AUSTRALIAN NATIONAL UNIVERSITY

ADMINISTRATIVE LAW SEMINAR

CANBERRA, 19 JULY 1981

ADMINISTRATIVE REVIEW:

BEYOND THE FRONTIER MARKED 'POLICY - LAWYERS KEEP OUT'

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

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ABSTRACT

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By a review of a series of comparable decisions in the Administrative Appeals Tribunal (AAT), Mr. Justice Kirby identifies some of the problems that may arise as the jurisdiction and role of the AAT, continues to expand in the review on the merits of Commonwealth administrative decisions. The problems include first, the apparent difficulty for democratic theory of unelected tribunal members (including persons who are also judges) reviewing policy determined by elected Ministers; secondly, the creation of a dichotomy between decisions made by the AAT and decisions of public servants faithfully and more consistently applying Ministerial policy; thirdly, the limitation upon the membership and procedures of the AAT which restrict any truly effective wide-ranging review of government policy; and fourthly, the potential damage to community confidence in the judiciary, by the involvement of judges in the frank determination of controversial matters of public policy. The author acknowledges the role of policy-making in the courts and points to similarities and differences in the function of the courts and the AAT in the review of policy issues. He concludes that the AAT will require all arms of government in Australia to face more precisely the role of policy in adjudicative decision-making.

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A GREAT PROBLEM AND A GREAT QUESTION

Nearly 20 years ago, when he delivered his inaugural lecture at the University of Oxford, Professor H.W.R. Wade stated a great problem and a great question.[1] Suitably, the lecture was about administrative law. It reviewed the state of the art in 1962 England. Appropriately enough, it began with a tribute to Dicey, whose brilliant summation of the spirit of the Constitution of England in the 19th century had 'crystallised the past rather than heralded the future'.[2] Wade pointed out that:

> The vast powers of modern government had no place in Dicey's scheme of things, and he felt little concern with the great problem, as we now see it : how far is power to be controlled by law?[3]

Recounting Lord Devlin's declaration that the English legal system had become defective in failing to develop a wide jurisdiction over administrative cases and his melancholy conclusion that the common law no longer had the strength to provide satisfactory solutions 'to the problem of keeping the executive under proper control'[4] he related to his Oxford audience the acid criticism of that foremost of American writers on administrative law, Kenneth C. Davis. Painting with a broad brush, Davis had criticised the English judiciary for dealing in policy problems 'only half-heartedly' whilst continually asserting that the responsibility for policy did not lie with them and whilst pretending all the while that they were not deciding policy issues at all:

> The traditional manner of opinion writing in public law thus involves a considerable degree of intellectual dishonesty; that is, what the English call 'humbug', for judges frequently purport to find the results in the application of logic to precedents, whilst in reality they sometimes find the results to a considerable extent in their own ideas about policy.[5]

Wade expressed doubts as to whether overt judicial policy-making would lead to the desired renovation of administrative law. He pointed to differing judicial views about policy-making ranging from Lord Denning's call to the 'bold spirits' to Lord Devlin's professed anxiety not to tread too obviously on executive toes:

> Criticism of the British concept of the judicial function therefore seems to me to miss the point. The question is not whether the judges should be prepared to make law, but what law they should be prepared to make. Where should the balance of power be struck between the courts and the executive? That is the great question. It has to be decided within the framework of our own Constitution, where judges must work with a sovereign Parliament looking over their shoulders, and have no ultimate constitutional power as has the Supreme Court of the United States.[6]

Wade, writing in 1962, suggested that there were two paths that could be chosen leading to a new alliance between law and administration. The first was along the road of administrative courts where administrative disputes would be decided on their merits by a mixed tribunal of lawyers and administrators. This was the road of the comprehensive administrative law pioneered by the French Conseil d'Etat but followed also by particular tribunals of much more limited jurisdiction in England and Australia. The second path did not lead beyond the traditional functions of the law courts : the prevention of excess and abuse of power, the enforcement of fair procedures and review of errors of law. This path would stop short of any frontier marked 'Policy — Lawyers Keep Out'.[7]

Two decades later, in his Hamlyn Lectures[8] Wade surveyed the 'renaissance of administrative law' in England, following the revival of activity in the courts starting with Ridge v. Baldwin.[9] He reviewed the reinforcement of this activity by the work of the Council on Tribunals. But he could not but conclude that the United Kingdom Parliament had been quite incapable of controlling the flood tide of discretionary power which followed the Second World War. The pressure had been partly reduced by the use of special tribunals to dispose of cases where the decision could be made according to rules.

A large part of the administration of the welfare state could be handled in this way. But the rules themselves were often made at the discretion of Ministers who secured large reserves of power from legislation expressed in the most skeletal form.

Whereas Wade in 1962 enrolled himself in the school that put its faith in an expansion of the role of the courts to achieve effective administrative review, Australia, at least in the Federal sphere, is now well down the other road towards the development of a comprehensive administrative law. The component parts have been described elsewhere.[10] They include the establishment of the Administrative Appeals Tribunal (AAT), the Administrative Review Council and the office of the Commonwealth Ombudsman. Freedom of information legislation is in the Parliament. Legislation for enhanced judicial review in the Federal Court of Australia is now in force.[11]

The Seventh Annual Report of the Law Reform Commission of Canada referred to this body of Australian Federal legislation as having taken 'an awesome leap'.[12] Some have regarded the leap as astonishing in the comprehensive changes which have been effected. Others find disturbing and inappropriate the width of the jurisdiction conferred on the AAT. The creation of the tribunal and of the new administrative law is a novel and peculiarly Australian response to Wade's 'great problem' : how far is power to be controlled by law? It answers his 'great question' : 'where should the balance of power be struck between the courts and the executive?' in a novel way which takes judges and the quasi-judicial AAT well past the frontier marked 'Policy — Lawyers Keep Out'. It is not surprising that in this new territory, with few sure signposts to guide them, lawyers should be somewhat diffident and uncertain. The territory remains unmapped. This essay is an attempt to state how we came into the new realm, what we have found in our explorations so far and what problems may await an undiscerning stranger in this unfamiliar territory.

INDEPENDENT ADMINISTRATIVE REVIEW AND GOVERNMENT POLICY

The Federal Court of Australia has made it plain that the AAT, in exercising its review jurisdiction, must not abdicate the function of determining whether the decision made was the correct or preferable one in favour of a function of merely determining whether the decision conforms with whatever the relevant general government policy might be.[13] Far from being bound by a decision of general government policy, in the absence of a specific statutory provision requiring it to apply such policy, the AAT is duty bound to perform its tasks under the Administrative Appeals Tribunal Act. In the matters committed to its jurisdiction, it is obliged to determine on the evidence before it the 'right or preferable decision in the matters subject to review'.[14]

Surveying what he saw as the encroachment of judicial officers into functions traditionally reserved for the legislature or the executive government, Professor Gordon Reid has recently written of a malady of the Australian body politic which he describes as 'judicial imperialism'.[15] One of the symptoms cited by Reid is the establishment of the AAT and the expansion of the function of judges[16] in the review of Federal administrative decisions. It has been said that the British Empire was acquired in a fit of absence of mind. With equal accuracy it could probably be said that in such a way was the precise role of the quasi-judicial AAT determined. Specifically, the conferring of an ample power to review policy (including Ministerial policy) in the AAT occurred not primarily as a result of any novel claim by the judiciary for its own powers but as a result of legislation enacted by the Australian Federal Parliament in the most comprehensive terms establishing the AAT and conferring on it jurisdiction of great scope. Every relevant report which had preceded the establishment of the AAT had cautioned about the involvement of judges in the business of reviewing administrative policy. It was recognised that almost inevitably such policy would, from time to time, involve the consideration of governmental and even party political attitudes.

In Britain, the Franks Committee had declined to adopt the view, long urged by Professor W.A. Robson, that there should be a general administrative appeal tribunal with jurisdiction to hear appeals from tribunals and from Ministerial decisions following public inquiries, as well as appeals against harsh or unfair administrative decisions where no tribunal or inquiry procedure existed. The refusal to take this path, though a decision congenial to Professor Wade, was denounced by other commentators:

> An opportunity has been missed. If the committee could have got away from the traditional belief in the supreme fitness of the courts to determine all that falls within the vague phrase 'questions of law', they might have been able to simplify the system greatly. It would have been possible to provide for appeals on law, facts and merits from one tribunal to another and left with the courts the two matters of excess of jurisdiction and breach of rules of natural justice. ...[17]

The concern about the expansion of delegated legislation and the other powers of the modern state, the inadequacy of the established courts to provide prompt, accessible and inexpensive review and the limitations of administrative law as it had developed in Australia to that time, were all canvassed at length during the Third Commonwealth and

Empire Law Conference in Sydney in 1965. The paper by Mr. Justice Else-Mitchell[18] called to Australian notice developments in Britain and the United States and commended to local study the views of Franks, Wade and Robson. For once, the call was heeded. The result was a series of law reform inquiries which, in turn, have led on to important legal changes.

The first report was that of the Victorian Statute Law Revision Committee. It recommended in 1968 that a general administrative tribunal should be established in Victoria and that an Ombudsman should be appointed for that State. Nonetheless, the committee agreed with the opinion of the then Chief Justice of Victoria that it would be undesirable to include an administrative appeals body within the framework of the Supreme Court of that State. The Chief Justice had urged that this should not be done because the appeals body would be in part concerned with policy and administration and:

> 'confidence in the judicial arm of government may be threatened if the judiciary is brought into an area of administration where public controversy often runs high'.[19]

The committee's recommendations concerning the appointment of the Ombudsman were adopted. Those relating to the establishment of a general administrative appeals tribunal have not yet been implemented in Victoria.

In New South Wales, the Law Reform Commission recommended in 1973 that a Public Administration Tribunal should be established to hear administrative appeals. The President of the Tribunal would be a Judge of the Supreme Court. Other members were to be selected from persons having special knowledge or experience in government, administration, the law, trade, commerce or industry or a branch of the social sciences or any other science. The potential for the tribunal to stray into areas considered appropriate to government policy and not appropriate to a quasi-judicial tribunal was recognised by the New South Wales Law Reform Commission. Three suggestions were made concerning the functions of the tribunal, designed to avoid or overcome this risk. First, it was proposed that the jurisdiction to be conferred on the tribunal should be the subject of recommendations as to suitability for review made by a Commissioner for Public Administration working with an advisory council on public administration.[20] Secondly, it was proposed that the executive government should have a reserve power at any time after the taking of any official action by order published in the Gazette to direct that the tribunal should not inquire or continue to inquire into specific official actions.[21] This provision for the executive to 'by-pass' the quasi-judicial tribunal was subject to parliamentary superintendence. Any such order was to be laid before Parliament and would cease to have effect if either House passed a resolution disallowing it.[22]

Thirdly, the New South Wales proposal provided specifically for a certificate of policy. Clause 32 of the draft Bill attached to the Commission's report provided:

> 32(1) Where in any inquiry, there is put before the Tribunal a statement of policy of the Government on a matter relevant to the inquiry, the Tribunal shall, to the extent to which the policy is within power, give effect to the policy.[23]

Such statements of policy were to be in writing and signed by a Minister of the Crown expressed to state a policy of the government. Provision was also made for statements of policy of a public authority. The tribunal though not bound to give effect to such policy was to 'have regard' to it.[24]

In the brief discussion of this important proposal, the New South Wales Commission described clause 32 as dealing with 'the legislative aspects of an official action':

> Government must be able, if authorised by law, to have the final say about the legislative aspects of any official action : it is responsible to Parliament for the action and must be in a position to accept that responsibility. On the other hand most public authorities are not directly linked with Parliament and their policies do not carry the weight of government policies. We propose, therefore, that the tribunal should have regard to those policies but not be bound by them. Where a public authority feels so strongly about policy that it wishes the Tribunal to be bound by it, the authority may seek the intervention of the responsible Minister. If the Minister is persuaded to the viewpoint of the authority, and the matter is one by law susceptible of control by government policy, the way is open to him to have the authority's policy stated as a policy of the government.[25]

