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The Hon. Mr. Justice M.D. Kirby

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The Administrative Appeals Tribunal (Cth) has been operating for eighteen months. It has a novel jurisdiction which extends beyond orthodox judicial review of administrative decisions. In this article Mr. Justice Kirby examines all of the decisions delivered by the tribunal during 1976 and 1977. Its key place in the mosaic of new administrative law at a Commonwealth level is described and the rationale for the establishment of the tribunal is sketched. Parallel developments in the United States and Germany are outlined and the article proceeds to a scrutiny and analysis of statistics based on the workload and decisions of the tribunal. The limits on the tribunal's capacity to review administrative decisions, as outlined in the early cases, are identified. The three principal themes emerging from the cases are then described and illustrated. These include the clarification of statutory obligations of Commonwealth administrators, the fuller and clearer identification of relevant facts and the novel power of the tribunal to review policy decisions including the policy of Ministers. Each of these themes is illustrated by reference to reasons for decision delivered by the tribunal. The article concludes with an analysis of certain features of the methods and procedures of the tribunal and some preliminary evaluative comments.

ADMINISTRATIVE LAW REFORM IN ACTION

INTRODUCTION

Australia is in the midst of a revolution in its administrative law. Under successive Commonwealth Governments, legislation has been passed that will inevitably rearrange long-established relationships between the citizen and authority.[1] Australia was something of a laggard in administrative law reform. It is over two hundred years since the first Ombudsman was appointed in Sweden. It is more than forty years since Lord Hewart wrote *The New Despotism*.[2] It is more than twenty years since the Franks Report[3] was tabled at Westminster, an event that passed without notice in Australian legal literature.[4] The Commonwealth's legislation, it is true, was unaccompanied by public debate. The new administrative law remains ill-perceived by the bureaucracy and the legal profession and unperceived by the great bulk of citizens. Nonetheless, the beginnings are there, upon which changes will be effected in a balance "which is critical to a free society",[5] viz. that between the citizen and the machinery of government.

Within the past year, a Commonwealth Ombudsman has been appointed.[6] The first report of the Administrative Review Council has been tabled,[7] the Administrative Appeals Tribunal (A.A.T. has commenced its operations in earnest and a new system of judicial review has been foreshadowed by the passage of the *Administrative Decisions (Judicial Review) Act* 1977.[8] Further legislation on administrative procedures,[9] freedom of information[10] and privacy protection[11] at a federal level has been promised.

The Commonwealth's initiatives are being taken up in the Australian States. Inquiries into government administration in New South Wales and Tasmania have begun. In the case of the former, the creation of a general tribunal for

dministrative review, after the model of the A.A.T., has been foreshadowed.[12] In Victoria, legislation has been tabled to simplify the processes of judicial review of administrative decisions.[13]

It is not intended to trace the history of these developments in Australia. Those who are interested can now find the sources conveniently collected in the opening chapter of the Administrative Review Council's first report. The judicial review Act has not yet been proclaimed and its operation by the new Federal Court of Australia is still an unknown quantity. The Ombudsman is already dealing with hundreds of complaints by individual citizens. His tale may be told elsewhere. It is obviously too early to evaluate the effectiveness of the A.A.T. or the impact of the Administrative Review Council. Nevertheless, in important respects, the Australian reforms of administrative law go further than their counterparts in Europe and North America. Already, in the operations of the A.A.T., several themes are beginning to emerge. Against the background of a discussion of the purposes of the tribunal, I propose to describe these themes, with illustrations from the decisions handed down during the first eighteen months of the operation of the tribunal.

RATIONALE

The immediate impetus for the establishment of a new system of administrative law was the series of reports produced between 1971 and 1973.[14] But fundamental to the achievement of this major package of law reform, in such a relatively short time, was the general conviction that the rapid growth in the Australian public sector required control and that the mechanisms of control designed for an earlier time, were inadequate to do the job. The changing conception of administrative law mirrors the expanding role of government in modern Australian society. An increasing number of decisions affecting a person's life are made by governments. Some decisions involve nothing more than the application of the law to undisputed facts. Others involve discretionary determinations according to policy, perhaps policy of the bureaucrat's own invention. Most involve the mixture of law, policy and discretion.[15]

The recognition of the expanding number of decisions committed to the bureaucracy required no special percipience. The growth in the size, importance and, on occasions, self-conceit of bureaucracy[16] is there for all to see. Nor did it require any special wisdom to recognise that the established checks and controls upon bureaucratic decision-making were inadequate. The parliamentary check was obviously incapable of detailed scrutiny of each and every rule by which the public service operates. This is not to denigrate the extremely useful work of parliamentary committees, such as the Senate Standing Committee on Regulations and Ordinances. Nor is it to underestimate the importance of question time and representations made by individual Members of Parliament. The very reason why Parliament delegates so much rule-making to the public service and statutory authorities is precisely because it does not know, and has not time to find, the multitude of problems that must be dealt with in the day-to-day life of governmental operations.[17] Indeed, some modern observers suggest that the future role of legislators lies properly in genera supervision of rule-making rather than involvement in the detail of law making that becomes increasingly difficult as the demands for new laws increase.[18]

Nor is the judicial arm of government likely to provide a detailed superivison of bureaucratic action. In the past, out of a respect for the proper and limited role of judicial activity, courts in English-speaking countries have generally adopted an attitude of self restraint in the judicial review of administrative decisions. They have concerned themselves, basically, with the *legality, manner, form* and *procedures* of administrative decision-making. The *substance* and *merits* and *policy* have, so long as the action is colourably lawful, not generally been regarded as a proper subject for judicial interference.[19] True it is that some writers urge the abandonment of the courts' "unjustifiable abdication of the responsibility of judicial review" of "invidious and irrational exercises of governmental power".[20] True it is that the courts have moved of late in the direction of a more vigorous policy of judicial review. The fact remains that judicial review, along

orthodox lines, is not really suitable as a means of supervising the plethora of administrative decisions. The courts "are not equipped to act as super-administrators, formulating individual rules to govern the thousands of cases heard daily by agencies".[21] The courtroom and the forensic medium have distinct limitations as mechanisms for wide-ranging reform and the development of rules of multiple application.[22] The regular judicial machinery is at its best in limiting the exercise of power and preventing unlawful acts. It has proved less able to confine discretion, to structure it and to guide the principles by which it should be applied.[23]

While Parliament was not able or willing to involve itself in the minutiae of administrative decisions and the judges confined their role, substantially, to matters of legality, form and procedure, the administration itself was not so organised or motivated as to be likely to devise general review machinery that would put the wrongful use of discretion to-day. The sheer pressure of increasing work inevitably inclines the public service towards the "ad hoc, case-by-case mode of operation".

> "Time has corrected one dearly held illusion. It was thought in the heyday of the New Deal that an operating administrative agency, because of its continuous exposure to the problems of an area, was ideally fitted for progressive planning and programme. We have found that such is not the case. The agency is so deeply, so anxiously involved in solving the problems of the moment that most of its effort goes out in keeping astride of its operating agenda. Furthermore, buffeted by strong opposing forces, it looks for compromise, expediency and short-run solutions. ..."[25]

Here then is the problem stated in general terms. Increasing numbers of decisions affecting the daily life of people are made by government departments and agencies. Many of them involve a discretionary element. Many are made according to principles or guidelines or policy directives which are not published or are stated in terms of the widest generality, leaving much

scope to the decision maker. It is likely that the number, variety and importance of such decisions will expand and not contract in Australia. The long established parliamentary and judicial machinery for superintending these decisions, however important, is generally inadequate. The hope of universal and voluntary reform throughout the public service was futile and probably unreasonable. Inevitably, the expansion of new and largely undisciplined power has attracted novel machinery of control and superintendence, to supplement the existing legislative, judicial and administrative controls.

THE GENERAL AIM

The general aim of the new administrative law in Australia is to provide adequate checks that will set aside errors in administration. In this new machinery, the A.A.T. has a critical role to correct mistakes in the exercise of administrative discretions, without unduly interfering with the freedom of the executive branch of government to act on the individual justice of the particular case.[26] There is a conflict here which necessitates a compromise between "two fundamental and conflicting goals of the legal order".[27]

> "On the one hand protecting citizens from arbitrary applications of the executive power of the State requires that citizens receive equal treatment under fixed and ascertainable rules of law. On the other hand, the fullest realisation of justice in the individual cases and the practical needs of the Executive often require that the decision maker have a measure of freedom to recognise and weigh special circumstances and factors the legislature could not have anticipated or subsumed under a comprehensive formula. Some instances of the need for administrative discretion involve only expediency, such as the problems of the design and the location of facilities in city planning. More often, administrative discretion relates to problems of individualised

> justice : balancing interests, minimising governmental interference with individuals, and ensuring uniformity of treatment"[28]

This statement by a German authority is apt for the operation of the A.A.T. in Australia. Behind its creation is the desire, in discretions committed to its review, to promote clearer and more detailed rule-making, to open up the general principles upon which administrators act, to secure clear and public statements in advance of the rules by which administrative decisions will be made, to avoid secret and illicit rules and to encourage principles and rule-abiding decisions at every level of government service.[29] Professor Lon Fuller has put it pithily, in the context of importing and enforcing the rule of law in the administrative context :

> "The first desideratum of a system for subjecting human conduct to the governance of rules is an obvious one : there must be rules".[30]

At the same time, it is important for reformers to remember not only the pressures of decision-making that are upon government officers and the need to keep the wheels of administrative turning. It is also vital to recognise that some decisions are not so susceptible to the straight application of pre-existing and clearly stated policy. Many decisions involve an act of judgment on the part of the administrator. The price of flexible, individualised justice is an individual decision in the facts, as known, of a particular case. We should not -

> "exchange Lewis Carroll's fantasy for Franz Kafka's nightmare. A tyranny of petty bureaucrats who lack power to change the rules even an iota in order to do justice is at least as bad as a tyranny of petty bureaucrats who make up the rules as they go along".[31]

The compromise called for from the A.A.T. seems to me to require striking the balance between Lewis Carroll's nightmare of unchannelled, unreviewable and untrammelled discretion and Franz Kafka's equal tyranny. Uncontrolled discretion is difficul

reconcile with the rule of law. But autonomic and inflexible application of minute rules, with no role for evaluative judgment on the part of the decision-maker would be equally unendurable.

INTERNATIONAL REFORM

A review of current overseas attempts to strike a balance between the objectives identified above is not appropriate here. In examining the mosaic of Australian legislation, it is important to recognise themes that are current in North America and in Europe. Clearly, the United States *Administrative Procedure Act* has left many United States commentators dissatisfied. Under the Act courts are empowered to set aside the action of governmental agencies which is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law",[32] or which is "contrary to constitutional right, power, privilege or immunity".[33] K.C. Davis in his seminal work *Discretionary Justice* reviewed American experiments at controlling and directing administrative decision-making. He concluded that the present system needs to be supplemented by innovations of the kind which have now been enacted in Australia :

> "The natural system of administrative appeals from subordinates to superiors is less desirable than appeal to independent officers, because of superiors' official, psychological and personal relationships with their subordinates. The excellent device of administrative appellate tribunals, manned by independent officers, should be used much more than it is. Checks by legislative committees and by legislators are both helpful and harmful to administration; in the aggregate, the net effects may be beneficial with respect to broad policies but injurious to individual justice. An independent Ombudsman having no stake in results either through helping constituents or otherwise, usually can be a better critic of administration than a legislator".[34]

Davis concluded with a proposal for the establishment of a new tribunal to conduct review of governmental action in a prompt, inexpensive and principled way.[35]

In the Federal German Republic, a Federal Law on administrative procedure was enacted in May 1976 to supplement the review of administrative acts already existing in the Constitutional Court and the Administrative Law Courts. The legislation re-enacts provisions that a discretion must be exercised within statutory limits and according to the purpose for which it was authorised.[36] In addition, it contains provisions which will strike the reader of the *Administrative Appeals Tribunal Act* as familiar. Discretionary decisions must be accompanied in most cases by a statement of reasons disclosing the basis of the decision.[37] The citizen is authorised to inspect records that are pertinent to the determination.[38] He is normally to have a right to a hearing before a decision is made that could impair his rights.[39] Relevant government authorities are under a duty to advise citizens about their rights in administrative proceedings.[40] The German statute came into operation on 1 January 1977. But further reform is imminent. The intermediate report of a Commission for Constitutional Reforms has proposed, as a supplement for judicial review, the creation within the Executive branch of government, of special boards empowered to "review administrative acts as to both their legality and their expediency".[41] The proposal has been criticised in Germany on the grounds that such boards would be no more sensitive to the policies and objectives of the administration than the courts have been and that deficiencies in general administrative practice are"better corrected by an Ombudsman than by formal review boards".[42] A similar debate has, of course, been waged in Australia. Critics of the A.A.T. model disputed the wisdom of creating yet another judicial-type of review mechanism :

> "Not everyone would accept the view that Australian administration should be made more judicial in character. Some writers argue that Australia has already gone quite

> far enough in this direction. A notable feature of public administration in this country is the extent to which provision has been made by Parliament for direct judicial or administrative tribunal review of official action. To the administrator indeed it may often seem that efficiency has been sacrificed to fair play, and that the conferring of judicial reviewing powers on the courts and the judicialisation of tribunals have gone too far. For such writers the emphasis in administrative adjudication and tribunals should be on skill, cheapness, informality and efficiency, rather than legal membership and court-like procedures".[43]

Whilst the argument continues in Germany, it is now settled in Australia. At a Commonwealth level, we have both a general review tribunal and a Federal Ombudsman. Indeed, when the judicial review Act is proclaimed, the citizen with a complaint against the Commonwealth bureaucracy may, in some cases, have a choice between taking the complaint to the Ombudsman, to the A.A.T., to the Federal Court or by prerogative writ, to the High Court of Australia. He may, as well, complain to the media the bureaucracy concerned, his Member of Parliament, the Minister or the Administrative Review Council. Much new machinery is there. But does it work?

