

M. C. Harris*

A CRITICAL ANALYSIS OF THE COMPOSITION, HEARING PROCEDURES, AND APPELLATE STRUCTURE AND POWERS OF SOUTH AUSTRALIAN ADMINISTRATIVE TRIBUNALS

I. Introduction

Elsewhere I have attempted to examine in detailed fashion the actual operation and functioning of selected administrative agencies, according to their functional classification within the administrative process¹. The miscellany of boards, tribunals, advisory bodies, and other agencies, the last category encompassing a plethora of individual functionaries exercising a significant amount of discretionary power, clearly demonstrates two things: first, the manifest and far-reaching extension of the administrative process, with its assemblage of powers to police, promote and plan², into what was once considered to be the private sector to an extent which is probably not generally appreciated or suspected; second, a survey of existing administrative agencies exhibits a range of corporate bodies, tribunals, and other agencies characterised by an extraordinary diversity, in terms not only of their particular functions, but also of their composition and procedures, and to a lesser extent in respect of appellate provisions. In relation to this second phenomenon, it is difficult to escape the conclusion that the current proliferation, or, more charitably, "development", has, as a general proposition, been allowed to proceed in a haphazard and unsupervised manner.

The purpose of this article is to provide a more rational analysis (and where possible, synthesis) than has hitherto been attempted in this State, of the major structural (including appellate structural) and procedural characteristics of those agencies which, because of the degree of autonomy and organisation, together very often with certain special procedures³ that have been brought to their adjudicative processes, may be subsumed under the generic title "tribunals"; and further to propose certain provisions which might possibly be implemented by way of reform in these areas. Excluded from the present inquiry, therefore, is any consideration of the problems related to the making of administrative acts and decisions by Ministers, officials and other administrative functionaries in pursuance of some discretionary power⁴.

* The Faculty of Law, the University of Adelaide.

1. See unpublished thesis for the degree of Master of Laws, *The Operation and Review of Administrative Action in South Australia*, 1971, chaps. 1-8 inclusive and appendices thereto, copies of which are in the Law and Barr Smith Libraries of the University of Adelaide.
2. See Landis, *The Administrative Process* (1938), 15, 46.
3. See Report of Committee on Administrative Tribunals and Inquiries, Cmnd. 218 (1957) (Franks Report), paras. 10-14, at 2-3.
4. I have elsewhere considered this field of administrative adjudication: see chap. 14 of thesis, *supra* n.1, where consideration is given to questions of substantive and procedural reform in relation to these agencies. Throughout this article, unless the contrary is indicated, I have used the term "agency" as a synonym for the word "tribunal", the precise meaning which I wish to ascribe to that latter term having been previously defined. However, it may be worth noting that in other contexts the expression "administrative agency" is a convenient

There are, of course, several reasons for the development of a system of administrative tribunals and administrative adjudication, a system which has in the relevant areas of concern pre-empted and supplanted the ordinary courts and the judicial process⁵. First, the problems with which they are dealing may and usually do require some special expertise not possessed by the ordinary courts. Second, having regard to the demands of the administrative process, the ordinary courts are said to be dilatory and cumbersome, and governed by over-stringent rules of evidence and procedure. Third, the ordinary courts are too expensive. Fourth, the ordinary courts would become seriously over-burdened if they were to be required to exercise the jurisdiction of administrative tribunals. In short, the great merits of the independent tribunal are said to lie in its relative speed, cheapness and flexibility, as contrasted with the slowness, expense and rigid formalism of the ordinary courts.