Although an Ombudsman was established in New South Wales, no other aspect of the NSW Law Reform Commission's scheme has yet been implemented. In 1978 a government commitment was given for administrative reforms. Action is apparently awaiting the final report of the Committee of Inquiry into New South Wales Government Administration under Professor Wilenski.[26]

In Western Australia, the review of administrative decisions has been conducted by the Law Reform Commission of that State. A working paper in 1978 reviewed Australian and overseas developments. Tentatively, the Commission favoured the establishment of a general administrative appellate body supplemented by a limited number of specialist appellate bodies, including in the industrial relations area.[27] In preference to the establishment of a tribunal, the Commission favoured the creation of an administrative division of the Supreme Court. Specifically, the Commission rejected the view that the established courts were 'too formal in their procedure, too rigid in their approach and generally ill equipped to determine matters involving economic or social policy'.[28] On the specific issue of policy, the Western Australian Commission had this to say:

> [I] t was said that the impartiality of the Court would be impaired if the Court had to make value judgments on matters of social and economic policy. This argument is somewhat inconsistent with the earlier arguments that a court would tend to avoid controversial decisions. It cannot be envisaged that administrative appeals would involve value judgments any less susceptible of impartial decision than value judgments about conduct such as fraud or negligence. The question in most appeals is whether the statutory criteria or government policy has been properly applied to a given set of facts. The Commission sees no threat to judicial impartiality in the determination of such questions.[29]

Implicit in this statement is the acceptance of the unargued proposition that the administrative review should involve nothing more than the application 'properly' of established government policy. The Western Australian Commission can perhaps be forgiven for assuming such a syllogistic function. Traditionally, courts at least have claimed that their function is one of applying pre-existing rules. Before the Federal Court in 1979 clarified the duty of the AAT, some had thought that it too should simply discover and apply proved relevant government policy, if lawful. Certainly, an examination of the reports leading to the establishment of the AAT indicate that this was the intention of its progenitors.

The report of the Commonwealth Administrative Review Committee in August 1971[30] made abundantly plain its views that the proposed general administrative review tribunal, though charged with the duty to 'hear and determine an application ... on the facts and merits of the case'[31] and also having power 'to deal with all questions of law necessary for its decision'[32] should not have the power to review government policy relevant to the decision:

> [T]he jurisdiction would still be workable although matters of government policy may be involved. This policy can be explained to the Tribunal by written or oral evidence and, of course, a representative of the department or instrumentality will be a member of the Tribunal. ... It may also be desirable that the Tribunal should be empowered to transmit to the appropriate Minister an opinion of the Tribunal that although the decision sought to be reviewed was properly based on government policy, government policy as applied in the particular case is operating in an oppressive, discriminatory or otherwise unjust manner. Such an opinion would presumably be accompanied by a reference back to the administrator for further consideration.[33]

Confirming that the function of the proposed new tribunal should simply be the 'correct application of policy', the committee did not consider that conferring such a jurisdiction upon a tribunal comprising judges as personae designatae would undermine confidence in the court in the way the Chief Justice of Victoria had feared:

> We do not think that at this time in Australia the involvement of persons who are judges in quasi-judicial administrative appeals concerned with the correct application of policy or the making of correct administrative decisions would threaten confidence in the judicial arm of government. The main argument to the contrary is that controversy may develop about policy and administrative matters involved in the review activities of an appeal tribunal and that this could extend to or involve the Court or Courts of which the judges in question are members. We think this fear can be exaggerated. After all, there can be controversy about judges in their judicial capacity and in a federation this is, to some extent, inevitable in constitutional cases, but such a controversy in Australian conditions does not undermine respect for the judiciary.[34]

The final report of the Committee on Administrative Discretions in October 1973[35] was even more emphatic on this topic. First, it envisaged that in some cases the proposed tribunal's functions would be recommendatory only. The rationale for this was explained by reference to the problem of handling policy:

> [T]here can be present in some cases policy elements that require that the Minister should make the ultimate decision. ... A tribunal to the extent that it is functioning as an extension of the administrative process must not exclude from its mind the totality of considerations that bore on the original decision-maker. It must not be constrained by the practices of the courts in relation e.g. to evidence and relevancy. In so many cases, the administrator cannot come to his decision on an individual case in, as it were, a vacuum. He has to take his decision not solely on premises acceptable to a court but in a context of a broad government response to its interpretation of socio-economic values acceptable to the community. He absorbs this in the culture of his total administrative activity.[36]

Although requiring that the proposed tribunal, with osmotic inevitability should absorb all government policies which would have influenced the administrator, the committee differed from the view that the tribunal should be entitled to express opinions on government policy. It would not even favour such an opinion where the operation of policy resulted in oppression, discrimination or otherwise in injustice:

> We do not agree that a Tribunal should be entitled to express opinions on government policy. It should not be entitled to question the policy grounds on which a decision is based or a decision to the extent to which it gives effect to a policy. It should do not more than identify the government policy on which the decision is based. That can provide the starting point for any rectification or adjustment thought necessary.[37]

The committee also rejected the notion that members of the tribunal should be officers of the Commonwealth department or authority responsible for the decision under review. It was considered that this could lead to an awkward situation if a junior officer were 'sitting in judgment of his superior'.[38] Public perceptions of the independence of the tribunal would also be damaged by constituting it in such a way.

When the Administrative Appeals Tribunal Act 1975 was introduced into the Parliament to establish the AAT, the issue of policy review was not specifically adverted to. But the Attorney-General stated the intention of the Bill in the widest terms:

> To establish a single independent tribunal with the purpose of dealing with appeals against administrative decisions on as wide a basis as possible. ... It will be called upon to review decisions by Ministers and of the most senior officials of government. In the words of the Franks Committee on Tribunals and Inquiries, the Tribunal is not to be an appendage of Government departments. The Tribunal is to be regarded as machinery provided by Parliament for adjudication rather than as part of the machinery of departmental administration. Nothing less than a tribunal of full judicial status would be satisfactory for these purposes.[39]

The Bill contained, and the Act contains, no provision equivalent to clause 32 of the New South Wales scheme. True it is, executive control is exerted at the gateway through which administrative decisions must pass before jurisdiction in respect of them is conferred on the AAT. Equally true, the executive may bring before the tribunal statements of government policy which are relevant and within power and which would have been considered by the original decision-maker, whose decision is the subject of review. But the power conferred on the AAT in conducting its review, is of the greatest amplitude. It may exercise 'all the powers and discretions' which are conferred on the person who made the decision. It may affirm, vary or set aside the decision. If it sets the decision aside it may make a substitute decision or remit the matter for reconsideration 'in accordance with any directions or recommendations of the tribunal'.[40] In Drake v. Minister for Immigration & Ethnic Affairs, the Federal Court stated its view of the proper approach to a Ministerial policy statement tendered in the proceedings:

> In a matter such as the present where it is permissible for the decision-maker to take relevant government policy into account in making his decision, but where the Tribunal is not under a statutory duty to regard itself as being bound by that policy, the Tribunal is entitled to treat such government policy as a relevant factor in the determination of an application for review of that decision. It would be contrary to commonsense to preclude the Tribunal in its review of a decision, from paying any regard to what was a relevant and proper factor in the making of the decision itself. If the original decision-maker has properly paid regard to some general government policy in reaching his decision, the existence of that policy will plainly be a relevant factor for the Tribunal to take into account in reviewing the decision. On the other hand, the

> Tribunal is not, in the absence of specific statutory provision, entitled to abdicate its function of determining whether the decision made was, on the material before the Tribunal, the correct and preferable one in favour of a function of merely determining whether the decision made conformed with whatever the relevant general government policy might be.
>
> It is not desirable to attempt to frame any general statement of the precise part which government policy should ordinarily play in the determinations of the Tribunal. That is a matter for the Tribunal itself to determine in the context of the particular case and in the light of the need for compromise, in the interests of good government, between, on the one hand, the desirability of consistency in the treatment of citizens under the law and, on the other hand, the ideal of justice in the individual case. ... It is ... desirable that, in any case where the Tribunal reaches the conclusion that the particular circumstances are such as to make the correct or preferable decision that which results from an application of some government or ministerial policy to the particular facts, the Tribunal makes it clear that it has considered the propriety of the particular policy and expressly indicates the considerations which have led to that conclusion.[41]

This, then, is the approach that has been laid down for the AAT. It differs from anything contemplated by the Franks Committee, and anything envisaged by the State or Federal Australian reports. Almost certainly, it goes beyond what was imagined when the AAT was established. Clearly, no specific recognition was given to the problem of policy review in the Bill, despite the precedent then available from the New South Wales Law Reform Commission. Before the Federal Court's pronouncements in Drake, the AAT itself had considered, in an early immigration case, the weight that should be given to the policy considerations 'which ought to be applied'.[42] Mr. Justice Brennan appeared to imply that the AAT would review policies of some kinds, though not others:

> A distinction will necessarily be drawn between policies of different kinds. Some policies are clearly made or settled at the political level, others at the departmental level. ... The difference between the factors to be taken into account in the two kinds of policy provides one ground of distinction between them; the difference in parliamentary opportunity to review the two kinds of policy provides another. Some policies are basic, and are intended to provide the guideline for the general exercise of the power, other policies or procedural practices are intended to implement a basic policy. Different considerations

> may apply to the review of each kind of policy : and more substantial reasons may have to be shown why basic policies — which might frequently be forged at the political level — should be reviewed. There may, of course, be particular cases where the indefinable yet cogent demands of justice require a review of basic or even political policies, but those should be exceptional cases.[43]

In the absence of clear statutory guidance as to how established and lawful government policy is to be applied by the AAT to the facts of a particular case, the Federal Court has made plain its view that the Administrative Appeals Tribunal Act 1975 imposes on the AAT an obligation independently to assess the propriety of government policy, even as stated by a Minister. Its proper function is not discharged merely by determining whether the decision made conformed with whatever the proved relevant lawful government policy might be. It is this statement of the AAT's functions and duties that has taken that tribunal beyond the frontier marked 'Policy — Lawyers Keep Out'. How has the tribunal fared?

INTO THE TERRITORY OF POLICY

Since the decision of the Federal Court in Drake the approach of the AAT to the review of governmental and ministerial policy has arisen in a series of deportation cases. Some of these will now be briefly reviewed. Professor Dennis Pearce has expressed the view that it is unfortunate that the 'fundamental questions' as to the role of the tribunal in relation to policy have arisen in the context of deportation cases. As he says, these are cases where there is a high political content in government policy. Decisions taken tend to be controversial. Policy necessarily arises in many other areas of decision-making by Commonwealth officials. It could distort the debate about policy examination if attention were exclusively focused upon the review of ministerial policy on criteria for deportation to the exclusion of the administrative process in other areas.[44] On the other hand, though there is discussion of the proper approach to the review of policy in a number of other cases since Drake, outside the highly charged field of deportation, the series of decisions in deportation cases does present the reviewer with a useful 'control group'. Each case has been heard by a Deputy President of the AAT and hence by a person who is a judge of the Federal Court. Each case has involved consideration not of broad government policy on socio-economic issues of the kind which the Bland Committee contemplated would be absorbed by administrative osmosis. In each case there has been tendered a statement of policy criteria expressly prepared under the direction of the Minister for submission in the AAT proceedings.[45] Each case under review has involved the application of the special policy for the deportation of aliens

convicted of drug offences. The same issues of principle are debated in the series. Frequently the reasons for decision include detailed repetition of reasons advanced in earlier cases. Sometimes there is comparison of cases. In each case the applicant, an alien immigrant, has served a term of imprisonment following his conviction for a drug offence. In most cases innocent members of the family of the alien are caught up in the decision, so that deportation will involve hardship to them, many of whom are Australians having little or no connection with the proposed country of return.

