SECOND DIVISION OFFICERS' ASSOCIATION

AUSTRALIAN CAPITAL TERRITORY BRANCH

CONFERENCE ROOM, C.S.I.R.O. HEADQUARTERS, CANBERRA

THURSDAY, 4 DECEMBER 1980

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The Hon. Mr. Justice M.D. Kirby
Chairman of the Australian Law Reform Commission

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## COMMONWEALTH LEGISLATION FOR THE NEW ADMINISTRATIVE LAW

The recent statutes. The interest of the Federal Parliament in Australia in reform of administrative law and procedure is relatively recent. However, in the past six years, important changes have been effected in Commonwealth law and practice. Those changes form the subject of this paper. The three pertinent statutes are the Administrative Appeals Tribunal Act 1975, the Ombudsman Act 1976 and the Administrative Decisions (Judicial Review) Act 1977. The first two mentioned Acts have been in operation for some time. The last-mentioned Act commenced as recently as 1 October 1980. The unique nature of this legislation was pointed out by Mr Justice Brennan, Chairman of the Administrative Review Council, in his foreword to the 1978 Annual Report of the Council:

> Both Houses of the Commonwealth Parliament contributed to the final form of the statutes enacting the new administrative law. The law thus far enacted reflects the insights of members on both sides of those Houses. It is uniquely Australian and its structure is dictated in large measure by our Constitution.

Administrative Appeals Tribunal Act. The Administrative Appeals Tribunal Act 1975 established the Commonwealth Administrative Appeals Tribunal, under the presidency of a Federal judge[1], to hear appeals from decisions of specified types. The jurisdiction of the Tribunal has gradually expanded. By 1 July 1979 the Tribunal had jurisdiction to hear appeals against decisions made under 54 Commonwealth Acts, 6 sets of Regulations, 13 Australian Capital Territory Ordinances and 1 Northern Territory Ordinance.[2] Under Part V of the Administrative Appeals Tribunal Act, an Administrative Review Council is appointed as an advisory body with functions to review primary and appellate decision-making in the Commonwealth sphere.

The Council comprises, ex officio, the President of the Administrative Appeals Tribunal, the Commonwealth Ombudsman, and the Chairman of the Law Reform Commission. The present appointed members include senior Commonwealth officers, a member of the Office of Parliamentary Counsel, a practising Queen's Counsel, a member experienced in commerce and a member who holds a high position in a community body with activities relevant to Commonwealth administration (the Returned Services League).

Ombudsman Act. The Ombudsman Act 1976 provided for the appointment of a Commonwealth Ombudsman, with deputies in the various States and Territories. The function of the Ombudsman is to investigate complaints of defective administration on the part of Commonwealth officials. The Ombudsman relies primarily upon the co-operation of officers in rectifying errors and omissions but he has the important capacity, by his Annual Report to Parliament, to ensure public knowledge of any continuing problem. The first Commonwealth Ombudsman[3] commenced duties on 1 July 1977.

Administrative Decisions (Judicial Review) Act. The Administrative Decisions (Judicial Review) Act 1977 commenced on 1 October 1980. The Act provides for the Federal Court of Australia[4] to review the lawfulness of administrative decisions made under Commonwealth legislation. It will operate, in effect, as companion legislation to the Administrative Appeals Tribunal Act which allows review on the merits, although in a more restricted area, of decisions. Under the Judicial Review Act it will no longer be necessary to resort to the technical and cumbersome prerogative writs, although these will remain available in the High Court of Australia because they are provided for in the Constitution.

The future. The existing legislation will probably be supplemented by further legislation relevant to the way in which Commonwealth officers perform their functions and are accountable for them. A Freedom of Information Bill 1978 was introduced into Parliament providing for access to certain classes of government information.[5] It lapsed with the dissolution of the last Parliament. A Human Rights Commission Bill was introduced under which complaints were to be made and investigated concerning the extent to which Commonwealth laws complied or did not comply with the International Covenant on Civil and Political Rights. The Bill was withdrawn after disputes relating to the rights of unborn children were aired in the House of Representatives. A Bureau has been established in the Federal Attorney-General's Department to perform some of the functions proposed for the Commission. The government has foreshadowed legislation designed to introduce certain minimum procedural rules to guarantee fairness in the proceedings of Commonwealth tribunals.[6] The Law Reform Commission has been asked to report upon two matters which raise general issues of administrative law. The first is the protection of privacy in matters of Commonwealth concern.