WORK OF THE A.A.T.

To evaluate the early operation of the A.A.T. in isolation from the other means of securing review of administrative decisions may give an unfair perspective. Furthermore, the tribunal is in its infancy and the number of reasoned decisions is modest and scarcely the sample from which to draw concluded opinions. A review of the recorded decisions says nothing of the important informal procedures which are laid down in the Act and which have already, in some cases, produced review of original decisions either before the tribunal or even in advance of the hearing. One of the major

aims of the legislation is the clarification of rules and of policy. Plainly, the AAT has an important educative role which it will be difficult to measure but which may be its most important and lasting function in administrative reform. This role makes it imperative that the decisions of the tribunal should be widely publicised, particularly within the public service but also to the legal profession, professional agencies dealing with the government and citizens generally. This has not yet been done. There may, accordingly, be a special utility in collecting the chief themes that have emerged from the first decisions of the tribunal. It is important to remember that although the AAT is designed to be a tribunal of general administrative review, the number and variety of administrative decisions made subject to its jurisdiction remains quite small. The list of them is found in the first report of the Administrative Review Council.[44] Many important decisions are not submitted to review by the tribunal. Discussion is continuing upon the expansion of the tribunal's jurisdiction[45] and there is little doubt that its remit will continue to expand fulfilling the prediction of Attorney-General Ellicott after its first six months:

> "Although there has not been an avalanche of work to date, the Administrative Appeals Tribunal is going to end up as a very substantial body. In terms of the various hearings and numbers of applications for review, this tribunal will probably grow beyond the size of any court in the country, which includes for instance, the Supreme Court of New South Wales with some thirty or forty Judges and the Family Court which has twenty seven. ... [U]nder the umbrella of the Administrative Appeals Tribunal [will] be brought all those review procedures which are appropriate to be dealt with either by a general tribunal, by the President sitting alone or by some specialised tribunal"[46]

It was no exaggeration to refer to the absence of an "avalanche" in the first six months. Nor do the figures for the first

year of operation disclose more than a minute trickle of cases when compared to the vast numbers of discretionary decisions being made, including under the provisions where jurisdiction is vested. The following tables illustrate the business of the tribunal in its first eighteen months :

TABLE 1

STATISTICS OF A.A.T. BUSINESS

1 JULY 1976 - 30 JUNE 1977 (47)

	Canb	Syd	Melb	Bris	Adel	Perth	Hob	Dar	Total No.
Applications for Review									
Air Navigation Regulations	-	2	-	3	3	-	1	1	10
Book Bounty Act	-	1	-	-	-	-	-	-	1
Customs Act	4	7	1	5	-	-	-	-	17
Defence Force Retirement and Death Benefits Act	2	1	1	-	-	1	-	-	5
Income Tax Assessment Act	-	-	1	1	-	-	-	-	2
Insurance Act	4	-	-	-	-	-	-	-	4
Marriage Act	1	-	-	-	-	-	-	-	1
Postal By-Laws	2	2	2	-	1	-	-	-	7
Superannuation Act	1	-	-	-	-	-	-	-	1
Trade Marks Act	-	1	-	-	-	-	-	-	1
	14	14	5	9	4	1	1	1	49
Stay Applications (Section 41)	1	1	1	1	-	-	-	-	4
Applications to be a party (Section 30)	1	1	-	-	-	-	-	-	2

Without more, Table 1 may give a misleading impression. It is certainly true that the tribunal got off to a slow start. Given the initial judisdiction conferred on it, this is scarcely surprising. Having regard to the limited number of tribunal members, available hearing rooms and other resources, it is possibly just as well. The statistics of business for the subsequent six months and the rate of the receipt of applications for review indicates the growing flow of work and reflects the already expanding jurisdiction. Fortunately, each of these has

been accompanied by an improvement in available manpower and resources :

TABLE 2

STATISTICS OF A.A.T. BUSINESS

1 JULY 1977 - 31 DECEMBER 1977 [48]

	Canb	Syd	Melb	Bris	Adel	Perth	Hob	Dar	Total No.
Applications for Review									
Air Navigation Regulations	1	4	6	4				2	17
A.C.T. Rates (Commercial)	6								6
Customs Act	3	10	5	3					21
Defence Force Retirement and Death Benefits Act	1	2			2				5
Home Savings Grant	3								3
Insurance Act	1	2	1						3
Migration Act		8	2						10
National Health Act		1							1
Postal By-Laws	1	2	2	9		2			16
Superannuation Act	2	2	2						6
	18	31	17	16	2	2		2	88
Stay Applications (Section 41)	2	1	1	1					5
Applications to be a party (Section 30)	Nil								

TABLE 3

RATE OF RECEIPT OF A.A.T. APPLICATIONS

1 JULY 1976 - 31 DECEMBER 1977 [49]

JULY 1976	-	JANUARY 1977	4	JULY 1977	12
AUGUST	1	FEBRUARY	-	AUGUST	17
SEPTEMBER	-	MARCH	7	SEPTEMBER	16
OCTOBER	1	APRIL	6	OCTOBER	11
NOVEMBER	1	MAY	12	NOVEMBER	20
DECEMBER	5	JUNE	12	DECEMBER	12
TOTAL FOR 6 MONTHS	8		41		88

The fate of the applications for review is interesting and although the figures are small they suggest that from the outset the A.A.T. is proving itself an effective organ of review, as

TABLE 4

RESULTS OF APPLICATIONS FOR REVIEW
1 JULY 1976 - 30 JUNE 1977[50]

Resolved by Agreement -		
Decision altered by decision maker	7	
Agreement after preliminary conference	2	
Deferred at parties' request	3	
		12
Outside Jurisdiction		
subject matter	5	
late lodgment	6	
		11
Applications heard		
Decision set aside or varied by Tribunal	4	
Decision affirmed by Tribunal	3	
Heard - awaiting decision	5	
		12
Applications pending		
In course of preparation	14	
		14
		49

The burdens of seeing the A.A.T. through its first eighteen months of operation have fallen heavily on its President, Mr. Justice Brennan. Only one other Deputy President was appointed during this time.[51] Both Presidential Members are judges of the Federal Court of Australia. In some cases, notably immigration appeals, the tribunal may be constituted by a Presidential Member sitting alone. During the eighteen month period under review, 12 part-time Members were appointed to the tribunal. When the jurisdiction of the Insurance Tribunal became vested in the A.A.T. on 28 June 1977, three part-time Members of that tribunal were appointed Members of the A.A.T. The amendments to the *Administrative Appeals Tribunal Act* 1975, passed during 1977, included significant amendments to the composition of the tribunal and the creation of a new category of member, viz. Senior Non-Presidential Member. During the period under review, one person has been appointed to that office. The appointment of one other person as a Senior Member has been announced, but not to take up office until 1978. Except in cases where jurisdiction is vested upon a condition that the tribunal will be constituted in a particular way, the amendments to the Act in 1977 provided that the President could give directions as

to the constitution of the tribunal for the purposes of a particular proceeding. Following the recommendation of the Administrative Review Council, some guidance was given to the President. He is obliged to have regard to the degree of public importance and complexity of the matters involved and the status of the position or office held by the person who has made the decision to be reviewed.[52] Other amendments to the Act, some of them based on the recommendations of the Administrative Review Council, should increase the flexibility of the composition and procedures of the tribunal. Indeed, the only matter upon which the Review Council's recommendations were not accepted related to the inclusion of a provision for the prescription of fees to be payable in respect of applications to the tribunal. Though included in the Act, no such fees have yet been prescribed. The Attorney-General undertook to take the Council's views into account before imposing fees.[53]

In the first eighteen months of its work, the A.A.T. delivered 33 reasoned decisions. The balance of this paper is devoted to an analysis of the principal features of these decisions. In the nature of things, it is more difficult to draw instruction from cases resolved by agreement that require no reasoning for the orders made. It cannot be emphasised too often, however, that much of the valuable work of the A.A.T. is, will and should be done in preliminary conferences and by conciliation. A breakdown of the 33 decisions under review discloses the following results:

TABLE 5

RESULTS OF A.A.T. REASONED DECISIONS BY SUBJECT MATTER
1 JULY 1976 - 31 DECEMBER 1977 [54]

	Total	Outside Jursdn & Other	Decision Set Aside Or Otherwise Varied etc			Decision Affirmed		
			Defect Proc..	Law	Facts	No Discrn	Law	Fact
Air Navigation Regs.	7	-	2	-	-	5	-	
Customs Act	10	1	-	5	-	-	4	
Defence Force Retirement Benefits Act	4	-	-	-	3	-	-	
Income Tax Asst. Act	1	-	-	-		1	-	
Migration Act	6	1	-	-	3	-	-	
National Health Act	1	-	-	-	1	-	-	
Postal By-Laws	4	1	-	-	-	3	-	
TOTAL DECISIONS	33	3	2	5	7	9	4	

TABLE 6

ANALYSIS OF A.A.T. REASONED DECISIONS BY OUTCOME
1 JULY 1976 - 31 DECEMBER 1977 [54]

Outside Jurisdiction			
Standing of the Applicant		1	
Decision pre-existed the Act		1	
			2
Applications Heard			
Decision set aside or varied by Tribunal			
On the Merits	(a) principally statutory construction	5	
	(b) principally on the facts	7	
Because of defect in procedures followed		2	
			14
Decision affirmed by Tribunal			
No evidence upon which to review		1	
No real discretion under the Statute		9	
On the merits	(a) principally statutory construction	4	
	(b) principally on the facts	3	
			17
	TOTAL DECISIONS		33

The analysis in Table 6 indicates how significantly the review on the merits by the A.A.T. tended, in reasoned decisions, to conclude in favour of the citizen applying for review. If cases where there was no jurisdiction are put to one side and the instance where no evidence was produced is ignored, the greatest number of decisions affirmed is in that class of case where the tribunal held that the law, properly understood, allowed the administrator no discretion at all in the facts of the case. In a number of these instances, the A.A.T. protested at the ensuing unfairness. If these cases are put to one side, and a comparison made between determinations on the merits, twelve of these favoured the applicant and seven affirmed the administrative decision. A similar ratio emerges from the omission of cases which turned on statutory construction (principally customs assessments). Omitting these, cases reviewed on the merits of the facts were

concluded in favour of the applicant in seven cases. The administrative decision appealed against was upheld on the merits in three cases. It would be dangerous to draw any extravagant conclusions from these figures, particularly at a time when the bureaucracy has not yet learned to live with the requirements and expectations of the tribunal. The sample is small. The cases are varied and, save in two instances, of limited general significance. In Germany, it is said, the Administrative Law Courts uphold "the large majority of cases" of administrative decision.[55] This statistic is explained as due "not to any special judicial friendliness towards the administration, but to the soundness of the Executive decisions".[56] On any view, the analysis of the decisions of the A.A.T. during its first eighteen months does not disclose a "large majority" of determinations upholding administrative decisions. When it becomes possible for tribunals to scrutinise administrative discretions against standards that go beyond mere lawfulness and the principles of fair play, the likelihood of reversal or amendment of the decision inevitably increases.

As a further measure of the effectiveness of the A.A.T. during the period January to December 1977, its first full year of operation, it is instructive to review details of the hearings held and decisions delivered in this time.