When, in accordance with the order of the Federal Court, Drake's case was returned for re-hearing by the AAT, it came before the then President, Mr. Justice Brennan. Whilst acknowledging that the Minister was free not to do so, the President pointed out that the Minister was equally free, in point of law, to adopt policy guidelines in order to 'guide him in the exercise of the statutory discretion'. The one requirement was that such policy should be consistent with the statute.[46] The discretion could not be so truncated by a policy as to preclude consideration of the merits of specified classes of cases for this was required by the statutory discretion itself. But when it came to the actual application of the policy, the President made it plain, with the words of the Federal Court clearly in mind, that the tribunal had its own independent statutory function:

> It is one thing for the Minister to apply his own policy in deciding cases; it is another thing for the Tribunal to apply it. In point of law, the Tribunal is as free as the Minister to apply or not to apply that policy. The Tribunal's duty is to make the correct or preferable decision in each case on the material before it, and the Tribunal is at liberty to adopt whatever policy it chooses, or no policy at all, in fulfilling its statutory function.
>
> In fulfilling its function, the Tribunal, being independent of the Minister, is free to adopt reasoning entirely different from the reasoning which led to the making of the decision under review. But it is not bound to do so. ... If the Tribunal applies Ministerial policy, it is because of the assistance which the policy can furnish in arriving at the preferable decision in the circumstances of the case as they appear to the Tribunal.

After recounting the arguments of counsel for the appellant that the AAT should not meekly apply ministerial policy, Mr. Justice Brennan drew a distinction which was to recur in later cases, between the making of 'a discretionary administrative decision' and 'the making of a curial decision'. Warning against any over-simplified categorisation, he urged that the curial function 'rightly ignores the policies of the executive government' but the administrative decision 'should not'.[47] Observing that the powers vested in the AAT by the Administrative Appeals Tribunal Act 1975 were 'wide enough to permit the sterilisation or amendment of policy in its application to the cases which come here', the President then sounded a note of caution:

> Although the Tribunal ought not, indeed cannot, deprive itself of its freedom to give no weight to a Minister's policy in a particular case, there are substantial reasons which favour only cautious and sparing departures from ministerial policy, particularly if parliament has in fact scrutinised and approved that policy. If the Tribunal in reviewing a decision made in pursuit of a lawful administrative policy, consciously departed from that policy, it would nullify not only the policy made by the repository of the discretionary power, but also any mechanism of surveillance which the relevant statute permits or provides. To depart from ministerial policies thus denies to parliament its ability to supervise the content of the policy guiding the discretion which the parliament created. On some occasions, reasons may be shown to warrant departure from ministerial policy, for example where the intervention of new circumstances has clearly made a policy statement obsolete. But in general, it would be manifestly imprudent for the Tribunal to over-ride a ministerial policy and to adopt a general administrative policy of its own. ... The very independence of a Tribunal demands that it be apolitical; and the creation of its deportation jurisdiction is intended to improve the adjudicative rather than the policy aspects of deportation decisions. The Tribunal is not linked into the chain of responsibility from Minister to government to parliament; its membership is not appropriate for the formulation of broad policy and it is unsupported by a bureaucracy fitted to advise upon broad policy. It should therefore be reluctant to lay down broad policy, although decisions in particular cases will impinge on or refine broad policy emanating from the Minister.

The AAT's proper approach was then stated bluntly:

> These considerations warrant the Tribunal's adoption of a practice of applying lawful ministerial policy, unless there are cogent reasons to the contrary. If it were shown that the application of ministerial policy would work an injustice in a particular case, a cogent reason would be shown, for consistency as not preferable to justice. ... When the Tribunal is reviewing the exercise of a discretionary power reposed in a Minister, and the Minister has adopted a general policy to guide him in the exercise of the power, the Tribunal will ordinarily apply that policy in reviewing the decision, unless the policy is unlawful or unless its application tends to produce an unjust decision in the circumstances of the particular case. Where the policy would ordinarily be applied, an argument against the policy itself or against its application in the particular case will be considered, but cogent reasons will have to be shown against its application, especially if the policy is shown to have been exposed to parliamentary scrutiny.[48]

Notwithstanding the ample language of the Administrative Appeals Tribunal Act and the wide discretion conferred on it as clarified by the Federal Court, the AAT with a fine display of self-restraint indicated in Drake No. 2 that the circumstances in which ministerial policy would be departed from would be rare. In part this restraint can be seen as a lawyer's response to the essential purpose of the establishment of the AAT, its limited resources, its adjudicative procedures as contemplated by the Act and the constitutional background into which it must fit. In part, the decision may be seen as one of sensible policy on the part of the AAT itself. Any bolder claim for the re-scrutiny of ministerial policy would undoubtedly invite retaliation by the many expedients available to the executive government, not least to the atrophying of the AAT's jurisdiction. Review of policy 'at the margins' in its impact on individual cases is all that is claimed. Yet though this decision is so sensible it finds no specific justification in particular provisions of the AAT's statute. It is a formulation devised by the AAT itself in response to the Federal Court's reminder of the AAT's ample powers under the statute.

The problem arising from the lack of statutory definition of the precise role of the AAT in dealing with government and ministerial policy is that there is a clear resulting tension between the thrust of the Federal Court's injunction for the tribunal to perform its own independent review of the Minister's policy and the tribunal's endeavour to limit that function to accord with political realities, its own court-like procedures and the necessity of getting through its busy caseload. In the absence of clear statutory criteria and guidance, members of the AAT are left with nothing more than general categories of indeterminate reference to point the way in which they should consider the merits of governmental and ministerial policy in a particular case. Will its application

'work an injustice'? Has a 'cogent reason' been shown for not applying the policy? Would application 'produce an injust decision in the circumstances of the particular case'? Are there grounds 'going to the merits of the ministerial policy'? Different AAT members, different people, will approach the application of these broad criteria in different ways. That this is so has been demonstrated in the reasoning of a number of decisions of the AAT since Drake No. 2. Furthermore, the problem for syllogistic decision-making is compounded by the generality of the language used in the ministerial policy statement itself. It is replete with further categories of uncertain denotation including such phrases as 'whether in all the circumstances of the particular case it is in the public interest'; the 'interests of the community' and 'other persons whose interests are affected'.

DEPORTATION POLICY AND THE AAT

According to Mr. Justice Smithers sitting in the Federal Court in Drake, it is necessary for the AAT unambiguously to state that it itself satisfied on the evidence as found by it that deportation is the right course. It was insufficient that it should be satisfied that, according to the tests applied by the Minister in the application of his policy, his decision was reached regularly and reasonably.[49] One of the first of the AAT deportation cases which followed the Federal Court decision was that of Nizam Gungor. Mr. Justice Smithers, sitting as a Deputy President, had to deal with the case of a Turkish alien immigrant subject to a deportation order following the sentence of one year's imprisonment for the offence of supplying Indian hemp. It was found by Mr. Justice Smithers that:

> The offence of trafficking actually committed was in the lower range of criminality and not of itself of a nature to merit or sustain an order for deportation. If however there were reason to think that there is a serious risk that the applicant will offend again the situation would be different.[50]

To answer this question his Honour sought and examined statistics concerning recidivism in relation to drug offences. He defined the functions of s.12 of the Migration Act as being designed:

> [P]rimarily to protect the Australian community from the presence of particular offending aliens and not for imposing extra punishment on an offender or by so doing deterring other unnaturalised aliens from particular offences. To use the powers conferred by the Migration Act for the purposes of punishment and deterrence is in substance to discriminate against immigrants and aliens by subjecting them to an additional sanction not applicable to other

> persons for breaches of the criminal law. Even if there were grounds for thinking that particular classes of persons were particularly disposed to trafficking in drugs such discrimination would call for justification as it inevitably must operate unjustly on certain individuals. But there are no such grounds.[51]

Mr. Justice Smithers, far from mechanically applying a ministerial policy that normally aliens should be deported when convicted of drug offences, felt himself free, indeed obliged, to question the application of that policy in particular cases and moreover its effectiveness in the generality of Australia's immigrant population:

> It is one thing to deport a person because he is a danger to Australian citizens but it is quite another to do so as additional punishment or as a deterrence to others. Obviously such a procedure even if technically lawful[ly], will inevitably inflict injustice to, or at least operate oppressively in the case of, persons who are not themselves a danger to Australia. Both for the reputation of Australia and as a matter of good government based on justice and a reasonable respect for the individual such a procedure has unfortunate aspects. ...[52]

Having reviewed the statistics of migrant involvement in drug offences in Australia, his Honour concluded:

> Having regard to the fact that of foreign offenders only a very small proportion are recidivists, it is clear that such deterrent benefits as may be achieved by deportation of persons who are not of a danger to Australia must, in the totality of the Australian drug scene, be quite minor. To subject a minority of persons to injustice in the name of deterrence to achieve a major result might be tolerable. But to do so in respect of little people to achieve little, is, in my opinion, not compatible with good government or the best interests of Australia considered as a nation sensitive to principles of fairness.[53]

After the close of evidence in Gungor, a new 'statement of government policy' was tendered to the AAT. It was urged that this should be applied. Mr. Justice Smithers, on the contrary, felt that there was much to be said for the view that the policy which ought to be applied was the policy by reference to which the original deportation order in the case had been made. Reviewing the 'new policy' the Deputy President expressed distinct reservations:

> These paragraphs introduce a new element of inflexibility in declaring a rule applicable 'in almost all cases'. That, in almost all cases concerning the production, importation, distribution or trafficking of illegal drugs, considerations arising from circumstances are to be outweighed, is certainly a distinct change from the policy as previously expressed. There is a Draconian tone in both these paragraphs not to be found in the [earlier] policy. ... I consider that there is a danger in inflicting injustice and hardship in cases of various individuals if that policy is applied according to its terms. It is clear also that I consider the deportation in this case would inflict injustice on the applicant and be oppressive.[54]

Mr. Justice Smithers made plain his view that, though consistency was a virtue, it should be sought by reference to policy 'only when the policy has passed the test of compatability with good government and the best interests of Australia'.[55] He recommended that the deportation order be revoked. Analysing his decision, it is plain that, although limited in terms, to the facts of the particular case, the observations based on statistical material and on the injustice of double punishment to migrants for the sake of deterring others, led Mr. Justice Smithers to question the substance of the Minister's policy itself. The Minister had stated that conviction of drug offences would 'in almost all cases' lead on to deportation. This approach, Mr. Justice Smithers declared to be 'Draconian'. Plainly it did not influence his decision and recommendation. The criteria of 'good government' and 'the best interests of Australia' provide little guidance of practical assistance for testing the acceptability or otherwise of governmental or Ministerial policy in a particular case. Effectively, a policy document (which it can be assumed was closely considered by the Minister himself) was simply not followed. The result may be applauded as a just decision in the case. The 'ideal of justice in the individual case'[56] may well have been achieved. But the achievement may have been at the cost of respect for the Minister's views and his desire for principled decision-making in the discretion reposed in him by Parliament.Furthermore it could lead to variance from the consistent application of those principles in those many cases which do not proceed to appeal to the AAT.

In August 1980 another Deputy President of the AAT, Mr Justice Fisher delivered his decision in Jeropoulos.[57] This was a case of a 'struggling' market gardener who was one of 29 persons convicted of growing Indian hemp north of Adelaide. Of the 29, only one was Australian born. Jeropoulos and four others were the only persons who had not become naturalised Australian citizens. He was sentenced to three years' imprisonment but released on parole after ten months. A deportation order was made against him. He appealed to the AAT. Mr. Justice Fisher approved and adopted the view

enunciated in Drake No. 2 that the Minister's policy would ordinarily be applied 'unless its application tends to produce an unjust decision in the circumstances of the particular case'. After stating in terms the 'new policy' of January 1980, the Deputy President asserted that even if it were not open on a statement of policy to consider three basic factors that should in his view be taken into account in deportation cases (the nature of the crime, the likelihood of rehabilitation and the risk of recidivism) they should still be considered by the AAT to see whether, in their application, they would result in such an injustice as required departure from the Minister's policy.

