DEPARTMENT OF IMMIGRATION & ETHNIC AFFAIRS

ANNUAL CONFERENCE OF REGIONAL DIRECTORS

CANBERRA, 20 NOVEMBER 1981

THE IMMIGRANT AND IMMIGRATION REVIEW

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

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PROGRESS IN ADMINISTRATIVE REFORM

A few days ago I received a book by a former Justice of the Supreme Court of India. It arrived from the printers wrapped in an edition of the Times of India. Following the British tradition still observed by some London newspapers, that journal records, in the column titled 'A Hundred Years Ago', an extract from the Times of India of Monday 18 April 1881. The extract deals with the problems of administrative review and reform in the Empire of India, at the apogee of the Raj. The subject matter of the journalist's spleen, on that April morning a hundred years ago, need not trouble us. In short, it related to the public demand concerning a level crossing of the GIP Railway. The entry goes on:

> 'the memorial to H.E. the Viceroy, praying that he would be pleased, after due inquiry, to take such steps as might be necessary to compel the Railway Company to provide an overbridge, was signed, in a few days, by about 1600 persons, including many citizens of the highest rank and position and, if necessary, many thousands of other persons would have gladly aided in testifying to the justice of the complaints set forth in the memorial. In the routine of official etiquette, it was necessary to submit the paper through the local Government, whose assistance was confidently claimed by the memorialists; but so far from affording such assistance, Government has entered the lists on the other side and done its best to destroy the efforts of the memorialists, who can but appreciate, more or less, the procedure by which the memorial, ere it was allowed to reach its destination, was subject to the criticism of the authorities whose actions it criticised.[1]

We have come a long way in the process of administrative law reform since April 1881. Probably nowhere in the English speaking world has the advance been more rapid and comprehensive than in the Australian Federal Commonwealth.[2] This piece by me is designed to outline a few general problems that must be considered in any discussion of the operation of the new administrative law in the migration field. It is important in law reform, but it is also important in the daily pursuit of functions under the law, to appreciate the environment in which we operate. It is all too easy, in the busy activities of daily professional life to miss the context, because of concentration of attention of one's own personal responsibilities. But unless we can see the context in which we operate, it is almost certain that we will not perceive the directions in which the legal system is moving.

Last week, the Federal Member, Mr J.J. Carlton, told The Age[3] newspaper that Federal ministers in Australia, distracted by their daily tasks, could give little more than five percent of their time to long term future planning. Federal ministers, at least, have the excuse of three year parliaments and the possibility, remote and unsavoury as it may sometimes seem, that someone else, and not they, will be around when the 'long term' eventually turns up. In the business of law reform, including administrative law reform, we can afford no such luxury of short term planning. Both the Law Reform Commission and the Administrative Review Council must seek to identify major trends and future problems in the laws committed to their review. It is about these, in the context of administrative law reform as it affects immigrants, that this paper is concerned.

FEDERAL ADMINISTRATIVE LAW REFORM

The overall picture of administrative review in the Federal sphere now emerging represents, I believe, one of the happiest features of law reform in our country. The reforms have attracted a generally multipartisan support.[4] Major reports were commissioned during the Gorton government and tabled during the McMahon government. Their implementation began under the Whitlam government and have continued under the present administration. I refer, of course, to the 'package' of administrative law reforms known for convenience as the 'new administrative law'.[5] This 'package' has seen:

- the establishment of an Administrative Appeals Tribunal (AAT), designed to provide a general Federal tribunal for appeals against decisions of Commonwealth officers in matters committed to its jurisdiction;[6]
- the creation of a general Administrative Review Council, designed to monitor current administrative law and practice in the Federal sphere and to push forward the development of a consistent system of administrative review;[7]

- appointment of the Commonwealth Ombudsman as a general Federal commissioner for grievances;[8]
- reform and simplification of judicial review of administrative decisions made by Commonwealth officers under Commonwealth laws, including a general right to reasons for administrative decisions;[9]

The breadth of these reforms, particularly in aggregate, has elicited gasps from some overseas observers.[10] This is perhaps even more remarkable because administrative law reform is now decidedly in fashion. One of the Ministers appointed by President Mitterand upon the change of government in France, M. Anicet Le Pors, is designated Minister for Administrative Law Reform. He is a communist, one of the three in the new French Administration. He tackles an administrative law system which is sophisticated and long-established. The Australian Federal experiment is certainly the most comprehensive in any common law country.