TABLE 7

HEARINGS OF ALL CASES BY THE A.A.T.
1 JANUARY 1977 - 31 DECEMBER 1977

Constitution of Tribunal

A.A.T. including Presidential Member	:	28
A.A.T. only non-Presidential Member(s)	:	25
		53

Duration of Hearings

1 day or less	- 41
1-2 days	- 9
2-3 days	- 2
3+	- 1
	53

TABLE 8

ANALYSIS OF ALL CASES HEARD BY THE A.A.T.
1 JANUARY 1977 - 31 DECEMBER 1977

Appeals undetermined as at 31 December 1976	6	
Appeals determined during 1977		
Appeals conceded prior to conference or hearing	26	43%
Appeals settled in or after conference or hearing	2	4%
Orders affirming administrative action	20	33%
Orders varying administrative action	6	10%
Orders substituting administrative action	3	5%
Orders remitting matter to administrator	3	5%
Total appeals determined during 1977	60	100%
Appeals undetermined as at 31 December 1977	73	

The figures in Table 7 demonstrate the assumption by the two Presidential Members, of a heavy workload and their participation in a majority of the early cases listed before the tribunal. The table also shows the relatively speedy way with which hearings of appeals are disposed of. Table 8 reflects the rapid growth in jurisdiction towards the end of 1977. When contrasted with earlier tables which analyse reasoned decisions in contested cases Table 8 emphasises the potential effectiveness of appeals in producing internal review of decisions and variation of administra action in advance of the hearing by the A.A.T. The passage of tim will probably confirm this as a permanent and desirable consequenc of the A.A.T.'s operations.

Before examining the reasoned decisions of the A.A.T. dur 1976 and 1977 to extract the features of review operations, it is useful to catalogue those instances where review has been declined or where, though granted, the matter had to be determined on a limited basis, without any real consideration of the merits. It is then proposed to examine three major features of decisions involving review on the merits. Some of the emerging characteristics of the procedures and methods of the tribunal will then be outlined.

LIMITS OF REVIEW

Constitutional Validity

The first reasoned decision of the A.A.T. raised the question as to whether the tribunal could hear, in support of an application for review, an argument that the administrative action complained about was based upon a statutory provision, invalid as going beyond the constitutional power of the Commonwealth. In the result, the President, sitting

application had been made by Mr. C.K. Adams for review of a decision of the Tax Agents' Board cancelling his registration as a tax agent. Subsection 251K(3) of the *Income Tax Assessment Act* 1936 is in mandatory terms. It requires a Board to cancel registration of an individual tax agent upon his bankruptcy. The bankruptcy of Adams was proved before the Board and the tribunal. Brennan J. held that the good character or other circumstances of the applicant were, as the Board had found, irrelevant. The Board had no discretion under the statute. There was no alternative but to cancel the registration because of the bankruptcy. Upon this basis the decision of the Board was affirmed.

However, Mr. Adams sought to mount his challenge upon an alternative basis which his counsel did not abandon, although he declined to argue the matter. Nonetheless Brennan J. proceeded to scrutinise the argument. In doing so he met also the contention that, if accepted, the argument might deprive the A.A.T. of jurisdiction to determine the matter. But first, he tackled directly the entitlement of a body such as the A.A.T. to pronounce upon such an argument. A distinction is drawn between the obligation of any administrative body to satisfy itself as to its jurisdiction (including by reference to the Constitution) on the one hand, and to pronounce on the validity of a challenged statute, on the other. By reference to Australian and United States authorities, the question is examined on the level of propriety, as well as on the level of power.

> "If it be allowed that there is, in Australian legal theory, a competence in an administrative body to consider and form an opinion upon the constitutional validity of a statute in order that that body may act in accordance with law, the competence to form the opinion and to be informed on the question of constitutional invalidity should not be treated as a jurisdiction invested in the administrative body to reach a conclusion having legal effect. It is merely a means which the administrative body may adopt in moulding

> its conduct to accord with the law".[58]

By reference to the powers of the tribunal on review (relevantly, to vary or set aside the decision) Brennan J. pointed out that invalidity on constitutional grounds would deprive the tribunal of power to vary a decision or to make a substituted decision. Nor would the Board have power to deal with the matter if it were remitted for reconsideration.

> "[I]t appears to me that, when a decision-maker acts in conformity with his statutory authority, a person whose interests are affected by his act may not obtain relief from this Tribunal upon the ground that the statute is ultra vires Parliament. This Tribunal has no powers of review which it might exercise to give effect to such a ground. It has no judicial power. The relief must be sought, if at all, from a court in which the judicial power of the Commonwealth is vested".[59]

Section 42 of the Act contemplates the determination of questions of law arising in proceedings before the tribunal. Section 44 contemplates appeal on any question of law to the Federal Court. Section 45 envisages references of such questions to the Court. Had the argument of constitutional validity been raised otherwise than in a half-hearted way, it is possible that the facilities of appeal or reference would have been put to use.

In *Re Becker and Minister for Immigration and Ethnic Affairs*[60] the tribunal, again constituted by the President sitting alone, identified four related but distinct issues which could arise in any application to review a decision to order a deportation under s.13 of the *Migration Act* 1958. The first issue specified was "Is it a case where the Minister may order deportation under [the section]". In other words, the question whether the Minister has acted *ultra vires* was not only listed as the first issue for review. It was described as one that could "seldom present difficulty".[61] Without debating the matter, the tribunal asserted a jurisdiction to pass upon the lawfulness

of the action of the Minister including whether it was *ultra vires*

It would therefore appear that, constitutional challenges apart, the tribunal will scrutinise the lawfulness of the administrative act under review, in much the same way as a court would.[62] The inhibition upon entertaining constitutional challenge to the validity of legislation under which a decision was made (basically on the grounds of the futility of any order made) will doubtless be open to argument, because of the handsome provisions for appeal on, or references of, questions of law to the Federal Court and the supervisory powers of the High Court under the Constitution. It is difficult to distinguish such cases conceptually from others involving decisions upon the lawfulness or otherwise of administrative action. For the time being, the stand of the A.A.T. is clear. Those who wish to challenge administrative decisions on the grounds of their constitutional invalidity, should go elsewhere.

Standing

One application has been dismissed on the ground that the applicant did not validly institute proceedings for review because he was not a person whose interests were affected by the decision complained of. In *Re McHattan and Assistant Collector, Import Clearance, Bureau of Customs*[63] the applicant was a licensed customs agent employed by a company which acted as customs agent for an importer. The importer sought advice from McHattan with respect to the classification of certain goods, the subject matter of a dispute as to the assessment of duty. The goods were initially entered free of duty but a Post Note subsequently reclassified them and demanded payment of certain duties. The demand was made on the importer. The Post Entry (but not the original entry) was signed by McHattan as "authorised agent" of the importer. McHattan, in his own name, applied to the A.A.T. for review of the collector's demand. His original application to the tribunal attached an authority to make the application on behalf of the importer. McHattan relied on subsection 27(1) of the *Administrative Appeals Tribunal Act* 1975 to support his standing to initiate the review. That provision empowers an application to be made "by or on behalf of any person ... whose interests are affected by the decision". The President, who determined the application, found that, despite the authority attached to the initial application

> "the language of the application and the intention of Mr. McHattan was to institute a proceeding by Mr. McHattan on his own behalf and not a proceeding on behalf of [the importer]".[64]

McHattan arranged for the importer to lodge its own application but nevertheless sought to sustain his earlier application. Hence the issue of McHattan's own standing arose to be determined. Two grounds were advanced. The first was a pecuniary interest and the second was not. McHattan contended that he "may be liable in negligence" for giving erroneous advice to the importer concerning liability for duty. Alternatively, he contended, that his "general reputation as a customs agent" was affected when his advice was shown to be wrong. He maintained that either of these interests were sufficient to support the application. Each claim was rejected by the tribunal. With due caution, because of the absence of full argument and a scrutiny of all relevant authorities, the President could not see that the outcome or possible outcome of the proceedings was a prop criterion for determining whether the proceedings had been duly instituted in the first place.

> "[I]t is not the decision of this tribunal but the demand of the Collector which must affect the applicant's interests. The relevant "interests" do not have to be pecuniary interests or even specific legal rights. ... Restrictions of that kind are incompatible with the variety of decisions which are subject to review - some decisions affecting legal rights, others being unlikely to do so. ... [A] decision which affects interests of one person directly may affect the interests of others indirectly. Across the pool of sundry interests, the ripples of affection may widely extend. The problem which is inherent in the language of the statute is the determination of the point beyond which the affection of interests by a decision should be regarded as too remote

> for the purposes of subs. 27(1). The character of the decision is relevant, for if the interests relied on are of such a kind that a decision of the given character could not affect them directly, there must be some evidence to show that the interests are in truth affected"[65]

Each of the interests claimed by McHattan was rejected. The alleged "pecuniary interest" was unsupported by evidence, dubious as a matter of tort law and unrelated causally to the liability to pay the duty complained of. The more nebulous "interest" in reputation was rejected as also unsupported by the evidence and too "tenuous"[66] to entitle McHattan to commence the proceedings on his own behalf. The President was at pains to "restrict the ambit" of the decision "so far as it may be to the precise circumstances of the present case".[67] The general question of liberalising "standing" rules in the Commonwealth's courts has been referred to the Law Reform Commission for inquiry and report.[68] This review may affect standing rights before the A.A.T. The decision in *McHattan* illustrates the limitations of the formula requiring proof of effect upon "interests".[69]

Outside Jurisdiction

The figures in Table 4 illustrate the number of cases brought which fell outside the jurisdiction of the tribunal. Because it has only such jurisdiction as is specifically vested in it, the categories of reviewable discretions committed to the A.A.T. constitute the most important limitations on its functions and utility. The number of applications that had to be rejected on the grounds of the late lodgment of process was a cause for concern that would appear to be removed by the 1977 amending Act.[70] The only reasoned decision rejecting a claim as outside the Act is *Re Serecen and Minister for Immigration and Ethnic Affairs*.[71] In that case, the Minister had, in February 1976, made an order under s.12 of the *Migration Act* that the applicant be deported. This order was made before the commencement of the *Administrative Appeals Tribunal Act* and was therefore not subject to review by the tribunal. An attempt was made to bring the claim within

jurisdiction upon the ground that the Minister had, after service of the order in September 1977 (when the Act was in force) reconsidered the applicant's case and reaffirmed the order he had made earlier. This "reaffirmation" was conducted in accordance with what the A.A.T. described as "sound departmental practice". But unless it fell within s.12 of the *Migration Act* it was not a decision that would enliven the jurisdiction of the tribunal. Section 12 empowered the Minister "upon the expiration of, or during any term of imprisonment" of an alien to order his deportation. This power was held to be "a power that terminated within a short time after the expiration of the relevant period of sentence".[72] Accordingly, what the Minister did in "reaffirming" his earlier order was not within s.12 of the *Migration Act* and hence, though done after the commencement of the A.A.T.'s operations did not activate its jurisdiction. Other grounds urged on the tribunal were rejected.[73] The result would doubtless have seemed unfair to the applicant who received no notice of the earlier order and was fully aware of the reaffirmation made by the Minister in November 1977, when the A.A.T. Act was in force. However, it illustrates the care taken by the tribunal to operate within the limited jurisdiction conferred on it.

