LEGAL RESOURCES CENTRE OF SOUTH AFRICA

CONFERENCE, JOHANNESBURG SOUTH AFRICA

LAW IN A CHANGING SOCIETY

12 - 13 APRIL 1989

'Effective Review of Administrative Acts - Hallmark of a Free and Fair Society'

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EFFECTIVE REVIEW OF ADMINISTRATIVE ACTS - HALLMARK OF A FREE AND FAIR SOCIETY

The Hon Justice Michael Kirby CMG*
Australia

THE GREATEST ACHIEVEMENT?

In 1962 Lord Diplock declared that the progress made over the past thirty years towards a comprehensive system of administrative law was "the greatest achievement of the English courts in my judicial lifetime".[1] It was, I suppose, inevitable that a common law system should respond vigorously to the necessities posed by the growing power of the State, which has been such a feature of this century. The two World wars, perceived challenges to domestic security coming from home and abroad and the increasing expectations of the welfare state have in many countries - including Australia and South Africa - produced the danger of the misuse of administrative power. That is why Lord Denning suggested that "the great problem before the Courts in the 20th century has been: In an age of increasing power, how is

the law to cope with the abuse or misuse of it?"

The traditional tools inherited from English law sometimes proved inadequate for the courts of the old British Empire to provide effective checks for legality and the protection for the ordinary citizen against the misuse of administrative power. The prerogative writs presented the claimant for relief with a minefield of technical requirements. Error within jurisdiction was usually impervious to correction. Error had normally to be shown on the face of the record and this expression was, until recently, most narrowly construed.[3] There was no common law duty which obliged administrators to give their reasons to enhance the record. The whole process was rather formalistic. The concentration of its attention was upon form, ie with correctness of <u>how</u> things were done rather than with the merits of <u>what</u> was done. A claimant securing victory in a court - in demonstrating that a decision had been unlawfully made or unfairly arrived at would all too often be subjected to the humiliation of facing the same decision, made on the second occasion, immune from review because the forms had by then been scrupulously observed. This was yet another instance where the strengths (and weaknesses) of the judge-made law lay in the remedies provided by the courts, derived from the circumstances which had given rise to those remedies in the first place. A small bureaucracy at Westminster, in more primitive legal times, did not give rise to a coherent body of administrative law

for the defence of legality and the protection of the individual. Often this absence of a coherent administrative law was boasted of - as if such checks were needed by foreigners in Europe but not by British subjects blessed by an uncorrupted bureaucracy and protected by Ministerial responsibility of elected officials answerable in parliament.

We might have continued to muddle along with this "system" had not the very growth of the size of the administration, the diversity of its activities and the risks and evidence of oppression seemed increasingly intolerable to civilized people. The law, as a constantly moving and developing force, especially in countries of the common law tradition, inevitably had to face, case by case, the offensiveness of unbridled power. In this way, courts and legislatures were stimulated to set about the task of developing a coherent administrative law. This is how "the greatest achievement" of the courts, in the fields of administrative law came about.

SOUTH AFRICAN COUNTERPOINT

No country has been exempt from the pressures for change. Some injustices of cruelty, oppression, indifference and illegality on the part of officials are so offensive to the human spirit that a judicial decision-maker cannot in conscience sanction what has occurred. I do not presume to comment upon the developments of administrative law in the courts of South Africa. I am not unaware of the criticisms which have been voiced by some commentators that the embrace

of the radical developments which have occurred in England, and to which Lord Diplock referred, has not always been enthusiastic or energetic in this country. Mr Christopher Forsythe, for example, has recently criticised the Appellate Division of the Supreme court of South Africa for failing to make use of the opportunities provided by the recent security cases to adopt a fresh approach to the problem of keeping the executive government within legal boundaries, particularly regarding the treatment of detainees. Mr Forsythe noted, for example, that Heffer JA's judgment in Castel No v Metal and Allied Workers' Union which, he claimed, showed an "ignorance of the applicable English law" and brought "to mind the vision of some dark-ages lawyer surrounded by classical texts peering over these jewels of legal scholarship, yet understanding almost nothing in them". He concluded: "This is the point, in public law at any rate, to which the Appellate Division has sunk."[4]

Similar criticism has been voiced by Professor Dennis Davis. His judgment is that the Appellate Division has "offered little in the way of a buffer between an executive armed with ferocious emergency powers and the individual citizen wishing to enjoy the ordinary civil liberties to which each citizen in any society claiming allegiance to the western democratic tradition is entitled."[5]

Nevertheless, the South African legal system has not been entirely immune from the pressures which have elsewhere developed changes designed to provide improved redress in a

administrative law to the citizen wishing to challenge state authority. From the early days of the century, as Arthur Chaskalson[6] has observed, South Africa's courts sometimes adventurously escaped the formalism of the common law prerogative writs. As early as 1903 Chief Justice Innes asserted:

> "[w]henever a public body has a duty imposed upon it by statute and disregards important provisions in the statute, or is guilty of gross irregularity or clear illegality in the performance of the duty, the court may be asked to review the proceedings complained of and set aside or correct them. There is no special machinery created by the legislature, it is a right inherent in the court ... The nonperformance or wrong performance of a statutory duty by which third persons are injured or aggrieved is ... a cause [which] falls within the ordinary jurisdiction of the court. And it will, when necessary, summarily correct or set aside proceedings which come under the above category."[7]

As evidence of the response of the judges to the growth of the bureaucracy and the greater dangers of unlawful, arbitrary or unfair actions by it, Chaskalson singles out the decision of Jansen JA in Theron v Ring van Wellington.[8] In that decision the court went beyond the earlier "formal approach" to the review of the decisions of public officials or statutory bodies.[9] It embraced a broad test by which official action would be reviewed by the touchstones of fairness and reasonableness. At least at the time of Chaskalson's essay, this enlargement of the claim for judicial review had not been adopted at the binding rule of

the Appellate Division.[10] In subsequent cases, such as Mandela v Minister of Prisons[11], the potential of the enlargement of judicial review was not brought to full flower.

But the point which I am making is a more limited one. Judges in South Africa, like judges everywhere, are from time to time confronted with examples of official illegality, oppression, insensitivity and injustice. Judges in many countries which have, in whole or part, derived their legal system from England, have increasingly of late reacted vigorously to uphold the rule of law, require fair procedures and insist upon natural justice for the ordinary citizen in the often unequal battle with officials. Judges and other lawyers in South Africa can take comfort and strength from learning of the responses of their counterparts in other parts of the world. No two legal system share precisely the same problems. The law responds differently in every land to the particular social circumstances in which it must operate. But in the field of administrative law, there are some developments which appear to be universal. They are the reasons behind the comparatively rapid advances of this branch of the common and statute law in many lands. If the universality of these phenomena is appreciated - and the vigour and resolution of judicial responses to them elsewhere, fully realized - the individual judge and lawyer confronted by lawlessness or injustice on the part of officials may take heart. For here is one of the truly worthy functions of the lawyer, mapped out and chartered for

us as we approach the 21st Century. That century will be one of great opportunities. Yet the developments of technology will enhance the risks of official intrusion and oppression. In such circumstances, if traditional civil liberties are to be preserved and protected, it will be vital for judges and lawyers to play their part in providing effective checks against the overweening state and its officials.

