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COMMENT: THE ANATOMY OF AN ADMINISTRATIVE DECISION

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Public law, governing the relationship of the individual with the State and its functionaries, is continually growing. Irrespective of which political party is in government, it may safely be expected that government's control over the activities of citizens (whether corporate or natural), and its provision of varying kinds of benefits will expand. In 1971, the Kerr Committee noted:

> In recent times in Australia, as in other countries, there has been a considerable expansion in the range of activities regulated, and in the volume and range of services provided, by government and statutory authorities for the benefit of the public. This expansion has been accompanied, as it must be, by a substantial increase in the powers and discretions conferred by statute on Ministers of the Crown, officers of the administration and statutory authorities. The exercise of these powers and discretions involves the making of a vast range of decisions and recommendations which affect the individual citizen in many aspects of his daily life.[1]

The rules of public law often affect an individual more intimately than the rules of private law. This consideration led Lord Scarman to observe:

> . . . The law is being remaindered — but to what? To death in a forgotten corner? Or is there a new role? Lawyers use a technical term to describe this field of battle — administrative law: and

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[1] Commonwealth Administrative Review Committee, of which Hon. Mr. Justice Kerr, C.M.G. (as he then was) was the Chairman.

> English lawyers tend to treat its problems as technical, i.e., the interpretation of statutes and the strengthening of the remedies available to the citizen against the executive arm of government. This is no merely technical problem amenable to a tinker-tailor approach for its solution. Our legal structure lacks a sure foundation upon which to build a legal control of the beneficent state activities that have developed in this country.[2]

That observation is not as true in the area of Commonwealth administration as it was before the enactment of the Administrative Appeals Tribunal Act 1975. In his second reading speech, the Attorney-General (Hon. K. Enderby, Q.C.) expressed the intention,[3] in which Opposition speakers concurred,[4] that the Administrative Appeals Tribunal should have a wide jurisdiction to review discretionary decisions made under statutory powers conferred on Ministers and other functionaries. The Attorney said:

> An inevitable development of modern government has been the vesting of extensive discretionary powers in Ministers and officials in matters that affect a wide spectrum of business and personal life. Unfortunately, this development has not been accompanied by a parallel development of comprehensive machinery to provide for an independent review of the way these discretions are exercised . . . .
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> The intention of the present Bill is to establish a single independent tribunal with the purpose of dealing with appeals against administrative decisions on as wide a basis as possible.

In the event, a wide discretionary jurisdiction has not been created. Although the Kerr Committee had noted that "the vast majority of administrative decisions involve the exercise of a discretion by reference to criteria which do not give rise to a justiciable issue",[5] the vast majority of the cases arising under the Tribunal's jurisdiction depend upon issues which are justiciable.

The causes of the disparity between intention and execution are various. First, because the jurisdictional package which was agreed upon when the Bill was in the Senate[6] and which was regarded as an interim definition of Tribunal activity became the core of Tribunal jurisdiction. The jurisdiction thus conferred gave rise to few cases with a significant discretionary content. Deportation cases under ss. 12 and 13 of the Migration Act 1948 were the principal exception. Then it came to be realized that, where a discretionary power is reviewable, a policy formulated to govern the exercise of the discretion also falls to be reviewed — a shift of power over policy which had

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[2] Hamlyn Lecture, 1974, at 70-71.
[3] House of Representatives, *Debates* 1975, Vol. H of R 93, at 1186-7.
[4] House of Representatives, *Debates* 1975, Vol. H of R 94, at 2287.
[5] Commonwealth Administrative Review Committee Report, para. 68.
[6] See Senate, *Debates*, 4 June 1975, at 2190 ff.

not been fully appreciated by all of those concerned with the creation of the Tribunal's jurisdiction. The Tribunal, for its part, has been cautious in its considerations of policy in cases where a discretionary decision is to be reviewed. Finally, the restraint on government expenditure has required a limit on the growth of the Tribunal's jurisdiction in order to keep its caseload within the limits of its resources, and to keep the administrative burden on government departments within the limits which they find themselves able to bear. The opportunity to vest new discretionary jurisdictions has been curtailed accordingly.