I have stated that in this article I am, in part, concerned with ways and means of remedying defects in the structural and procedural aspects of the decision-making processes of tribunals. It may be accepted that it would be unwise to impose uniform structural and procedural rules on all tribunals simply because they are involved in what may be termed "adjudication". It is also important to remember that these bodies, as well as being involved in the administrative process, do share with the courts the responsibility of doing justice over a wide area⁶. It is for the reason that their acts and decisions have such a significant impact on the social and economic interests of the individual that one is disturbed at the present unsupervised growth-process, and the lack of a coherent framework. In response to strong promptings⁷, other countries, notably the United Kingdom⁸, have gone far towards solving this problem. In this State we have not yet started; it is imperative that we should do so before it is too late⁹.

compendium, encompassing administrative tribunals *proper*, public regulatory corporations and other statutory bodies, local authorities, agencies established for the purpose of investigation and advice (or recommendation), and the uncoordinated body of decision-making authority vested in a heterogeneous body of functionaries and officials ranging from Ministers of the Crown down (although not including decision-making within the bureaucratic infrastructure of government departments). The categories of bodies and functionaries given above are related by virtue of the fact that they were created legislatively for some well-defined, even specialist, purpose, within the administrative process, and by virtue of the fact that the powers and authorities vested in them to make decisions may in their exercise vitally affect the economic and social interests of the individuals in respect of whom they operate.

5. See Landis, *supra* n.2, chap. I, esp. at 30-46.
6. See Report of Committee on Administrative Tribunals and Inquiries, Cmnd. 218 (1957) (Franks Report), para. 40 at 9.
7. See for example Lord Denning's *Freedom under the Law* (1949).
8. Franks Committee Report, *supra* n.3.
9. We may take some comfort from the fact that in the diversity of jurisdictions where this remedial exercise has been successfully undertaken, or has at least been motivated by "proddings" similar to the present article, the symptoms were perceived in strikingly similar terms to those used in this introduction, e.g., Orr, in chap. 11 of his *Report on Administrative Justice in New Zealand* (1964) describes his analysis of New Zealand tribunals as revealing "a confused and inconsistent pattern": "The overall pattern of our administrative tribunals need not be as unsystematic as it is" (p. 66). In an examination of "Administrative Government in Texas", 47 *Tex. L. Rev.* 805, the difficulties are put thus: "In Texas the state agencies have accumulated an uneven record for the achievement

Finally, an examination of the constitution and procedures of South Australian administrative tribunals reveals a confused and inconsistent pattern which is far less systematic than is necessary. It appears to have happened quite fortuitously, and calls for rectification. In short, there is a need to rationalise and reform a number of the procedural and structural anomalies in the light of what are now accepted as basic principles of administrative justice. If this is done, it will enhance the quality of the decisions of these tribunals, and give a commensurate boost to public confidence in their work.

II. Composition and Structure

(A) CONSTITUTION

The composition of tribunals varies considerably, both in terms of the number of members and their qualifications. That the size and membership qualifications of tribunals should depend largely on the nature of their functions is both proper and predictable. The main ground for the creation of a tribunal is often its expert knowledge of a particular matter. Thus, for example, in the case of tribunals and agencies concerned with the supervision of professions and certain skilled occupations, the guild character predominates; the profession or occupation supervises itself. What is, however, surprising is the inattention to what may properly be regarded as matters of significance. For example, there is no settled method of appointment; tenure varies greatly; and special qualifications for office may or may not be stipulated, even though they may be eminently desirable, particularly in relation to the stipulation of legal qualifications for the office of Chairman.

(B) METHOD OF APPOINTMENT

There is remarkable variety in the methods of appointment sanctioned under existing legislation. True, the Governor is customarily the *formal* repository of power to make appointments to tribunals and other agencies. Within this general power, however, there is substantial scope for the adoption of different methods. For example the members of some tribunals are chosen partly by the Governor and partly by election; the Architects Board affords a good illustration of this. Again they may be chosen by the Governor on the nomination or recommendation of the relevant Minister, or on the nomination or recommendation of an interested group. A variation of the latter is to vest the power of appointment in the Governor, but require him to appoint those who by their special qualifications are able to represent some group or interest¹⁰. Power of appointment to tribunals is not, however, exclusively vested in the Crown Representative. Of the other prescribed methods, election

of fairness and functionality in administrative government. Practices vary greatly from agency to agency; and the procedures followed within each agency are often a source of bewilderment to outsiders. This absence of uniformity is largely attributable to the failure of the legislature to adopt an administrative procedure act applicable to all the state agencies" (pp. 812-813). It is apparent from these deliberately unrelated and random examples that ours is a far from unique dilemma.