At the recent Australian Legal Convention in Hobart in July 1981, papers by the noted English authority, Professor H.W.R. Wade and Lord Chief Justice Lane dealt with administrative law developments in England and Australia. Lord Lane was full of praise for the operation of the Australian Administrative Appeals Tribunal, describing it as having powers 'far in excess of anything hitherto dreamed of in the United Kingdom'. He described the powers afforded to the AAT to adjudicate on the merits of a decision and even the propriety of a government policy, as radical, such that he viewed them with astonishment and admiration:

> I see that these Acts were heralded by Senator Missen as measures which help to 'bring us out of the jungle of administrative law and help to put a little civilisation in that area. They provide for people who have an administrative decision and want an appeal against it, an idea of where to go and what they should do: they put some simplicity into the law which is applicable to the situation. ...' We are still in the jungle in the United Kingdom and I speak as one who has only been released from the jungle on parole for a short visit to your country and must soon return. It has not been possible for me, unhappily, to do more than grasp the merest outline of your great legislative changes. ...This radical approach of yours to the jungle is one which I view with astonishment and admiration. There is no doubt that at least in all countries operating under

> the Common Law system there is the same object in mind. That is to achieve a proper balance between on the one hand the legitimate right of the individual to be treated fairly and on the other hand the necessity for the administrators to be able to make decisions without having a judge breathing down their neck all the time. You seem to have taken the quick route — almost the revolutionary route — by means of these statutory enactments. We in our laborious fashion tend to proceed more slowly, feeling our way from decision to decision, gradually enlarging or extending the existing principles.[11]

The Administrative Appeals Tribunal deserves such words of approbation from this high English judicial quarter. The tribunal has coped with its establishment phase remarkably well. The establishment of a new national tribunal with wide and novel powers and a constantly growing catalogue of new jurisdiction is remarkable enough in itself. The figures provided in the annual reports of the Administrative Review Council demonstrate the large and increasing numbers of cases coming before the tribunal for review under an ever-expanding variety of Federal enactments. These enactments range from those that give rise to the controversial hearings under the Broadcasting and Television Act and Migration Act to the much more humble review of administrative decisions which takes place under the Defence Force Retirement and Death Benefits Act, the Home Savings Grant Act and various Bounty Acts. The range of Commonwealth legislation continues to expand. The variety and significance of administrative discretions expand with it. The value of independent, careful review by the AAT is sufficiently obvious to the numerous litigants who have come before it that the jurisdiction of the AAT has continued steadily to expand and the caseload to expand with it.

VALUE OF TRIBUNAL REVIEW

Guidance to Administrative Officers. It would be presumptuous of me to expound on the high standard of individualised justice accorded to citizens by members of the AAT aggrieved against Commonwealth administration. Not all are judges, though some are, and all are bound to act in a judicial manner, according the parties before them a fair hearing. The tribunal is entitled to determine the appeal de novo, on the material placed before the tribunal, according to the 'right or preferable' decision in the case.[12] But quite apart from these praiseworthy elements at a micro level, there are a number of macro considerations that should be weighed in assessing the value of a general administrative review tribunal. First, there is the value of such a tribunal, in those cases which do not come up for appeal, as an educator of administration. It states and explains the general principles that should be observed in fair administrative practice. Reasoned

decision-making, the patient explanation of the law, the careful sifting of the facts, the application of the law to the facts and the detailed statement of the fair and impartial approach to administrative justice can have a value far beyond the facts of the particular case before the AAT. There is no doubt that many Commonwealth departments have improved their administrative procedures either as a direct result of comments or clarification provided in an AAT decision or as a result of preventative self-scrutiny, set in place by the obligations of new accountability to judges imposed by the Administrative Appeals Tribunal Act and, for the past year, by the Administrative Decisions (Judicial Review) Act.