For the three years of its existence — it commenced on 1 July 1976 — the Tribunal has been dealing with a variety of cases where the issues are, for the most part, of a character comparable with issues encountered in curial litigation. That is not surprising, for the decisions made by an administrator are governed by the same factors as those which govern a curial decision — the facts of the case, and the applicable law — and there are few of the discretions open to review which, on analysis, turn upon policy or non-legal considerations.

For the lawyer presenting a case before the Tribunal few novelties appear. His first enquiry relates to the jurisdiction of the Tribunal. That is a commonplace of Commonwealth jurisdiction, whether judicial or administrative. The decisions which are reviewable are mentioned in the Schedule to the Administrative Appeals Tribunal Act, or in the several Acts, regulations, ordinances, by-laws or other statutory instruments which confer jurisdiction. A list of the powers in the exercise of which reviewable decisions may be made is kept by the Tribunal registries in each of the capital cities, and is published from time to time in the *Administrative Law Service.*

The charter of the Tribunal's jurisdiction is ss. 25 and 26 of the Act, which empower the Tribunal to review decisions made in the exercise of powers conferred by an enactment. In an important decision, *The Collector of Customs (New South Wales)* v. *Brian Lawlor Automotive Pty. Limited,*[7] the Federal Court of Australia held that the Tribunal's jurisdiction extended to decisions made in the *purported* exercise of powers conferred by an enactment. This interpretation of s. 25, said Bowen, C.J., is:

> . . . consistent with the context in the *Administrative Appeals Tribunal Act.* The Acts committed to the administration of each Minister and his Department are set forth in the Administrative Arrangement Orders published from time to time in the Gazette. There might be a rare case where a decision appeared to have no relationship to one of the Acts committed to the administration of the Minister or Department concerned. However, in the ordinary course, it would be reasonably clear from the objective

[7] (1979) 2 ALD 1; (1979) 24 A.L.R. 307.

> facts under which enactment or in the exercise of which statutory powers an official had purported to act. The adoption of this view would mean that the Administrative Appeals Tribunal would have jurisdiction to entertain an appeal from a decision in fact made, which purported to be made in the exercise of powers under an enactment. It could then proceed to determine whether the decision was properly made in fact and in law.

And Smithers, J. agreed:

> The decisions in respect of which the object of the *Administrative Appeals Tribunal Act* requires review are essentially those whose relationship to the relevant Act is that the administrator who made the decision actually made it in purported or assumed pursuance thereof.

The jurisdiction thus vested in the Tribunal allows it to give the relief which an applicant might otherwise have to seek by prerogative writ procedures, and to make a new decision in substitution for a decision set aside. Indeed, merely by application to the Tribunal, an applicant is assured of a reconsideration of a challenged decision. The Tribunal reconsiders the decision on whatever material was available to the primary administrator, supplemented or controverted by evidence adduced in the hearing before the Tribunal. The Tribunal hearing is a hearing *de novo*. There is no presumption that the decision under review was right or that it was wrong.

The powers of the Tribunal with respect to the making of review orders are, for the most part, defined by s. 43. It provides, *inter alia,* that for the purpose of reviewing a decision the Tribunal may exercise all the powers and discretions that are conferred on the primary administrator who made the decision under review. So the question for the Tribunal is the same question as that which faces the primary administrator: what is the correct or preferable decision in this case?[8] The question is answered by reference to the elements of an administrative decision: the facts of the case, the applicable law, and (if appropriate) the exercise of a discretion. Before the Tribunal intervenes to set aside or vary a decision under review it must come to the view that—

- the facts are different from what they were believed to be by the primary administrator;
- the law applies differently from the way in which the primary administrator applied it; or
- if there be a discretion, there is a way of exercising it preferable to the way in which the primary administrator exercised it.