It has been commented that South Africa has now been "left behind by the English courts", nurturing in its courts the "narrower and more formal approach" of earlier decisions which have now been overthrown in other jurisdictions.[12] This would not be the first time that a legal system, cut off from its original sources, has gone its own way: sometimes for better, sometimes for worse. The clearest illustration of this phenomenon is to be found in the legal system of the United States of America. Many of its common law principles reflect the core ideas which were current at the time of the American Revolution. Sometimes this is vividly illustrated by the terminology used which seems curiously old-fashioned to ears attuned to a further two centuries of English legal development. Local adaptation and variation of the source of law are both natural and desirable. But in the field of administrative law, where Lord Devlin makes his proud boast for English law, the universal nature of the problem being tackled suggests that there is much for us to learn from each other. The rule of law: preventing arbitrary, idiosyncratic oppressive rule by the whim of the official is as important

in Cape Town as it is in Canberra, Calgary or Cambridge. Bureaucratic insensitivity, the unfair denial of legitimate expectations, just procedures and the abuse of the requirements of natural justice are as objectionable in Johannesburg as they are wherever they show their ugly face.

So the way of the future in South Africa will include, in this connection, the return of the Appellate Division to the mainstream of legal developments on administrative law which have been occurring in many other legal jurisdictions. It will also, doubtless, include the enactment of South African legislation designed to collect, reform and enhance administrative law remedies. The South African Law Commission has published a working paper Investigation into the Courts' Power of Review of Administrative Acts.[13] This annexes draft legislation. The Bill proposes a new Judicial Review Act. That Act provides for the giving of reasons for the decision under review within 30 days of the request and the re-statement of the list of grounds upon which such review might be had. This timely proposal for legislative reform leads naturally to a statement of the main purpose of this paper. It is to describe some of the more remarkable legislative reforms which have been adopted in recent years in Australia. Those reforms have concerned administrative law. They represent probably the most adventurous and far-reaching legal reforms which have taken place in Australia in recent years. They are not without their critics but they also have their proponents. As South Africa

reviews, in circumstances which are particularly apt for administrative reform, the directions which it should take in this regard, lessons may be derived from the Australian experience. It may suggest some things worth adapting. Equally, it may suggest some developments not suitable for export.

THE OMBUDSMAN - ACCESSIBLE REMEDY WITH LIMITED POWER

There have been important reforms in administrative law in Australia, secured by the techniques of judge-made law. I will return to these. For the moment my purpose is to describe the "package" of administrative reform adopted by legislation and known as "the new administrative law". Most of the developments have occurred in the last 15 years. The most important of them have occurred, under successive governments, in the Federal sphere. But some have also occurred in the Australian States. Every State now has an Ombudsman - an official who can receive public complaints about alleged administrative wrong-doing and who can report on "wrong conduct" on the part of administrators.[14] In some parts of Australia, as in my own State of New South Wales, the Ombudsman also enjoys enhanced powers to investigate complaints against the police.[15] These powers arise out of early reports of the Australian Law Reform Commission.[16] Following a recent change of government in New South Wales, and expressed concern about the alleged misuse of the police complaints procedure, proposals have now been made to exclude from Ombudsman review "minor offences"

as determined by the Commissioner of Police in his absolute discretion.[17] Needless to say, this proposal has attracted criticism both within and outside parliament.

The office of Ombudsman adapted from Scandinavia via New Zealand, is now such a feature of the informal redress available to citizens in a modern community with complaints against officials, that it scarcely requires elaboration in the Australian context. The proposal for an Ombudsman-like official was made in a report of the Kerr Committee.[18] It followed study of the function of the United Kingdom Parliamentary Commissioner and the more widely empowered New Zealand Ombudsman. The committee proposed that the Australian Federal Ombudsman should have still wider powers to advise complainants on their rights of review. If a matter of principle were involved the official would have the power to initiate proceedings before the tribunal or court concerned, on behalf of the complainant. This "super Ombudsman" would also have the right to appear in any action before a tribunal or court, with the leave of that body. Because powers beyond those normally provided to an Ombudsman were contemplated, the Kerr Committee avoided the name "Ombudsman". It proposed instead the establishment of a "Counsel for Grievances".

In the end this proposal was not favoured by another committee which was set up (in a typical Australian fashion) to review the recommendations of the Kerr Committee. This second report, by the Bland Committee, recommended instead

the adoption of an Ombusdman based upon the New Zealand model.[19] It was this proposal which was finally adopted. The office of the Commonwealth Ombusdman was established.[20] By the time of its establishment, there were equivalent officers in the other Australian jurisdictions.

The Ombudsman has attracted the least academic attention and excited the least criticism amongst the units of the new administrative law in Australia.[20] According to one commentator:

> "The procedures of the Ombudsman continue to exhibit the virtues of simplicity, informality and adaptability to the administrative processes under review. Only where the Ombudsman in the States has come up against the powerful vested interests in Police Forces and in local government, and on one or two occasions, vested interests in the senior bureaucracy in N S W, has the institution appeared to come under serious threat."[21]

One remnant of the rôle of the General Counsel proposed by the Kerr Committee is to be found in the case of the Commonwealth Ombudsman in Australia. This arises under the Freedom of Information Act 1982 (Cth). Under that Act, the Ombudsman may represent a person in proceedings relating to access to official information, before the Administrative Appeals Tribunal. However, although this power exists by statute, the Ombudsman has, until now, taken the view that insufficient resources have been supplied to permit the task to be carried out.[22]

Lack of resources has been a constant theme of the complaints of successive Commonwealth [and State] Ombudsmen in Australia. In a recent address, the present Commonwealth Ombudsman (Professor Dennis Pearce) has lamented that his is the "world's second busiest Ombudsman's office", has the lowest ratio of staff to complaints yet has the "world's poorest resources". Professor Pearce points out that in 1988 he received 22,000 approaches to his office of people who felt wronged by an administrative decision. Of these, some 12,500 came under the jurisdiction of the Ombudsman. He asserted that on a staff to complaint ratio the Australian Federal Ombudsman was second only to the Ombudsman in Pakistan in disposing of citizen complaints. He suggested that the reason why Australians complain to their Ombudsman more than citizens in other countries was that "they had less respect for government officials, were better educated and more aware of their rights". And he pointed to the attraction of the office of Ombudsman as a review body:

> "It costs nothing to lodge a complaint, it is informal - the bulk of complaints are made by phone - and it's quick. Fifty percent of complaints are dealt with within two months and 90% within six months. It is also effective. The majority of our recommendations are followed. In about half of the matters investigated, some advantage to the person complaining is obtained. This figure is very high by world standards."[23]

The lack of resources has led to the curtailment of publicity campaigns concerning the facility of the Ombudsman

and in particular in respect of providing access under the Freedom of Information Act to official information.[24]

Another issue which has attracted comment in connexion with the Ombudsman in Australia has been the increasing number of occasions upon which recommendations made by the Ombudsman for action (particularly ex gratia compensation) has been resisted or refused by the agency concerned. Under the Act, the Ombudsman has the power in such circumstances to forward a copy of a report to the presiding officers of the Federal Parliament for presentation by them to their respective chambers. This action has led to a review of the impasse by the Senate Standing Committee on Constitutional and Legal Affairs. However, until now, it has not led to change in the position of the executive government.[25]

The most important criticism which has been voiced concerning the functions of the Ombudsman in Australia has related to the suggested failure of the Ombudsman to articulate a coherent concept of error which warrants the decision that there has been an instance of "defective administration". Where there are several (as opposed to one) reasonable courses of action open to the administrator, the Ombudsman will not ordinarily find that the choice of one, as against another, amounts to defective administration, provided that the correct decision-making procedures were followed.[26] Yet both at a State and Federal level in Australia, the office of Ombudsman has generally been regarded as extremely useful, approachable, cost effective

office and typically courageous where the exposure of wrong administration is felt necessary on the facts presented in the complaint.

ADMINISTRATIVE APPEALS TRIBUNAL - RADICAL REFORM

If the Ombudsman has been an Australian adaptation of an office earlier developed elsewhere, the most adventurous component in the new administrative law has been the Administrative Appeals Tribunal (AAT).[27] This body is a general tribunal for administrative decisions in the Federal sphere of government. Only Victoria has established such a general tribunal and its jurisdiction remains quite limited. The Federal AAT, on the other hand, can lay claim to being an appellate tribunal of very large and general jurisdiction. In the scope of its jurisdiction, its statutory powers and the wide interpretation given by the AAT itself and the courts to its functions, this body represents a very important and challenging innovation to administrative law in Australia. It is firmly cast in the judicial model of decision-making. This is done both by its legislation and by the practice established by its first President (now Sir Gerard Brennan of the High Court of Australia).

The purposes of the AAT are to be a general tribunal of final review, to take over as far as possible from the courts and existing tribunals, final review functions of administrative action and to undertake that review at a high level of quality. The AAT aims to replace in Australia the proliferation of tribunals which has been such a feature of

20th Century government with a single body which will enhance the coherency of Australia's federal administrative review.

From the outset a number of critical decisions had to be made. They came up in a series of key decisions. These laid down the broad charter of the AAT. They have been followed ever since:

(1) The first concerned whether a review "on the merits" meant no more than that the AAT should decide whether the decision under review was one which could reasonably have been made by the official concerned. In Drake v Minister for Immigration and Ethnic Affairs[28] the Federal Court of Australia held the AAT had to make its own decision on the merits on all of the facts known to it and not only upon those facts which had been known to the decision-maker. Furthermore, it had to determine, on the basis of all those facts, what was the "correct or preferable decision" in the case in its opinion. In short, the AAT stepped into the shoes of the decision-maker. Unlike traditional administrative review, its focus of concern was not simply whether the decision had been made in the correct way or arrived at by fair procedures or was open to be made, within the jurisdiction, of the decision-maker. The focus of concern of the AAT was upon the merits of the decision itself. This function represents, as will readily be seen, a radical departure from the traditional and more

limited role of the courts and of most (though not all) tribunals;[29]

(2) Another question which arose early was whether the AAT was at liberty to review policies which lay behind decisions which it was required to review. In Re Becker and Minister for Immigration and Ethnic Affairs[30] Brennan J pointed out that a review "on the merits" required consideration not only of the facts of the case but also of any policy which had been applied. He drew a distinction between policies which were clearly made or settled at the political level and those which were made at the departmental level. Substantial reasons would have to be shown why basic policies, which might have been forged at the political level, should be reviewed and changed by the AAT. Nevertheless, Brennan J asserted that there might indeed be particular cases where "the indefinable yet cogent demands of justice required a review of basic or even political policies". Although these would be exceptional cases, they would be cases where the AAT would, if necessary, act resolutely in its pursuit of "the merits" as it saw them;

(3) In a more acute form, the last-mentioned question was posed as to whether, if a Minister had decided the policy in question, the AAT was bound to follow the Ministerial policy. The Federal Court of Australia held that, to the contrary, the AAT must not abdicate

its function of determining whether, on the material before it, the decision in question was the correct or preferable one. It was obliged to avoid an uncritical application of policy - even that of the Minister - where this resulted in an incorrect decision or a decision being made which was less than the preferable one;[31]

(4) A fourth question arose where it was shown that, although the official had acted in purported exercise of powers under law, in fact he or she had exceeded those powers. Could it then be said that although the jurisdiction of the AAT had been validly invoked, the power relied upon was not in truth "in exercise of" that provided by law. In other words, if the action of the official was null and void did this fact deprive the AAT of the right to provide review? Brennan J in Re Brian Lawler Automotive Pty Limited and Collector of Customs (NSW)[32] held that "the effectiveness of the AAT's function would be 'grievously weakened if it were impotent to check excesses of power'". He therefore rejected a literal construction of the statute by which the non-fulfilment or non-observance of the conditions governing the valid exercise of powers would go without correction by the AAT. He held that it was enough that the decision was made in the intended exercise of the power. This decision was taken on appeal from the AAT to the Federal Court in Australia. The

Solicitor-General for the Commonwealth urged that Brennan J had erred. However, by majority that Court held that the AAT had jurisdiction to review a decision purported to be made in the exercise of powers conferred by a statute, whether or not, on a proper interpretation of the enactment, such powers were in law conferred.[33]

Following these early decisions, the AAT set upon the task of building sound procedures and a firm foundation for a wide ranging jurisdiction of administrative review. That jurisdiction has been gradually enhanced. When the tribunal was established in 1975 it had power to review decisions under 25 statutes. Now nearly 300 Federal statutes in Australia make provision for AAT review.

Every year the number of enactments conferring jurisdiction has increased. Apart from the number of statutes conferring jurisdiction it is important to note that very large bulk jurisdiction has been conferred to replace that previously exercised in separate tribunals, such as those dealing with income tax disputes, and cases involving claims to benefits by veterans and persons asserting an entitlement to social security benefits. As well, important new jurisdiction under novel legislation such as the Freedom of Information Act has been conferred on the AAT.