Greater Openness in Administrative Decisions. The second impact of the AAT which has been highly beneficial, beyond the interests of the immediate litigants, has been its facility to 'flush out' the details of administrative decisionmaking and to reduce the secretiveness of the actual rules by which Federal administrative discretions are to be exercised. That there are such rules is entirely understandable and desirable. They promote consistency of decision-making and are frequently needed because of the generality of the discretions conferred by legislation, either on a Minister or on those under him. The procedures of individualised justice in the AAT have required the justification of a particular decision. This has required the production to the tribunal of the administrative 'rules of thumb' and their justification, not only against the standard of lawfulness (as established by reference to the legislation) but also against the standard of administrative fairness (inherent in the AAT's power to substitute its conclusion for that of the administrator in reaching the 'right or preferable decision' in the circumstances). Thus, in the area of deportation appeals, it was not until the AAT began the review of deportation decisions made by the Minister under statutory language of the greatest generality, that the detailed policy instructions to immigration officers were disclosed. In turn, the criticisms and comments of AAT members in the course of reviewing particular deportation cases led on to modifications and elaborations of the ministerial policy, which has now gone through three drafts. Furthermore, the policy was considered by the Cabinet and tabled in the Parliament. In this way the AAT has contributed directly to greater openness in policy, in a manner that is beneficial not only to the litigants who come before it, but also to all potential litigants, the whole migrant community and indeed the whole Australian community, comprised as it is now of such ethnic and cultural variety.

Procedural Innovations. A third contribution of the AAT is more tentatively stated. In order to cope with the nature of its jurisdiction, involving sometimes review of subject matter of relatively little financial value (such as compensation for loss or damage of items in the post) the AAT has felt forced to explore in its procedures new means of saving costs. Its innovations may come, in time, to encourage greater inventiveness in the general courts. The AAT has, for example, experimented with telephone conferences for the purpose of interviewing witnesses at long distance. In a large country, where the costs and inconvenience of travel are great, who can doubt that the future of litigation will involve the greater use of telecommunications?

It seems to me that scientific developments will provide means by which tribunals can more efficiently deal with the claims of a wider range of people in a shorter space of time. I do not need to expand about word processors and information retrieval systems. The use by the AAT of telephone conferences and hearings, to take evidence from witnesses in various parts of Australia, and to save the costs of such witnesses, whilst at the same time ensuring that vital evidence is heard, represents one way of making the generally cost-intensive tribunal procedure appropriate for claims which, though important to the parties are expensive to adjudicate. One hundred years after their invention by Alexander Graham Bell, we are beginning to see the greater use of telecommunications in the justice system. The Australian Law Reform Commission recommended this in the Criminal Investigation report. To keep the independent scrutiny by the judicial arm of government of police decisions, it was proposed that warrants for arrest and search should be permitted by telphone. Now, we are seeing the beginning of telephone conferences and hearings. I am sure that in Australia we will see much more of this.

In fact, in the United States a start has been made on telephone conferences to permit judicial determination of motions in civil trials.

- In Baltimore, Judge Frank Kaufman of the United States Federal District Court has used 'telemotions' for more than five years. He is quoted as saying that 'whenever the issue is reasonably simple, I prefer to settle the matter by phone'.[13]

- In Los Angeles, Judge Goebel of the State Superior Court has combined telephone motions with a tentative ruling procedure to reduce in-court arguments substantially. In 40% of the cases, the lawyers submit written briefs. In more than 70% of those having an oral argument, the telephone is used by one or more of the parties linked together with the judge.

. In Spokane, Chief Judge Dale Green of the Washington Court of Appeal (Division III) has reported that approximately 50% of all motions in his court now use telephone conferences under procedures established by rule of court in 1976.

Most Australian tribunals and their members are likely to be resistant to developments of this kind, at least initially. It is to change the curial way of doing things that has existed for as long as our legal system has been in place, and indeed before. There is thought to be great value in non-verbal means of communication. Persuasion is not simply a verbal phenomenon. On the other hand, ours is a country of continental size. Lawyers and other advocates spend considerable time and expense travelling to court to argue matters, often quite short. This is especially true of suburban and country lawyers. Once at court, or at the tribunals, representatives frequently have to wait for hours to be heard. Furthermore, their clients and often witnesses must wait for long periods, involving very great expenses to the parties and to the community. Whether the time and travel are paid for by the client or absorbed by the lawyer or by the community, in the end 'someone pays'. It is a substantial factor in litigation costs.