A common feature of overseas privacy legislation has been the provision of a right of access by an individual to personal information concerning himself in order, amongst other things, to ensure its accuracy, completeness, up-to-dateness and relevance. The second Reference requires the Commission to review the law relating to the standing of persons to sue in federal courts, in other courts exercising federal jurisdiction and in Territory courts.[7] Any relaxation of the present standing rules would increase the accountability of government officers, amongst others, for the lawfulness of their actions. It would widen the classes of case in which persons would have the legal right to have the courts examine the lawfulness of official conduct. The Law Reform Commission has also reported on the handling of complaints against Federal Police and new procedures for compulsory acquisition of property : both matters relevant to the new administrative law.

## HISTORY OF ADMINISTRATIVE REFORM

Early suggestions. In 1957 an English Committee, the Franks Committee[8], proposed sweeping changes to English administrative law which was then, for practical purposes, indistinguishable from that of Australia. Both English and Australian law were based upon the common law prerogative writs enabling the courts to review the legality, but not the wisdom, of particular decisions. Those writs were subject to significant procedural limitations which, in practice, seriously reduced the ability of the courts to review decisions. However the report of the Franks Committtee caused no significant reaction in Australia until 1965. In that year, Mr Justice Else-Mitchell delivered a paper referring to the work of the Franks Committee and calling for reform of administrative review procedures.[9] The subsequent reforms substantially correspond with his proposals.

Victorian reports. In 1968 the Victorian Statute Law Revision Committee[10] proposed the creation of a general Administrative Appeals Tribunal for Victoria. Also in 1968 the Victorian Chief Justice's Law Reform Committee reported on the application to that State of the Tribunals and Inquiries Act 1958 which had followed the Franks Committee report in England. The Committee recommended substantial adoption of several of the reforms in the United Kingdom Act including s.11 (giving of reasons), s.12 (abolition of privative clauses) and more liberal rules on standing.[11] In December 1978 the Victorian Administrative Law Act was passed.[12] It provides a new, simplified procedure for seeking Supreme Court review of the decisions of a 'tribunal', being a person or body which acts judicially 'to the extent of observing one or more of the rules of

natural justice'. Further, it requires such a tribunal to furnish, upon request, a written statement of the reasons for its decisions (s.8), and it overrides any provision in an earlier Act which seeks to exclude the jurisdiction of the Supreme Court ('privative clause') (s.12). The Act does not provide for review on the merits.

Commonwealth reports. In October 1968 the Commonwealth Administrative Review Committee ('the Kerr Committee') was established to consider the jurisdiction of the proposed Commonwealth Superior Court, procedures and grounds for judicial review and the introduction of legislation along the lines of the United Kingdom Act. The Committee's report, presented in October 1971, recommended the establishment of a 'package' of important administrative law reforms, most of which have now been established or are promised:

- establishment of an Administrative Review Council;
- establishment of an Administrative Review Tribunal;
- creation of a General Counsel for Grievances;
- codification of the system of judicial review before a specialised court; and
- passage of a statute on administrative procedures.

Following that report, two further committees were established. The first, a Committee on Administrative Discretions ('the Bland Committee') examined existing administrative discretions in Commonwealth statutes and regulations. In January 1973 it made an interim report dealing solely with the proposal to establish a Commonwealth Ombudsman. In its final report, in October 1973, the Committee recommended the establishment of a general Administrative Appeals Tribunal. The other committee ('the Ellicott Committee') reviewed prerogative writ procedures. In a report dated May 1973 it recommended legislation that would reform, simplify and state the laws and procedures of judicial review.

New South Wales. The New South Wales Law Reform Commission in 1973 delivered a report proposing a scheme of administrative review for the State of New South Wales broadly similar to that proposed in the Commonwealth sphere.[13] It suggested an Advisory Council on Public Administration, with functions similar to the Administrative Review Council, and a Public Administration Tribunal. Legislation has been foreshadowed to implement these proposals.[14] Furthermore, a review of New South Wales government administration has suggested the enactment of freedom of information and other relevant legislation.[15]

THE RATIONALE OF ADMINISTRATIVE REFORM

Accountability. A common thread runs through the legislation already enacted and the further legislation promised. It is the desire to render governmental decision-making more accountable to persons affected by it and open to review by independent decision-makers.