PRELIMINARY EVALUATION OF THE NEW TRIBUNAL

It is too early to evaluate this radical effort to

bring together in a single tribunal of extremely wide powers the bulk of administrative review of Federal bureaucratic decisions in Australia. A number of important benefits have undoubtedly attended the establishment of the Administrative Appeals Tribunal. They include:

1. The provision of a more effective remedy to ordinary individuals affected by administrative decisions. In the past, the theory of Ministerial responsibility broke down, in practice, because of the sheer number of administrative decisions being made in the name of the Minister for which it would not be reasonable to require him or her to be personally accountable. Furthermore, the provision of curial review was not only dilatory and expensive but suffered the limitations already mentioned, both procedural and substantive, in what the courts could offer. Here, at last, was a tribunal which could decide matters on the merits. It could make binding orders. Unlike those of the Ombudsman, these orders had, as a matter of law, to be observed unless (rarely) expressed in the form of a recommendation. In this way, an extremely effective remedy was provided to the individual in contest with the state.

2. In the course of providing its decisions, the AAT was necessarily engaged in the task of elucidating Federal legislation. This in turn has led to an increased awareness amongst officials both of the necessity to

comply with the law and of the content of the law to which they must adhere.[34] It may be presumed that most officials will be law-abiding. But the facility of a skilled and specialist tribunal of general jurisdiction, with the interaction of experience in many spheres of administrative operation, assures the provision to administrators in doubt of a ready, speedy and relatively flexible instrument for authoritative decision-making for general guidance.

3. One of the purposes of establishing the AAT was to promote greater consistency in public administration. One of the advantages of the AAT has been the way in which it has promoted internal review mechanisms within Federal administrative agencies, established in order to cope with AAT appeals. These have become the usual vehicles for disseminating information concerning AAT decisions. They have thereby promoted greater evenness in the application of the law. The official's discretion can be a helpful palliative against the inflexible application of rules in a mindlessly unquestioning and mechanical fashion. But it can also become an instrument of idiosyncratic oppression as officials with preconceptions carry out their own personal predilections. The provision of a general tribunal of review has, it is believed, reduced this problem in Australia.

4. The benefit to the public generally of a system of

review such as the AAT provides is in some ways intangible. But it includes the enhancement of the accountability of officials and the provision of a more open administration. Once it became necessary to elucidate the facts and policies behind administrative decisions, a whole series of unexpected and hitherto unknown official guidelines were exposed to critical review. Thus, decisions on deportations of aliens from Australia were found, in the early cases, to be based on internal departmental memoranda which were in turn framed as a consequence of a Ministerial press release written many years before. The statute was expressed in the most general terms ("the Minister may depart"). It was only the procedure of administrative review, provided by the AAT, which displayed to public gaze the actual way in which this broad Ministerial power was operated by officials within criteria known to them but not otherwise open to public scrutiny, criticism and improvement.

5. The advent of the AAT has also led to improved internal arrangements within departments. Thus there has been introduced improved systems for training staff[35] and improved mechanisms for internal decision-making aimed at avoiding the necessity of AAT review or, once initiated, settling the differences in a pre-hearing conference.[36] The development of the conference, in the model of conciliation, is one of the most

innovative procedural achievements which has accompanied the new administrative law.

6. Although, as will be seen below, there have been criticisms of the costs involved in AAT review, it is necessary to get those costs in perspective. By and large administrators have acknowledged that the Federal system has coped well to absorb the AAT machinery. One departmental head has pointed out that although 1380 social security appeals in one year might seem a large number, and a costly burden on the public purse, that number must be measured against the 16 million social security decisions made in the same period. Seen in this perspective, the machinery for review is not only an assurance to the individual of justice in the particular case but a safeguard against arbitrary decision-making and a stimulus to improved administrative standards.[37]

On the other hand, the AAT system has been criticised in Australia on a number of levels:

1. A frequent criticism by administrators is that the AAT can become a first port of call where administrators should try to get their decision right in the first instance.[38] Yet if the decision is "right", it may be unlikely that a bothersome appeal will follow.

2. Another criticism often voiced is that the system is too favourable to the individual and that from a social

point of view the concern of public administration should be with good administration for the protection of the whole community. Thus, an excessively scrupulous approach to cases of welfare fraud in social security appeals might maximise justice to the individual whilst discouraging the community's legitimate interest in striking down anti-social conduct such as is involved in unjustifiable claims for social security.[39] On the other hand, the officials' view of what is "welfare fraud" should surely be the subject of external scrutiny, lest those who are too close to the assertion become judges in their own cause;

3. A still more frequent complaint is that many administrative decisions are discretionary in nature and are therefore not susceptible to a simple right or wrong classification. They are, instead, matters upon which different decision-makers may reach different conclusions. Courts have long shown sensitivity to this fact by disciplining themselves from unduly interfering in discretionary decisions made by judges. Why, it is asked, should it not be equally so in the case of administrators?[40] On the other hand, this argument should not be allowed to mask a repeated course of unfairly exercised discretion. If, consistently, the AAT reaches conclusions different from those of the administrators, this fact raises a

doubt as to whether the administrators' exercise of discretion was reasonable in the first place.

4. A more fundamental criticism of the AAT relates to the range of material upon which the administrator and the tribunal will respectively act. The tribunal, acting fairly, will generally confine itself to matters properly proved before it. Administrators, on the other hand, will not normally act upon oral evidence. Instead they will rely upon a whole range of background data, whether formally proved or not. They will be more sensitive to political realities and to the attitudes of Ministers. In this way the ordinary administrator may be more attuned to the democratic faces at work in society. One of the dangers of a disharmony between the materials relied upon by the AAT and those relied upon by the ordinary official is that this disparity will produce a growing formalism in administration which would be undesirable and costly.[41]

5. Yet another criticism, relevant to the last, arises from the entitlement of the AAT to review Ministerial decisions. It is often claimed that this power represents a derogation from the democratic features of Australian society. Ministers have themselves spoken out most forcefully - and still more forcefully in recent years - concerning what they perceive to be the unacceptable substitution by judges of their decisions

concerning what is the "right or preferable" exercise of discretion for that earlier reached by the elected Minister.[42] It is true that in practice it is rare for the AAT to differ from Ministerial decisions.[43] But the fact that it can happen - and has happened - and in sensitive matters such as migration decisions, has led to a great deal of heartburning. This has been so not simply amongst Ministers concerned about their own importance and the rightness of their own decisions. It has also been so amongst observers of the democratic nature of decision-making and its responsiveness to political change enforced at the ballot box.