Mr. Justice Fisher felt that it was crucial that the AAT be satisfied that 'the particular deportation is likely to have the anticipated beneficial consequences' as a deterrent. To stress the element of deterrence a very senior officer was called for the Minister. He recounted the Minister's approach and the Section Head's view that the case presented:

> The opportunity to demonstrate with considerable impact that the people of Australia do not accept or condone behaviour of this nature.[58]

However Mr. Justice Fisher made a criticism of the policy which, though in some way special to the facts of the case, could have application to many or most migrants of this class:

> The significant fact disclosed by the evidence in this case was that of 29 people convicted of growing marihuana ... only one was an Australian citizen by birth and five were aliens. The balance appear to have acquired citizenship, and thus immunity from deportation. It is thus not these offenders or even the majority of these offenders who are liable to be influenced by the deportation of the applicant, but only that small group of aliens who have not obtained Australian citizenship, in many instances because of their ignorance or illiteracy.[59]

Mr. Justice Fisher declared that his decision was an application of the Minister's policy. But, lest there be any doubt, he concluded:

> If however I am wrong in my interpretation of the new policy and the correct consequence of applying the policy is that the deportation order must be affirmed then in my view such application has worked an injustice in this particular case. The injustice arises because there is, in my opinion, a substantial disproportion between the detriment to the applicant, his wife and

> children and the benefit to the community in consequence of the deportation. ... In my opinion deportation is neither necessary nor appropriate for [the protection of the Australian community against a particular individual].[60]

In December 1980 in the case of Gallo[61] a similar case came before Mr. Justice Gallop, Deputy President. The applicant was convicted of trafficking in Indian hemp and sentenced to imprisonment for four years. After stating the facts, his Honour observed in language that is perhaps more reminiscent of Drake No. 1 than Drake No. 2 that:

> It is now well established that [the Minister's policy relating to the deportation of persons convicted of a criminal offence] should be observed and applied by this tribunal in the exercise of the discretion to review deportation orders.[62]

He then pointed out that the policy statement did not purport to distinguish between different drugs. Referring to sentencing decisions of the courts, he stated that it should not be assumed that all illegal drugs are equally harmful.[63] There was a similar observation by Mr. Justice Smithers in Gungor when he expressed the view that:

> the Australian people would make great distinction in general between the supply of Indian hemp and the supplying of heroin.[64]

These comments amount to a definite gloss on the Minister's policy. As Mr. Justice Gallop says, the policy, in terms, draws no such distinctions. It speaks simply and clearly of 'illegal drugs'. In the result, after considering the factors set out in the policy statement 'which need not be regarded as compelling either singly or in combination'[65] Mr. Justice Gallop recommended that the deportation order be revoked. Clearly he had given weight to the fact that the drug involved in the case was Indian hemp. No warrant for this approach could be drawn from the language of the Minister's policy.

In Saverio Barbaro, the President, Mr. Justice Davies, had to deal with the case of an Italian farmer convicted and sentenced to three years' imprisonment as a result of the discovery of a large marihuana crop under cultivation on his property.[66] Mr. Justice Davies received into evidence, against objection, the report of Mr. Justice Woodward as Royal Commissioner into Drug Trafficking in New South Wales. He also referred to the report of Mr. Justice Williams, who constituted the Federal Royal Commission of Inquiry into Drugs. Clearly relevant in his Honour's view was his disbelief of the continued protestation of innocence by Mr. Barbaro and his consequent failure to assist police to discover the persons behind the large-scale trafficking in cannabis:

> The applicant has information which would be of value to the community and it is offensive to the community that that information not be disclosed, particularly as the information concerns the identity of the persons involved with the organisation of which it has been said by Mr. Justice Woodward that it was responsible for the disappearance of Mr. Donald Mackay, a murder which has yet to be solved.[67]

Mr. Justice Davies compared the 1978 and 1980 statements of ministerial policy. He concluded that the essence of both policies was 'that the facts of each particular case are to be looked at upon their own merits and that all facts and matters relevant to a particular case are to be considered'.[68] In an elaboration of the policy statement, Mr. Justice Davies repeated his view first stated in Sergi[69] that a consideration relevant to the discretion under s.12 of the Migration Act was whether the person was still 'an immigrant' or, though an alien, 'has become fully absorbed into the Australian community'. Despite the inclusion in the 1980 statement of the explicit policy that it was in the interests of the Australian community 'almost always' to remove persons who are involved in the drug problem, Mr. Justice Davies considered that it would be:

> wrong to conclude that the issue as to the deportation of a criminal is to be resolved merely by reference to that statement. Section 12 of the Migration Act confers a discretion to deport a person who has been convicted of a crime of a certain character. That section sets down the law, the legislative framework within which this review is to be considered. In revising a ministerial decision made under those sections, Government policy is a relevant matter to be taken into account but the Tribunal may not abrogate its duty to arrive at the correct or preferable decision simply by applying government policy to the facts of the case.[70]

Having pointed out that the 1980 policy statement did not seek to overbear humanitarian considerations to which it was the tribunal's policy to give due weight, Mr. Justice Davies concluded in favour of affirming the Minister's decision for a number of stated reasons. He could not make a firm judgment that there was little risk of recidivism. He could not overlook the applicant's continuing non-disclosure of knowledge that would be useful to law enforcement authorities. Deportation could be useful in this 'very type of case' as a deterrent to Calabrians who have been involved for many years in marihuana growing on a large scale. It was only after citing these reasons of his own that Mr. Justice Davies adverted to his duty to 'give weight' to the government's policy for the reasons stated in Drake No. 2.[71]

In Nevistic the applicant was a Yugoslav convicted as a result of the discovery of a crop of marihuana on his farm near Orange, New South Wales. His wife Christa, a German citizen, had four children by him, all Australian citizens. He was sentenced to imprisonment for six years and after release on parole was ordered to be deported. There was no doubt of the hardship deportation would do to his family, none of whom had links with Yugoslavia. His wife did not wish to return to a communist country or indeed to Europe. After recounting at length what he had said of the Minister's policy in Saverio Barbaro, Mr. Justice Davies turned to the instant case:

> [I]f it were not for the government's policy on deportation, I may find in favour of Nevistic. The term of imprisonment is likely to achieve a sufficient reform in Nevistic's outlook to ensure that, hereafter, he does comply with the community's laws. Thus, apart from the factor of government policy, the balance may lie against deportation, though I could not say that clearly it would so lie. However, government policy in this field is a matter to which significant weight must be given. ... This policy finds expression in the 1980 statement which the Minister of State for Immigration and Ethnic Affairs has tabled in Parliament. The policy there stated gives considerable significance to the desirability of deterring other persons. ... If I were myself to formulate a policy, I think I would not give such weight to the factor of deterrence. ... [I]mplementation of the policy tends to operate in some cases as an additional or double punishment. And it so operates not with respect to the whole population but only with respect to immigrants and aliens, many of whom suffer from disadvantages resulting from migration, language problems and the like. Moreover, I doubt that deterrence has a noticeable effect unless the deportee is a member of an ethnic community, particularly involved with the particular type of offence. However, for the reasons enunciated in ... Drake No. 2, the formulation of an overall policy for the deportation of criminals is primarily a function of the government. ... The 1980 policy for the deportation of criminals is a policy properly formed in the political context. It is a policy which involves an area where value judgments are required and where different views may validly be taken. As the policy has properly been formulated in the political context and is an exercise of political power and, also, as it is desirable that there should be consistency in decision-making, it is proper that I should give weight to it. I would not decide this case by applying the precise terms of the policy statement. Nor do I take the policy into account uncritically and without regard to what I see is its limitations and problems. However, one of the

> matters to which I should give weight is government policy and the substantial effect of that policy is that a person in a position of Nevistic should be deported. Application of that policy to Nevistic is not unjust or unduly harsh. There are no particular factors operating in this case which would make it wrong to give weight to the policy in this review.[72]

The Minister's decision was affirmed. A similar result was reached by Mr. Justice McGregor, Deputy President, in Tombuloglu in January 1981.[73] The applicant was a Turk who pleaded guilty to selling Indian hemp. He was sentenced to imprisonment for two years and two months. The Deputy President accepted that his wife and children, who preferred to stay in Australia, would experience hardship if he was deported and would accompany him. An attempt was made to establish the unfavourable social conditions in Turkey from the oral evidence of a witness who had visited Istanbul only for a fortnight eight years before and from a recent edition of the news magazine 'Newsweek'. The effect of deportation on another woman and a child of that relationship was likely to occasion 'some hardship'. But this could not be given much weight:

> [T]o have entered into a relationship where she has been, in effect, his mistress, when he was, and is, both married and with a family, must always have been a hazardous enterprise anyway. Separation from her and the child would cause him some hardship.[74]

Mr. Justice McGregor did not express the doubts voiced by Justices Smithers, Fisher and Davies concerning the general effectiveness of deterrence by deportation:

> Migrants who are tempted or disposed to enter into the kind of criminal activities such as undertaken by the applicant are, in the national interest, most firmly to be deterred. ... In my opinion the aspect of deterrence is of great importance in this case; and the effect of deportation will operate significantly to dissuade others who are foolish enough to attempt in this fashion to make extra money out of this sordid trade. The Australian community will be better off without persons prone to such offences. The tribunal should, and I do, accord some weight to the Minister's decision. It is in my view also appropriate that, as a matter of policy, there should be a more serious view taken of some types of crime than others. One such category of offences is the distribution and trafficking in illicit drugs. ... The Australian public would not, in my view, choose to accept this man as one of its members even if, in the result which follows, i.e. deportation, his wife and children would also leave this country.

> The deportation of the applicant would, I consider, be a significant deterrent to migrants not only in areas where his activities have been well known but to migrants generally who are minded to commit such breaches of the law.[75]

No mention is made, nor any reference given, to the reservations of other presidential members of the AAT about the effectiveness of deterrence. No observations are offered on the effect of deterrence on migrants from the particular country or province to which this applicant would be expelled. No distinction is made, as Justices Smithers and Gallop proposed, between types of illegal drugs. Mr. Justice McGregor obviously accepted more wholeheartedly than the other presidential members of the AAT the policy of the Minister, the likelihood of effective deterrence and the unacceptability of 'trafficking in illicit drugs' described as a class.