The American Bar Association Journal comments on argument by telephone conferences in these terms:

> Recent innovations in communications technology make conference calls easier to set up and conduct. The deepening energy shortage also highlights the telephone alternative. ... Under a grant from the National Science Foundation [a commission] will work with the Denver-based Institute for Court Management and hopes to experiment with telemotions in a variety of courts in Colorado, New Jersey and Maine.[14]

I predict that before too long we in Australia will see experimentation with 'telemotions'. In a sense, they have long been available for securing urgent injunctions, ex parte. The issue now is one of expanding the efficient use of telecommunications in the justice system. Lawyers in Australia, much more than their United States colleagues, have a deep faith in oral argumentation and a strong resistance to written briefs of argument. It may be that telecommunications will permit the continuance of oral argumentation, whilst at the same time facilititating in some cases (especially simple hearings) the efficient use of scarce, expensive court and tribunal time. The price of the survival of tribunals and of quasi adversary procedures, against the advent of the much more effective inquisitorial system of the Ombudsman, is that tribunals must themselves become more cost conscious. Even at the price of losing a little in the quality of oral testimony, by failing to have the

advantage of the presence of witnesses, it seems to me that both in tribunals and in the courts we will move quite quickly to the use of telecommunications in order to preserve, though in a more cost effective way, the advantages of oral hearing and spontaneous human testimony.

Another area in which the AAT has been innovative is in its use of preliminary conferences.

Evidence Law and Practice. A third area of abjectival law in which the AAT has proved itself adaptable relates to the admission of evidence. Paragraph 33(1)(c) of the Administrative Appeals Tribunal Act 1975 provides that in proceedings before the Tribunal, it is not bound by the rules of evidence 'but may inform itself on any matter in such manner as it thinks appropriate'. Some of the early decisions of the AAT demonstrated a cautious approach to the admission of evidence, merely reflecting what normally happens (notwithstanding general statutory commands to the contrary) when tribunals are established and manned predominantly by lawyers. In the initial decision in Pochi and The Minister for Immigration and Ethnic Affairs the rationale for caution was expressed by the Tribunal:

> The Tribunal and the Minister are equally free to disregard formal rules of evidence in receiving material on which facts are to be found, but each must bear in mind that 'this assurance of desirable flexible procedure does not go so far as to justify orders without a basis in evidence having rational probative force' as Hughes C.J. said in Consolidated Edison Co. v. N.L.R.B. 305 U.S. 197 at p.229. To depart from the rules of evidence is to put aside a system which is calculated to produce a body of proof which has rational probative force ... That does not mean, of course, that the rules of evidence which have been excluded expressly by the statute creep back through a domestic procedural rule. Facts can be fairly found without demanding adherence to the rules of evidence.15

In the case just cited, a deportation appeal, the Tribunal proceeded to review not only the conduct established by the applicant's conviction, but also certain other conduct upon which the Minister had relied. It reached the conclusion that:

> Notions of fairness - notions which reflect our ability to give to aliens who lawfully settle here the security needed to establish a family, home and employment - require that an alien resident should not be deported without proof of the facts tending to show that his deportation is in the best interests of Australia. A family is not to suffer the banishing of a husband and father without such proof. Suspicion is wholly insufficient.16

In that case, the Tribunal had to adapt its procedures to receive, in the absence of the applicant but in the presence of his legal advisers, certain confidential information. Administrators, in making discretionary determinations, quite often rely not only on facts, nor even on suspicion, still less on confidential material that cannot readily be disclosed and possibly incapable of proof. It is inherent in the administrator's functions that he, as any other person holding a responsible office, must act on hunch, guesswork and 'feeling' which develops over many years of dealing with like problems. The A.A.T. may ultimately come to a similar expertise, though it is unlikely and may be undesirable. For the moment, at least, it acts virtually exclusively upon the material placed before it. Though not bound by the rules of evidence, it has shown some reluctance to move far from them.