6. The most consistent criticism in recent years has related to the suggested high costs and inefficiencies of the new system. In the vanguard of the criticism has been the Australian Minister of Finance (Senator Peter Walsh), never a man to pull his critical punches.[44] One response to the complaints about costs has been the increase in the fees charged to initiate proceedings in the AAT.[45] From 1 March 1987 a filing fee of $200 for many AAT appeals was introduced. The fee is refundable where the outcome of the appeal is favourable to the appellant. But the introduction of such a relatively high free has already had a significant impact on the number of appeals being lodged. It has clearly turned away many genuine cases

where the person with a complaint and a legitimate cause could simply not afford to turn the key to open this form of administrative review. The decision to impose such a fee has been justified on the basis of stark economic realities which necessitate limits on the provision of an ideal system. Necessarily there are social and opportunity costs of administrative review which must be borne by the whole community.[46]

The evaluation of the Australian AAT, a little more than ten years since its initiation, continues. The judge who played such an important part in launching this experiment concluded in a recent address to an administrative law seminar:

> After ten years it may not be possible to say that this society is fairer, or more egalitarian, or more compassionate than it was before. But it is possible to say that this society is one which now accords to the individual an opportunity to meet on more equal terms the institutions of the State. The structures of administrative review now offer an opportunity for individuals to meet the anonymous and sometimes remote agencies of the State on more equal terms. The interests of individuals are more frequently acknowledged and the repositories of power are constrained to treat the individual both fairly and according to law, even if the substance of the law is defective. Of course, that is something which costs a certain amount of money, and whether it is appropriate to provide that benefit to the citizen at times of economic stringency is a debate upon which I must not enter. However a society which truly accords that opportunity to the citizen is a free and fair society, and there can be no doubt that the object of the new administrative law was intended to accord that opportunity."[47]

ENLARGED JUDICIAL REVIEW AND RIGHT TO REASONS

Another vital component in the "structures of administrative review" to which Brennan J was referring was the passage of the Administrative Decisions (Judicial Review Act)1977 (Cth). That Act was yet another product of the proposals of the Kerr Committee. In the Australian tradition, a further committee, the Ellicott Committee, reviewed the proposal for the reform and re-statement of a new system of judicial review. By its report of May 1983 the Ellicott Committee suggested that legislation should be enacted to collect and modernise judicial review of Federal administrative decisions in Australia.[48] Much of the debate in the Ellicott Committee concerned the need for the exclusion of some decisions from the procedures for review. The Committee did not suggest the general exclusion of Ministerial decisions. But it did contemplate that some decisions (such as those relating to defence, national security, relations with other countries, criminal investigation, the administration of justice and the public service) should be removed from the operation of the Act because their policy content or for other reasons, made judicial review of them undesirable in the public interest.[49]

It was in this Committee report, and also in yet another report of the Bland Committee, that attention was specifically paid to an enforceable right to reasons for administrative decisions. Whereas in the past administrative

review had been hampered by the necessity to find error on the face of the record in the future the nature of the error made could be extracted by requiring the enlargement of that record by the provision on the part of the decision-maker of the reasons for his or her decision. Such a requirement found its way into the legislation establishing the AAT. It is also a central provision of the new Australian Federal legislation on judicial review. That legislation provides, in section 13, for the securing of the reasons for the decision of the Federal official which the person affected wishes to challenge:

> "13(1) Where a person makes a decision to which this section applies, any person who is entitled to make an application to the Court ... in relation to the decision may, by notice in writing given to the person who made the decision, request him to furnish a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision.
>
> (2) Where such a request is made, the person who made the decision shall, subject to this section, as soon as practicable, and in any even within 28 days after receiving the request, prepare the statement and furnish it to the person who made the request.

The key operative provisions of the Judicial Review Act include, in section 5, the classification of the grounds upon which a person who is aggrieved by a decision may apply to the Federal Court for an order of review. These include that

a breach of the rules of natural justice have occurred; that the procedures required by law to be observed have not been observed; that the person who purported to make the decision did not have jurisdiction to do so; that the decision was not authorised by the enactment in pursuance of which it was purportedly made; that the decision was an improper exercise of the power; that the decision involved an error of law; that it was influenced or affected by fraud; that there was no evidence or other material to justify it or that it was "otherwise contrary to law". This list of categories may be contrasted with the somewhat shorter list recommended by the South African Law Commission.[50] Yet the recommendation by that Commission that there be included a criterion "that the decision was unfair or unreasonable"[51] may go beyond the categories provided in the Australian legislation.

The basic justification for keeping decision-makers within the law of the land needs no lengthy elaboration. Long ago Bracton asserted:

> "The King ought not be subject to man, but to God and the law, for the law maketh the King ... for he is not truly King, where will and pleasure rules."

And it was Blackstone who stated that the principal duty of the King is to govern his people according to law.[52] It is therefore of the essence of a society which lives under the rule of law that it should provide effective machinery to individuals living within it to require those who are the

recipients of power to exercise that power strictly as the law provides. Few would challenge this assertion. But the chief problems which have been faced in adapting judicial review to the modern features of public administration have been two. The first is the absence, until recently, of the obligation to provide reasons. And the second is the fact that many of the powers conferred by law are expressed in terms of a discretion which is not readily susceptible to curial disturbance if the power exercised is arguably available to the decision-maker.

So far as the absence of reasons is concerned, the statutory obligation to provide them is undoubtedly one of the most important reforms that has been effected by the new administrative law in Australia. Professor Pearce has suggested that the obligation to state reasons "has had a greater impact on administrative review than any other":

> "At the Federal level (and in Victoria) it is now no longer possible for an administrator to hide behind a bland statement of a decision without indicating the basis on which it was reached. From the viewpoint of persons affected by government action it has enabled decisions to be challenged where this would not otherwise have been possible because of the inability of identify the basis on which the decision was reached."[53]

Nevertheless, the cost of having to provide reasons has, like the other costs of administrative review, attracted the ire of Ministers and officials. The 10th Annual Report of the Administrative Review Council of Australia - a body

established to monitor the implementation and expansion of the new administrative law - indicates that during 1985-6, in response to requests made under s 13 of the Administrative Decisions (Judicial Review) Act, some 1621 statements were furnished. The average time taken to prepare these responses was 4.67 hours. The report indicates very great differences in the time taken by various authorities. The Public Service Board reported an average of only 0.84 staff hours in producing its 291 responses. At the other extreme, the Reserve Bank of Australia received only 6 requests. Yet it required an average of 34.66 hours to produce each! Similarly the Department of Transport received 13 requests and these consumed 21.25 hours on average to produce. It may be that some of these reasons have taken undue time to prepare. Whilst it is proper to have regard to cost in judging the utility of a reform such as the obligation to provide reasons, necessarily the benefits must be weighed too. The benefits include the discipline which the obligation to provide reasons imposes upon the decision-maker in case he subsequently be asked for them; the accountability which the giving of reasons provides to those who are the public's servants; the public and individual satisfaction which the giving of reasons supplies that the decision is not simply one of the arbitrary exercise of power; and the promotion of consistency in decision-making which the necessity to provide reasons can encourage.