10. The New Zealand Public and Administrative Law Reform Committee recommended in its First Report that "in principle" particular interests "ought not to be specifically represented" (para. 42). It did not, however, indicate the circumstances, if any, which would justify a departure from this principle.

is the most popular; this is done for example in the case of the Pharmacy Board. Here again, however, the basic method exhibits a capacity for protean variation: thus we may encounter a combination of election and appointment by the Governor or relevant Minister within the same tribunal or agency, as for example occurs in the case of the Phylloxera Board. Other sanctioned methods of moderate frequency are appointment by a Minister, particularly in the case of advisory tribunals, and appointment by an independent outside body, such as the University of Adelaide. One even finds on occasion a number of discrete methods co-existing and having a concurrent operation in respect of the one tribunal as, for example, in the case of the Physiotherapists Board. In the case of this tribunal, some members are appointed by the Governor on the recommendation of the Minister; some are appointed by an outside body, in this case the University of Adelaide, and some are elected by the registered physiotherapists. While in the case of some tribunals there may be special arguments for retaining a variety of different methods of appointment, it would seem sensible as a general principle to vest the power of appointment in the Governor acting on the advice of the Minister concerned¹¹.

A final matter relates to the need to have some residual check on the personnel appointed to administrative tribunals. Here one may adopt the arguments and conclusions of Orr, who expresses himself as follows:

"Bearing in mind the adjudicative functions of most tribunals, and the desirability of ensuring that persons of judicial temperament are appointed, there is much to be said for all appointments being first approved by the Attorney-General. Where special qualifications are called for it is rare to find these stipulated for all members, and the non-specialist members (one of whom will frequently be chairman) at least should be approved by the Attorney-General"¹².

(C) CHAIRMAN

(i) *Appointment*

The most important member of any tribunal is the chairman; his personal attributes and abilities will go far in determining the relative success or failure of that tribunal. The Franks Committee in its Report of 1957 recommended that the chairman of certain tribunals should be appointed subject to the approval of the Council of Tribunals. It is therefore proposed that save for the comparatively rare case of "ex officio" appointments, the Attorney-General should give his prior approval to appointments to the office of tribunal chairman.

(ii) *Qualifications*

It follows that if the Attorney-General in South Australia were given power to veto the appointment of a chairman (and any other appointment) to a

11. A uniform method of appointment was recommended by the New Zealand Public and Administrative Law Reform Committee in its First Report (1968), para. 42. See also Orr, *Report on Administrative Justice in New Zealand* (1964), 125.

12. *Supra* n.9, 67. In the U.K. the Council on Tribunals is empowered to make general recommendations to the appropriate Minister on the question of appointment to membership of any specified tribunals.

tribunal, he would by and large be in a position to ensure that any potential appointee was suitably qualified. One important ancillary safeguard is to require that the chairman of any tribunal, whether that body is exercising original or appellate authority, should have legal qualifications¹³. At the moment, however, close scrutiny discloses that legal qualifications are required in only a small proportion of the tribunals presently operating in this State; moreover, the few cases where this is prescribed fail to reveal the application of any clear and consistent principle which may in turn be invoked in order to determine when legal qualifications are or are not appropriate in future cases.

(D) TENURE OF OFFICE

In the majority of cases legislation requires members to be appointed for a fixed or prescribed term, which may vary from one to five years although terms of less than two and more than four years are infrequent and only exceptionally does one find terms in excess of five years; for example, members of the Superannuation Fund Board are appointed for a seven-year term, with eligibility for re-appointment. In others, their appointment is for a prescribed maximum term, but with the possibility of a shorter term than the maximum being fixed if thought appropriate in the circumstances of the particular appointment. The legitimacy of such variations from the prescribed maximum is secured by the use of such a formula as "for such period not exceeding five years as the Governor may fix at the time of appointment"¹⁴. In theory and in practice this may lead to appointments of not more than one year, which may or may not be renewed. In some cases the Chairman is either appointed for a longer term than the other members, or has eligibility for re-appointment whereas the other members do not. Most statutes permit reappointment or re-election.