In Piscioneri[76] the President, Mr. Justice Davies, had to deal with yet another case of a Calabrian convicted as a result of the discovery that he was growing marihuana, sentenced to imprisonment for three years and then ordered to be deported. The facts were similar to Saverio Barbaro from ~~the~~ which decision ~~in which~~ the President cited extensively. It was necessary to give weight to the policy of the government 'which favours the deterring of other persons from committing crimes of a like nature':

> If such deterrence is to be given weight, this is the type of case to which it is most applicable. Calabrians have been involved in marihuana growing on a large scale for many years and any step that may serve to inhibit like activity in the future is in the public interest.[77]

In summarising the reasons for his decision to affirm the Minister's deportation order, Mr. Justice Davies concluded thus:

> The applicant arrived in Australia in May 1951 and has been in this country during most of the period since. His parents, brothers and sisters are in this country. ... He was described by witnesses as a 'good man' and 'hard worker' for which descriptions there would, I think, be reasonable justification. ... I would not think it proper to deport him were it not for his continuing non-disclosure, his possible financial obligation to a clandestine organisation, his membership and involvement with the ethnic group which has caused such harm to the community and, lastly, the government's policy. However these factors seem to me to weigh the balance in favour of deportation'.[78]

True it is, the government's policy is not overlooked. But in the listed reasons for the ultimate decision advanced by his Honour, it is the last to be recorded. It would seem that in reaching the decision to affirm the Minister's order, the President of the AAT was more decidedly influenced in concluding that the order was the 'right or preferable decision' not by the simple application of any blanket policy concerning deportation of migrant drug offenders but by considerations which were in no way mentioned in the governmental policy. As in Saverio Barbaro it is plain that Mr. Justice Davies was influenced more powerfully by the conclusion he had reached, from the reading of Mr. Justice Woodward's report, that Piscioneri was continuing to withhold information concerning the serious criminal activities:

> [T]he applicant has, in my view, knowledge of the organisation of which Mr. Justice Woodward reported and it is a continuing affront to the community that he does not disclose this knowledge which would be useful for the law enforcement authorities. A community left with the problem of the unsolved murder of Donald Mackay and with continuing criminal activities involving or relating to drugs cannot be unconcerned that there are persons in the community with knowledge which is not imparted. The applicant may choose not to disclose relevant information ... and he may fear harm should he make that disclosure. Nevertheless, I cannot treat him as a person who was involved simply in an isolated offence unconnected with other criminal activities. The connection between the plantation ... and other criminal activity has been shown by Mr. Justice Woodward's Report. It is detrimental to the community's interests that the applicant continues to tell lies about the events in which he was involved.[79]

The latest decision in this series is that of Mr. Justice Fisher in Vincenzo Barbaro.[80] This decision was delivered in March 1981. The applicant had been found guilty by a jury and convicted of a charge of supplying Indian hemp. He was sentenced to imprisonment for three years. He was the youngest of the Barbaro family. Like Saverio Barbaro, at the trial and before the AAT, he protested his innocence with a story which the Deputy President, described as 'full of discrepancies and improbabilities'.[81]

Mr. Justice Fisher received, over objection, the new statement of ministerial policy and the reports of the Woodward and Williams Royal Commissions. He examined the indicia that the applicant was more deeply involved in the drug enterprise than as a farm labourer. Such a view was not, he held, justified on the evidence. Endorsing the views in Nevistic cited above, went on to comment on the Minister's policy as disclosed in the new policy statement:

> [I] feel to apply the policy ... to the applicant and his family for the purpose of attempting to deter others and particularly others in like circumstances to himself, is unduly harsh and not necessarily productive of benefit to the Australian community. ... I would wish to be reasonably satisfied that the risk of deportation was likely to inhibit a migrant from succumbing to temptation or persuasion. This is especially the case if a migrant is vulnerable to pressure by reason of impecuniosity or otherwise. My concern has been that a more likely consequence is that prior to becoming involved in illegal activities most migrants who are eligible will first acquire Australian citizenship. Evidence in this matter confirms that my concern was justified. The names of two persons were by consent told to me, each of whom has been charged with relation to a plantation in the Canberra region. They were under observation on the property prior to planting marihuana but when they were arrested it was ascertained that they had taken out citizenship subsequent to the initial observation. Secondly, where a person is to be deported for an ulterior purpose, namely for the purpose of influencing others, it seems proper and just for this to be effected in the circumstances where there is minimal detriment to innocent parties. ... The Minister's policy statement ... identifies a number of matters which I agree must be given consideration and, in the approach I have adopted to the matter, placed in the scales. They are all matters containing a substantial element of compassion or humanity and which were taken into account prior to their inclusion in the policy. That document indicates that it is government policy to take them into account but neither singly nor in combination are they necessarily to be regarded as compelling circumstances.[82]

In the result, Mr. Justice Fisher reached the conclusion that there was 'a substantial disproportion' between the detriment to the applicant's wife and children and the benefit of deportation 'to the Australian community'. Applying the words of Mr. Justice Smithers in Gungor he concluded that it was not 'necessary and appropriate to impose deportation for the protection of the Australian community' in the case of the applicant. He recommended that the order be revoked. Mr. Justice Fisher was plainly sceptical about the effectiveness of the Minister's policy of deterrence. Even with a Calabrian, who would have the merit of taking the message of deportation back to that part of Italy which the evidence disclosed has been intimately connected with illegal drug growing in Australia, the likely result of the government's policy, when it became known, was not deterrence either in Calabria or generally. Rather it was likely to expedite the processes of citizenship application which would take migrants and their families beyond the inconvenient reach of the Minister's deportation discretion.

A review of this series of deportation decisions discloses a number of conclusions. The first is the variety but similarity of the relevant facts both as to the detail of the offences and as to the migrant's links with Australia in the several cases. The patient examination of the evidence and the flexible approach taken to the admission of relevant evidence shows the AAT at its best in upholding the ideal of individualised justice in administrative review. Secondly, the deference paid to the ministerial statement of policy appears to vary in part by the conception which the several Deputy Presidents have concerning the extent to which they should stray from it, in part the connotation they severally give to its language of generality and in part by the simple consideration of whether, according to their own value system, they concur with it. It is fairly plain that Mr. Justice Smithers found at least some elements of the new policy unacceptable. 'Draconian' was the expression he applied to it upon its late tender before him in Gungor. Mr. Justice Fisher questioned the vital assumption in it that deportation would be an effective deterrent to migrants generally. According to him it would fall unequally upon the poorly educated who did not cure their vulnerable position by securing citizenship. Justices Smithers and Gallop were not prepared to accept the absolutist approach of the Minister's policy statement, lumping all illegal drugs in the one objectionable basket. Mr. Justice Smithers felt the Australian community would draw a distinction between Indian hemp and heroin. Mr. Justice Gallop drew that distinction for himself on the basis of judicial pronouncements relevant to criminal sentencing. Mr. Justice McGregor appears more wholeheartedly to have accepted government policy. He entertains no evident doubts about the effectiveness of a resolute application of the policy to deter migrants generally from such offences. Clearly he accepted the policy on its face and drew no distinction between illegal drugs of different kinds. The President, Mr. Justice Davies, committed full-time to the daily operation of the AAT, appears to walk the middle line. Faithful to the instructions of the Federal Court in Drake he neither ignores or mechanically applies the ministerial policy. He gives it 'weight', though generally last in the listed considerations to which he pays attention in reaching his view of the 'right or preferable decision'. In all the decisions, words of generality recur. Reference is made to 'good government' or 'the best interests of Australia'. The 'protection of the Australian community' and 'suitability for membership of the Australian community' recur repeatedly : leitmotifs in the verbal resolution of the right decision in the particular case.

The sample is small. The facts of particular cases are different in significant respects. But enough may have been recorded to show that there is a degree of ambivalence among the Deputy Presidents of the AAT concerning the precise way in which the ministerial statement of policy is to be considered. Each refers to it. Each takes it 'into account'. None applies it uncritically. None specifies precisely the weight he has assigned to it, though Mr. Justice Davies comes closest in Nevistic in his statement that but for the policy, he should not have concluded in favour of deportation. The enthusiasm of the Deputy Presidents for the policy statement in its generality clearly varies, ranging from Mr. Justice McGregor's apparent endorsement of its terms to Mr. Justice Fisher's scepticism about the effectiveness of its major premise and Mr. Justice Smithers' denunciation of aspects of it as 'Draconian'. Perhaps no greater degree of consistency can be expected in the business of individualised justice performed by a tribunal, constituted by judges accustomed to resolute action, strong opinions strongly expressed, and the traditions of judicial independence. The fact remains that when applied to review of government policy, a number of special problems are disclosed. It is to these that I now turn.

FOUR PROBLEMS

Democratic Theory. The chief cause of anxiety on the part of observers of the AAT experiment is the toleration of an acknowledged review by an independent tribunal of the formulated and lawful policy of an elected government. Clearly, the concern must be put in perspective. The reasoned decisions of the AAT, now over a period of more than four years disclose that a great many cases involve little or no element of government policy. Many of them follow perfectly orthodox lines with which lawyers are well familiar. Most turn on the fuller ascertainment of facts, in which the AAT frequently has decided advantages over the administrator.[83] Many depend upon the clarification of the law. Although this function has caused judicial[84] and academic[85] hesitations for constitutional reasons, it continues, in practice, to be a most useful facility of the AAT, expertly performed. Where policy is involved, it will rarely give rise to such controversy and emotion as the application of immigration policy. But it is precisely where controversy and emotions are stirred that societies such as ours frequently look to the political process to resolve conflict and settle strong feelings in an authoritative way.

The problem was adverted to by Mr. Justice Brennan in Drake No. 2. The tribunal is apolitical. It is adjudicative. Above all, it is:

> not linked to the chain of responsibility from Minister to government to parliament.[86]

The Federal Court in Drake declined to state any general rule as to how far the AAT should go in its review of clearly stated government policy. But if there are no clear limits in law, save those that must be drawn by inference from the nature and functions of the AAT, the scope of the AAT to question, criticise, elaborate, vary and depart from government policy, openly and lawfully stated, is very great indeed.

Commenting on this novel jurisdiction, Sir Zelman Cowen told a conference of parliamentary committees involved in the scrutiny of delegated legislation:

> It is a matter of great concern, particularly in a democratic system that our institutions operate under great pressure. ... [T]he pressures under which legislatures work give them but limited time to consider important aspects and elements of the legislation presented to and required to be considered by them. The pressures on governments and ministers are formidable and so too are the pressures and conditions under which officials work. The argument about the very wide scope of the jurisdiction entrusted to the new Administrative Appeals Tribunal takes this into account; it is said that the Tribunal can examine carefully and without comparable pressures and restrictions than a Minister or official may have to resolve much more quickly with less information available to him. You may wish to ponder the implications of authorising the replacement of a ministerial or governmental policy with that of a judicial — more accurately a quasi-judicial officer.[87]

Many readers of the deportation decisions of the AAT may be led to a conclusion that is critical of the particular government policy in question. It may be seen as naive and based upon a collection of false premises : that migrants constitute a large proportion of the drug trade in Australia, that deporting alien migrants will have a significant deterrent effect and that there is no distinction in fact, or in the popular mind, between illegal drugs of differing kinds. But when an unelected tribunal begins to evaluate, elaborate, criticise, distinguish and even ignore particular aspects of a ministerial statement openly arrived at and even tabled in the Parliament, the lines of responsible government have become blurred. True it is, the Minister may have the remedy available to him. He can clarify a lawful policy to make his intentions plainer. He can propose to Parliament the amendment of the Migration Act to modify the present deportation discretion at least in

cases of drug offences. But the very pressures which are upon parliaments today and the desirablity that they should not become lost in the minutiae of administration, to say nothing of political considerations that may make a full-scale parliamentary debate untimely or unwelcome, suggest that clarifying particular aspects of government policy by detailed legislation is neither feasible nor desirable. The symptoms which Professor Reid has called 'judicial imperialism'[88] once discerned by the administration are more likely to provoke quite a different response. If the AAT is perceived to be questioning strongly held and lawful government policy, it may occasionally, by its reasoned judgment, lead officials and even Ministers to the point of modifying or even abandoning that policy. More frequently, the response is likely to be a frustration with the AAT, a feeling that it has over-stepped the proper bounds of an unelected body and a determination to retaliate either by limiting its jurisdiction to inconsequential matters (largely free of policy) or even, in the migration area, of rejecting its decisions, framed as they are in the form of a recommendation.

If the long-run aim for the AAT is still the establishment in Australia of a general Federal administrative tribunal to bring together to independent review a wide variety of appeals against administrative decisions in the Commonwealth's sphere, it seems plain that a clearer delineation of the AAT's role in the review and application of government policy will be necessary. There would certainly appear to be merit in the AAT's facility to have some government policy identified and clarified. Not least in deportation decisions, this has already been a beneficial result of the AAT's operations. Statements of policy went through three drafts in as many years. Furthermore, the facility to comment upon government policy when it operates in an 'oppressive, discriminatory or otherwise unjust manner'[89] is also surely a useful and beneficial advantage of AAT procedures. As the AAT develops its expertise, it will have many useful comments to make, helpful to good administration in Australia. Its detailed study of individual cases will aid the identification of problems which even a sincere and dedicated official may not have foreseen and considered. Furthermore, the symbiosis between the expert departmental official and the external generalist tribunal is one traditional in so many institutions of English-speaking countries. I cannot believe that the Bland Committee's report is to be preferred and that the AAT should be reduced to a mute body completely unable to express opinions on government policy, silent in the face of injustice.[90]

But the problem with the current arrangements is that they do not confine the AAT's role to one of an external critic and commentator. On the contrary, the Federal Court has made it clear in Drake that the AAT must not abdicate its own separate role of reviewing lawful government policy. Whilst giving such policy an unidentified 'weight' the AAT is to consider the propriety and acceptability of such policy according to no clearer principle than whether it leads to the 'correct or preferable' decision in the facts of the case.