In order to perform its functions, the Tribunal was armed with different powers from those possessed by the primary decision-maker. The

[8] *Re Becker and Minister for Immigration and Ethnic Affairs* (1977) 1 ALD 158.

powers with which the Tribunal was armed are the powers ordinarily vested in courts, but not ordinarily vested in administrators. It is not surprising, then, if the same question is answered in a different way by the Tribunal, which is differently constituted, has different powers, and may have a different approach to the exercise of a discretion.

Fact Finding

In fact finding, three stages of the process may be identified: gathering, testing and finding. The Tribunal is armed with powers to assist in gathering evidence — power to compel the attendance of and the giving of evidence by witnesses, to compel the answering of questions and to obtain documents. The primary administrator does not possess these powers, but the Tribunal must be armed with them if it is satisfactorily to resolve conflicts of fact and to determine appeals on the findings it makes. The Tribunal was not intended to be and is not limited to the facts recorded in the administrator's file. It finds the facts on the material before it.

The Tribunal is, of course, bound by the rules of natural justice. Apart from rare exceptions, it therefore—

- ensures that a party has notice of the case to be met;
- permits a party to confront and cross-examine opposing witnesses; and
- allows a party an opportunity to rebut the opposing case.

The second of these rules marks the clearest departure from the administrative to the judicial model. It is at the heart of the procedure by which conflicts of evidence or challenges to factual assertions are resolved. It is an essentially court-like procedure. Though one cannot predicate of every case that cross-examination must be permitted,[9] in the kinds of cases with which the Tribunal has been dealing it would be unwilling to deny a party the right of cross-examination when it might so readily be given. Indeed, it might be wrong to do so, for there may be no other way of providing a fair opportunity of commenting on or contradicting the other party's case.[10] It is the applicant's appearance and his adducing of evidence before the Tribunal which stimulates the respondent's reply, and this "adversarial" production and testing of evidence is the means by which the facts, gathered by the parties, are furnished to the Tribunal. It is a different process from that in which the administrator is engaged. It gives the Tribunal a greater capacity than the primary administrator to resolve evidentiary conflicts and challenges. Fact finding is improved. The point is illustrated by the high rate of applicants' success in deportation cases. Although those cases reveal a good level of departmental enquiry, and

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[9] *The King* v. *War Pensions Entitlement Appeal Tribunal; ex parte Bott* (1933) 50 C.L.R. 228 at 244, 249.

[10] See *per* Denning, M. R. in *T. A. Miller Ltd.* v. *Minister of Housing and Local Government* [1968] 1 W.L.R. 992 at 995; *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 33.

anxious consideration of the merits by the Minister and his senior advisers, the administrative process has simply failed to get at the real facts in many of the cases.

Suggestions have been made that a change from "adversarial" to "inquisitorial" procedures might improve the Tribunal's functioning. The Tribunal does not have field officers or research assistants to pursue enquiries (although the Kerr Committee expected it would). The primary administrator often has assistance in gathering the facts — departmental staff, investigating officers, information from other agencies. So the Tribunal is in practice limited to material placed before it by the parties supplemented by material which the members of the Tribunal request or seek. As the primary sources of information are the departmental file and the evidence adduced by either party, each party is given an opportunity to challenge the other's material. This is fair — it is also adversarial. The Tribunal sometimes seeks further information from the parties, and if the request is met, that party produces the information as his own evidence. An attempt by the Tribunal to acquire evidence on its own account would take the time of the Tribunal itself, and would delay the decision while the newly-gathered material was submitted to and dealt with by the parties.

