before it. It is true to say that the Tribunal stands in the shoes of the decision maker and makes an administrative decision. The Tribunal on review exercises all the powers and discretions which were exercised by the primary decision maker. The Tribunal, of course, is bound by the law and sometimes may need to rule upon a point of law in making its decisions. The Tribunal must act within its own jurisdiction and abide by the rules of natural justice.

The Tribunal was part of an administrative law package designed, in the words of the Kerr Committee, 'to reconcile the requirements of efficiency of administration and justice to the citizen'. The Tribunal is now almost 15 years old and in recent years has been criticised for failing to live up to the expectations which were placed upon it in the early years.

The Tribunal was given powers to operate as informally and flexibly as possible. Much criticism has been levelled at the Tribunal for adopting legal procedures and a legalistic approach to many matters. There is concern about delay in dealing with matters. The Tribunal should perhaps avail itself more often of the power to make oral decisions than it presently does. In many cases, this would be the most effective course to follow in allowing applicants to the Tribunal to get on with their lives. The counter position is, of course, that the Federal Court's approach to Tribunal decision making has created an environment where detailed written decisions are sometimes required. The other effect of Federal Court supervision has been to imbue some Tribunal Members with a sense of caution in giving reasons for decision.

It is, of course, the applicants to the Tribunal who should be given first priority in the operation of the Tribunal. In one sense, these people are the consumers of the Tribunal's services. Without them of course the Tribunal would not exist. They have been assured that the Tribunal is there to provide an alternative to the courts. Many are probably surprised therefore at the degree of formality which can exist in the Tribunal.

Yet, we only need to look at some examples of the Tribunal's jurisdiction to see that the consumers of the Tribunal's services are the ordinary people in the Australian community. They may want governmental decisions reviewed about social security entitlements and benefits, about veterans' pensions, about their income tax, about student assistance, about workers' compensation, about licences to engage in various occupations regulated by the Commonwealth or about access to government information. It is therefore important that the Tribunal has available to it appropriate procedures which facilitate access by the Tribunal's consumers to its services and which they understand.

Along side of this criticism of Tribunal procedures, which still has as its focus the responsiveness of the Tribunal to the needs of the consumer, there is running a debate which has come to be known by the phrase 'the costs of justice'. In my view, this debate has grown out of a fundamental shift in political thought which has occurred since the Tribunal's inception. That shift has been away from collective consumption towards principles which embrace the efficacy of the market as a way of distributing public services. The latest style is corporate management which is phrased in terms of achieving outputs which are measured as if they were products in the marketplace. The Tribunal itself has at this stage a Corporate Plan, the goal of which is:

> 'To achieve efficient resolution of applications for review by proven dispute resolution methods, including conciliation and arbitration, on a timely basis with a high quality dispute resolution input and/or decision making and in a manner that effectively uses the available resources.'

The key term is, of course, 'the available resources'. For some years now, cost effectiveness and efficiency have been the guiding principles in public administration. And in fact efficiency has been equated with cost effectiveness - an

approach which itself may be open to question or at least debate. The concern to reduce levels of public expenditure so that finite resources are expended efficiently and economically, has focussed attention on the cost of providing administrative review.

There can be no question that the Tribunal must be accountable for the resources that it spends and for the effectiveness of its operations in providing review which meets the criteria set down at the time the legislation creating the administrative law system was passed. What we must question however, is whether in a desire to achieve fiscal restraint some other principles are being neglected or being given a lower priority than they deserve. Decisions about the provision of administrative review must take into account the benefits which are achieved as well as the costs of the systems. Those benefits, however, may be impossible to quantify in monetary terms, but that should not make them any less significant.

On 1 November 1990, a general Review of the Tribunal will commence. The Review is designed to focus on the needs of that institution for the next few years. It has been set up as a result of the separation of the Tribunal from the Attorney-General's Department for financial and management purposes. As part of that Review, we will be examining the functional aspects and the philosophy of the Tribunal.

Hard decisions will have to be made and they will have to be made at a high level. Questions of economy were less prominent in 1975 than an ideal of providing effective administrative review to aggrieved citizens. In 1990 we must be careful that that ideal is not completely overwhelmed by the desire to create a suitably sized budget surplus. The system of review is by no means perfect and there is room for improvement in the quality and range of services delivered by the Tribunal. It will be important to develop appropriate performance indicators in the course of the Review. But we must look at the Tribunal in a broader context that that of economic rationalism.

Speaking here in Canberra in 1987, Mr Justice Brennan said that as a result of the administrative review system:

> '... it may not be possible to say that this society is fairer, or more egalitarian, or more compassionate than it was before. But it is possible to say that this society is one which now accords to the individual an opportunity to meet on more equal terms the institutions of the state. The structures of administrative review now offer an opportunity for individuals to meet the anonymous and sometimes remote agencies of the state on more equal terms. The interests of individuals are more fully acknowledged, and the repositories of power are constrained to treat the individual both fairly and according to law, even if the substance of the law is defective. A society which truly accords that opportunity to the citizen is a free and fair society, and there can be no doubt that the object of the new administrative law was intended to accord that opportunity.'

It is these sorts of considerations which we must bear in mind in the 1990s.

REGULAR REPORTS

Administrative Review Council

ANNUAL REPORT OF THE COUNCIL

The Council's Fourteenth Annual Report, 1989-90, was tabled in the Senate on 18 December 1990. Copies are available from AGPS at a cost of $14.95. As in previous years the Annual Report contains letters of advice provided to the Government in 1989/90.

LETTERS OF ADVICE

Between November 1990 and the August issue of Admin Review the Council provided letters of advice on the following issues

- Determination of Refugee Status
- Higher Education Contribution Scheme - AAT filing fee
- Federal Court of Australia Resources Review
- Amendments to the Migration Act 1958 and Regulations: Exclusion of the operation of Privacy Principles
- Review of decisions within the Employment, Education and Training portfolio
- Draft Report of the Committee on Court Fees and Charges.

CURRENT WORK PROGRAM - DEVELOPMENTS

Broadcasting

The discussion paper prepared for the Council by the Communications Law Centre is expected to be published shortly as a contribution to the Commonwealth Government's general review of the Australian Broadcasting Tribunal and the Broadcasting Act 1942.

Community Services and Health

Discussion papers are being prepared on Commonwealth/State funding programs and assessment of therapeutic products. A letter of advice on the decision making process of the National Health and Medical Research Council and review of its decisions was prepared.

Intellectual Property

A consultant's paper on review of patents decisions is being prepared by Dr Margaret Allars of the University of Sydney.

Informal Rule Making

The issues paper on 'Rule Making by Commonwealth Agencies', released on 30 June 1990, has provoked substantial and varied responses, both from within and outside government. These