> During the past decade ... there has been a great deal of public disquiet about the exercise of political and bureaucratic power. Some of that disquiet has had to do with matters of major public and political importance and no system of review, judicial or otherwise could be expected to allay it. Apart from judicial interpretation of constitutional powers and limitations the only remedies available are to be found in the parliaments and in the ballot box. But the larger area of discontent almost certainly focuses upon the way in which powers have been used and abused at all levels of the administrative structure. Complaints of unfairness and abuse of power are regularly made about social service administration, customs and tariff policy, educational administration, town and country planning decisions, environmental issues, health administration and many other areas of administrative activity. .. The discontent has been fuelled by a general awareness and fear of the rapid growth of the ambit of administrative power over the lives of ordinary citizens.[16]

The demand for better forms of external review of administrative decision-making arose from a number of factors:

- The power of government was growing in a society and economy which are increasingly sophisticated and interdependent.

- There was an increasing perception of the weakness of the constitutional theory of Ministerial accountability and of effective democratic checks upon administration. A question in Parliament, a resolution or even a Bill may sometimes be effective but the effects of these remedies are sporadic and uncertain. Partly as a consequence of the growing role of government, more functions of Ministers have to be delegated to public servants. It is not possible for a Minister to know each act done, and decision made, on his behalf or in his name. When such acts are questioned or criticised, there is a natural tendency for the Minister to defend those whose conduct is questioned and to justify their decisions, whether or not he would himself have made those decisions. Ministers did not hold themselves personally responsible for the errors or injustices of departmental officers. They tend not to resign where such errors are uncovered. Perhaps it is unreasonable to expect them to do so.

- So far as judicial review was available, it was more effective in controlling and preventing illegal acts than in ensuring administrative fairness. Procedural impediments frequently stood in the way of getting to the true merits of the complaint of the citizen. In order to initiate action the prosecutor had to show a case sufficient to justify an order nisi, an order requiring the matter to be argued in court. However, at that stage, he had no recourse to discovery or subpoena of documents and no ability to force evidence from the prospective defendant. An administrator who declined to supply reasons, or supplied vague and general reasons, would generally render himself immune from review, certainly legal review.

- Many of the procedures for review were regarded by the ordinary citizen as exceptional or unworkable. The technicalities of judicial review put an important intellectual and cost barrier in the way of the ordinary citizen with a complaint against an administrator. What was needed was a routine way of submitting administrative decisions to external scrutiny, which would get at the real reasons for the decision and submit it to independent examination, recommendation or determination.

Better decisions. The reason for imposing an obligation to furnish information to persons affected by governmental decision-making is not only to provide a routine and low-key way of reviewing such decisions. Its ultimate aim is to ensure that initial decision-making is reasoned and consistent and that it is not based on whim, prejudice or other irrelevant considerations. The statement of reasons and the reference to relevant material upon which the reasons have been based provide a means for external review of those reasons by bodies such as the Administrative Appeals Tribunal and the Federal Court. The Ombudsman, with his direct access to most governmental information and his sanctions of recommendation and publication, provides an external means of getting, with less formality, to the true reasons for decisions and submitting them to independent scrutiny, review and, if necessary, criticism. The very existence of these external reviewers, with the possibility in any particular case that the decision and the reasons for it will be considered by some review authority, may be expected to foster better considered, better reasoned, administrative decisions.

## THE DUTY TO GIVE REASONS

Statutory provisions. Reference has been made to the emphasis placed by the recent legislation on the furnishing of reasons. The theme appears in the United Kingdom legislation which implemented the recommendations of the Franks Committee.

> [I]t shall be the duty of the tribunal or Minister to furnish a statement, either written or oral, of the reasons for the decision if requested, on or before the giving or notification of the decision, to state the reasons.[17]

This provision became the progenitor of similar Australian provisions. The most important are to be found in s.28(1) of the Administrative Appeals Tribunal Act 1975 and s.13 of the Administrative Decisions (Judicial Review) Act 1977. Section 28(1) of the Administrative Appeals Tribunal Act is in the following terms:

> Where a person makes a decision in respect of which an application may be made to the Tribunal for a review, any person (in this section referred to as the "applicant") who is entitled to apply to the Tribunal for a review of the decision may, by notice in writing given to the person who made the decision, request that person to furnish to the applicant 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, and the person who made the decision shall, within 14 days after receiving the request, prepare, and furnish to the applicant, such a statement.