OTHER REFORMS IN A DERIVATIVE LEGAL CULTURE

There are many other aspects of the new administrative law in Australia which could be discussed. They include:

(a) The work of the Administrative Review Council which has proved energetic and creative in the review of the introduction of the new system, self-critical in evaluating its operation and imaginative in bringing its chief developments to attention throughout the Australian Public Service;[54]

(b) Consideration of the operation of the Freedom of Information Act with its beneficial provisions, enforceable in the AAT, by which the citizen can secure access to the overwhelming bulk of material in the possession of the Federal bureaucracy. This legislation has been copied in the State of Victoria. Although repeatedly promised in other States (notably New South Wales and South Australia) it has not yet been introduced elsewhere in Australia; and

(c) The large debate concerning the introduction of better procedures for legislative rule-making to enhance parliamentary and public scrutiny of subordinate legislation. This affects directly the right and duties of individuals living in Australia. Yet it has all too often attracted insufficient review attention in Parliament and in the community.[55]

The Australian reforms of administrative law have been accompanied by numerous reports, Federal and State, enquiring into public administration, examining its features from economic and sociological as well as legal standpoints. Sometimes proposals for reform to make the administration more answerable to the community have been buried by the powerful administrators who exhibit, from time to time, an Appleby-like resistance to greater openness, more answerability in courts and tribunals and higher accountability to the citizen. We should not despair at the sight of this resistance. It has endured for millennia. Petronius in 210 BC observed:

> "It seemed that every time we were beginning to form up into teams we would be reorganized. I was to learn in later life that we tend to meet any new situation by reorganization; and a wonderful method it can be for creating the illusion of progress while producing confusion, inefficiency and demoralization."

It is when measured against this truism (doubtless as applicable to South Africa as to Australia) that the advances made in legislation on administrative law reform in Australia during the past fifteen years can be seen as the more truly remarkable. It is especially so because Australia has not been, relatively speaking, a particularly innovative or creative legal culture. We were not stimulated to novelty of legal ideas by the existence of a counterpoint legal tradition, such as was provided by the Roman Dutch law in Southern Africa or the civil law system of Quebec and

Louisiana. Comfortable it was to be an outpost of the great common law family linked to the creative and constantly moving legal system of England. In a sense, the fires of our legal imagination were dampened by our institutional, cultural and other links to England. They were muted by a certain want of confidence that we could do anything particularly novel which was specially worthwhile.[56] There were, it is true, some exceptions. The Torrens system of land title, provision for testator's family maintenance and industrial arbitration were ideas of considerable legal importance which originated in Australia or were largely developed there. But with these relatively few exceptions, ours was overwhelmingly a derivative legal culture.

Against the melancholy ruminations of Petronius and these more recent features of the Australian legal scene, the development of the new administrative law by Federal legislation in Australia is all the more astonishing.

THE COURTS ENLARGE THE PROVISION OF RELIEF

Nor has creativity in administrative law been limited in Australia to committees of enquiry and to legislation. The courts have also lately proved adventurous in developing the principles of the common law relevant to administrative review. In part, they have done so as a mirror image of the like developments in England of which Lord Diplock boasted. But, particularly in recent years, there has been evidence of the willingness of the Australian courts to go further and to press on with their own innovations beyond even those adopted

in England.

The leading decision of the High Court of Australia on natural justice doctrine is now Kioa v Minister for Immigration and Ethnic Affairs.[57] The decision in that case required that the Minister should observe natural justice when making at least certain kinds of decisions to deport a person pursuant to the broad powers conferred upon him by Parliament in section 18 of the Migration Act 1958 (Cth). The Court adopted a view more protective of the individual than that previously accepted in earlier Australian authority. One of the reasons offered for the different view was that the Minister was now obliged by section 13 of the Administrative Decisions (Judicial Review) Act to provide reasons for his decision. In the course of his judgment, Mason J (now the Chief Justice of Australia) said:

> "It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is to be made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given the opportunity of replying to it ... the reference to 'right or interest' in this formulation must be understood as relating to personal liberty, status, preservation of livelihood and reputation, as well as proprietary rights and interests.

Stimulated by this decision, the superior courts of Australia have been enlarging, in ways which would previously have been unthinkable, the accountability to courts of officials

exercising large discretionary powers. One of the most interesting cases, which shows the outer limits of the rules of natural justice arose in the Court of Appeal of New South Wales. The former Courts of Petty Sessions of that State were abolished. They were replaced by the Local Courts Act 1982 (NSW). All but five of the magistrates who had been members of the former court were appointed to the new court. The five magistrates had, like their colleagues, applied for such appointment. But in respect of them, private allegations concerning their suggested unfitness to be appointed had been made to the Attorney General. They were not confronted with these allegations. Nor were they given the opportunity to answer them. The complaints were not even mentioned at the time of interview. The Attorney General did not subsequently recommend their appointment. Unanimously, the Court of Appeal held that the decision of the Attorney General not to recommend the appointment of the five magistrates was void because it was made in such a way as to deny the applicants their legitimate expectations of procedural fairness.[58]

In earlier times it would, perhaps, have been thought that the power of appointment was so integral to the Crown's entitlement to choose for judicial office whom it wished, that suggested unfairness in the procedure leading to such appointment would melt before the Crown's large prerogative. Stimulated by Kioa and other decisions which had underlined the power of the Court to hold even the Crown to procedural

fairness,[59] the Court of Appeal declared that the magistrates had not received fair treatment. They were not entitled to a declaration that they should be appointed to the new court. But they were entitled to have the consideration of their claim to appointment made fairly, and uncontaminated by unfair material about them which they were never given the opportunity to confront.

A great deal of attention has been paid in recent decisions in the Australian courts concerning the duty of courts (as distinct from the AAT whose position I have already mentioned) to observe Ministerial decisions of policy. Obviously where the policy is inconsistent with the law, there is no duty of a court or anyone else to heed it. But where the policy is lawful, different considerations can arise.[60] Barwick CJ, for example, had no doubt that an officer was bound to act in accordance with government policy in the performance of a discretion conferred upon him.[61] A similar view was expressed by Gibbs J (later Chief Justice).[62] It was also accepted by Murphy J.[63] The last-mentioned justified it as an inference from the system of responsible government:

> "Unless the language of legislation (including delegated legislation) is unambiguously to the contrary it should be interpreted consistently with the concept of responsible government."

On the other hand, the present Chief Justice (then Mason J) took a more cautious approach to the relationship between

departmental decision-makers and government policy:

> "Whether [government policy] is decisive will depend on the nature and terms of the policy and the circumstances of the particular case. But I cannot think that this means that the Secretary is entitled to abdicate his responsibility for making a decision [conferred on him by law] by merely acting on a direction given to him by the Minister"[64]

The position is not yet settled in Australia. However, it seems likely that the view last expressed by Mason J would probably reflect the predominate judicial opinion in Australia.[64] One reason, in policy, for supporting this view is that public officials themselves frequently play a high part in the development of what is later presented as Ministerial or government policy. In this way, they run the risk of becoming a government insufficiently accountable to the rule of law. They may tyrannize although they are not elected.[66] This is a further reason for confining strictly the obligation of independent decision-makers, who are the donees of discretionary power, and insulating them from the obligation to follow blindly what is presented as "government policy".