No Evidence

The decisions disclose an effort by the tribunal to receive evidence in an informal way. For example, in one case involving a complaint about compensation for damage to an item sent by registered post, evidence was taken in Perth before the Deputy Registrar of the tribunal and the balance of the hearing took place in Brisbane.[74]

As will be shown, the tribunal has endeavoured to avoid sterile arguments about the onus of proof in proceedings before it. Nevertheless, there are limits upon the extent to which a body such as the tribunal can operate where there is no evidence at all. In *Re Keane and Australian Postal Commission*[75] the applicant complained about the refusal of the Postal Commission to pay compensation in respect of damage to the contents of a parcel addressed to the applicant and

posted in Canberra. The applicant lived in Nowra, New South Wales. The appeal came on before the tribunal for hearing in Canberra. The applicant did not appear in person, nor was she represented by any other person. Notice of the proceedings was proved. The applicant by letter asked that the hearing "go ahead on the evidence before the tribunal" and that she be informed of the outcome. The claims of the applicant were disputed by the Postal Commission and were therefore in issue. The Commission appeared to answer the claim. The Senior Member stated his difficulties thus:

> "The Act provides for the hearing by a Tribunal of applications made to the Tribunal. In a case such as the present application there is no onus on the applicant to prove the Postal Commission's decision is erroneous nor is there an onus upon the Commission to prove its decision is right. The state of known facts however may give rise to some onus of proof resting on one party or another in a particular case. In this case there is no such onus of proof resting on either party. ...[T]he Tribunal cannot determine the contested issue in the applicant's favour in the absence of some supporting evidence and in the absence of that evidence the applicant's claim must fail and the decision of the Australian Postal Commission affirmed".[76]

No Discretion

In a large number of cases, the tribunal has held that general review on the merits was not possible because, in the facts proved, the legal obligations of the decision maker were clear and mandatory. In such cases, where there is no discretion available to the decision-maker, the tribunal has likewise no discretion. It may re-examine the facts and satisfy itself that the case falls within the statute in question. Once so satisfied, however, it must simply proceed

to affirm the decision, applying the obligatory legal consequence to the facts as found.[77] The case of *Adams*[78] is an illustration in point. Once it was established that Adams was bankrupt, the Board (and on appeal, the A.A.T.) had no discretion. The relevant provisions of the *Income Tax Assessment Act* required it to cancel the registration as a tax agent. Issues of good character and circumstances or general notions of fairness are irrelevant if the administrator has only one action open to him, consistent with the law. A number of the early decisions of the A.A.T. fall into this class. A series of applications for review of the refusal to grant a pilot's licence brings home this point. In *Re Sullivan and Delegate of the Secretary, Department of Transport*[79] the applicant sought review of a decision refusing him the grant of a pilot's licence. It was proved that the applicant, a captain in the Army, had a distinguished record of military service and was able to lead men during a sustained period of stress and attack. However, in March 1976 he was assigned onerous duties of assisting in flood relief. After a period of intense activity, severe deprivation and considerable emotional stress, he suffered disturbance described by a psychiatrist who attended him as a "schizophreniform illness ... with massive anxiety ...". The condition settled but the medical evidence was that at least for five days in 1976 the applicant "was suffering from a psychosis".

Section 47.1 of the *Air Navigation Orders* provides that the applicant for an air pilot's licence :

> "shall have no established medical history or clinical diagnosis of ... a psychosis".

The A.A.T. found that this provision "determines the present application".[80] As the applicant did in fact have such an established history, he was disqualified from gaining a licence because he failed to meet the medical standard referred to in the *Air Navigation Regulations*, incorporating the Order. The tribunal proceeded to refuse a discretionary licence but the gist of its determination is found in the absence of any room for discretionary manoeuvre. To like effect are the

decisions in *Re Hanpen and Delegate of the Secretary, Department of Transport*,[81] *Re Grover and Delegate of the Secretary, Department of Transport*,[82] and *Re McKewin and Delegate of the Secretary of the Department of Transport*.[83] In some cases ascertaining the relevant law to be applied is more difficult than in others. Once the relevant statutory rule has been found, it must be applied to the facts. If it leaves open a discretion, the A.A.T. may exercise that discretion. If it allows no discretion, the A.A.T. must apply the law. Whether, in those circumstances the conclusion is a just one "is not a relevant consideration" for the tribunal.[84]

THREE THEMES

Statutory Clarification. The principal features of the decisions of the A.A.T. in the eighteen month period under review are three. They emerge from the nature of the jurisdiction conferred on the tribunal by the Act. The first is the role of the tribunal in clarifying the statutory obligations of Commonwealth administrators. In areas not previously exposed to judicial or other legal exegesis, the tribunal has attempted to clarify applicable law and to specify the approach that should be taken by administrators in the application of the law to particular cases. An exercise of statutory construction is required in almost every case coming before the tribunal. The role of the tribunal has been one of spelling out what previously may have been generally understood by administrators but not so specifically and accurately expressed. The tribunal has emphasised the importance of complying with statutory obligations, however inconvenient administratively. In some cases it has resolved doubts concerning the precise statutory provision applicable. In all cases it has accompanied its determinations with reasons which are available for the instruction of administrators handling like cases in the future.

Clearer Fact Finding. In a number of the decisions, the original administrative process has been found to have been starved of adequate facts or even adequate fact-finding capacity. In these cases, the tribunal has been able to get

a better view of the facts and circumstances relevant for decision than the original decision-maker had before him. The tribunal is thus able to get a superior appreciation of the matter in hand and is thereby fitted to make a fairer administrative decision than the one appealed against.

Policy Review. The tribunal is, in some circumstances, empowered to determine policy. Several decisions have turned upon assessment of competing social values, general considerations of equity and competing policies. It is in these cases that the functions of the tribunal go beyond the functions of a court. Courts are well equipped, and their personnel well trained in the processes of legal interpretation and the ascertainment of relevant facts. The establishment of the A.A.T. and the vesting in it of jurisdiction to set aside a decision, inevitably involves, on occasion, the vesting of a jurisdiction to substitute the decision-maker's assessment, value judgment and policy determination for those of the Executive. This is a novel jurisdiction and it is clear from the decisions to date that the A.A.T. is concerned to discover how this very wide power should be properly exercised. Should the review of policy be conducted according to the views held by the tribunal itself or should the tribunal in every case observe and apply the statement of policy tendered on behalf of the Executive? Is there an intermediate position and if not, is it desirable to repose in a body, organised and manned as the A.A.T. is, a power openly to substitute its evaluative notions for those of the elected government?

LAW : STATUTORY CLARIFICATION

The clearest cases illustrating the role of the tribunal in articulating and clarifying the relevantly applicable law include those cases, already described, where it is held that no discretion exists and one decision is available and mandatory. To the tax and air navigation cases already mentioned must be added a series of claims based on the *Postal By-Laws*. In *Re Grolier and N.A. Howeth, Delegate of the Australian Postal Commission*[85] an application was made for review of a decision refusing the applicant compensation in respect of the loss of

certain cheques posted by the applicant and lost. Compensation was denied on the grounds that the "value" of the cheques for the purposes of the By-Laws was nil. For administrative reasons, the applicant was unable to identify the individual cheques. Various arguments were raised by the respondent to defeat the claim. Because it was argued that the By-Laws "were not designed to cover loss of cheques or other negotiable instruments" it appears that reference was made, for the first time, to By-Law 179(3) which required, in the case of the loss of articles such as cheques, that "particulars sufficient for their identification shall be furnished by the claimant". It was on this ground that the appeal was dismissed, although it was not a ground that had been advanced by the respondent for refusing the claim.

> "The applicant did not provide and contends that it is now unable to provide particulars sufficient to identify the cheques. But unless it complies with By-Law 179(3) it cannot enforce a right to compensation. ... [Which] is conditional upon compliance with By-Law 179(3), and for sound reasons. ... Compliance with By-Law 179(3), in cases to which it applies, is mandatory ... Although non-compliance ... was not one of the reasons advanced by the respondent for refusing the claim, it is a bar to our allowing the appeal".[86]

To the same effect is the decision in *Re Keevers and Australian Postal Commission*,[87] also an application for review of a refusal to pay compensation for an item sent by registered post. In this case, a record player and turntable were damaged, as it was found, because of the inadequate packing in which the items were posted and excessively rough handling while they were in the course of transmission. By-Law 177 was then identified as the relevant statutory rule. Paragraph 3 provides that compensation is not payable where the loss or damage arose wholly *or in part* from the defective nature of the packing This exemption from liability left no room for discretion, in

the fact of the case as found :

> "I have found that part of the damage was caused by the defective packaging ... and it follows therefore that to use the words of the By-Law , damage arose in part from the defective nature of the packaging. The introductory words of paragraph (3) are mandatory in providing compensation is not payable in those circumstances."[88]

The tribunal went on to refer to the unfairness of the By-Law and the fact that it had been amended to accord with more modern notions but without retrospective operation. An almost identical case is *England*[89] where review of the denial of compensation was declined for the same reason. Again, the unfairness of the By-Law was referred to, but in doing so, its legal effect was spelt out :

> "[I]f any part of the damage suffered ... can be said to be due to defective packaging considering the fragile nature of the contents of the parcel, the claimant is denied any compensation although the greater part of the damage may have resulted from excessively severe treatment the parcel received during transmission".[90]

A number of customs cases illustrate the role of the tribunal in clarifying the approach to complex statutory provisions. In *Re Ladybird Childrens Wear Pty. Ltd. and Assistant Collector, Revenue Control (N.S.W.), Department of Business & Consumer Affairs*[91] the applicant sought a review of a demand for customs duty levied upon certain garments. To assess the proper classification for duty, the tribunal had to identify the appropriate (or most appropriate) category contained in the applicable tariff item. This, and several other customs cases, illustrates the A.A.T.'s superior fact-finding capacity and its instructional role in spelling out the way in which administrators should apply the *Customs Tariff Act* 1966 to the facts, as found. For example, in *Re Gissing Distributors Pty. Limited and The Collector of Customs, Departmen*

of Business & Consumer Affairs, N.S.W.,[92] the tribunal was at pains to lay down the proper approach that should be taken by the administrator here :

> "The question raised by the application is one of classification. In order to answer the question, it is necessary to identify the goods, and by construing the Tariff, to determine which provision of the Tariff includes the goods so identified.
>
> Identification of goods to be classified is often a simple exercise. On the other hand, there is sometimes a relationship between or among various units of such a kind as to identify them as a combination rather than as separate units. The test to be applied is whether the identity of the units is subordinated to the identity of the combination"[93]

After referring to a "test of subordinate identity", developed in parallel circumstances in the United States, the tribunal lays down what is and is not the administrator's proper approach

> "The identification of the relevant entity for classification is to be distinguished from the step which follows, namely, the inquiry whether one or more of the Tariff provisions applies to the entity which has been identified. The provisions of the Tariff do not determine the relevant entity; they determine whether the importation of the relevant entity attracts the charge. In attempting to identify the entity, the Tariff gives no assistance. Although it will frequently be possible to apply a descriptive word to the combination which is established as the entity, the naming of the entity is not an essential step in the process of identification. Identification is concerned with goods, not with the description of goods. Description is relevant to the next step, the application of the Tariff to the entity".[94]

It will be seen that the tribunal has not contented itself with a mere description of the goods and the application of the relevant tariff item to reach a conclusion. The occasion has been taken to instruct customs officers in the proper approach they should take to their legal duty. A similar opportunity was taken in *Re Sapphire & Opal Centre Pty. Ltd., and The Senior Inspector, Appraisements, Bureau of Customs, Department of Business & Consumer Affairs*[95] where it was held that the arguments advanced by the applicant and the department were equally erroneous. In *Re Renault (Australia) Pty. Limited and Chief Inspector, Evaluation Administration, Bureau of Customs*,[96] the tribunal closely examined the terms and purposes of the *Customs Amendment Act* 1976 which imported into Australian domestic law certain valuation principles adopted by the Convention on the Valuation of Goods for Customs Purposes signed at Brussels in 1950. The result was to bring to duty the costs of a foreign manufacture in establishing and maintaining a market in the importing country, in this case, Australia. The purpose of the legislation was identified in order to make its detailed application to the facts found clearer. References to United Kingdom, German and French authorities illuminate the tribunal's reasoning and illustrate the way in which administrators should approach their partly notional calculations required by the new Act. There would be little doubt that the availability of access to the tribunal in a case such as this will represent a boon to the hard-pressed customs assessor, anxious for authoritative guidance in the proper application of difficult an novel statutory requirements.[97] In clarifying the law, the tribunal is not only a guardian for the aggrieved citizen. It is also, in practical terms, an instructor for the bureaucracy

The work of the tribunal has gone beyond identification and clarificiation of relevant statutory rules. On several occasions, the point has been made that, however inconvenient or unexpected, the law must be obeyed. The result in the *Sapphire & Opal Centre*[98] case would have doubtless surprised nobody more than the applicant who secured review of the initial determinatic of duty but with a consequent increase in the duty levied. The decision in *Serecen* [99] was inconvenient and possibly even unexpected to the Minister. But it was not possible for the

parties to confer jurisdiction on the tribunal if the section of the *Migration Act* from which that jurisdiction flowed, did not authorise it.