Section 13 of the Judicial Review Act imposes a similar obligation to furnish a statement setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based, and to give the reasons for the decision which is the subject of the application. Exceptions are provided for in the Schedules to the Act, exempting certain classes of decision from the Act altogether and others only from the obligation to give reasons. Debate about the extent of such exemptions was the reason for the delay in the commencement of the Act.

Common law rule. The common law imposes no general obligation upon administrative authorities to state the facts upon which their decisions are based or the reasons for their decisions.[18] Exceptions arise in particular cases. Thus the High Court of Australia has held that the Commissioner of Taxation should furnish the facts upon which he has based an administrative discretion under the Income Tax Assessment Act 1936.[19] Courts are under a general obligation to give reasons[20] and there are decisions supporting the duty of an administrator exercising quasi-judicial functions to give reasons. Thus the High Court has held that, if a Minister were under a duty to act in a quasi-judicial manner in revoking a licence, he would have to disclose to the licensee his

reasons for doing so.[21] The former New South Wales Land and Valuation Court has held that local Land Boards are obliged to give findings and reasons for decisions affecting the rights of applicants.[22] Perhaps, in the future, the principle applying to quasi-judicial decisions will be extended to all administrative decisions but the common law has not yet taken this step.[23] In the Commonwealth sphere the omission is substantially rectified by the statutory provisions already mentioned. It has not been left to the chance factors of common law judicial inventiveness.

## THE CONSEQUENCES OF THE NEW ADMINISTRATIVE LAW

Effect on administration. The new system of administrative review does not simplify administration. Mr Justice Brennan put it this way:

> As the jurisdiction of the Tribunal became known, applications to it increased. The review of certain administrative decisions by the Tribunal and scrutiny of administrative action by the Ombudsman are proving to be valuable reforms, civilising the anonymous complexity of modern government. The individual has been furnished with new institutional means of questioning the decisions or actions which concern him.
>
> These reforms do not simplify administration. The Tribunal and the Ombudsman are independent institutions, external to the administration. By design, the invoking of their jurisdictions affects the internal workings of departments and statutory authorities. A department or authority may find it necessary to re-examine, explain and, where appropriate, defend either a decision under review by the Tribunal or administrative action under investigation by the Ombudsman.
>
> The objective of these reforms is to make administration responsive to the interests of the individuals affected by it; but some may see these innovations as intrusions into an orderly process of administration - a process which (in constitutional theory) is already responsible to a Minister and through him to the Parliament. Both of these propositions are true. They are not contradictory, but neither can be pushed too far. On the one hand, some administrative decisions are unsuited to review under the current procedures of the Tribunal, and some areas of administrative action must remain even outside the Ombudsman's jurisdiction. Administrative review has its proper limits; it is not a substitute for sound primary administration.

> On the other hand, the theory of responsibility to a Minister does not mask the real risks of administrative injustice to which reference was made in the reports and parliamentary speeches which preceded the passing of the new laws....
>
> The system is new and novelty is not always welcome. The way in which the system can serve the individual and the administration must be learned, and learning can be difficult. But sufficient is known of the new system to say that it is apt to secure a better measure of justice for the individual, and to improve the administration's perceptions of its own functions.[24]

Review of Ministerial Decisions. The Administrative Appeals Tribunal is not yet a general administrative appeals tribunal as envisaged by the Kerr Committee. Administration is accommodating to the new order. The Tribunal's jurisdiction includes scrutiny of the decisions not only of subordinate administrators but also, in a limited number of cases, of Ministers. In every case where a Minister's decision is submitted to review, the review is, in practice, conducted by a presidential (judicial) member of the Tribunal.[25] In the case of review of decisions by the Minister under the Migration Act, the Tribunal may either affirm the decision or remit it to the Minister with a recommendation that it be revoked.[26] There have already been several recommendations that the Minister reverse orders for the deportation of aliens and immigrants. In every case to date the Minister has accepted the Tribunal's recommendation.