BUT SOMETIMES THE COURTS HOLD BACK

The one area of administrative law in Australia where the common law did not prove fruitful for the development of basic rights is that of the right to reasons. In the New South Wales Court of Appeal a majority (in which I participated) held that the common law had moved to provide

such a right. It held that a senior departmental officer, qualified for appointment as a Chairman of a Local Land Board but passed over by a selection committee was entitled to have reasons why his appeal had been refused. He was a senior and experienced officer. Those who decided his application were experienced and capable administrators. Parliament had provided an appellate mechanism. The appeal process had been duly invoked. A judge in such circumstances would be obliged by law to provide reasons for a decision adverse to the applicant.[67] The officer asked for reasons. He was refused.

By reference to English, New Zealand, Canadian, Indian and other overseas authority, a majority of the Court of Appeal believed that the common law could sufficiently adapt, case by case, a refined principle necessitating the giving of reasons in such a case. However, the decision was reversed in the High Court of Australia. The reference to overseas authority was dismissed by Gibbs CJ (who gave the leading judgment of the High Court). He said that it would be "hazardous" to assume that such decisions had not been influenced by local constitutions or statutes. The High Court preferred the view that such a change in a settled rule of the common law should not be made by courts but by the legislature, properly advised, giving account to the sensitive balance that would be required. The decision of the High Court of Australia has been criticised.[68] But it states the current rule in Australia. Reform requiring the

provision of reasons for administrative decisions must come from the legislature. The justification of the duty to provide reasons in modern circumstances for at least the great bulk of administrative decisions affecting the individual is overwhelming. The inconvenience of having to give reasons and the cost of doing so pale by comparison to the enhancement of the accountability of the public servant to the individual affected, the enlargement of the opportunities for external review, the facility thereby given for testing the decision by standards of lawfulness and fairness and the encouragement which reasoned decision-making gives to consistency, openness and good administration.

There are other fields of common law development where the courts have held back from pushing too far, changes in administrative law. Just as in South Africa, there have been beneficial advances in the provision of review where the decision-maker has acted so unreasonably that no reasonable decision-maker could have so decided[69] - a development noted by Chaskalson. But as in South African, Australian courts have been careful to preserve the distinction between review and appeal.[71] Brennan J, for example, speaking extra-curially, put it this way:

> "The problem of policy is at the heart of the tension to which reference has been made. There are two bridges over which the courts may pass if they wish to enter the prohibited area of policy. The first bridge involves the restriction on the determination of appeals from the AAT. ... The other bridge may be lowered when the courts say that a decision is unreasonable in the Wednesbury sense when the

> decision is not so unreasonable. Unless the courts exercise restraint on these two bridges, unless they keep the drawbridges firmly up, then there is a risk of impermissible entry into the prohibited area of policy. On the other hand, if the administrators do not understand that the law must have full operation in administration, as in every walk of life, then of course there will be inevitable tensions and inevitable disagreements of a most profound and constitutionally significant kind."

Finding the point at which the activism of the courts will respond properly to the necessities of upholding the rule of law and defending administrative fairness (on the one hand) whilst keeping courts out of those decisions which they are not really competent to make (on the other) is a continuing challenge for the judiciary and other lawyers (not to say for administrators) as we approach the 21st century. Administrators complain in Australia that the courts have become "more interventionist" in public policy at all levels of its formulation. The result has been, according to the same administrators, an adverse reaction amongst politicians. This has doubtless been stimulated from time to time by the complaints of those on the receiving end of curial correction:

> "My perception ... is that over the last 10 years there has been a change in attitude within governments and alternative governments (influential senior Ministers and their Opposition Shadows) from one which, in the late sixties into the mid-seventies supported an increased ability for judicial review to achieve a better balance between administrative justice and effectiveness of public policy to one where there is a coalescence of view that core public policy making particularly that concerned with major economic and social settings and foreign

and immigration policy may need some quarantining from judicial review."[73]

DEFINING THE PROPER MISSION OF THE LAW

The road of administrative review upon which we walk is a narrow and dangerous one. In Australia, both in the AAT and even in the courts, we have crossed over into the territory formerly marked clearly with the sign "Policy - Lawyers Keep Out".[74] The process of reform is a continuing one. In achieving advances, it is necessary to take the reforms step by cautious step. And that is the way of our system. A new problem presents new opportunities. But it also presents the necessity to develop remedies for the individual which will neither impede unduly the lawful and legitimate attainment of public policy nor, more to the point, provoke the retaliation of those powerful forces which design that public policy in the first place. The inter-action between independent courts and tribunals (on the one hand) and the political and administrative power groups of society (on the other) is a creative process. But the courts forget their mission if they shut their doors or deny relief to individuals who seek protection from unlawfulness or unfairness on the part of the organised State. At the same time, courts exceed their mission if they usurp from democratically elected representatives, or officials lawfully working under their direction, the determination of large and polycentric questions of policy upon which legal training may ill-fit them to make decisions and curial procedures may

provide inadequate data.

Finding the mean between the loss of mission and the excess of it is the challenge for administrative law as we move to the 21st century. Getting the answers right will be increasingly important. This is so because of the ever expanding functions of the state, its powers enhanced by the modern technology of control.

I have never thought of the lawyer's function - still less the judicial obligation - as being that of a puppet on the stage of public affairs. We are not mere mercenaries in the pursuit of power. At its best, the legal profession calls its members of a highly ethical service. There is a full measure of opportunity within that service for the pursuit of idealism, the advancement of human rights, the defence of lawfulness against arbitrariness and the defence of the underdog against bureaucratic oppression. That is why administrative law is such a specially important category of the law's modern operation. The "fable that the individual citizen is fully protected from administrative error by parliamentary review and ministerial responsibility has been consigned to the dustbin of history".[75] But we are still developing the institutions, rules and procedures that will replace that mythology with a new reality. In the field of administrative law, I am bold enough to believe that some of the experiments which we have tried in Australia may have lessons for other countries. Providing effective review of administrative acts is the hallmark of a free and fair society.

FOOTNOTES

President of the Court of Appeal of New South Wales, Australia. Commissioner of the International Commission of Jurists. Formerly Chairman of the Australian Law Reform Commission, Judge of the Federal Court of Australia and Member of the Administrative Review Council of Australia.