The fact-gathering techniques of the primary administrator are significantly different from those of the Tribunal. Lacking the necessary coercive powers, the primary administrator is required to seek information from those who are willing to give it, and to rely upon his own initiative and resources in seeking the information upon which the applicant's rights depend. In order to obtain information he must sometimes promise confidentiality to his informants and deal with the case within the constraints that an undertaking of confidentiality imposes. Administration has been a cloistered process[11] — not inevitably or as a matter of choice, but often as a matter of practical necessity. The Administrative Appeals Tribunal, having powers similar to those of a court in relation to the summoning and examination of witnesses, is ordinarily bound to deal with the case in public, and to give a party access to the case which he has to meet (*cf.* ss. 35 and 36), but the origins of the case in the offices of primary administration may affect questions of confidentiality, and the publicity of the Tribunal's proceedings. Nevertheless, the process of fact-finding before the Tribunal is in substance the same process of fact-finding as that undertaken by a court. Rules of evidence do not apply (s. 33), but the seeming liberty of this dispensation is tempered by the requirement that the material should be logically probative of a relevant fact.[12]

The facts found by the Tribunal are often different from the facts found by the administrator, largely because the curial method of fact-

[11] *McPherson* v. *McPherson* [1936] A.C. 177 at 200.
[12] See *Pochi and Minister for Immigration and Ethnic Affairs, supra* n. 10.

finding is adopted. Criticism of administrative decision, based on errors of fact, can be removed if the interested parties are given free access to an independent Tribunal which impartially determines the factual maters in dispute. It should be said, however, that Tribunal decisions indicate that, unless the primary administrator misconceives his powers, there are few instances where the primary administrator makes a wrong finding *on the facts before him;* even though the Tribunal makes different findings in the same cases *on the facts before it.*

Application of the Law

The exercise of administrative power inevitably requires the ascertainment of the relevant law, if only to define the extent of the power and the conditions of its exercise. Administrative practice develops in government agencies and furnishes many administrators with guidelines which they use from day to day. Yet there is always a question whether adherence to departmental practice accords with the relevant law.

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

Special provision has been made by the Act for the Tribunal to deal with questions of law, and appropriate appointments have been made in the light of those provisions. All Presidential Members of the Tribunal hitherto appointed are Judges of the Federal Court, and all Senior (non-Presidential) Members are lawyers of considerable standing and experience. A Presidential Member decides all questions of law arising in proceedings where he is presiding (s. 42(1)), but a Senior Member's view on the law could theoretically be overruled by his colleagues (s. 43(2)). The questions of law committed to a Presidential Member include the question whether a particular question is one of law.

Appeals on questions of law lie to the Federal Court (s. 44) and a Tribunal may, with Presidential agreement, itself refer a question of law to the Court. It is manifest that Tribunal review of administrative decisions is calculated to ensure administrative conformity with the law. By operating in the curial tradition of laying down general principles in the course of deciding particular cases, the Tribunal is clearly performing (and is interested to perform) a normative function. Its rulings, whether in construing a statute or applying some other principle, guide primary administrators. Primary administration is thus more exposed to correction of legal error than it was when the preroga-

tive writs were the only (and sometimes inadequate) remedy for the citizen.

Discretion

It is in the formation of discretionary judgments that the Tribunal most clearly diverges in function from the curial model. In *Drake* v. *Minister for Immigration and Ethnic Affairs,*[13] Bowen, C.J. and Deane, J. wrote:

> 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.

Though holding that the Tribunal was entitled to treat government policy as relevant, the Court held that—

> the Tribunal is not, in the absence of specific statutory provision, entitled to abdicate its function of determining whether the decision made was, on the material before the Tribunal, the correct or preferable one in favour of a function of merely determining whether the decision made conformed with whatever the relevant general government policy might be.

When a case turns upon the application of a policy and the policy applied by the primary administrator is lawful, how is the Administrative Appeals Tribunal to decide the case?[14] It may reject the primary administrator's policy, or it may apply it, or it may give weight to it, in deciding the case in hand. It may appear that the result of applying the policy to the particular case in hand could not have been intended. There are no defined *a priori* criteria which are to be applied in choosing the course to be followed. Mr Justice Kirby has observed that:

> The A.A.T. has shown . . ., considerable expertise in clarifying legal obligations and entitlements and in ascertaining and articulating facts relevant to administrative decisions, particularly discretionary decisions.
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> If its hand has been less steady in the review of matters of broad policy, this is scarcely a matter of surprise. The jurisdiction is new and there are no sure guide-posts showing the way in which it should be exercised.[15]

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[13] (1979) 2 ALD 60; (1979) 24 A.L.R. 577.