The importance of a uniform approach to questions of tenure of appointment to administrative tribunals have been well argued by Orr, who puts the matter as follows:

"Two of the strongest arguments for setting up administrative tribunals are that this permits the appointment of persons with special qualifications, and, where the jurisdiction is a relatively limited one, that it enables members to become expert quickly. But if members are removable at pleasure or are appointed for a very limited term, they have both less incentive and opportunity to gain the experience and knowledge necessary to ensure sound decisions. Nor, lacking any real tenure, will they have the full independence which is desirable in any one exercising functions of a judicial character"¹⁵.

This being accepted, it is submitted that appointments to tribunals, whether original or appellate, should be for a fixed term of reasonable length. Five years would seem to be an appropriate minimum term of appointment to an appellate tribunal, whereas a shorter minimum period of three years would seem appropriate for appointment to an inferior tribunal.

13. Franks Committee Report, para. 55, at 12.

14. Alcohol and Drug Addicts (Treatment) Act 1961-1964 (S.A.), s.4(c)(1).

15. *supra* n. 9, 68. See also Landis, *supra* n. 2, 23-24.

(E) SUMMARY OF PROPOSALS

- (i) Members of a tribunal should be both disinterested and in possession of appropriate qualifications and experience. This can be ensured to a large extent by vesting a power of veto in respect of all appointments, in the Attorney General.
- (ii) As a general principle the chairman of a tribunal should be legally qualified, and his appointment subject to the approval of the Attorney-General.
- (iii) Appointments should be made by the Governor acting on the appropriate ministerial advice, following prior consultation with the Attorney-General.
- (iv) Appellate appointments should be for a period of not less than five years, and appointments to original tribunals for a period of not less than three years. There should be prescribed in addition, standard grounds for removal.

III. Procedures**(A) INTRODUCTION**

It is a truism that it is neither desirable nor feasible to formulate a *detailed* code governing the procedure of all tribunals and administrative agencies. This proposition can be seen to be valid from a reasonably detailed consideration of the structure, composition, powers and functions of the various tribunals and other agencies presently operating in this State¹⁶. On the other hand, it has been recognized that *more general* rules of a fundamental nature can and should be formulated so that at certain critical points in the administrative process the citizen has some irreducible minimum guarantee of procedural due process.¹⁷

What then is the significance of procedural due process in the working of those administrative agencies under consideration in this article? Above all it represents an integral part of that compromise between the judicial and the administrative processes in which a balance is struck, at one and the same time guaranteeing substantial justice to the regulated individual without unduly impeding the work of administrative agencies. It seems clear, therefore, that in such a situation a system of pre-decision safeguards must on the one hand avoid the temptation to over-emphasise or over-implement rules of procedural due process, thereby causing undue delay in the work of administrative agencies, or as it has been put, causing the administrative process to become overheated; on the other hand it should incorporate a sufficient number of procedural safeguards derived from the judicial process in order to protect the individual against the tyranny of the unrestrained administrative process¹⁸.

16. See unpublished thesis, *supra* n. 1, chaps. 1-7 and the appendices thereto.

17. "Due process" is used here not with its American connotations but, rather, to express general notions of fair dealing in the administrative, adjudicative, and decision-making processes.

18. This is, of course, but an aspect of the wider, more profound, problem of the rôle of judicial (in its widest sense) review and control of administrative action within the administrative process. Fundamentally this is a problem in the control of "power". While power remains benign we have nothing to fear. So long as

In short, we must recognize that a great deal of good government and good administration lies in technique, in procedure, and in routine, as well as in the practical task of making adequate substantive decisions. Indeed, it ought to be remembered that concern with substantive matters, i.e. with the *quality* of decision-making, must necessarily be postponed until after this initial procedural problem has been adequately resolved.