## PROBLEMS FOR THE FUTURE

The 'Right or Preferable Decision'. It would be less than frank if I did not admit that the above developments towards a new federal administrative law have brought in their train various problems, many of which remain to be solved. First, the A.A.T. is not, as has been said, the general administrative tribunal for review of Commonwealth administrative decisions. In fact its jurisdiction remains confined to those matters specifically conferred upon it either by the original statute or subsequently. Indeed, the initial list contained in the schedule to the 1975 Act remains the core of the A.A.T.'s jurisdiction. For want of resources, concern at the full consequences of its review or otherwise, there has been no accretion of significant jurisdiction (in terms of importance or quantity of workload) conferred on the Tribunal since 1975. The scope of the influence of the Tribunal upon federal administrative decision-making is therefore still a limited one.

Secondly, within its jurisdiction, the Tribunal has explained that its function is that of reviewing the facts of particular cases, examining the legal basis of the administrative decision, scrutinising the policy decision and finally:

> On the facts of the case and having regard to any policy considerations which ought to be applied [to ask the question] is the ... decision the right or preferable decision.[27]

Now, in the ascertainment of facts and in the scrutiny of the law, the A.A.T. is doing tasks which are well familiar to judges and judicial officers. Judges have been criticised sometimes for an artificial and over-refined view of the rules governing administrative decisions[28] and indeed have sometimes lamented the vacuum in which they must make such decisions.[29] However, the role of the A.A.T. in this area of its work is entirely orthodox. It is a court-like role. Debates can be had concerning the degree of intervention and judicial superintendence of administration.[30] Steps can be taken by the legislature to increase or diminish Tribunal activism.[31] But the task remains a fairly familiar one : well known and understood to Tribunals and administrators alike. It is substantially the task which courts of our tradition have been performing for centuries.

It is when the A.A.T. turns to review policy questions that its unique and, to some, surprising jurisdiction may be seen in the clearest light. It is here that the functions of the A.A.T. go well beyond those typically performed by courts. The Tribunal has expressed the view that:

> It is in review of discretionary decisions that the greatest utility of the Administrative Appeals Tribunal will be found. It will be necessary to develop principles to regulate the occasions when the Tribunal should intervene to alter the exercise of the discretionary power, else it may unpredictably confuse the due process of primary administration. These principles are emerging, tentatively and with growing appreciation on the part of the Tribunal and government.[32]

Conferring such substantial powers on an independent court-like Tribunal will have the advantage of bringing out into the open policy guidelines which have hitherto been secret and hidden from public view, though they are in truth rules by which administrators have made decisions. In this sense the A.A.T. is part of the movement towards greater openness of administration. Furthermore, in some cases the A.A.T. scrutiny may actually help to clarify and further delineate administrative policy. I believe this has happened in several of the migration cases. But as it has been held that the A.A.T. is not in law bound by the policy determinations even of the elected Minister, the role of the A.A.T. in considering

policy questions is a very special one. It is one which surprises many observers. Working out the proper and acceptable relationship between the A.A.T. and the elected government is at the same time the most difficult and vital task of the A.A.T. Unless an arrangement can be found which acknowledges and upholds the superiority of decisions openly arrived at, consistent with the law, by elected officials, it would seem likely that the A.A.T. will atrophy or be confined to a very limited class of case.

A further problem of a more technical kind relates to the evidence which the A.A.T. receives. The temptation of a judicialised tribunal is to resort to the safety and comfort of the established rules of evidence. Some cases have suggested a disinclination of the A.A.T. to receive factual material which would, in an ordinary court, be rejected as 'hearsay'. That path is a dangerous one, for it will confine the A.A.T. to a limited class of information.[33] If the A.A.T. is truly to step into the shoes of the administrator and to make the decision which he ought to have made, the 'right or preferable decision', it would appear to be self-evident that the A.A.T. should not unduly fetter itself in the reception of information. Otherwise, the decision on appeal will be made on a narrower and more artificial range of factual data. However justified the narrowing of such data may be in courts of law, to confine the bureaucracy to such strict determinants would be artificial and unreasonable.