An Emerging Dichotomy. A second problem which I foresee is a practical one. Elsewhere, I have identified the difficulty that could arise if, limiting itself to an approach to acceptable evidence akin to that adopted in the courts, the AAT refrained from taking into account the whole range of hearsay and other evidence which the original decision-maker would act upon in reaching his conclusion.[91] In part, this difficulty appears to have been overcome in the more recent experience of the AAT. The immigration decisions alone demonstrate the flexibility of the tribunal in the receipt of material which almost certainly would not have been accepted in a court of law. Royal Commission reports, statistical material on migrant crime and even a journalistic description of social conditions in Turkey in a news magazine have been accepted into evidence because they were considered relevant. In the past year, the tribunal has also made notable steps towards greater informality of proceedings, more beneficial use of preliminary hearings and telephone conferences to overcome the problem of resolving matters in a large country and in a tribunal without power to order costs.

Now, however, a different potential dichotomy emerges in many ways more dangerous for the effective operation of the AAT as an educator of the Commonwealth administration and as a body laying down standards to be observed by Federal officials 'at the counter'. The review by Professor Pearce of the duty of Commonwealth officials in responding to ministerial or governmental policy, within broad statutory discretions conferred upon them by Parliament, is so recent that it needs no repetition.[92] Although there has emerged a difference of view concerning the legal obligation and entitlement of public servants when subject to 'ministerial dictation'[93] the balance of opinion in the present High Court (Mr. Justice Mason to the contrary) would appear to uphold the propriety of the public servant, even with a specific statutory discretion, performing his duties so as to comply with lawful ministerial or governmental policy.[94] Furthermore, Pearce is surely right when he says:

> It is highly improbable that a public servant will refuse to comply with a ministerial directive and it would undermine our system of government if such an event were to occur with any frequency. ... A public servant is, and probably should be, governed by his Minister. This being so, it seems unwise to talk of him as exercising an independent discretion.[95]

Respect for the conventions of responsible government, the desire for normal career survival, if not advancement, and knowledge that in the end a government can usually get its way, ensures compliance by most public servants with clearly stated and lawful ministerial policy. Often, of course, the officials have themselves taken an important part in the formulation of that policy. But even where they have not and even where they personally disagree with it and even where they may have, in form, an independent statutory discretion, the political reality that ought not to be ignored is that such policy will usually be complied with. Furthermore, the balance of legal opinion in Australia would seem to suggest that this is how it ought to be.

Any disparity between the approach to policy taken by the AAT and the approach taken by officials, including officials with an independent statutory discretion, diminishes the value of the AAT as an instructor of the administration. If officials feel bound to comply with clear governmental policy but the AAT is at large and may criticise, modify, elaborate and even ignore such policy, it is clear that a dangerous division of governmental practice may emerge. The result will be more than inconsistency in decision-making. It will be decision-making that encourages appeals to the AAT. But such appeals will not result in sure clarification of proper conduct by government officials. Instead they will invite the substitution for ministerial policy consistently and faithfully observed by officials, of a curial procedure in which such policy is 'taken into account' but independently and critically assessed before any decision is made as to whether or not to apply it in the particular case. Some inconsistency between the more mechanistic and inflexible approach to government policy by public servants and the more independent, critical review of policy by an independent tribunal may be both inevitable and desirable. Indeed, it may be the very reason for promoting an external system of individualised justice such as the AAT offers. But too great a discordance between the approach in the tribunal and the approach in the departmental office will undermine the value of the AAT, at least in the eyes of those public servants who can only in the most grave and exceptional circumstances feel themselves as free as the AAT is to question, criticise and depart from clearly established governmental policy, particularly when laid down by their Minister.

Tribunal Constitution and Procedures. In the wake of the Federal Court's decision in Drake, it was acknowledged that the AAT, although bound to review government policy and entitled to reject it and even substitute for it, is not by its constitution or procedures well equipped to do this task. It is an adjudicative and not a representative body. Large policy questions, in particular, can rarely be moulded into even approximately 'either-or' forms. They tend to be better dealt with in a legislative or some other kind of representative authority : the more 'polycentric' they are the less susceptible they may be to a litigious institution and adversary procedures. Yet this is the institution and these, by and large, are the procedures of the AAT. The proposals of the Kerr Committee to include representatives of the relevant administration in the AAT[96] were rejected by the Bland Committee. They have not been adopted in the form the AAT has taken, although members have been appointed with special skills, including those of former members of the Commonwealth administration. The Administrative Review Council has favoured the approach of the Bland Committee, urging that:

> Provisions should generally not be made for the appointment of public servants serving in the department whose decisions will be reviewed under the jurisdiction in question'.[97]

However, the absence of a representative composition of the tribunal and indeed the positive rejection of that notion in the Act renders the tribunal far less competent to perform any thorough-going, systematic and satisfactory review of policy than might have been the case had a representative rather than a judicial composition been followed.

Moreover, the procedures of the AAT permit a superficial approach only to policy review. Although the Kerr Committee favoured the provision of a research unit[98], and although a little use is made of the small secretariat of the Administrative Review Council, no proper resources exist to permit the kind of review of policy that would be regarded as rudimentary in a Department of State in a matter such as deportation criteria. Moreover, the procedures of the AAT and its proper concentration upon resolving the dispute between the parties before it, limit its capacity to perform the widespread and intensive consultation with relevant experts, community groups and the general public that are increasingly considered important in many areas of modern administration. The tribunal's necessary apolitical stance prevents its having contact with party political organisations, although these, quite frequently, will have relevant and even sometimes decisive views about policy issues. The fact that these views may be considered irrational, unjust and wrong-headed will not alter in the slightest the influence they will have upon the policy of governments and hence the administration of that policy by public servants brought up in a tradition of loyalty, within the law, to their Minister and to the government of the day.

In short, though the Federal Court ~~clarified~~ in Drake a substantial power and duty of independent review by the AAT of government policy, it has to be acknowledged that the AAT is singularly ill-equipped to perform that function, except in a superficial way and then only at the margins and in the circumstances presented by and illustrated in particular litigation. These limitations on the AAT are well recognised by those administrators who are constantly involved in policy formulation, criticism and review. They are likely to look askance at any significant ventures by the AAT into policy formulation, especially where existing policy is clearly formulated and has been subject of parliamentary, Cabinet, Ministerial or party political discussion. A claim to an independent assessment of government policy, if it is to be in any way realistic, should be accompanied by procedures and other means that will assure the review of some measure of reality. Otherwise what is being claimed is more than what can in truth be expected. Without a representative composition, independent research facilities, procedures for widespread consultation and political inputs, the assertion that the AAT should conduct its own independent assessment of government policy and the contemplation that it may on occasion even substitute its own policy for the lawful policy of the elected government must appear bold in the extreme. In a realistic recognition of its limitations, the AAT, whilst acknowledging as it must the claim, has generally contented itself with 'taking into account' the government policy. Particular details have been questioned, varied or even negated. But no effort has been essayed so far to present an entirely new and different policy. Perhaps in time, by the traditional procedures of the common law, new policies will emerge, conflicting in material respects with the ministerial policy. If this happens it will force the Minister to the traditional means by which judicial obduracy is corrected, namely legislation. Possibly the ministerial policy will itself be modified, with the advantage of the AAT critique. Certainly, the deportation policies have already changed twice as a result of the AAT litigation, though generally in directions designed to make ever more clear to the tribunal the firmness of the Minister's resolve in the deportation of drug offenders.

It would be a misfortune for litigants and for the AAT itself if the assertion of the independent scrutiny of government policy were taken too much at face value. A body which asserts the claim to review policy but lacks the personnel and resources to do so in a satisfactory manner is bound, in the end, to fall victim to criticism from all sides. Either it will be said to have falsely raised expectations which it is unable or unwilling to meet. Or it will be said to have claimed a power which ought not rightly to belong to it and which in any case it is only ever able to fulfil in a superficial and somewhat haphazard way.

Judicial Prestige. The suggested dangers of involving the judiciary in the review of administrative policy have been cited. The opinion of the Chief Justice of Victoria did not find favour in the New Zealand, New South Wales or Western Australian reports on review of administrative decisions. All of these favoured judicial involvement, though admittedly in ways which did not so assertively bring the judiciary into the public evaluation of government policy as has occurred in the AAT. The debate about the role of judges in non-traditional areas is a lively one in Australia. It has generated many recent commentaries both from judges themselves[99] and from political scientists.[100] Closest attention of all must be paid to the opinion that the involvement of the judiciary in a routine procedure that results in the making of controversial judgments, which are political in the wide sense of that term may cause actual damage to the judicial function. The concern here is less with the loss of personal prestige for the holders of judicial office than with the diminution in the effectiveness of the judiciary which relies overwhelmingly upon public confidence for obedience of its orders. Professor Gordon Reid has written of the 'dangers for a fearlessly independent judiciary'[101] involved in controversial activities, traditionally those of the executive. The Chief Justice of South Australia, whilst not adopting too narrow an approach to the use of judges, has recently cautioned:

> Policy in the area of government and public administration is for the executive and the legislature, not for the judiciary. But there are times when the government considers that a particular judge possesses special qualities which make it desirable for him to take part in the formulation of policy in some area of public administration. These qualities may arise from some special study or experience in the area, or merely from the judges' particular temperament, character and general experience of life. In this situation, I think that any possible involvement in party political or other public controversy is to be scrupulously avoided. Judges undertaking such a ~~taking~~ must recognise that it lies outside the scope of the judicial function. If controversy results, it may tend to undermine public confidence in the impartiality of the judiciary.[102]

Comments of this kind reflect the deeply entrenched view, inherent in the Australian constitutional arrangements, concerning the proper respective functions of the various arms of government. The total embrace of Montesquieu's fundamentalism is scarcely likely in Australia. The use of judges outside the courtrooms is too long and too firmly established for this. Furthermore, even a determination that the use of judges in a body such as the AAT may, to some extent, 'damage' judicial prestige is not conclusive of the debate. Judges could depart from the AAT and under its present statute, the problem of reviewing policy would not depart with them. Furthermore,

as Professor Julius Stone has pointed out, some diminution in judicial prestige may be considered to be outweighed by the increase in social efficiency resulting from the use of judges:

> We should stop short of converting an 'ideal type' [of the judiciary] into a rigid prescription. ... On the problems which most vex lawyers the argument for an 'ideal type' usually has to admit that concretely the ideal type is not usually found but merely an approximation to it. For instance, granted that the 'polycentric' question whether a 40-hour week should be introduced in this country is 'ideally' inapt for judicial determination, two considerations prevent this being necessarily decisive. The 'judicial' process, insofar as the interests concerned trust it more, may still be the most efficient way of handling the question. Even if this might somewhat damage judicial prestige, we still have to weigh the degree of social efficiency against the damage to judicial prestige. The decision made when these are weighed is one of <u>policy</u>, not a mere inference from the nature of adjudication. The fact is ... that there are 'polycentric' elements in much of the most staple and important judicial business. This is daily seen is appellate court development of the law and testified to by accepted juristic thought.[103]

The AAT's difference from ordinary judicial functioning may be more one of degree than of kind. The assertion to review government policy may be more remarkable for its frank disclosure than for its existence. Nevertheless the fact remains that the assertion of such a role, rather than the interstitial practice of it, will inevitably raise anxieties and invite scrutiny in a way that does not generally happen in the courts. Concern about loss of judicial prestige and public confidence in the judiciary arising from a handful of AAT decisions involving scrutiny of government policy seems misplaced. But there are limits. Governmental and ministerial perceptions of the proper constitutional role of judges in the controversial areas of policy that may come before the AAT are likely to suffer serious damage if there is too frequent, too radical and too assertive a review of lawful, formulated government policy. There are limits to tolerable judicial creativity, whether in the courts or in tribunals such as the AAT:

> Individuals and governments are not prepared to entrust their destinies to the whim of a few persons who will determine their controversies in accordance with their individual beliefs and principles. But they will entrust them to judges who will decide in accordance with the law. It is the proper role of the courts to apply and develop the law in a way that will lead to decisions that are humane,

> practical and just, but it would eventually be destructive of the authority of the courts if they were to put social or political theories of their own in place of legal principles.[104]

These observations may, with greater force, apply where the 'social and political theories of their own' are not worked out in traditional ways, interstitially and overwhelmingly in private litigation but are asserted as a legal right of the judicial officer in litigation, one party to which is always the government. Even more astonishing to the lay mind brought up in the traditions of judicial deference will be a head-on conflict with a carefully formulated and perfectly lawful policy of the Minister reached after thorough inquiry and consideration by him of expert, community and political representations.