In the *H.C.F.* case[100] the subordination of administrative convenience to the law was clearly spelt out. One issue related to the operative date of amendments to the rule of a medical care fund. The view had been taken in the past, and was urged on the tribunal, that the statutory requirement to obtain the Minister's approval and the provision that the change had no operation "unless and until the Minister's approval of the change has been given" produced the consequence that the rates of contribution changed only from the date of the decision approving the change. The tribunal could not accede to this argument :

> "I have difficulty with that construction ... "The change" to which s.78 refers is the change effected to the rules of the organisation, the contents of the change being defined by the terms of the resolution passed by the governing body. The Minister's function is to approve or to refuse to approve the change, and though he has special statutory power to approve the change in part, he is denied the power to select a date for the commencement of the new rates which is different from that resolved upon by the organisation. It is administratively inconvenient to adopt this construction of the legislation but it is a consequence of the form which the legislation takes."[101]

Two cases illustrate the determination of the tribunal to ensure that statutory requirements of fair play shall be observed seriously both in form and in reality. In *Re Tobin and The Delegate of the Secretary, Department of Transport*[102] the tribunal set aside a decision that the applicant's licence as an aircraft maintenance engineer be suspended on the ground that certain work done by him had been unsatisfactory. Under Regulation 258(1) of the *Air Navigation Regulations* certain powers of suspension of a licence are conferred on the Secretary of the

Department or his Delegate. But sub-Regulation 258(3) requires that before the Secretary reaches a decision on the facts and circumstances and whether they warrant suspension he is required to give the holder of the licence a notice in writing of the facts and circumstances that, in the opinion of the Secretary warrants consideration being given to the suspension" and "an opportunity to show cause why the licence should not be suspended".

In the present case, the Delegate wrote to the applicant informing him : "You are hereby advised that I am of the opinion that ... suspension of your ... licence is warranted" Certain grounds were then stated. The tribunal pointed out that the Delegate had approached his statutory duties in the Incorrect order :

> "The obligation [to give notice and an opportunity to be heard] is not a mere matter of form. It is not an obligation, the discharge of which is effected by the framing of a letter in satisfactory terms; nor an obligation, the non-performance of which can be concealed by the language of a letter. The obligation is a matter of substance. It requires the Secretary (or his Delegate) who has investigated a particular incident and who finds that there is a prima facie case for suspending the licence, to defer making a decision in the matter until an opportunity to show cause is given. In the present case the letter ... makes it clear that a decision was taken by the Delegate ... before the opportunity to show cause was given. ... He had already formed the opinion that the ... suspension ... was warranted ... and although the opinion had been formed, an opportunity was presented ... to endeavour to alter that opinion. That is not the opportunity of which subsection 258(3) speaks. The relevant opportunity had to be given before the opinion

was formed, not afterwards. The relevant opportunity was not given and therefore the power referred to in sub-Regulation 258(1) was not conferred upon the Delegate of the Secretary".[103]

As a consequence of this finding, the tribunal held the suspension unauthorised and substituted a decision that no action should be taken to vary or suspend the licence.

A similar case is *Re Upton and The Regional Director, Department of Transport*.[104] In that case a decision was made suspending an air pilot's licence on the ground that he had failed in his duty with respect to the safe operation of an aircraft. A letter was sent to him asking him to show cause why his licence should not be suspended. He did not respond. The tribunal examined the circumstances of the flight in question in detail. With the advantage of full facts it reached the view that the applicant's conduct "fell short of discharging his duty with respect to the safe operation of his aircraft". The matter did not stop there. Reference was again made to the obligation imposed by sub-Regulation 258(3) of the *Air Navigation Regulations*. Again reference was made to the precise letter sent by the Delegate to the applicant. Again, the letter indicated satisfaction that grounds existed to suspend the pilot's licence. Only then was notice given calling on the applicant to show cause why the licence should not be suspended.

> "An opportunity to show cause is not given .... when the holder of the licence is merely given the option of procuring the Regional Director to reverse the decision already taken or to suffer the suspension already decided upon. In the present case, the Regional Director did not give the holder of the licence an opportunity to show cause ... before making his finding and reaching his decision. As failure to comply with sub-Regulation (3) precludes the existence of the power to suspend under sub-Regulation (1), it follows that the Regional Director had no power to suspend the applicant's licence".[105]

The tribunal pointed out that although the decision of the Director was outside the power vested in him, this was not relevant to the tribunal's jurisdiction.[106] In view of the finding made concerning the pilot's conduct, it is perhaps surprising that the matter was not remitted for reconsideration in accordance with the tribunal's directions.[107] It is possible that the tribunal was minded to emphasise the need for administrators to comply with the spirit of legislation requiring fair conduct and also with its letter.

It is clear that the effect of this class of decision is to underline the obligation of administrators to conform to the law, and not to subordinate legal obligations either to governm policy or administrative convenience. Clearly it suited administrative convenience to make a decision first and offer an opportunity for hearing later. As the tribunal pointed out, the law required otherwise. The A.A.T. will perform a most valuable function in reminding administrators and the public that the executive government itself must conform to the law. If it does not find the law convenient it must seek to change the law, honouring it in the observance, not the breach.

FACTS : CLEARER AND MORE DETAILED FACT FINDING

The medium of the tribunal provides an opportunity for clear and detailed fact finding which is sometimes lacking or at least restricted when the initial administrative decision was made. The cases under the *Customs Tariff Act* illustrate the expertise of the tribunal in ascertaining and then expressing the relevant facts. In *Ladybird*[108] the authority of Dixon J. was cited[109] to warrant resort to evidence of mercantile understanding in order to apply the custom tariff to goods known by distinctive names and identities. Most of the customs cases involve such trade evidence which certainly assists in the oral elaboration of the characteristics of the goods : the first step in the decision-making process.[110]

Likewise in the air navigation cases, the tribunal provides procedures for detailed examination of oral and other evidence relevant for the determination of the existence of a specific, determining fact[111] or the drawing of an appropriate judgmental conclusion.[112]

In the cases brought for review of assessments under the *Defence Force Retirement and Death Benefits Act* 1973; the tribunal has on several occasions substituted different assessment of disability based upon the availability to it of more detailed medical and other facts than were before the primary decision-makers. In *Re Bos and Defence Forces Retirement and Death Benefits Authority*[113] the tribunal varied the percentag of disability of the applicant exaplaining that :

> "The Committee, when it determined the percentage disability to be 25%, did not have before it the applicant's statement that there had been an improvement in his health, nor did it have the report of Dr. Ammon. Its determination appears too high. When the Authority reviewed the Committee's assessment and reduced the percentage disability to 5% it did not have before it the evidence of the applicant's study problems and the health difficulties which the applicant met within his employment. ... Its determination appears too low.
>
> The Tribunal, although it confirms the reclassification to Class C which both the Committee and the Authority decided upon, determines the percentage incapacity in relation to employment is 15%."[114]

In the course of determining this initial case, the tribunal took the occasion to clarify the approach that should be adopted in evaluative assessments of this kind and scrutinised publicly the factors that should guide the administrator in applying an Act conferring such wide and imprecise discretions.[115] In a number of similar cases brought since *Bos* the enlarged opportunity to produce lay and medical evidence has facilitated a more accurate and just determination.[116]

The cases where the tribunal's superior fact-finding facility, powers and expertise most stand out, are migration cases. Here, too, the criteria available to the

decision-maker are in the most general terms, although, in this case, substantially in the form of Ministerial policy directives, not statutory guidelines. The first migration case, *Becker*,[117] saw the production of statements of policy devised by successive Ministers to guide officers in the exercise of the very wide discretion conferred by s.13 of the *Migration Act* which permits the Minister to deport an immigrant convicted of certain offences. Becker came to Australia with a record of offences in New Zealand and was subsequently convicted in Australia of offences including drug offences. He thereby rendered himself liable to deportation. The order was made. He appealed to the tribunal. A great deal of evidence was taken upon the basis of which the tribunal recommended that the deportation order be revoked. In coming to this conclusion, the tribunal pointed to the advantage it enjoyed over the Minister and his officers :

> "[T]he Tribunal must ascertain the relevant facts of the case. This examination may frequently throw a new light on the case, for the Tribunal may compel the production of evidence and expose it to cross examination and comment, an advantage which the Minister does not have. ... In this case, the Tribunal has been furnished with the facts which were placed before the Minister and the policies which were thought to be applicable. In addition it has had evidence from the applicant which was tested by cross examination, and submissions from the legal representatives of the parties ... [The applicant] impressed me, as he impressed the officer who interviewed him as 'having a genuine desire to avoid trouble'. I agree with that officer's assessment : "I feel he is unlikely to offend again"....
>
> In this case, I have had the advantage which was denied to the Minister, of seeing the applicant and of forming an opinion as to his likelihood again to transgress. ... In my judgment deportation at the present time is not warranted".[118]

In two cases where he recommended revocation of the deportation order, Smithers J. referred to the advantage he had of much more evidence than the departmental officers had before them as well as the advantage of assessing the applicant under cross examination.[119] Even in cases where the Minister's order was affirmed[120] the conclusion was reached only after an assessment of much greater evidence than, in practical terms, would be available to the Minister or his officers. In one case, scrutiny of the evidence led the tribunal to prefer the Minister's order for deportation to the officers' recommendation that the applicant be allowed to stay.[121] It is not necessary to elaborate the novelty of procedures which flush out departmental advices to their Ministers. In the long term a system which reposes final decisions in a tribunal rather than the Minister must have some effect upon the concept of ministeria accountability.

It is already clear that the tribunal has ample fact-finding powers. Most administrators do not have those powers. Clearly, where the ascertainment of detailed facts is important to reaching the administrative decision in hand, the A.A.T. will have a most useful role to play. It will supplement the work of administrators by providing machinery that will encourage greater individualisation of decisions and, by example, instruction in the approach that should be taken to the assessment of relevant facts.

POLICY : THE ROLE OF THE TRIBUNAL

Matters of Administrative Practice. It is when the tribunal goes beyond the worn paths of statutory construction and clearer fact-finding that the A.A.T.'s jurisdiction is at once more novel and more uncertain. Gone is the star by which judges and lawyers in our tradition have hitherto been guided in the practice of their art. A distinction should be made, at the outset, between mere matters of form, upon which the tribunal has not been silent and matters of significant policy where the tribunal has made a number of decisions at variance with those of the responsible Ministers.

Clearly the tribunal has asserted a role to comment on the law and policy it is applying. Doubtless these comments will come, in time, to have much influence because of the growing expertise and reputation of the A.A.T. For example, in *England*[122] whilst upholding the departmental submission, the occasion was taken to tender advice which is clearly full of common sense.

> "Despite all the warning signs placed on the parcel by the sender such as "fragile", "handle with care" and "this side up" plus arrows indicating the top of the parcel it was transmitted in the normal way of post by being placed in a mail bag. As this is the traditional method of transmission, it is regrettable that when a customer presents a parcel so extensively marked with warning signs which indicated that not only were the contents fragile but should be carried with one side uppermost, a postal clerk receiving such a parcel does not warn the customer that although the post office may be forced to carry parcels on which the proper postage has been paid that there is no system of handling them gently or with any side uppermost ... The failure to give such a warning gives a sense of false security to a customer who obviously believes there is some method of affording particular care to a parcel marked as the present one was ..."[123]

Similarly, public criticisms of unfair by-laws which may be in the power of the authority itself to alter, though not strictly germane to the decision in hand, could have a beneficial effect on administration.[124] In the same class is the observation in *Smooker*[125] when, after reviewing the way in which the applicant was retired on the ground of invalidity, the tribunal concluded :

> "There is one matter which the Tribunal finds difficult to understand and that is why the Air Force saw fit to discharge the Applicant

> with the experience he had had in the Air Force and when medically it appears he was quite capable of carrying out duties other than those of a flying nature".[126]

The existence, in addition to the Ombudsman, of this rather more public scrutiny of administration and the inclination of tribunal Members to express their views on administrative fairness (apart from the law) should, in time, have a humanising effect on the design of policy and on its application. The performance by the tribunal of Ombudsman-like functions has caused surprise in some quarters. It is a development that will be carefully watched. The A.A.T. procedures do not have the built-in safeguards contained in the *Ombudsman Act* whereby a Department or officer have a specified and guaranteed opportunity to comment before adverse criticism is reported. This facility permits Departments to put their house in order before a report is made public. It provides a safeguard against misunderstanding of detailed administrative processes. Its absence from the A.A.T. curial process imposes additional obligations on those hearing cases before they venture criticism or suggestions for reform.

Substantive Policy. Although evaluation and judgment are inherent in many decisions made by courts, constitutional cases aside, the decisions are normally made within relatively narrow bounds. Classification of a person for employment purposes or evaluation of a pilot's airmanship fall readily into this class. Two classes of case illustrate the difficulties which the A.A.T. faces when the matters of policy upon which the original decision-maker has passed, turn on very broad considerations not so readily susceptible to the processes of quasi judicial review. The limits of the tribunal as a forum for debating broad matters of social and economic policy include its current procedures, its personnel, its resources and its expertise. These difficulties can be clearly seen in the migration cases and in the *H.C.F.* case.[127] The tribunal has not shirked the statutory responsibility to substitute its decision for that of the Minister. It is still not clear, however, whether the tribunal regards itself as bound by a statement of policy made by a Minister. Some observations suggest that it will be so bound. Both *Becker* and the *H.C.F.* case sug that, in some circumstances at least, it will not be bound.