In Pacific Film Laboratories Pty. Ltd v. The Collector of Customs[17] the question arose as to whether the Tribunal would have regard to certain material which was undoubtedly before the original decision-maker and, some might think, rightly so. The Collector of Customs sought to tender in this case the transcript of evidence taken during a Tariff Board enquiry. Evidence had been given about the description of goods, the duty of which was in question, namely 'bulk rolls' of photographic material. In support of the tender, the representative of the Department submitted:

> that the Tribunal should not remain ignorant of the matters contained in the Report having regard to the fact that Parliament amended the tariff to refer to "bulk rolls" shortly after the Tariff Board Report was released on 2 June 1967. In fact, so our inquiries later disclosed, the tariff was amended by Act No.39 1968 which was assented to on 18 June 1968 and was given retrospective operation from 1 November 1969.[18]

Even though the material would undoubtedly have been available to the decision-maker, if not actually in the forefront of his mind, the A.A.T. rejected the tender:

> Although under s.33(1)(c) of the Administrative Appeals Tribunal Act 1975, Parliament has provided that, in a proceeding before the Tribunal, the Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate, we concluded that it may be unfair to the applicant if we were to have regard to the transcript of evidence taken during the Tariff Board enquiry when there had been no opportunity for the applicant to test relevant evidence in cross-examination. We indicated that any witness whose evidence might assist in establishing the trade meaning of 'bulk rolls'

> should be called before the Tribunal ... We invited submissions on behalf of the Collector on whether the Tribunal could properly refer to the Report as an aid to interpretation of the Tariff but the invitation was not pursued ... We accordingly decided that we should not refer to the Report.[19]

In addition to being released from the rules of evidence, the Tribunal is instructed by paragraph 33(1)(b) of its Act to conduct its proceedings with as little formality and technicality and as much expedition as the requirements of the law and 'a proper consideration of the matters before it' permit. Where the Tribunal is by statute established with the duty, on appeal, to step into the shoes of the administrator and virtually to make the decision he ought to have made, (though on the material before the A.A.T.) it deprives itself of its advantage in fact-finding by a slavish adherence to rules of evidence. Failure to consider a relevant Tariff Board enquiry (even at a price of permitting material in reply) seems to illustrate the danger of the Tribunal's depriving itself of information which, quite properly, would have activated the decision of the administrator.

What inference is to be drawn from the Pacific Film case? If the ultimate rationale of the creation of the A.A.T. is the improvement of administrative decision-making at the 'grass roots' level, is the administrator to infer that, in case an appeal is lodged, he must not consider hearsay material which a potential appellant did not have the opportunity to cross-examine and to test?[20] A preferable course may be the reception of all relevant and reliable material, with ample opportunity to respond. Otherwise, the process of administrative review and the search for the so called 'correct' and 'preferable' decision may be distorted. There may be cases where it is convenient in the Tribunal's adjudicative setting to exclude evidence that is embarrassing or otherwise unsatisfactory in order to ensure a fair hearing. Unreliable material or material proffered as confidential and not to be disclosed to the applicant may be rejected in order to require the party to pursue some other method of proof. Thus, in deportation cases, hearsay and rumour about the subject may be so unreliable and embarrassing that it should be rejected and put out of mind as much by the Tribunal as by the original decisionmaker. What must not happen, as it seems to me, is that the Tribunal becomes enmeshed in rules of evidence and seeks, however unwittingly, to impose a curial straightjacket on decision-makers who inevitably look for wider range of information, probative though not admissible in the orthodox sense. There is in a strict approach to receiving evidence a danger of bifurcation which the statute provided against, viz. that the administrator and the A.A.T. reach decisions on material that is typically quite different. The recognition of this danger seems to have been reflected in some of the earlier, and an increasing number of the

later, cases coming before presidential members of the AAT. They have exhibited a growing willingness to go far beyond the limitations, sometimes artificially imposed, by the laws of evidence applicable to a court of law. Thus in Beats and Minister for Immigration and Ethnic Affairs[21] Mr. Justice Davies had to consider the prospects of rehabilitation which the applicant would have if he were deported to New Zealand. A telegram from the applicant's father was received into evidence deposing to the extreme difficulty of the situation. The applicant and his sister gave evidence on the subject. A further telegram was submitted disclosing that a number of engineering companies had been telephoned, but they had no vacancies for welders, the employment of the applicant. Mr. Justice Davies did not place much reliance on this information. He admitted into evidence an extract from a publication on monthly employment statistics produced by the New Zealand Department of Statistics showing that the unemployment rate in New Zealand was less than Australia.