CONCLUSIONS

A criticism commonly expressed by non-lawyers of the role of judges, courts and lawyers in public administration is that they are overly concerned with form, with fair play and just procedures and inadequately concerned with administrative skill, cheapness, informality and efficiency and the merits of the case.[105] Now, in the AAT, the judicialisation of Australian administration has gone a step further. But the criticisms now voiced are different. Now, it is said, the lawyer's claims are too bold. Examination of the merits has included examination of the merits of official government policy and public criticism of and variance from that policy in ways which loyal public servants would not dream of. The problem facing the AAT in the scrutiny of governmental policy is not a local dilemma arising only out of the language of the Administrative Appeals Tribunal Act. It is one inherent in any modern procedure for administrative review independent of the political government and permanent bureaucracy.

The growth of the number and complexity of administrative decisions, frequently made under legislative language of great generality, invites, for consistency's sake, policy guidelines, some of them made at a very high level. Once the decision was taken to stray from the orthodox and well marked path of judicial review, to the development of a general administrative tribunal with powers extending to review on the merits, the consideration of the merits of government policy, ~~absent~~ in the absence of statutory provisions to the contrary, became likely. It might have been possible in the Drake case for the view to be taken that, compatibly with the duty of the original decision-maker to comply with lawful ministerial directions, so the AAT, in its review, should hold itself bound to do so out of deference for the principles of responsible government. This view was not taken. The High Court of Australia declined an opportunity to uphold such a view when it refused

special leave to appeal from the decision of the Federal Court in the Drake case.[106] The Federal Court's ruling stands. The AAT is obliged independently to review government policy and not to abdicate this function.

The debate about policy in the AAT may have the beneficial effect of expediting the debate about policy in the ordinary courts. Teachers of jurisprudence in this century have long encouraged the open acknowledgement of the creative role of judges in lawmaking.[107] Increasingly, the judiciary itself has come to acknowledge this role and, hence, its function of evaluating policy choices where these are equally open to the judiciary in resolving a legal dispute. Lord Reid has denounced the 'fairy tale' that judges merely declare the law[108], and has openly acknowledged the policy choices especially before appellate courts.[109] Other judges prefer to base their opinions on justifications of 'public policy', the 'public interest', the general benefit of the community and similar words of general connotation.[110] In Australia, a series of cases in the High Court in recent years has seen the court grappling with important issues of policy. Sometimes individual judges have declined to alter settled rules of law precisely because of the existence of inadequate procedures and resources to effect comprehensive legal reform. The language used is apt for the predicament of the AAT with its asserted power and responsibility to review policy:

> [T]here are more powerful reasons why the Court should be reluctant to engage in [moulding the common law to meet new conditions and circumstances]. The Court is neither a legislature nor a law reform agency. Its responsibility is to decide cases by applying the law to the facts as found. The Court's facilities, techniques and procedures are adapted to that responsibility; they are not adapted to legislative functions or to law reform activities. The Court does not and cannot carry out investigations or inquiries with a view to ascertaining whether particular common law rules are working well, whether they are adjusted to the needs of the community, and whether they command popular assent. Nor can the Court call for and examine submissions from groups and individuals who may be vitally interested in the making of changes to the law. In short, the Court cannot, and does not, engage in the wide-ranging inquiries and assessments that are made by governments and law reform agencies as desirable, if not essential, preliminaries to the enactment of legislation by an elected legislature. These considerations must deter a Court from departing too readily from a settled rule of the common law and by replacing it with a new rule.[111]

The High Court of Australia has asserted the limited function of the court in developing new rules, even of the common law, in the face of long-established legal authority.[112] The assertion has been repeated in recent cases involving prisoners' rights[113], the widening of standing to sue[114], the alleged right to legal aid in serious criminal cases,[115] tax avoidance[116] and voluntary intoxication as a defence to otherwise criminal conduct.[117] In each of these cases the High Court, usually by a majority, often expressly or by implication, has noted the need for reform. But that need was held to be a matter for the elected Parliament, possibly aided by a permanent law reform body.[118] It was said not to be a task for unelected judges operating within the constraints of courtroom procedures and inter-partes litigation.[119]

I do not mean to imply that policy considerations have not influenced recent decisions of the High Court. On the contrary, policy plainly played a part in at least some of the judgments in all of the above cases. Even if confined to administrative law matters, one has only to read Sankey v. Whitlam[120] or the decision of Mr. Justice Mason in The Commonwealth v. John Fairfax & Sons Ltd[121] to see the orthodox operation of policy considerations. The difference between the courts and the AAT is that no court claims, in terms, an unlimited power to evaluate, review, modify, substitute for or negate government policy, not by reference to some pre-existing rule of law (however indeterminate) but by reference to the decision-maker's estimate of the correct or preferable decision in the particular case. The result may be similar. When the principle of law is examined it may amount in reality to little more than a statement of personal opinion on the part of the judge whatever formula is used to describe it.[122] It is the very boldness of the assertion for the AAT, so out of line with the usually modest and deferential language of the courts, that attracts attention and invites doubt and scepticism. Myths die hard. Despite Lord Reid, Ministers, government official and probably the community generally, sleep easier in the notion that judges do no more than mechanically apply pre-existing rules. Often that is all they may do. When they have a choice, it is our tradition rarely to acknowledge that there is an open choice of policy to be made by the judge. Judicial recruitment and training, the procedures of the adversary trial, the experience and inclinations of most lawyers of our tradition and the lack of facility for social research and inquiry combine to discourage a frank acknowledgement of policy choices. Our procedures of adjudication and decision-making would require too great a reform if matters of policy were to become too prominent. True to this tradition, the AAT has not itself asserted its right to conduct a major review of government policy. But in the series of cases examined, its legal power to do so has been asserted repeatedly and its inclination to stray from ministerial policy has been manifest in almost every case.

Can this position last? Governments and Ministers in Australia may be robust enough to accept the AAT's critical scrutiny of its policies. Occasionally, they may even find the scrutiny helpful in the elaboration and application of policies to cases not contemplated when the policy was drawn. In the event of a profound disagreement, legislation may be enacted to ensure that a policy, found uncongenial to the tribunal, is ultimately observed by it. However, a more likely response is the disinclination of the executive government to commit jurisdiction involving important policy questions to the AAT and a disinclination of officials to recommend to Ministers that issues likely to raise the application of controversial policy should be committed to the AAT's review.

Other options are available to cope with the problem of submitting government policy to AAT consideration. They include binding the original decision-maker and the AAT to criteria published by the Minister and tabled in Parliament.[123] Alternatively, the decision-maker and the AAT could be bound in terms by ministerial directions subsequently published in the Gazette.[124] It would be possible to require the decision-maker and the AAT to have regard to prescribed criteria which do not purport to be exhaustive when exercising their discretionary powers.[125] It will be possible to require review of cases involving important issues of policy to be at the discretion of the Minister and recommendatory only in effect, so that they can, as the Kerr Committee proposed, be available for his assistance but not to bind him. Finally, it is possible to require such cases to be heard by a tribunal constitued in a special way, as by a presidential member. This procedure has been adopted under the Migration Act and in respect of appeals from the Australian Broadcasting Tribunal.[126]

The conferring of powers on Ministers to give directions to a tribunal binding on it, however published and wherever tabled, may solve the problem of the tribunal's approach to government policy. But it may do so at a cost of the public's perception of the tribunal's diminished independence. A similar consequence may flow from any special provisions concerning the constitution of the tribunal and from treatment of the tribunal as an advisory body only. Since the AAT is a body some of whose members are judges, the question arises as to whether a greater identification of the AAT with the administration would affect public perceptions of the independence of the judiciary in such a way as to damage both institutions.[127]

We continue to explore the right solutions for the problems identified in this essay. Those who take bold reforming measures must expect to face difficult problems in the consequence. In working out the proper relationship between the AAT, elected officials, administrators and individual litigants, the road ahead is not at all clear. Plainly, lawyers have crossed over into the territory of policy. There are some signs that lawyers were there before, though generally they covered their tracks and rarely admitted the adventure. The passage may come to nothing and those who guard the frontier may prevent too many incursions, for fear of the unpredictable damage that may be done. On the other hand, lawyers may well find that grappling more openly and frankly with policy issues in the AAT points the direction for the way in which the courts themselves should more openly address the problem of policy choices. Jeremy Bentham awaited a 'Luther of Jurisprudence' who would, with 'penetrating eye' search the unsatisfactory features of our legal techniques.[128] In many ways, the AAT requires all arms of government in Australia to face more precisely the role of policy in adjudicative decision-making. Whether a legal reformation will ensue, or whether a counter reformation will curtail this brave experiment, remains to be seen.

FOOTNOTES

* See H.W.R. Wade, 'Law, Opinion and Administration', (1962) 78 L.Q.R. 188, 202: hereafter 'Wade'.

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1. Wade, 189.

2. Ibid.

3. Id.

4. Lord Devlin, Address to the Bentham Society, 1956, cited Wade, 194.

5. K.C. Davis, 'The Future of Judge-Made Public Law in England : A Problem of Practical Jurisprudence', 61 CoLL.R. 201, (1961).

6. Wade, 201.

7. Id. 202.

8. H.W.R. Wade, 'Constitutional Fundamentals', The Hamlyn Lectures, Thirty-second series, London, 1980, reviewed and criticised, G. Winterton, 'Parliamentary Supremacy and the Judiciary', (1981), 97 L.Q.R. 265. C. Harlow, 'Politics and Principles : Some Rival Theories of Administrative Law' (1981) 44 Mod.L.R. 113.

9. Ridge v. Baldwin [1964] A.C. 40.

10. G.D.S. Taylor, 'The New Administrative Law' (1977) 51 A.L.J. 804.

11. Administrative Decisions (Judicial Review)Act 1977 (Cth.), (commenced October 1980).

12. Law Reform Commission of Canada, Seventh Annual Report, 1977-8, 14.

13. Drake v. Minister for Immigration & Ethnic Affairs (1979) 24 A.L.R. 577; 2 Administrative Law Decisions (A.L.D.) 60, 70: hereafter 'Drake'. See also Case Note (1980) 11 F.L.Rev. 93.

14. The expression was first used in Re Becker and Minister for Immigration & Ethnic Affairs (1977) 15 A.L.R. 696, 699-700; 1 A.L.D. 158, 161. In Drake the Federal Court adapted the expression slightly to 'the correct or preferable' decision. See (1979) 24 A.L.R. 577, 589; 2 A.L.D. 60, 68.

15. G.S. Reid, 'The Changing Political Framework', Quadrant, January-February 1980, 5.

16. The judiciary is here referred to in a wide sense. Judges sit in the A.A.T. as presidential members, although not as judges. They are personae designatae. The position is explained by Bowen C.J. and Deane J. in Drake (1979) 2 A.L.D. 63-65.