In *Becker* the problem was identified by the President in the migration context :

> "There are four related but distinct issues which may arise in any application to review a decision to order deportation under s.13(a) of the *Migration Act* 1958. First, is it a case where the Minister may order deportation under s.13(a)? Second, if the Minister has a policy which governs or affects his exercise of the power, is that policy consistent with the Act? Third, if the Minister has such a policy, is any cause shown why the Tribunal ought not to apply that policy, either generally or in the particular case? And finally, on the facts of the case and having regard to any policy considerations which ought to be applied, is the Minister's decision the right or preferable decision?"[128]

Elaborating the approach to the third question, the one here relevant, Brennan J. put it thus :

> "The third question arises because this Tribunal is empowered, as a Court is not empowered, to review a decision on the merits (see sections 25 and 43), and the merits of a decision include not only the facts of the case but also any policy which has been applied or which ought to be applied to the facts in reaching the decision. Jurisdiction is thus conferred upon the Tribunal to review policy considerations which govern or affect certain discretionary powers. This is a novel jurisdiction, and the occasions for its exercise will require definition. But it is neither necessary nor desirable here to define exhaustively the circumstances in which the Tribunal will review or will refuse to review a decision on policy grounds. The working out of those criteria should await the accumulating wisdom

> of future experience. The importance of departmental assistance in the review of policy is not easily overstated. Whenever the review of a decision involves consideration of policy, it is essential that the Tribunal be fully informed as to the policy and the reasons for it. Otherwise the decisions of the Tribunal may, instead of providing a rational analysis of policy and assisting to develop principled yet flexible decision-making, intervene incongruously to disrupt the due course of administration".[129]

One possible distinction referred to, but not developed, was between policy made at a departmental level and policy made at a political level.[130] Whilst acknowledging a possible difference the President was not prepared to exclude review of basic or even political policies where the demands of justice required it in an exceptional case.[131]

In *Becker* the Ministerial policy, in general terms, was proved by certain press releases and by a letter of the Commonwealth Crown Solicitor which was tendered. The resulting analysis of policy showed certain inconsistencies and the policy was, in any case, stated in such general terms as to confer wide leeways for choice. Nevertheless, the policy as ascertained and determined, was applied, including the criterion of the "risk of damage to the Australian community" inherent in allowing the convicted immigrant to stay.[132] In the series of deportation cases which have followed *Becker* the same criteria have been applied. In *Re Sullivan and Minister for Immigration*[133] Smithers recounted the decision in *Becker*, the duty to review the decision on the merits and the items on Ministerial policy identical to those tendered in *Becker*. He proceeded :

> "And it is my view that the question before the Tribunal is to be resolved by reference to the policy as so expressed".[134]

This observation is not elaborated and does not indicate whether the conclusion is reached as a general rule that the tribunal should resolve questions of policy by reference to Ministerial statements or whether, limited to the facts of the case, the review of the relevant decision on the merits would be achieved

by applying the Minister's rather broadly expressed policy directives. In *Chan*, his Honour drew attention to the large area left for discretionary judgment.

> "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 the 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".[135]

Having concluded from the policy statements that deportation was a "last resort" Smithers J. determined that "a decision to deport this applicant at this stage *does not accord with policy* and is not appropriate".[136]

But if some of the migration cases appear on superficial reading to be little more than instances of lawyers falling back on the ascertainment of policy and its application to the facts of the case, the decision in the *H.C.F.* case makes it plain that the A.A.T. does not feel itself obliged automatical to apply Ministerial policy. In that case, the Minister's policy was pellucidly clear. It was publicly announced and widely reported during an election campaign. It was, moreover, clearly stated in correspondence and elaborated in a statement of reasons furnished pursuant to the Act. In short, it was that the Minister would not, in accordance with the *National Health Act* approve a change in the contributions payable to H.C.F. By letter of 3 November 1977 the Minister wrote to the Director-General of Health :

> "I do not approve the increases recommended in this submission. I have also taken it to Cabinet for advice to reinforce my views".

The letter to H.C.F. advising the decision is in equally clear terms. The tribunal could have no doubt that the decision had been made by the Minister and taken to Cabinet where his decision was, by inference, approved.[137] The tribunal did not

consider this a barrier to the review of the Minister's decision on the merits. On the contrary, it scrutinised his statement of findings and reasons, critical to which was a determination that the Fund had "sufficient reserves for the financing of its operations for the time being". Having concluded that the Fund did not and that long established, bipartisan principles of liquidity were being undermined by the decision, the tribunal proceeded to set aside the Minister's decision and in substituti approved the Fund's changes in contributions. Furthermore, the tribunal remitted the matter of the approval of any other change to the Minister "for reconsideration with the recommendation that he decides whether to approve or to refuse to approve any other change in accordance with the reasons for this decision".[138]

The scrutiny of the Minister's decision in this case was obviously advantaged by the obligation of the Minister to state reasons and findings against which the exercise of his discretion was then able to be measured. Having rejected one ground (adequacy of reserves) it was still necessary for the tribunal to reject another (the Minister's desire that levels of contributions to major funds should rise simultaneously). Even this decision of policy, which amounted to little more than an argument for delay in the H.C.F. claim, was rejected :

> "There is much to be said for simultaneous increases, and I should not have been prepared to depart from the Minister's view in these proceedings if adherence to it did not involve a threat to the solvency of the combined H.C.F. funds. Balancing the importance of keeping the combined H.C.F. funds solvent and with some free reserves ... and the desirability of effecting simultaneous increases in the contribution rates of the major funds, I think the changes must be approved. The balance is in favour of approval, in order to achieve the agreed policy : viability in operation, and protection of the interests of the contributors."[139]

In the last sentence, there is more than a hint that the A.A.T. was doing nothing but applying agreed policy in the correct way in substitution of the Minister's incorrect application, as disclosed by the scrutiny of his reasons. However, it is plain that the Minister was given every opportunity to reconsider his policy decision. He persisted with it, in a statute which committed the decision to him. The matter was one of political significance which had been taken to the Cabinet. It says much for the resolve of the A.A.T. that it nonetheless felt constrained, reviewing the matter on the merits, to substitute its judgment for that of the Minister. Any Minister ignorant of the jurisdiction of the A.A.T. before the *H.C.F.* case would be aware of it now. There is little doubt that the passage of the *Administrative Appeals Tribunal Act* was unaccompanied by a clear appreciation in some quarters of the power that was thereby conferred on a quasi-judicial body to review and reverse even considered decisions of Ministers, made in accordance with law and supported by Cabinet consideratio

It is to be hoped that, given its special circumstances, the *H.C.F.* case will not cause Ministers to take fright and impede the development of the A.A.T.'s jurisdiction. Consistent with the principles that repose ultimate policy in elected representatives, it may be desirable, without damaging the independence of the tribunal, to permit Ministers in certain cases to certify publicly statements of policy which will be binding on the tribunal and not open to reversal by it. Such a system would at the one time ensure ultimate electoral responsibility for broad decisions of general policy, preserve the independence of the tribunal and retain public scrutiny of administrative acts, including Ministerial decisions, consistent with our system of responsible government. Whether such a formal system will be developed may depend upon whether the A.A.T. is prepared to adopt a policy of self denial in the review and criticism of ministeria policy. If it adopts the view that clearly stated and publicly disclosed ministerial policy should always be applied except where it results in, say, clear injustice, discriminatory treatm or unfairness, it is likely that an accommodation will be achieved between the tribunal and the Executive. If a different view develops, the consequence may well be either a shrinking of vested jurisdiction or, the development of a formal system of enforcing publicly certified ministerial policy in the decisions of the tribunal. Clearly the latter is to be preferred.

PROCEDURES AND EVIDENCE

Certain features of the methods and procedures of the A.A.T. have already begun to emerge. Within the tribunal, the President has always sat upon the first case involving the exercise of a new jurisdiction.[140] Where the tribunal is constituted for the particular case by a number of Members, a single decision has so far always ensued. There have been no dissents.

It is plain from consideration of the decisions that the tribunal proceeded in a relatively formal way, drawing inferences from the judicial model upon which it was plainly established and doubtless influenced by the legal background of most of its Members.

> "The Legislature clearly intends that the Tribunal, though exercising administrative power, should be constituted upon the judicial model, separate from, and independent of, the Executive (see part II of the Act). Its function is to decide appeals, not to advise the Executive. The remedies which it awards may be limited or large, but the remedies are incidental to the decision at which it arrives. The decision of the Tribunal in the particular circumstances of each case,

> is therefore to be resolved according to its opinion as to the merits of that case ... It is not concerned to ensure that its recommendation is carried into effect. The Legislature in creating a right of appeal to the Tribunal, no doubt intended that the successful exercise of the right should not be unjustifiably frustrated by subsequent administrative action but the remedy, if any, is reserved for the Courts or the Parliament - not this Tribunal. The Tribunal decides the appeal : it is left to the Executive to implement the decision".[141]

Consistent with this approach, the decisions of the tribunal draw, on occasions, on legal judgments. A feature is the reliance placed upon United States and European decisions in addition to those of Australian and English courts. No case has yet arisen in which the tribunal has had to decide whether to overrule a principle stated in an earlier decision. On the contrary, a number of decisions already bear the mark of citation of earlier rulings by the tribunal.[142] This is not necessarily a bad thing. Consistency in correct action is a thoroughly desirable administrative goal. It does, however, emphasise the pressing need for the publication of more decisions of the tribunal than have so far come to light. If the tribunal is to have the role of instructor, as it should, its instruction should not be reserved to a few initiates.

The tribunal has not yet conclusively answered the questions raised about where the onus of proof should lie in proceedings before it.[143] Some decisions suggest that the tribunal merely sits in the shoes of the administrator and, on the whole of the evidence, at the end of the day, substitutes its determination, *de novo*, as it were.[144] Other decisions suggest that whilst there may be no legal onus of proof, there may be a tactical onus which arises out of the circumstances. Thus in *Ladybird*[145] the tribunal put it this way :

> "In arriving at this conclusion we have not thought it right to assume that the

> Collector's decision is either prima facie wrong or prima facie right. There is no onus upon an applicant to prove that the Collector's decision is erroneous; nor is there an onus upon the Collector to prove that his decision is right. Of course, the language of the tariff or the state of the known facts may give rise to some onus of proof resting on one party or another in a particular case, but such an onus does not arise from the making of a decision which is brought up to the tribunal for review".[146]

A practical application of this principle can be seen in the decision in *Keane* where, although no onus lay on the applicant, in the absence of evidence from her and in the face of contested issues for determination, it was simply not possible to conduct the contest.[147]

One or two observations suggest that notions of onus survive.[148] However, the general approach has remained happily free from this relic of the trial process.

It is clear that the tribunal has resisted technicalities in permitting the admission of evidence. This has extended beyond the receipt of evidence before a deputy in *England*[149] and the taking of trade evidence in customs cases.[150] In *Re Sussan (Wholesalers) Pty. Limited and Assistant Secretary, Tariff Contro Bureau of Customs and Department of Business & Consumer Affairs*[15] Smithers J. even proposed the possibility of calling members of the public to clarify the identification of the goods in questior

> "It was a feature of the evidence called by the applicant and by the respondent that the witnesses who gave it were persons engaged in the business of selling garments by retail. No attempt was made to call evidence from members of the public who wear the garments or from persons who have observed the manner of use of the garments by members of the public. The attention of both parties was expressly

> called to this feature of the evidence, but neither manifested any desire to supplement the evidence so presented. We take this as an indication that the parties regard the evidence of the persons handling the garments commercially by retail as the class of evidence most likely to disclose the characteristics of the garments and the kind to which they are normally put".[152]

Certainly, the admission of the kind of evidence called to the attention of the parties would go beyond orthodox rules of evidence. But this is no reason why it ought not to be done.

A number of decisions have made it clear that the tribunal looks to the substance as well as the form of administrative decision-making.[153] It has not hesitated to determine a matter on a ground not relied upon by the administrator.[154] It has on frequent occasions called attention to the need for substantial departmental assistance in dischargin its function. This involves not only clarification of policy[155] and the provision of full and reasoned arguments where important questions of law have to be determined.[156] It also includes the need for departments to give proper and full pre-appeal consideration to the issues appealed. In *Grolier*[157] a case which revealed inadequate departmental attention to the issues involved, the tribunal departed from the case with a severe admonishment to the bureaucrats :

> "We therefore affirm the decision, while denying the validity of the grounds upon which the decision was originally based. We express the hope that, before appeals of this kind are again brought to this Tribunal for determination, the decision in question is reconsidered by the Commission itself, and that the Commission is adequately advised as to the meaning, effect and operation of its own By-Laws".[158]

The effect of statements such as this can be seen in later decisions. It is plain that steps are increasingly being taken t

clarify the issues for determination, to rescrutinise the initial decision[159] and, on occasions, to redetermine entirely the administrative decision and redefine the issues in dispute to be placed before the tribunal for its decision.[160] It is obviously desirable that the tribunal should be protected from becoming submerged in a morass of cases that will merely substitute a costly and time-consuming mechanism for dealing with matters that should be promptly and cheaply disposed of by a single administrator. Under the pressure of new statutory obligations (e.g. to give reasons, state material facts and supply documents) and encouragement from the tribunal itself, the Departments have begun to organise themselves to review administrative decisions which have enlivened the new administrative law.