Likewise in Tombologlu and Minister for Immigration and Ethnic Affairs[22], Mr Justice McGregor, in January 1981, had to address the hardship that would be faced by the appellant if he were deported, with his wife and children to accompany him, to Turkey. An attempt was made to establish the unfavourable social conditions in Turkey from the oral evidence of a witness who had visited Istanbul for a fortnight only, eight years before and from a recent addition of a news magazine Newsweek. Within the limits fixed by obligations of relevance to the issues, general reliability and procedural fairness to the parties at the hearing, there is much to be said for following the processes of ordinary decision making in the non-curial activities of life. Doing this expands greatly the range of material that can be considered by a tribunal. Where there is no statutory inhibition against doing so, and especially where there is positive statutory encouragement to be released from the rules of evidence, tribunals do well, within the limits I have mentioned, to receive a wider range of evidence than would be permitted by the strict rules of evidence applicable to courts. Even these rules are now under review. The pressure of computerised evidence and of sensible procedures, has encouraged the Commonwealth Attorney-General to refer the reform of the law of evidence in Federal and Territory courts to the Australian Law Reform Commission for examination and report.[23]

EMERGING PROBLEMS

It should not be surprising that reforms at once so radical and pervasive should produce problems and controversy. Indeed it would be remarkable if they did not. One chance to review the 'package' in an international setting was provided by the conference of the Association of Schools and Institutes of Administration held in Canberra on 13 July

1981. Mr. Justice Else-Mitchell, who gave the initial thrust for administrative law reform at the Third Commonwealth Law Conference in Sydney in 1965, chaired the session in Canberra in July 1981. Mr. Justice Brennan, former President of the AAT and now a Justice of the High Court of Australia, delivered a reflective paper, 'Administrative Law : The Australian Experience'.

After reviewing the Federal legislation and institutions, Mr. Justice Brennan pointed to a special feature of the powers of the AAT. Within its powers to review the merits of a bureacratic decision and to substitute its own decision for that of the administrator is a specially wide power actually to review and rescrutinise the perfectly lawful policy of the elected government:

> From time to time the Minister has changed the policy by which he governs the exercise of his discretion in [deportation] cases and the Tribunal had to determine whether it would follow the Minister's policy changes. It is entirely within its legal powers to adopt a policy of its own. ... On occasions the Tribunal appears to have given little weight to a Ministerial policy which it thought to be too harsh or rigid. And thus tensions have surfaced, generated by the exposure of a Ministerial discretion to review by an independent quasi-judicial tribunal.[24]

Listing a number of problems that had emerged in the operations of the AAT, Mr. Justice Brennan identified four in particular:

- If there is to be an independent review on the merits of discretionary administrative powers, how can a second judicialised bureaucracy be avoided?
- Can the comparatively high costs of AAT review be justified in a particular area?
- What are the countervailing advantages of AAT review to the improvement, on a broad front, of primary administration?
- How should discretionary decisions be reviewed by the AAT, whilst leaving the formulation of broad policy with the Executive Government?

It is this last question which Mr. Justice Brennan described as the 'fundamental and abiding problem':

> How does a government confide to an independent tribunal the review of a discretionary power without abdicating to that tribunal the ultimate political power to formulate the policy by which the exercise of the discretion will be guided? To me that has been a fascinating conundrum of the new administrative

law. The answer affects the extent to which jurisdiction can be confided to the tribunal, and the extent to which the individual can participate effectively and by right in the making of administrative decisions which affect his interests.[25]

TRIBUNAL REVIEW AND RESPONSIBLE GOVERNMENT

A number of difficulties of principle can emerge from the novel jurisdiction conferred on the AAT. Consideration of these difficulties is a necessary prerequisite to any decision to expand the role of the AAT in veterans' cases. In a paper written by me for a seminar in Canberra in July 1981, I reviewed a number of cases in which the AAT has recommended reversal of Ministerial deportation decisions, notwithstanding the general government policy that a migrant convicted of a drug-related crime should be deported. I pointed out that the Federal Court of Australia had made it plain[26] that the AAT was obliged to consider not only the facts and law in cases coming before it (in the way entirely familiar to judges and courts over the centuries) but also government policy. The obligation of a quasi-judicial independent tribunal to review frankly and openly government policy, determined at a high level, poses special difficulties which have not previously been faced by the courts. They might be especially difficult in the area of migrants' rights where there is considerable political and electoral sensitivity. Among the difficulties I listed were:

- the apparent problems for the democratic theory of Ministerial accountability and responsibility of unelected judges openly and avowedly reviewing policy determined by elected Ministers;
- the creation of a possible 'dichotomy' between decisions made by the AAT and decisions of public servants, more faithfully and unquestioningly applying lawful Ministerial policy;
- the limitation on the membership and procedures of the AAT which restricted any realistic, effective, wide-ranging review of government policy by it; and
- the potential damage to judicial prestige of the frank involvement of judges in debates over controversial matters of public policy.

The AAT has been most valuable in the identification of government policy and in pursuing the substance of justice rather than being content, as lawyers generally are, in examining compliance with its form. But in developing the AAT to be a general body for the review of Federal administrative decisions, it will, as it seems to me, be essential to 'come to grips with the proper relationship between elected policy makers and the independent judicialised tribunal':

> 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 Act. ... 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.[27]

My paper went on to suggest, as I do now, that there may be problems in the development of two streams of decision-making:

> Some inconsistency between the more mechanistic and inflexible approach to government policy by public servants and the independent critical review of policy by an independent tribunal may be both inevitable and desirable. ... 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 government policy, particularly when laid down by their Minister. ... 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 a Minister reached after thorough inquiry and consideration by him of expert, community and political representations.[28]

In keeping with the current media vogue in reporting legal matters, some of the lastmentioned comments were recorded as if a criticism of the AAT and its members, rather than an exploration of important questions of legal and constitutional principle. Typical was the comment of Peter Robertson in the Sun Herald:

> If we cannot rely on the judiciary to protect us from venal, self-interested or incompetent politicians, who can we rely upon? If this is what a law reformer thinks about the issue, what can we expect from the true-blue legal conservatives?[29]

The Federal Attorney-General, Senator Durack, felt moved by the way my observations were dealt with in the media, to issue a deserved statement of praise for the valuable role of the AAT. It was, he said, 'providing the citizen with an independent review of government decisions which directly affected him'. Senator Durack pointed out that:

- the AAT was operating under powers which Parliament itself had conferred;
- the review of government policy was a difficult question and had arisen chiefly in the rather special area of deportation cases;
- the AAT had made it clear that whilst not bound by government policy it was carefully taken into account in every case; and;
- it was the responsibility of Parliament to spell out the criteria by which the tribunal judged the decisions of the government coming before it.

These points simply highlight the importance of facing, in a clear sighted way, the issue that is inevitably raised by the introduction of comprehensive independent review of decisions in public administration. That question is, where should the power lie? Should we recognise that in today's world, where public administrators have to make decisions of great variety, complexity and urgency, it is simply not possible for the elected Minister to scrutinise every such decision? If we give this factor weight, we will be encouraged down the track of the new Federal administrative law: conferring on an independent judicial type body, the right to make the final decision and on the merits. This we will do even if it involves a review and rejection of policy made in the name of the Minister. Or should we, recognising the need for political accountability of decision-makers, insist that, in the ultimate, the elected government, through its Minister and loyal public servants, should have the last say, subject to being publicly answerable at the ballot box? Like so many problems, this one cannot be over simplified. Ministers do make some decisions themselves. Some ministers make more than others. Most approve policy guidelines, though the extent to which the politically accountable officer gets involves in these is sometimes insignificant. Such decisions and rules of practice affect the lives of many citizens. On the other hand, governments always do retain the 'ultimate say'. It is always open to them to seek legislation from Parliament to clarify that which a judge or tribunal has found obscure or to set right to mischief done, in their opinion, by this judgment or that.

One of the foremost writers on administrative law, Professor H.W.R. Wade, pointed out 20 years ago, that debate about administrative review is really one about power. It is a demarcation issue, if you like, between the respective powers of the executive government, the permanent public service, the Ombudsman, the tribunals and the judicial arm of government. In working out the resolution of the debate, a number of the time honoured principles of our democracy are coming under the microscope:

- that ministers are 'responsible' for decisions actually made in their name by public servants of their administration;
- that public servants merely loyally implement the policy of elected ministers; and
- that judges simply mechanically apply pre-existing principles and do not involve themselves in policy evaluation.