Finally, one should perhaps define what is meant by the expression "procedural due process". An American judge has recently expressed it as follows:

"The basic essential of procedural due process is that the administrative hearing at which facts are to be determined must be orderly and conducted in a manner meeting the requirements of fair play, measured by what the courts deem to be fair, just and appropriate under the circumstances. These basic requirements include the following: There must be a fair and open hearing; the parties must be apprised of the evidence to be considered; the evidence must be produced at the hearing by witnesses present or by authenticated documents, maps or photographs; there must be an opportunity to inspect documents, to cross-examine witnesses within reasonable limits and to offer evidence in explanation or rebuttal¹⁹."

To what extent are these and other matters catered for in the legislation setting up South Australia's administrative process? The suggestion made in this article is that by and large the demands of administrative due process have been overlooked by the legislature in this State; the consequence of this oversight or omission is that we have a remarkable profusion of administrative agencies (as well as of other administrative functionaries excluded from the present inquiry)²⁰, without there being "built" into them at the same time

the repository of a power remains with the prescribed limits, there is no need for judicial surveillance or scrutiny. It would, however, be foolish to assume that the benign is never capable of becoming malign and dangerous; that the scrupulous and wise administrator may not on occasion fail from grace, and exhibit signs of deviousness, obtuseness, or mere stupidity. The whole thrust of the Anglo-American legal tradition in this area, it may be argued, has been towards the position that ultimately it is the setting of limits to the power granted by the legislature and the imposition of procedural rules upon agency action by the courts which together provide the ultimate guarantee against executive abuse. In this connection see Jaffe, *Judicial Control of Administrative Action* (1965), chap. 9 *passim*; Jaffe and Henderson "Judicial Review and the Rule of Law: Historical Origins" (1956) 72 L.Q.R. 345.

19. John B. Molinari, "California Administrative Process: A Synthesis Updated" (1970) 10 Santa Clara Lawyer 274 at 275. Expressed in terms of the Rule of Law the following definition is, perhaps, more complete and just as succinct:

"The Rule of Law in terms of powers, rules, and procedures:

Any matter except a matter of government policy, which might affect the interests of a person must be determined after due notice to the parties, by a professional adjudicator, independent and disinterested, through a process involving a hearing of the parties, in public, evidence on oath, the right of parties to subpoena, examine and cross-examine witnesses and present arguments, the publication of the adjudicator's decision and his reasons therefore in writing, the decision being based on the evidence adduced, the parties having equal access to evidence, and equal access to the adjudicator, and subject to an appeal under the same conditions." J. Wickham, "Power Without Discipline: The Rule of No-Law" in *Western Australia: 1964*" (1965-66) 7 Univ. W.A.L.R. 88, at 91.

20. See *supra* n.4.

those procedures deemed necessary for a full and fair hearing. Such things, for example, as notice of the issues; the right to legal representation; an entitlement to a statement of the reasons for a decision and so forth. While it may be possible to adduce reasons to explain *why* this deficiency exists (one may advert in particular to the fact that the growth process of tribunals has been characterised rather by pragmatism and expediency than by planned design, leading to the creation of new tribunals as a particular need arose, a process which has in turn substantially contributed to the overall impression of haphazardness), these can under no circumstances be permitted to serve as an excuse for the continuation of what is clearly a grave derogation from the rule of law²¹.

In South Australia, as in the other Australian States, legislative prescriptions with respect to agency procedures at the moment exhibit a great variety of attributes. Four main types of legislation may, however, be discerned²². In the first, the tribunal is given complete discretion as to procedure. In the second, some elementary rules, usually associated primarily with natural justice, are laid down. In the third, powers are conferred and procedures prescribed similar to those associated with the ordinary courts, such as the power to summon witnesses, to administer an oath, to order production of documents and so on. In the fourth, the procedures are altogether assimilated to those of an ordinary court. From research, which has elsewhere been written up, into the South Australian situation the fact clearly emerges that in general the relevant legislation in this State falls into the first and second categories, although in some cases more satisfactory procedures have developed as a matter of practice or convention²³. Only rarely is legislation encountered which provides detailed procedural rules bringing the statute within the third and fourth categories.