CONCLUSIONS

It is too early to judge the effectiveness of the A.A.T. The time is too short. The sample of decisions is too small and too narrow. The A.A.T. has taken a cautious view of its role in relation to constitutional challenges and has applied a technical interpretation of the requirements of "standing". It has adhered quite closely, in essentials, to the curial model upon which it was based. By adhering to court-like procedures and reasoning it has doubtless taken the safer path and enhanced the authority which will be necessary if decisions such as the *H.C.F.* case are to be accepted and abided by.

On the other hand, it has clearly adapted to the role that justifies its creation, in addition to that of the Commonwealth Ombudsman and widened judicial review. It has assumed a pedagogic function which will be the more effective because of the clarity of its decisions and the care with which the proper processes of decision-making are spelt out for future guidance. The civilising value of an independent, external critic and supervisor such as the A.A.T. cannot be underestimated As the role of government increases, the value will expand.

The tribunal has shown, as would be expected, considerable expertise in clarifying legal obligations and entitlements and

in ascertaining and articulating facts relevant to administrative decisions, particularly discretionary decisions:

> If its hand has been less steady in the review of matters of broad policy, this is scarcely a matter for surprise. The jurisdiction is new and there are no sure guide posts for the way in which it should be exercised. Opinions would appear to differ within the tribunal as to whether it should simply accept and apply a Minister's statement of policy. The better view is that it need not. A clearer refusal to abide by plainly stated Ministerial policy could not be had than in the last case in this series.[161] It is this novel function of the A.A.T. that will command the greatest attention of those who are following closely the development of this significant and untried Australian experiment in administrative law reform.

FOOTNOTES

* Chairman of the Australian Law Reform Commission. Member of the Administrative Review Council. The views expressed are the author's personal views only.

1. Mr. Justice Brennan (President of the A.A.T.) in the Foreword to the Administrative Review Council's *First Annual Report 1977* (hereafter A.R.C. Report).

2. R.J. Ellicott, Speech at the Opening of the Administrative Review Council, 15 December 1976 in Press Releases by the Attorney-General, 1976, *mimeo*, 319.

3. The report of the Committee on Administrative Tribunals and Inquiries, 1957, cmnd. 218. (United Kingdom)

4. A.R.C. report, *supra n.1*, 1.

5. *Ibid*, Foreword.

6. *Ombudsman Act 1976*. H. Whitmore & M. Arson, *Review of Administrative Action*, 1978, 5.

7. The Adminstrative Review Council is established by s.48 of the *Administrative Appeals Tribunal Act* 1975.

8. The Act has been passed but has not at the date of writing been proclaimed to commence.

9. A.R.C. report, *supra*, n.1, 11.

10. Senator P.D. Durack, Address to the Administrative Review Council, 14 October 1977, *mimeo* (67/77), 6.

11. Speech from the Throne, Commonwealth Parliamentary Debates (Senate), 17 February 1976, 11.

12. P.S. Wilenski, Address to Graduate School of Management, Univ. of N.S. 10 November 1977, *mimeo;* Review of N.S.W. Government Administration *Interim Report*, 1977, 279.

13. *Administrative Law Bill 1977* (Vic).

14. A.R.C. report, *supra n.1*, 2-4.

15. K.C. Davis, *Discretionary Justice; a Preliminary Inquiry*, 1971, 3 (hereafter Davis).

16. J. Skelly-Wright, Review "Beyond Discretionary Justice", 81 Yale L.Rev. 575, 597 (1971-2) (Hereafter Skelly-Wright).

17. E. Gellhorn and G. O. Robinson "Perspectives on Administrative Law" 75 Col.L.Rev. 771, 775 (1975)(Hereafter Gellhorn and Robinson).

18. V. Herman "Who Legislates in the Modern World?" (1976) 57 *Parliamentarian* 93.

19. Skelly-Wright, *supra n.16*, 581.

20. *Id.*

21. *Id.*

22. *Farrell v. Alexander* [1976] 1 *Q.B.* 345, 371. (Court of Appeal).

23. Davis, *supra*, n.15, 228; Gellhorn and Robinson, *supra*, n.17, 780.

24. Skelly-Wright, *supra*, n.16, 578.

25. L. Jaffe, *Judicial Control of Administrative Action*, 1965, 51.

26. E K. Pakuscher, "The Use of Discretion in German Law", 44 Uni. Chicago L.Rev. 94, 104 (1976) (Hereafter called Pakuscher).

27. Pakuscher, *supra* n.26, 106.

28. *Id.*

29. Davis, *supra*, n.15, 3. It is surprising that the potential of the A has so far gone unremarked in the debate on freedom of information i

30. L. Fuller, *The Morality of Law*, (Revised ed. 1969), 46. To the Aus same effect, Davis, *supra* n.15, 215.

31. Skelly-Wright, *supra* n.16, 575.

32. 5 U.S.C. § 706(2)(A)(1970). But see § 701(a)(2).

33. 5 U.S.C. § 706(2)(B)(1970).

34. Davis, *supra* n.15, 228-9.

35. *Ibid*, 229.

36. Verwaltungsverfahrensgesetz [VwVfG], [1976] B.G.Bl.I 1253 § 40.

37. *Id.* § 39(1). *Cf. Administrative Appeals Tribunal Act* 1975, s.28, 29 More recently Resolution (77)31 of the Committee of Ministers of the Council of Europe, adopts as a fundamental principle the obligation to state reasons for any administrative act that adversely affects a person.

38. *Id.* § 29(1). *Cf. Administrative Appeals Tribunal Act* 1975, ss.36,37,

39. § 28(1).

40. § 25.

41. Enquete-Kommission für Fragen des Verfassungsreform, *Zwischenbericht* 1972 § 3.4.2. (September 1972).

42. Bullinger, Ermessen und Beurteilungsspielraum 27 N.J.W. 769, 772 (1974). Cited in Pakuscher, *supra* n.26, 108.

43. R.N. Spann, *Public Administration in Australia*, 1973 ed., 293. See also D.C. Pearce "The Australian Government Administrative Appeals Tribunal" (1976) 1 N.S.W.L.J. 193, 196. *On the Protection of the Individual in Relation to the Acts of Administrative Authorities*, 28 September 1977, IV.

44. A.R.C. Report, *supra*, n.1, 20 (Appendix 1).

45. *Id*, 16-17.

46. Ellicott, *supra*, n.2, 320-1.

47. Source : A.R.C. report, *supra*, n.1, 40 (Appendix II).

48. Source : Information supplied by the Registrar of the A.A.T.

49. Source : As to figures to 30 June 1977, A.R.C. report, *supra*. n.1, 41. As to figures to 31 December 1977, from information supplied by the Registrar of the A.A.T.

50. A.R.C. report, Appendix II. It should be noted, in respect of applications rejected for late lodgment that time limits imposed by the 1975 Act were altered and a power to extend time was provided by the 1977 Amendment Act. As to the 5 matters heard and awaiting decision as at 30 June 1977, 3 decisions were affirmed and 2, set aside.

1. Mr. Justice R.A. Smithers.

52. s.20(3) inserted by s.11 of the *Administrative Appeals Tribunal Amendment Act* 1977. See A.R.C. report, *supra*, n.1, 9.

53. A.R.C. report, *supra*, n.1, 11.

54. The assignment of the principal reason for decision necessarily involves, in some cases, a degree of judgment. See the Appendix. For students of jurimetrics, the figures disclosed the following proportions of affirmed and reversed decisions : President participating : 8 affd, 9 revd; D.P. : 3 affd, 2 revd; other Members : 8 affd, 3 revd. These figures must be treated with caution because other Members participated with the President and cases heard by other Members alone often involved no discretiona element.

55. Pakuscher, *supra*, n.26, 104-5.

56. *Id.*, 104.

57. *Re Adams and The Tax Agents' Board* (1976-77) 12 A.L.R. 239.

58. *Id.*, 245.

59. *Loc cit.*

60. (1977) 15 A.L.R. 696.

61. *Id.*, 700.

62. This is the conclusion of G.D.S. Taylor, "The New Administrative Law" (1977) 51 *A.L.J.* 804.

63. A.A.T., 77,10003, 15 November 1977, unreported. Where the decision is not reported it will be cited by reference to the A.A.T. file num and date of decision.

63. A.A.T., 77/10013, 15 November 1977.

64. *Id.*, 3. The President determined the question alone in accordance with s.21(1A)(c) of the Act.

65. *Id.*, 5-6.

66. *Id.*, 7.

67. *Id.*, 4.

68. A.R.C. report, *supra*, n.1, 12.

69. But see ss.27(2) and 31 of the *Administrative Appeals Tribunal Act* 1

70. A.R.C. report, *supra*, n.1, 10.

71. A.A.T. 77/10031, 17 November 1977.

72. *Id.*, 3,

73. *Id.*, 3.

74. *Re England and Australian Postal Commission*, A.A.T. 77/18003, 12 December 1977.

75. A.A.T. 77/108, 19 October 1977.

76. *Id.*, 2-3.

77. *Cf.* 5 U.S.C. § 701(a)(2) (1970)(United States) and the "gebundene Verwaltung" (W.Germany). The latter is discussed in Pakuscher, *supra*, n.26, 96.

78. *Op cit*, *supra*, n.57.

79. A.A.T. 77/14004, 15 November 1977. An appeal to the Federal Court was lodged in this case. The court allowed the appeal and remitted the matter to the tribunal for rehearing. *Sullivan v. Department of Trans* (1978) 20 A.L.R. 323. It was held that there had been an absence of reference to or analysis of the relevant evidence and material facts o the grant of a conditional licence.

80. *Id.*, 3.

81. *Re Harper and The Delegate of the Secretary, Department of Transport*, A.A.T., 77-12010, 23 December 1977 ("A history of proven myocardial infarction ... shall be disqualifying").

82. A.A.T., 77/12007, 23 December 1977 ("No established medical history or clinical diagnosis of a psychosis").

83. A.A.T. 77/14002, 23 December 1977 ("Proven cases of diabetes mellitus ... [not] shown to be controlled by the use of oral ... drugs").

84. *Re Renault (Australia) Pty. Limited and The Chief Inspector, Valuation Administration, Bureau of Customs*, A.A.T. 77/104, 8 September 1977, 19

85. *Re Grolier Enterprises and N.A. Howeth, Delegate of the Australian Postal Commission*, A.A.T. 77/10007, 6 July 1977.

86. *Id.*, 6-7.

87. A.A.T. 77/16001, 29 November 1977.

88. *Id.*, 7.

89. *Op cit, supra*, n.74.

90. *Id.*, 5-6.

91. A.A.T. 76/10000, 16 December 1976.

92. (1977) 14 *A.L.R.*, 555; A.A.T.

93. *Id.*, 556

94. *Id.*, 557

95. A.A.T. 77/105, 4 August 1977.

96. *Op cit, supra*, n.84.

97. A.A.T. 77/106, 3 October 1977. *Re Design Centre and Collector of Cus South Australia, Bureau of Customs, Dept. of Business & Consumer Affa*

98. *Op cit, supra*, n.95.

99. *Op cit, supra*, n.71

100. *Re The Hospital Contribution Fund of Australia and Minister for Health*, A.A.T. 77/10040, 31 December 1977.

101. *Id.*, 6-7.

102. A.A.T. 77/10009, 15 June 1977.

103. *Id.*, 3-5.

104. (1977) 15 A.L.R. 675.

105. *Id.*, 682.

106. *Loc cit.*

107. *Administrative Appeals Tribunal Act* 1975, s.43(1)(c)(1).

108. *Op cit, supra*, n.91.

109. In *Herbert Adams Pty. Limited v. Federal Commissioner of Taxation*, (1932) 47 *C.L.R.* 222, 228.

10. *Re Beautiful Day Pty. Limited and Collector of Customs (Queensland) Department of Business & Consumer Affairs*, A.A.T. 77/14005/6, 6 July *Cf. Re Companion Pty. Limited and Director of Tariff Control, Bureau of Customs, Department of Consumer Affairs*, A.A.T. 77/12005, 12 December 1977.