A problem which has already been evidenced is one inherent in the judicialised format of A.A.T. hearings. Courts are by their nature slow, painstaking, labour-intensive and somewhat formal. The A.A.T. has begun its life clearly modelled after the curial pattern. Lately, there is evidence that its procedures are becoming more informal. Certainly the Act establishing the Tribunal warrants and envisages this. If the jurisdiction of the A.A.T. is to expand, to embrace the large turnover work of administrative decisions in the Commonwealth's sphere (such as social security cases, repatriation appeals and even income tax appeals) not only must the A.A.T. demonstrate a capacity for specialised divisions. It must also demonstrate skill in adapting its procedures to a less formal and more efficient turnover of business. In particular, much more business may have to be transacted by an inquisitorial rather than an adversary procedure and more emphasis placed on written rather than oral testimony.

The Cost/Benefit Equation. Many problems remain for the future scrutiny of the Administrative Review Council. These include not only the examination of particular administrative discretions and the work of particular Commonwealth officers and Tribunals, but, more fundamentally, the broad philosophical and practical questions

which are raised by the new administrative law. I have already hinted at the issues of the fundamental principles by which the independent tribunal substitutes its view of what is 'right' or 'preferable' for the view of the administrator. But there are other problems. One, especially relevant at a time of staff ceilings and pressures for economic restraints by government, is the cost/benefit equation by which administrative reforms are introduced. Administrators can deal with problems quickly, on paper, on hearsay evidence and even 'hunch'. The Ombudsman may sometimes do likewise in his review. It is more difficult for a public tribunal and scarcely possible for the Courts to act in this informal way. Their procedures are much more time-consuming. They involve the use of highly trained manpower. Their costs and speed of operation will plainly be relevant considerations in determining which matters are appropriate for curial review and which are not. It is difficult where matters of rights of citizens are concerned to talk rigidly in terms of any given cost/benefit equation. Traditionally, the law has taken the view that the necessities of law-abiding conduct transcends the costs of litigation in a particular case. Yet some of the migration appeals before the Administrative Appeals Tribunal have absorbed many days of the Tribunal's time and involved the parties in great legal costs. Though the issue of deportation is clearly one vital to the prospective deportee, his friends and family, it is equally clear that such an exquisite procedure would not be feasible, without major procedural reforms, in review of 'bulk business' administrative decision-making. The costs would be just too prohibitive. In such cases a compromise may be necessary between the form and quality of review and the importance of the issues at stake. I do not say that this compromise is easy to define. Nor is it a particularly palatable notion to some reformers. Hopefully the equation will be developed in a principled, clear-sighted and just way. But failure to recognise the legitimacy of the debate about costs and benefits both for the extent and methodology of administrative law reform is bound, in the end, to defeat its advance. By the same token, many of the benefits secured may be intangible and not readily susceptible to a dollars and cents equation. One recent commentary has put it thus:

> While these changes especially will do much to ameliorate the loss of individuals with a grievance against some particular administrative action, the countervailing costs of such changes remain to be counted. Surely, however, the cost cannot be so great as to outweigh the advantages. When this becomes clearer, perhaps Canadians should consider transplanting the system.[34]

Damages in Administrative Law. Finally, one the general topics which the Administrative Review Council can be expected to address in due course is the extent to which citizens who sustain losses by reason of unlawful administrative actions by Commonwealth officers should be entitled generally to money damages in compensation of such losses. A few weeks ago a report of the Public and Administrative Law Reform Committee of New Zealand became available in Australia. Titled 'Damages in Administrative Law' it is the first report of any law reform agency of the Commonwealth of Nations dealing directly with this question.[35] There are already certain remedies available to the citizen who is harmed by unlawful or wrong administrative action. If he can overcome the general immunity of the Crown and establish that the wrong done fits within an existing legal cause of action, he may have a claim. Likewise, most Ombudsman legislation provides a jurisdiction in the Ombudsman to recommend an ex gratia sum to be paid to compensate for maladministration. Ad hoc provisions are made in some statutes. Political pressure can sometimes give rise to payment of ex gratia amounts.

Courts both in Australia and New Zealand have lately made it clear that a merely invalid decision causing loss does not of itself give rise to a cause of action for damages against the government, unless the invalidity is accompanied by a recognised civil wrong.[36] The common law is developing in this area. But though the New Zealand committee was not prepared to recommend a broad new liability and though it did not favour the extension of the Ombudsman's power, it did recommend that some legislative action was called for. Specifically, it suggested that each Department of State should immediately consider the inclusion of statutory liability in new legislation conferring powers which, if exercised unlawfully, would lead to loss.[37] It also suggested broadening the Crown's liability to damages and further limiting Crown immunity against legal action.