What follows is a critical examination and summary of South Australian tribunals in the light of some of the more important aspects or indicia of administrative due process. This section concludes with a compendious statement of the basic requirements of a model code of administrative procedure, the adoption of which, it is thought, would better serve the needs of administrative adjudication in this State than the existing piecemeal approach.

In these various proposals for reform of agency procedures, reliance has to a large degree been placed on the extensive body of American statutory provisions which have attempted with considerable success to prescribe certain minimum standards of procedure to which administrative agencies must conform. Where appropriate, particular provisions have been set out, not necessarily as definitive pieces of drafting, but because they substantially mirror the sorts of concepts which such legislation should articulate. In the case of

21. See a paper by J. H. Greenwell, "Administrative Tribunals and the Rule of Law", delivered to the Australian section of the International Commission of Jurists, Sydney Conference, 1966. See further the article by J. Wickham, *supra* n.19, and the appendix thereto headed "Presence or Absence of the Essentials of the Rule of Law in Selected Statutory Tribunals in Western Australia" at 107-110.

22. The same categories are apparently discernible in Victoria; see Memorandum of I.C.J., Victorian Division, on Administrative Justice in Victoria, 29-30.

23. See unpublished thesis, *supra* n.1, chaps. 1-7 inclusive and appendices thereto.

the Federal agencies, this has been done through the Federal Administrative Procedure Act, 1946²⁴. The position with respect to the American States is rather more complex, and warrants some examination in the light of later reliance on their legislation in this field, and in particular on that of the State of Massachusetts.

The ferment, as it may be described, in the federal administrative law sphere, from which finally emerged the Federal Administrative Procedure Act in 1946, brought about an awakened interest on the part of the States in the problems associated with the practices and procedures of their own administrative agencies. Of primary importance in this field is the work of the Section on Judicial Administration of the American Bar Association which had, some years prior to the publication of the important Benjamin Report on the operation and functioning of administrative agencies in the State of New York²⁵, created a committee on Administrative Agencies and Tribunals, and at the 1935 meeting of the American Bar Association this committee presented a significant report on the subject of judicial review of state administrative action²⁶. The effect of this report in the view of a leading commentator was "to give major impetus to constructive thinking about state administrative action, paralleling the impetus . . . in the federal field"²⁷. The Judicial Section reported again in the following year, this time setting forth a proposed act dealing with certain major phases of state administrative procedure²⁸. The act was prepared to serve as a model for state legislation on the subject. So well did it serve this purpose that it was in fact the origin of the Model State Administrative Procedure Act, eventually adopted by the National Conference of Commissioners on Uniform State Laws. The complexities and delays of the years which intervened between the adoption of the first model and the promulgation of the final model in October, 1946 need not be canvassed here²⁹. Suffice it to say that it was finally offered in a much abbreviated form of only thirteen sections, by the National Conference to the state legislatures in the hope that "it (would) serve a useful purpose in those states considering the adoption of new administrative procedure legislation or the amendment of existing legislation on the subject"³⁰. It was, in short, intended "to serve as a verbal embodiment of the basic principles of common sense, justice, and fairness that should be deemed of universal applicability wherever the affairs of mankind are subjected to regulation by governmental administrative processes"³¹.

-
24. For a general account of the events leading up to and subsequent to the passing of the Federal A.P.A., see K. C. Davis, *I Administrative Law Treatise* (1958), s.1.04, at 28-32.
 25. Benjamin, *Administrative Adjudication in the State of New York* (1942).
 26. A.B.A. Rep. 623 (1938).
 27. Stason, "The Model State Administrative Procedure Act" (1948) 33 *Ia. L. Rev.* 196, at 198.
 28. 64 A.B.A. Rep. 407 (1939).
 29. They are very clearly set out by Stason in his article in the *Iowa Law Review*, *supra* n.27, at 198-200.
 30. Stason, *supra* n.27, 200. It is noteworthy that in the years prior to 1946, six states had already enacted their own Administrative Procedure Acts, viz., North Dakota (1941), Wisconsin (1943), Ohio (1943), Virginia (1944), Missouri (1945), Pennsylvania (1945).
 31. *Ibid.*