[14] See *Becker and Minister for Immigration and Ethnic Affairs, supra* n. 8 at 162 ff.

[15] "Administrative Law Reform in Action" (1978) 2 *U.N.S.W.L.J.* 203 at 241.

The primary administrator may be bound by government policy or be bound to give great weight to government policy. The Tribunal, it seems, is not so bound unless an Act so provides expressly or by implication.[16] There is consequently a prospect of departure from a primary decision made in the exercise of a discretionary power if the Tribunal considers that a different decision is the correct or preferable one to make.

The Tribunal's independence of the Executive Government is a significant factor in the review decision. Independence in exercising a discretion can ensure that the interests of an applicant are not unduly overridden by the objectives of government or its bureaucracy. Reciprocally, independence means that the objectives of government and its bureaucracy are susceptible of frustration by the Tribunal. The Tribunal is called on to stand between the interests of the State (as perceived by the government and its bureaucracy) and the interests of the citizen. It is a position which requires the manifestation of wisdom and authority.

For obvious reasons I should not wish to define in advance of particular cases the course which the Tribunal will take. But I venture to suggest that it is in the review of discretionary decisions that the greatest utility of the Administrative Appeals Tribunal will be found.

It will be necessary to develop principles to regulate the occasions when the Tribunal should intervene to alter the exercise of a discretionary power, else it may unpredictably confuse the due process of primary administration. Those principles are emerging, tentatively and with a growing appreciation on the part of the Tribunal and Government. Thus the Tribunal, constituted by Smithers, J., took into consideration a ministerial statement of policy on deportation which referred to the "best interests of Australia", and placed a gloss upon it in *Re Chan and Minister for Immigration and Ethnic Affairs*:

> The expression "the best interests of Australia" leaves much open to judgment. It is my view that in the application of policy as stated that expression is to be understood not in a narrow and restricted sense, but as extending to such interests broadly regarded, and embracing, on occasion and according to circumstances, the taking of decisions by reference to a liberal outlook appropriate to a free and confident nation.[17]

Broad policy concepts may be given a more precise denotation by the Tribunal as cases arise for applying a policy. The Administrative Appeals Tribunal has not hitherto rejected a policy in the sense of refusing generally to apply it, but in one case, where the application of one ministerial policy would have affected the carrying out of an-

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[16] See *Drake's Case, supra* n. 13, and note the Dairy Industry Stabilization Amendment Act 1978.

[17] (1977) 1 ALD 55 at 56.

other applicable ministerial policy, [18] it did not apply the former policy. No doubt rules or guidelines will be enunciated by the Tribunal to assist it and to guide administrators in the application of policy.

The thought that administrative review is a task for administrators alone, and not for lawyers, would have validity only if the processes and purposes of review were intended to be similar to the processes and purposes of primary administration. But if the review process is intended to be normative, improving primary administration by defining the nature and extent of the administrator's function, the lawyer's contribution is indispensable and salutary. When the Franks Committee made its Report on Administrative Tribunals and Enquiries[19] Lord Denning chose it as the subject of his maiden speech in the House of Lords, saying:

> it contains and re-affirms a constitutional principle of first importance — namely, that these tribunals are not part of the administrative machinery of government under the control of departments; they are part of the judicial system of the land under the rule of law.[20]

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[18] *Re H.C.F. and Minister for Health* (No. 1), (1977) 1 ALD 209.
[19] Cmnd. 218, 1969.
[20] *The Discipline of Law*, Lord Denning, London (1979) at 83.