The growth and diversity of government decisions persuade some commentators to the view that the present limited entitlements to damages from government are relics of an earlier time and should be replaced by a general entitlement to recovery from the whole community. On the other hand, other commentators draw precisely the opposite conclusion, suggesting that the path to effective reform lies in quicker and more approachable review machinery. Upon this view, damages claims would simply complicate and delay the improvement of administrative decision-making, whilst adding great burdens to the public purse.

It is clear that this is the debate of which we will hear more in the future. Under many overseas systems of public law, an entitlement to damages for unlawful or unjust actions by government officials is regarded as a constitutional necessity. Under French law, for example, a remedy is provided in damages to the individual affected by State action whether the state is at fault or not:

> The activity of the state is carried out in the interests of the entire community; the burdens that it entails should not weigh more heavily on some than on others. If then state action results in individual damage to particular citizens, the state should make redress, whether or not there be a fault committed by the public officers concerned. The state is, in some ways, an insurer of what is often called social risk (risque social).[38]

The development of the new administrative law in Australia represents a belated attempt of a legal system inherited from England to come to terms with the tremendous expansion of the importance of government decision-making in the lives of all individuals in society. This expansion has occurred rapidly this century, particularly since the Second World War. It is a development that is unlikely to be reversed. The new federal administrative law should be seen as the effort of the Commonwealth's legal machinery to come to grips with social facts which have changed in a most significant way. Of the details there can be legitimate debate. Whether the future holds out the prospect of a general administrative tribunal enforcing a coherent administrative law, whether there should be more court or Ombudsman review, whether and if so when, costs and benefits will be counted, and whether damages should be provided in particular cases : all these are matters of controversy. But they are matters of detail. The development of the new administrative law in the federal sphere may be an 'awesome leap'.[39] But it is clearly a 'leap' in the right general direction for it addresses a problem supremely important for our time : the striking of a just balance between the needs of the machinery of enlarged government, on the one hand, and the interests of the individual human being, on the other.

FOOTNOTES

1. The first President of the Tribunal was Mr Justice Brennan a member of the Federal Court of Australia and a former member of the Law Reform Commission. The Act does not require the President to be a judge; see s.7(1).

2. The number of appeals that may be brought has expanded since then. No new major workload has been added.

3. Professor Jack E. Richardson.

4. The Federal Court was established by the Federal Court of Australia Act 1976. It exercises both original and appellate jurisdiction on certain matters arising under Commonwealth law. The establishment of the Court may be regarded as a further step in reform of Commonwealth administrative law.

5. The Bill was introduced into the Senate on 9 June 1978. Subsequently the Senate Standing Committee on Constitutional and Legal Affairs reported on the Bill proposing many changes. Some of these were accepted by the government.

6. Administrative Review Council, First Annual Report, AGPS, Canberra, 1977, para.55-6.

7. Australian Law Reform Commission, Discussion Paper 4, Standing: Public Interest Suits, 1977, and Discussion Paper 11, Class Actions, 1979.

8. Committee on Administrative Tribunals and Inquiries (Sir Oliver Franks, Chairman), Report, Cmnd. 218, HMSO, London, 1957.

9. 'The Place of the Administrative Tribunal in 1965', a paper delivered to the Commonwealth and Empire Law Conference in Sydney, July 1965.

10. Report on Appeals from Administrative Decisions and an Office of Ombudsman, D. No.6 1941/68, Vic. Govt. Printer, Melbourne, 1968.

11. Minutes of a meeting of the Chief Justice's Law Reform Committee, 12 September 1968.

12. It came into force on 1 May 1979.

13. New South Wales Law Reform Commission, Appeals in Administration, (NSWLRC 16), NSW Govt. Printer, Sydney, 1973.

14. N. Wran, Q.C., M.P., Australian Labor Party Policy Speech, NSW Elections 1978.

15. Review of New South Wales Government Administration, Directions for Change (Interim Report), N.S.W. Govt. Printer, Sydney, 1977. The Review was conducted by Professor Peter Wilenski.