The microscopic examination of these 'principles' will be very uncomfortable for some. The very examination of old verities will even be condemned in some quarters. What is surprising to me is that it has taken nearly the whole of the 20th century — the century of big government — before our institutions were forced to come to terms, frankly and openly, with the implications of such a profound social change as the growth of government and its agencies. If institutions, even powerful institutions, do not adapt to changing circumstances, they have the dinosaur before them as a constant warning of what happens when the world changes but big things stay the same.

FOOTNOTES

1. Times of India, 8 April 1881, quoted Times of India, 17 April 1981.

2. For a review of the developments at a Federal level, see the succeeding Annual Report of the Administrative Review Council. The most recent is Administrative Review Council, Fifth Annual Report, 1981.

3. The Age, 14 November 1981, 9.

4. A history of the reforms is contained in the first Annual Report of the Administrative Review Council, 1977 and in Australian Law Reform Commission, Lands Acquisition & Compensation (ALRC 14), 26.

5. G.D.S. Taylor, 'The New Administrative Law' (1977) 51 ALJ 804.

6. Administrative Appeals Tribunal Act 1975 (Cwlth).

7. id., s.51.

8. Ombudsman Act 1976 (Cwlth).

9. Administrative Decisions (Judicial Review) Act 1977 (Cwlth).

10. Law Reform Commission of Canada, 7th Annual Report, 1977-8, 14. See also the comments of Lord Chief Justice Lane, 'Change and Chance in England', (1981) 55 Australian Law Journal, 383, 384.

11. Lord Lane, n.10 above.

12. The expression was first used in Re Becker and Minister for Immigration and Ethnic Affairs (1977) 15 ALR 696, 699-700; 1 ALD 158, 161. In Drake v. Minister for Immigration and Ethnic Affairs (1979) 24 ALR 577, 2 ALD 60, 70, the Federal Court adapted the expression slightly to the 'correct or preferable' decision. See ibid, 589, 68.

13. 66 American Bar Association Journal 965, 967 (1980).

14. ibid.

15. Re Pochi and Minister for Immigration and Ethnic Affairs. (1979) 26 ALR 247, 256; 2 A.L.D. 33, 41. See now decision of the Federal Court of Australia. Special leave to appeal to the High Court, rescinded 29 July 1981, print.

16. id., 275; 58. cf. Drake v. The Minister for Immigration and Ethnic Affairs (1979) 24 ALR 577, 588; 2 A.L.D. 60,67.

17. (1979) 2 ALD 144.

18. id., 51.

19. ibid.

20. J.D. Davies, 'The Work of the Administrative Appeals Tribunal', address delivered at Australian Administrative Law Jurisdiction Conference, Melbourne, 21 February 1980, mimeo, 24-25. See also Re Kevin and the Minister for the Capital Territory (1979) 2 ALD 238.

21. Beets and Minister for Immigration and Ethnic Affairs (1979) 2 ALD 33. Note that an appeal to the Federal Court of Australia has been heard but no judgment has yet been handed down.

22. Re Arif Tombuloglu and Minister for Immigration and Ethnic Affairs, unreported, No. S.80.13, 13 January 1980, 23—4, (Davies J., President).

23. Australian Law Reform Commission, Discussion Paper 16, Reform of Evidence Law, 1980.

24. F.G. Brennan, 'Administrative Law : The Australian Experience', Paper for the International Association of Schools and Institutes of Administration, Round Table, Canberra, 13 July 1981, mimeo, 19.

25. ibid.

26. Drake, op cit, n.12.

27. M.D. Kirby, 'Administrative Review : Beyond the Frontier Marked "Policy — Lawyers Keep Out"', Paper for the Administrative Law Seminar in the Australian National University, 19 July 1981, mimeo, 32. Federal Law Review forthcoming. See also reported statements of the Minister for Immigration and Ethnic Affairs (Mr. MacPhee) in Australian Financial Review, 22 August 1981, 10.

28. ibid.

29. Sun-Herald, 2 August 1981.