17. J.A.G. Griffith, 'Tribunals and Inquiries' (1959) 22 Mod.L.R. 125, 143.

18. R. Else-Mitchell, 'The Place of the Administrative Tribunal in 1965', in R.A. Woodman, (Ed.), Record of the Third Commonwealth and Empire Law Conference, Sydney, 1966, 65.

19. Victoria, Statute Law Revision Committee, Appeals from Administrative Decisions and a Proposal for an Office of Ombudsman, 1968, para. 36.

20. New South Wales, Law Reform Commission, Right of Appeal from Decisions of Administrative Tribunals and Officers, 1973 (N.S.W.L.R.C. 16), 70 (para. 157).

21. Id. 105. Draft Bill, sub-cl. 26(1).

22. Id. 101. Draft Bill, sub-cl. 26(5). See also Id. 158 (para. 22).

23. Id. 105.

24. Id. Draft Bill, sub-cll. 32(3) and (4).

25. Id. 159 (para. 25).

26. P.S. Wilenski, Directions for Change, Interim Report of the Committee of Inquiry into N.S.W. Government Administration. The final report is expected late in 1981.

27. The Law Reform Commission of Western Australia, Working Paper and Survey, Review of Administrative Decisions, Part I — Appeals (Project No. 26), 1978, 34 (para. 4.9).

28. Id. 35 (para. 4.11).

29. Id. 37 (4.17).

30. Australia, Commonwealth Administrative Review Committee, Report, 1971: hereafter 'Kerr Committee Report'.

31. Id. 90 (para. 300).

32. Ibid.

33. Id. 89 (para. 299).

34. Id. 87 (para. 293).

35. Australia, Committee on Administrative Discretions, Final Report, 1973: hereafter 'Bland Committee Report'.

36. Id. 32 (para. 172(e)).

37. Id. 33 (para. 172(g)(iii)).

38. Id. 28 (para. 149).

39. (1975) 93 Cth. Parl. Deb. (H of R) 1187.

40. Administrative Appeals Tribunal Act 1975 (Cth.) sub-sec. 43(1).

41. Drake, 70.

42. Re Becker, supra. n.14, 162.

43. Id. 163, 263.

44. D. Pearce, 'Courts, Tribunals and Government Policy', (1980) 11 F.L.Rev. 203, 219-220; hereafter 'Pearce'.

45. The policy was changed in January 1980. The change is discussed by Smithers J. in Re Nizam Gungor and Minister for Immigration & Ethnic Affairs, unreported, No. 10039, 30 May 1980. Hereafter Gungor. An appeal to the Federal Court was heard in June 1981. Decision reserved. There have been deportation decisions in the AAT involving illegal drug convictions other than those reviewed in this paper. Among the reported decisions not reviewed are Re Ajamian (1979) 2 A.L.D. 366 (N.); Re Alkan (1979) 2 A.L.D. 361 (N.); Re Habchi (1979) 2 A.L.D. 623; Re Kiely (1979) 2 A.L.D. 159; Re Malekas (1979) 2 A.L.D. 547 (N.); Re Pochi (1979) 2 A.L.D. 33; Re Sergi (1979) 2 A.L.D. 224.

46. Re Drake and Minister for Immigration & Ethnic Affairs (No. 2), (1979) 2 A.L.D. 634, 640. Hereafter Drake (No. 2).

47. Id., 643.

48. Id., 645.

49. Smithers J. in Drake, 85.

50. Smithers J. in Gungor, 20.

51. Id. 23.

52. Id. 24.

53. Id. 24-5.

54. Id. 29, 32.

55. Id. 28.

56. Drake, 7.

57. Re Jeropoulos and Minister for Immigration & Ethnic Affairs, (1980) 2 A.L.D. 891 (Fisher J.). Hereafter 'Jeropoulos'.

58. Id. 902.

59. Ibid.

60. Id. 903.

61. See Cosmo Gallo and Minister for Immigration & Ethnic Affairs, unreported, No. V.29/80, 5 December 1980, Gallop J. Hereafter 'Gallo'.

62. Id. 12.

63. Id. 14.

64. Id. 26.

65. Id. 19.

66. Re Saverio Barbaro and Minister for Immigration & Ethnic Affairs, (1980) 3 A.L.D. 1 (Davies J., President). Hereafter 'Saverio Barbaro'.

67. In the unreported transcript of the full decision in Saverio Barbaro, 31.

68. Saverio Barbaro, (1980) 3 A.L.D. 1, 10..

69. Re Sergi and Minister for Immigration & Ethnic Affairs, (1979), 2 A.L.D. 224 (Davies J.). See now Kuswardana v. Minister for Immigration and Ethnic Affairs, unreported, Federal Court, June 1981.

70. Servario Barbaro, supra. n.66, 12.

71. Id. 17.

72. Ratimir Nevistic and Minister for Immigration and Ethnic Affairs, unreported, No. 79/2028, 19 December 1980, 23-4, (Davies J., President). Hereafter 'Nevistic'..

73. Re Arif Tombuloglu and Minister for Immigration & Ethnic Affairs, unreported, No. S.80.13, 13 January 1981 (McGregor J.). Hereafter 'Tombuloglu'.

74. Id. 28.

75. Id. 30-31.

76. Re Vincenzo Piscioneri and Minister for Immigration & Ethnic Affairs, unreported, No. 79/2028, 19 December 1980 (Davies J., President). Hereafter 'Piscioneri'.

77. Id. 34.

78. Id. 35.

79. Id. 33.

80. Re Vincenzo Barbaro and Minister for Immigration & Ethnic Affairs, unreported, No. 16010 of 1979, 18 March 1981 (Fisher J.). Hereafter 'Vincenzo Barbaro'.

81. Id. 7.

82. Id. 27-8.

83. M.D. Kirby, 'Administrative Review on the Merits : The Right or Preferable Decision', (1980) 6 Monash Uni.L.Rev. 171, 174.

84. Deane J. (dissenting) in Collector of Customs (N.S.W.) v. Brian Lawlor Automotive Pty. Ltd. (1979) 2 A.L.D. 1, 31.

85. L. Katz, 'Australian Federal Administrative Law Reform', (1980), 58 Canadian Bar Rev. 341, 349.

86. Drake No. 2, 644.

87. Sir Zelman Cowen, Address to a Conference of Parliamentary Committees Involved in the Scrutiny of Delegated Legislation, in Commonwealth Parliamentary Association Countries, mimeo, 29 September 1980, 14-15.

88. Reid, supra. n. 15, 12. I do not overlook the limitations of the responsibility theory in the case of Ministers. Triennial electoral accountability is a remote means of enforcing ministerial answerability for devising and administering particular policies in particular cases. But it is a greater accountability than can usually exist in respect of an independent tribunal.

89. Kerr Committee Report, 89 (para. 297).

90. Bland Committee Report, 33 (para. 172(g)(ii)). A similar point is made by Mr. E.J.L. Tucker (Chairman of the ARC), 'Implications of External Review of Policy Decisions', mimeo, February 1981, 12.

91. Kirby, supra. n. 83, 179f.

92. Pearce, supra. n. 44.

93. Id. 213.

94. Ansett Transport Industries (Operations) Pty. Ltd. v. Commonwealth of Australia, (1977), 139 C.L.R. 54. Cf. R. v. Anderson; Ex parte Ipec-Air Pty. Ltd., (1965), 116 C.L.R. 177. See discussion in Pearce, supra. n. 44, 210-213.

95. Pearce, ibid.

96. Kerr Committee Report, 87 (293).

97. Australia, Administrative Review Council, Second Annual Report 1978, 15 (para. 63).

98. Kerr Committee Report, 86 (para. 292).

99. M. McInerney, 'The Appointment of Judges to Commissions of Inquiry and Other Extra-Judicial Activities', (1978), 52 A.L.J. 540; X. Connor, 'The Use of Judges in Non-Judicial Roles', (1978), 52 A.L.J. 482; F.G. Brennan, 'Limits on the Use of Judges', (1978), 9 F.L.Rev. 1.

100. Reid, supra. n. 15.

101. Id. 14.

102. L.J. King, 'The Role of the Judiciary in Relation to Public Administration', (1980), 39 Aust.Jl. of Public Admin., 1, 17.

103. J. Stone, 'Social Dimensions of Law and Justice', Sydney, 1966, 654-5.

104. Sir Harry Gibbs, Address at the Ceremonial Sitting on the Occasion of his Swearing in as Chief Justice of the High Court of Australia, mimeo, 12 February 1981. To similar effect, F.G. Brennan, 'Ministers of the Third Branch of Government', mimeo, unpublished address, Sydney, May 1981, 9.

105. On this, see e.g. R. Else-Mitchell, 'Administrative Law', in R. Spann (Ed.), 'Public Administration in Australia', Sydney, 1975, 273, 293.

106. The application by the Minister for special leave to appeal to the High Court was refused on 30 July 1979.

107. See e.g. J. Stone, 'Legal System and Lawyers' Reasonings', Sydney, 1964, Chapters 6-8.

108. Lord Reid, 'The Judge as Lawmaker', (1972-3), 12 Jl. of Society of Public Teachers of Law, 22 ('There was a time when it was thought almost indecent to suggest that judges made law — they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin's Cave there is hidden the Common Law in all its splendour. ... But we do not believe in fairy tales any more'). Cf. Lord Devlin, 'The Judge as Lawmaker', in 'The Judge', Oxford, 1979, 1; Wade, Constitutional Fundamentals, supra. n.8, 75..

109. See e.g. Lord Denning, in Spartan Steel and Alloys Ltd. v. Martin & Co. [1973] Q.B. 27.

110. See e.g. Rickards v. Lothian [1913] A.C. 263; Miller v. Jackson [1977] 3 W.L.R. 20, and discussion of these and other cases by D. Pannick, 'Of Hard and Easy Cases', in Encounter, Feb-March 1981, Vol. 54, 50, 54-55.

111. Mason J. in State Government Insurance Commission v. Trigwell and Ors, (1979), 53 A.L.J.R. 656, 661; (1979) 26 A.L.R. 67, 78. See to similar effect Scarman L.J. (as he then was), in Farrell v. Alexander [1976] 1 Q.B. 345, 371.

112. Barwick C.J. in Trigwell, supra, n. 111, 70.

113. Dugan v. Mirror Newspapers, (1979), 53 A.L.J.R. 166; (1978), 22 A.L.R. 439.

114. Australian Conservation Foundation v. The Commonwealth, (1980), 54 A.L.J.R. 176; (1979-80) 28 A.L.R. 257. Cf. Ingram v. The Commonwealth (1980) 54 A.L.J.R. 395.

115. McInnis v. The Queen, (1980), 54 A.L.J.R. 122; (1979-80), 27 A.L.R. 449.

116. Federal Commissioner of Taxation v. Westraders Pty. Ltd. (1980), 54 A.L.J.R. 460; (1979-80), 30 A.L.R. 353.

117. The Queen v. O'Connor, (1980) 54 A.L.J.R. 349; (1979-80), 29 A.L.R. 449.

118. See Stephen J. and Mason J. in Australian Conservation Foundation v. The Commonwealth, supra. n.114, 182, 188.

119. Murphy J. dissented in Dugan, The Australian Conservation Foundation, McInnis and Westraders.

120. (1979) 53 A.L.J.R., 11

121. (1981), 55 A.L.J.R., 45.

122. See Pannick, supra, n. 110. Cf. Lord Scarman, 'The Common Law Judge and the Twentieth Century — Happy Marriage or Irretrievable Breakdown?' Ninth Wilfred Fullagar Memorial Lecture, (1980) 7 Monash Uni.L.Rev. 1.

123. Dairy Industry Stabilisation Act 1977 (Cth.), s.11A.

124. Cf. Trade Practices Act 1974 (Cth.), para. 29(1)(a), sub-sec. 102(3).

125. Broadcasting and Television Act 1942 (Cth.), sub-sec. 81(2).

126. Id., sub-sec. 119A(3).

127. Brennan, supra, n. 99.

128. J. Bentham, cited in Pannick, supra. n. 110, 59.