16. H. Whitmore & M. Aronson, Review of Administrative Action, Law Book Co., Sydney, 1978, p.1.

17. Tribunals and Inquiries Act 1958, s.12(1).

18. In Breen v. Amalgamated Engineering Union [1971] 2 QB 175, Lord Denning MR argued for a duty to give reasons whenever it would be fair to do so. However this was a dissenting judgment. The other members of the Court denied any general obligation. See also Salemi v. Mackellar (No. 2) (1977) 137 CLR 396, 403, 407, 419-21, 443-4.

19. Giris Pty Ltd v. Commissioner of Taxation (1969) 119 CLR 365; Commissioner of Taxation v. Brian Hatch Timber Co. (Sales) Pty Ltd (1972) 128 CLR 28; Kolotex Hosiery (Australia) Pty Ltd v. Commissioner of Taxation (1975) 132 CLR 535.

20. Pettitt v. Dunkley [1971] 1 NSWLR 376; Donovan v. Edwards [1922] VLR 87. The obligation probably exists only where there is a right of appeal.

21. Election Importing Co. Pty Ltd v. Courtice (1949) 80 CLR 657, 663.

22. The Grove (Cootamundra) Pty Ltd v. Landgrove Pty Ltd [1970] 3 NSWR 333, 335-6. See also Trivett v. Nivison [1976] 1 NSWLR 312, 321.

23. G.A. Flick, Natural Justice, Butterworths, Sydney, 1979, ch.5, reviews the authorities (Australian, English, Canadian and American) and argues in favour of a wider duty to give reasons. He cites five reasons: better thought-out decisions; the opportunity for the affected party to determine whether he has good grounds of appeal; easier supervision by the courts as errors will be explicit; encouragement of public confidence in the decision-maker; and the inhibition of arbitrary conduct by the decision-maker: see pp.87-8.

24. Administrative Review Council, Second Annual Report, AGPS, Canberra, 1978, Foreword.

25. Only reviews of decisions by the Minister under the Migration Act 1958 are required to be heard by a presidential member: see cl.22(4) of the Schedule to the Administrative Appeals Tribunal Act 1975.

26. Administrative Appeals Tribunal Act 1975, Schedule cl.22(3). See para.127 below.

27. Re Becker v. Minister for Immigration & Ethnic Affairs (1977) 16 ALR 696, 699-700; 1 ALD 158, 161. See also Drake v. Minister for Immigration & Ethnic Affairs (1979) 24 ALR 577, 589; 2 ALD 60, 68.

28. R. Else-Mitchell, 'Administrative Law', in Spann (ed), Public Administration in Australia, 1973, 273, 293. See also D. Pearce, 'The Australian Government Administrative Appeals Tribunal' (1976) 1 UNSWLJ, 193, 196.

29. See for example Dixon J. in The King v. Hickman; ex parte Fox and Clinton (1945) 70 CLR 598, 612, 613-4.

30. P.W. Hogg, 'Judicial Review: How Much Do We Need?' (1974) 20 McGill LJ 157, 163.

31. American Bar Association, Summary of Action of House of Delegates, 1979, Annual Meeting (Dallas, Texas), 14-15 August 1979; 19-20. See also (1979) 48 US Law Week 2134 and Senator R. Dole quoted in Congressional Quarterly Weekly Report, Vol. 37, No. 37, 15 September 1979, 2014.

32. F.G. Brennan, 'The Anatomy of An Administrative Decision' (1979) 9 Sydney LR, 1, 9.

33. Re Pacific Film Laboratories Pty Ltd v. Collector of Customs (1979) 2 ALD 144. See discussion of this issue in M.D. Kirby, 'Administrative Review on the Merits : The Right or Preferable Decision' (1980) 6 Monash Uni LR 171, 179.

34. See L. Katz, Australian Federal Administrative Law Reform, (1980) 58 Canadian Bar Rev, 341, 358.

35. Public and Administrative Law Reform Committee (N.Z.), 'Damages in Administrative Law', 14th Report, May 1980 (hereafter N.Z.P.A.L.R.C. report).

36. See for example Takaro Properties Ltd v. Rowling [1978] 2 NZLR 314, 318. This case is discussed in N.Z.P.A.L.R.C. Report, 11ff.

37. N.Z.P.A.L.R.C. report, 51.

38. Duguit, 'Traite de Droit Constitutionnel' (3rd ed), 469.

39. The Law Reform Commission of Canada, Seventh Annual Report 1977-78, 14.