1. See R v Inland Revenue Commissioners; ex parte Hillingdon London Borough Council [1982] AC 617, 641 (HL).
2. Lord Denning, The Discipline of Law, 1979, 61.
3. R v Knightsbridge Crown Court; ex parte International Sporting Club (London) Limited [1962] 1 QB 306, 314 (DC).
4. C Forsyth "The Sleep of Reason: Security cases before the Appellate Division" (1988) SALJ 679 at 708.
5. D Davis, "Appeal to Reason" in
6. A Chaskalson, "Legal Control of the Administrative Process" (1985) 102 SALJ 419.
7. Johannesburg Consolidated Investment Company v Johannesburg Town Council 1903 TS 111, 115.
8. 1976 (2) SA(2)(A).
9. Established by such cases as National Transport Commission & Anor v Chetty's Motor Transport (Pty) Limited 1972(3) SA 726(A).
10. Chaskalson, 421.
11. 1983(1) SA 938(A) at 964.
12. Chaskalson, 422.

13. South African Law Commission, Investigation into the Courts' Powers of Review of Administrative Acts, Working Paper 15, Project 24 (August 1986).

14. For a recent review of the role and functioning of the New South Wales Ombudsman see E Grotte, "The Ombudsman: Investigating and Calling to Account", Law Society Journal (NSW), March 1989, 62.

15. See Police Regulation (Allegations of Misconduct) Act 1978 (NSW).

16. The Law Reform Commission (Aust) Complaints against Police (ALRC 1) 1975 AGPS. See also ALCRC 9.

17. Police Regulation (Allegation of Misconduct) Amendment Bill 1988 (NSW).

18. Australia, Commonwealth Administrative Review Committee, Report, Canberra, AGPS, 1971 ("The Kerr Committee") Parliamentary Paper No 144 of 1971.

19. Australia, Committee on Administrative Decisions, Interim Report, January 1973, AGPS, 1973, Parliamentary Paper No 53 of 1973.

20. Ombudsman Act 1976 (Cth).

21. L J Curtis, "Crossing the Frontier Between Law and Administration", unpublished paper of the Seminar Administrative Law: Prospect and Retrospect (hereafter Seminar Papers), 3.

22. D Pearce, "The Fading of the Vision Splendid?" in Seminar Papers, 11.

23. D Pearce, Graduation Address, Australian National University, reported M Bruer, "Ombudsman Wants More Resources", The Age (Melbourne) 31 March 1989, 10.

24. P Bayne, "Administrative Law: The Problem of Policy" in R Wettenhall and J R Nethercote (eds), "Hawke's Second Government: Australian Commonwealth Administration 1984-1987", Canberra CAE, 1988, 162.

25. Ibid, 163.

26. J E Richardson cited in Bayne, 163.

27. Administrative Appeals Tribunal Act 1975 (Cth).

28. Drake v Minister for Immigration and Ethnic Affairs (1979) 24 ALR 577.

29. For example, the Australian Taxation Boards of Review for 50 years had conducted a review on the merits. In the United Kingdom many tribunals carried out such review. What is unique about the AAT is the level of decision-making which may be reviewed (including that of Ministers) and the range of decisions committed to review. See I Thompson, "An Appraisal of the Federal AAT" (1988) 62 Law Inst J (Vic) 282.

30. Re Becker and the Minister for Immigration and Ethnic Affairs (1977) 15 ALR 696 (FFC).

31. See Drake (above) in 28.

32. Re Brian Lawler Automotive Pty Limited & Collector of Customs (NSW) (1978) 1 ALD 167 (AAT).

33. Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd (1979) 24 ALR 307 (FFC).

34. F G Brennan, "Closing Address", Seminar Papers, 1.

35. D Volker, "The Effect of Administrative Law Reforms on Primary Level Decision-Making" in Seminar Papers, 10.

36. Curtis, 40.

37. Volker, 1, 2.

38. I Castles cited in Bayne 144.

39. Volker, 15.

40. Volker, 17.

41. M D Kirby, "Administrative Review: Beyond the Frontier Marked 'Policy - Lawyers Keep Out'", (1981) 12 Fed Law Rev, 121. See Curtis, 36.

42. P Walsh, Address to Seminar on Administrative Law, Release 20/87, Canberra, 15 May 1987 in Seminar Papers.

43. Bayne, 157.

44. Walsh, op cit.

45. J Griffith, "The Price of Administrative Justice" in Seminar Papers, 4.

46. Ibid.

47. Brennan, 6-7.

48. Australia, Prerogative Prerogative Write Procedure, Report of the Committee of Review, AGPS, Canberra, 1973, Parliamentary Paper No 56 of 1973.

49. Pearce, 9.

50. South African Law Commission, op cit, supre n 13, 109.

51. See Draft Bill clause 3(1)(h) in South African Law Commission, ibid 110.

52. Commentaries on the Law of England, vol 1, 226. See Curtis, 27.

53. Pearce, 25.

54. The Administrative Review Council publishes a regular bulletin, Administrative Review. This is widely distributed throughout the Federal service in Australia.

55. R Tomasic, "Formalised Consultation, Delegated Legislation and Guidelines: 'New' Directions in Australian Administrative Law?" in Seminar Paper, 12, 23.

56. F C Hutley, "The Legal Traditions of Australia as Contrasted with Those of the United States" (1981) 55 ALJ 63, 69. See also M D Kirby, "Closer Economic and Legal Relations Between Australia and New Zealand" (1984), 58 ALJ 383, 392.

57. Kioa v Minister for Immigration and Ethnic Affairs (1987) 159 CLR 550, 582.

58. Macrae & Anor v Attorney General for New South Wales (1983) 9 NSWLR 268 (CA).

59. See e g F A I Insurances Limited v Winneke (1982) 151 CLR 342, 349.

60. See e g British Oxygen Co Limited v Minister of Technology [1971] AC 610 (HL); Green v Daniels (1972) 13 ALR 1 (HCA).

61. Salemi v MacKellar (1977) 137 CLR 391, 403.

62. Ibid, 416.

63. See Ansett Transport Industries (Operations) Pty Limited v The Commonwealth (1977) 139 CLR 54, 87.

64. Ibid at 83.

65. See Curtis, 31. Cf M Aronson & P Franklin, Review of Administrative Action (1987) Sydney at 51-54.

66. M Wilcox, "Judicial Review and Public Policy" in Seminar Papers, 16.

67. Pettit v Dunkley [1971] 1 NSWLR 376.

68. M Taggart (ed), Judicial Review of Administrative Action in the 1980s: Problems and Prospects, OUP, Auckland, 1986. See especially M D Kirby, "Accountability and the Right to Reasons", ibid, 36ff; and M Taggart, "Osmond in the High Court of Australia: Opportunity Lost", ibid 53.

69. See Associated Provincial Picture House Limited v Wednesbury Corporation [1948] 1 KB 223, 230 (CA).

70. See e g Chaskalson, 427f.

71. See ibid, 422; cf Rosenberg v South African Pharmacy Board, 1981(1) SA 22(A) at 34.

72. See Brennan 8-9.

73. A Rose, "Commentary" in Seminar Papers 2-3.

74. See Kirby op cit n 41 above.

75. A Mason, Dinner Speech in Seminar Papers, 2.