111. e.g. *Harpers case, op cit, supra*, n.81, where one question was wheth a myocardial infarction had occurred".

112. e.g. *Upton's case, op cit, supra*, n.104.

113. A.A.T. 77/18002, 29 September 1977.

114. *Id.*, 14-15.

115. See esp., 3f.

116. *Re Ross and Defence Force Retirement and Death Benefits Authority*, A.A.T. 77/10008, 1 December 1977; *Cf. Re Smooker and D.F.R.D.B.A.*, A.A.T. 77/109, 1 December 1977; *Re Okell and D.F.R.D.B.A., A.A.T.* 77/10016, 1 December 1977.

117. *op cit, supra*, n.60.

118. *Id.*, 701, 704.

119. *Re Chan and Minister for Immigration and Ethnic Affairs*, A.A.T. 77/1018, 31 October 1977 (D.P.); *Re Sullivan and Minister for Immigration and Ethnic Affairs*, A.A.T. 77/12006, 19 Oct. 1977, 12.

120. *Re Hood and Minister for Immigration and Ethnic Affairs*, A.A.T. 77/10021, 19 October 1977. Smithers J. commented on the fact that counsel refrained from offering the applicant as a witness, 6.

121. *Re Salazar-Arbelaez and The Minister for Immigration and Ethnic Affairs*, A.A.T. 77/10037, 30 December 1977.

122. *Op cit, supra*, n.74.

123. *Id.*, 4-5.

124. *Keevers case, op cit, supra*, n.87; *England's case, op cit, supra* n.74, 6.

125. *Op cit, supra*, n.116

126. *Id.*, 10.

127. *Op cit, supra*, n. 100.

128. *Op cit, supra*, n.60, 699-700.

129. *Id.*, 700-1.

130. *Cf.* Menzies J. in *The Queen v. Anderson; ex parte Ipec-Air Pty. Limited* (1965) 113 *C.L.R.* 177, 220.

131. *Becker's case, op cit, supra*, n.60, 701.

132. *Id.*, 704.

133. *Sullivan, op cit, supra*, n.119.

134. *Id.*, 4.

135. *Chan, op cit, supra*, n.119, 3-4.

136. *Ibid.*, 24 (emphasis supplied).

137. *H.C.F. case, op cit, supra*, n.100, 9.

138. The decision in the *H.C.F. case*, 1.

139. *Id.*, 18.

140. Taylor, *op cit, supra*, n.64,

141. *Becker's case, op cit, supra*, n.60, 699.

142. e.g. *Chan, op. cit, supra*, n.119., 3 and *Salazar, op cit, supra* n.121, 4.

143. Pearce, *op cit, supra*, n.43, 207-8.

144. *Ross, op cit, supra*, n.116, 9; *Keane, op cit, supra*, n.75, 3.

145. *Op cit, supra*, n.91.

146. *Id.*, 10.

147. *Op cit, supra*, n.75.

148. e.g. Smithers J. in Re Sullivan and Minister for Immigration and *Ethnic Affairs, op cit, supra*, n.119, 3 : "If the tribunal is not satisfied that certain recommendations should be made and the matter remitted for reconsideration ... then it ought to affirm the decision in question". See also Brennan J. in the *H.C.F. case, op cit, supra*, n.100, 18.

149. *Op cit, supra*. n.74.

150. e.g. *Re Ladybird, op cit, supra*, n.91; *Re Gissing, op cit, supra*, n. A.A.T. 77/10012, 20 December 1977.

151. A.A.T. 77/10012, 20 December 1977.

152. *Id.*, 4-5.

153. *Tobin, op cit, supra*, n.102 and *Upton, op cit, supra*, n.104.

154. *Grolier, op cit, supra*, n.85.

155. *Ladybird, op cit, supra*, n.91, 10; *Becker, op cit, supra*, n.60, 9.

156. *McHattan, op cit, supra*, n.63, 4.

157. *Op cit, supra*, n.85.

158. *Id.*, 7.

159. *Serecen, op cit, supra*, n.71.

160. As in *Sussan, op cit, supra*, n.151, 3.

161. *H.C.F. case, op cit, supra*, n.100.

APPENDIX

SCHEDULE OF A.A.T. DECISIONS WITH REASONS

1 JULY 1976 - 31 DECEMBER 1977

DATE & TRIBUNAL	PARTIES	STATUTE & NATURE OF PROCEEDINGS		DECISION
12.11.76 Pres.	Re Adams and The Tax Agents' Board	*Income Tax Assessment Act* s.251K(3). Application for Review of Tax Agents' Board cancellation of registration as a tax agent	X	Decision of the Board affirmed
16.12.76 Pres. + 2M	Re Ladybird Childrens Wear Pty. Ltd. and Dept. Business & Consumer Affairs	*Customs Tariff Act* 1966. First Schedule. Application for review of classification of Garments for Customs purposes.	✓	Demand for customs duty reviewed and proper duty determined
27.4.77 Pres. + 2M	Re Gissing Distributors Pty. Ltd. and Dept. Business & Consumer Affairs	*Customs Tariff Act* 1966 Application for review of classification of garments for purposes of customs duty.	✓	Demand reviewed and proper duty payable determined
27.4.77 Pres. + 2M	Re Osti Holdings Ltd. and Collector of Customs (NSW)	*Customs Tariff Act* 1966 Application for review of classification of "bedspread" for purposes of customs duty.	X	Decision affirmed.
15.6.77 Pres. + 2M	Re Tobin and Dept. of Transport	*Air Navigation Regulations* R258(1)(c) Application to set aside decision suspending an engineer's licence	✓	Decision set aside and in substitution furthe decision that no actio be taken in respect of the licence.
16.6.77 Pres. + 2M	Re Upton and Dept. of Transport	*Air Navigation Regulations* R258(1)(c) Application to set aside decision of Regional Director	✓	Decision set aside and in substitution decision that no actio be taken in respect of the licence.
6.7.77 Pres. + 2M	Re Grolier and Aust. Postal Commission	*Postal By-Laws* Sub-paras. 177(1)(a) and (c) and 179(3) Application for review of refusal to pay compensation for lost article	X	Decision affirmed on different grounds
6.7.77 Pres. + 2M	Re Beautiful Day Pty. Ltd. and Collector of Customs (Qld)	*Customs Tariff Act* 1966 Application for review of classification of garments for purposes of customs duty	X	Decision affirmed.

TRIBUNAL	PARTIES	STATUTE & NATURE OF PROCEEDINGS		DECISION
8.9.77 Pres. + 2M	Re Sapphire & Opal Centre Pty. Ltd. and Bureau of Customs	*Customs Tariff Act* 1966 and *Customs Act*, 1901. Application for review of demand for customs in respect of certain items of gold jewellery	√	Review of decision and determination of duty, although at a higher, not lower level.
22.8.77 Pres.	Re Becker and Minister for Immigration & Ethnic Affairs.	*Migration Act* 1958 ss. 6,8,13(a) Application for review of decision of Minister and revocation of order for deportation	√	Recommendation that deportation order be revoked. Matter remitted to the Minister for re-consideration in accordance with recommendation.
8.9.77 Pres. + 2M	Re Renault (Aust) Pty. Ltd. and Bureau of Customs	*Customs Act* 1901 s.154 Application for review of demand for customs duty paid on certain cars	√	Proper duty payable redetermined
29.9.77 Pres. + 2M	Re Bos and Defence Forces Retirement & Death Benefits Authority (DFRBA)	*Defence Forces Retirement & Death Benefits Act* 1973 Application for review of decision of Authority re-classifying the applicant for invalidity from Class B to Class C	√	Decision affirmed but % invalidity increased from 5% to 15%
3.10.77 D.P. + 2M	Re Design Centre and Coll. of Customs (S.A.)	*Customs Tariff Act* 1966 Application for review of classification of "stove" for customs duty purposes	X	Decision affirmed
19.10.77 D.P. + 3M	Re Hood and Min. for Immigration & Ethnic Affairs	*Migration Act* 1958 s.13 Application for review of Minister's order for deportation	X	Decision affirmed
19.10.77 D.P.	Re Sullivan and Min. for Immigration & Ethnic Affairs	*Migration Act* 1958 s.13 Application for review of Minister's order for deportation	√	Recommendation that the deportation order be revoked and matter remitted to the Minister for reconsideration
19.10.77 S.M.	Re Keane and Aust. Postal Commission	*Postal By-Laws* Application for review of decision rejecting claim for compensation	X	Applicant failed to present evidence. Decision affirmed

DATE & TRIBUNAL	PARTIES	STATUTE & NATURE OF PROCEEDINGS		DECISION
31.10.77 D.P.	Re Chan and Min. for Immigration & Ethnic Affairs	*Migration Act* 1958 s.13 Application for review of order for deportation	✓	Recommendation that deportation order be revoked and matter remitted to Minister for reconsideration
5.11.77 Pres. + 2M	Re Sullivan and Dept. of Transport	*Air Navigation Regulations and Orders* Application for review of refusal to grant a commercial pilot licence etc.	X	Decision affirmed. Reversed on appeal by Federal Court. See (1978) 20 *A.L.D.R.* 323.
8.11.77 S.M. + 2M	Re Peebles and Dept. of Transport	*Air Navigation Regulations and Orders* Application for review of refusal to grant a student pilot's licence	X	Decision affirmed
15.11.77 Pres.	Re McHattan and Bureau of Customs	*Customs Act* 1901 s.167(1) Application for review of a demand for customs duty on imported fabrics [illegible] the applicant	X	The applicant is not a person whose interests are affected and did not validly institute proceedings for review of that demand
17.11.77 Pres.	Re Serecen and Min. for Immigration & Ethnic Affairs	*Migration Act* 1958 Application for review of deportation decision	X	No jurisdiction (decision antedated the Act)
29.11.77 S.M.	Re Keevers and Aust. Postal Comm.	*Postal By-Laws* 177(3) Application for review of decision of Delegate rejecting claim for compensation	X	Decision affirmed
1.12.77 S.M. + 2M	Re Ross and D.F.R. D.B.A.	*Defence Force Retirement & Death Benefits Act* 1973 Application for review of disability	✓	Disability reviewed and increased 25% to 30% and applicant reclassified Class B to Class C
1.12.77 S.M. + 2M	Re Smooker and D.F.R. D.B.A.	*Defence Force Retirement & Death Benefits Act* 1973 Application for review of classification	X	Decision affirmed
1.12.77 S.M. + 2M	Re Okell and D.F.R. D.B.A.	*Defence Force Retirement & Death Benefits Act* 1973 Application for review of classification	✓	Applicant's incapacity redetermined and reclassified as Class A

DATE & TRIBUNAL	PARTIES	STATUTE & NATURE OF PROCEEDINGS		DECISION
12.12.77 S.M.	Re England and Aust. Postal Commission	*Postal By-Laws* 177 Application for review of refusal to pay compensation for damage to item posted by registered post	X	Decision affirmed
12.12.77 S.M. + 2M	Re Companion Pty. Ltd. and Bureau of Customs	*Customs Tariff Act* 1966 Application for review of classification of plastic coolers for customs duty purposes	√	Demand reviewed and proper duty payable determined
23.12.77 D.P. + 2M	Re Sussan(Wholesalers) Pty. Ltd. and Bureau of Customs	*Customs Tariff Act* 1966 Application for review of classification of garments for customs duty purposes	X	Decision affirmed
23.12.77 S.M. + 2M	Re Harper and Dept. of Transport	*Air Navigation Regulations and Orders* Application for review of decision to refuse to grant commercial pilot's licence	X	Decision affirmed
23.12.77 S.M. + 2M	Re Grover and Dept. of Transport	*Air Navigation Regulations and Orders* Application for review of decision to refuse to grant a student pilot's licence	X	Decision affirmed
23.12.77 S.M. + 2M	Re McKewin and Dept. of Transport	*Air Navigation Regulations and Oaders* Application for review of decision to refuse to grant a student pilot's licence	X	Decision affirmed
30.12.77 Pres.	Re Salazar and Min. of Immigration & Ethnic Affairs	*Migration Act* 1958 s.13 Application for review of order for deportation	X	Decision affirmed
31.12.77 Pres.	Re Hospital Cont. Fund of Aust. and Minister for Health	*National Health Act* 1953 s.78 Application to set aside decision of the Minister refusing to approve changes to the rules of the applicant (increasing contributions).	√	Decision set aside and in substitution the Tribunal approved changes in health fund contributions proposed and remitted the matter of approval of other changes to the Minister for reconsideration