Finally, during 1961, the National Conference of Commissioners on Uniform State Laws brought out a new Model State Administrative Procedure Act, supplanting the old Model Act of 1946. The position immediately before and since the promulgation of this revised Model State A.P.A. is thus summarised by a leading commentator:

"Twelve states had adopted legislation based in whole or in part on the Model Act. The six that dealt with all three main subjects—adjudication, rule making, and judicial review—were Indiana, Massachusetts, Michigan, Pennsylvania, Virginia, and Wisconsin. The states that dealt with at least one of the three subjects were California, Illinois, Missouri, North Carolina, North Dakota, and Ohio. Since 1961, at least seven additional states have based legislation on the Model Act: Georgia, Oklahoma, West Virginia, Idaho, Florida, Wyoming and Louisiana. Altogether, about thirty-six states have general legislation on one or more segments of administrative law . . .

The state legislation is typically limited to the state level and does not reach municipal and other local administrative action. Much constructive work remains to be done.

The Uniform Law Commissioners speak of "certain basic principles of common sense, justice, and fairness that can and should prevail universally", and their six major principles are: '(1) Requirement that each agency shall adopt essential procedural rules, and except in emergencies, that all rule-making, both procedural and substantive, shall be accompanied by notice to interested persons, and opportunity to submit views or information; (2) Assurance of proper publicity for all administrative rules; (3) Provision for advance determination of the validity of administrative rules, and for "declaratory rulings", affording advance determination of the applicability of administrative rules to particular cases; (4) Assurance of fundamental fairness in administrative adjudicative hearings, particularly in regard to such matters as notice, rules of evidence, the taking of official notice, the exclusion of factual material not properly presented and made a part of the record, and proper separation of functions; (5) Assurance of personal familiarity with the evidence on the part of the responsible deciding officers and agency heads in quasi-judicial cases; (6) Provision for proper proceedings for, and scope of, judicial review of administrative errors'.

By and large, the Commissioners' proposals deserve full consideration by every legislature, although some of the proposals are more controversial than the Commissioners recognize. The Commissioners assert: 'There is no good reason why these general principles should not govern throughout the entire administrative structure. They are not details; they are essential safeguards of fairness in the administrative process.' Yet the Commissioners say that the Model Act is largely derived from s.1070 of the 86th Congress. The fact is that s.1070 has not been enacted. It did not win support either from the Eisenhower administration of the Kennedy administration. Locating 'essential safeguards of fairness' remains a matter of opinion"³².

32. K. C. Davis, *Administrative Law Treatise*, 1970 Supplement, chap. 1, s.1.04, 14-15. The adoption of an administrative procedure act for Texas has been a

State legislation had often blindly followed the first Model Act, despite its flaws. A notable exception to this pattern is the Massachusetts Administrative Procedure Act, 1954 (A.P.A.) which has received the authoritative accolade that "it is an example of a state that has made its own independent studies and has come up with legislation far superior to the Model Act"³³. Since, therefore, we may legitimately regard the Massachusetts A.P.A. as one of the best statutes in this field, it will serve as a useful guide as to what should be done to improve agency practices and procedures in this State. Reference will be made only to such provisions as are thought relevant to the South Australian situation³⁴, for it must be recognized that in many respects the provisions of the American codes are too detailed and elaborate for a total integration into our system.

(B) THE RIGHT TO A HEARING

This would seem to be axiomatic, but there are instances where there appears to be an express intention on the part of the legislature wholly to exclude "*audi alteram partem*". A formula which is encountered with moderate frequency describes some types of decision as "administrative acts". The intention here is twofold: to deny any form of hearing to the person aggrieved, and to refute any argument that the rules of natural justice are to be inferred by a court reviewing the legality of such a decision in direct or collateral proceedings. Thus the Metropolitan and Export Abattoirs Board has power "as an administrative act" to grant certain kinds of permits, and to *revoke* permits "without assigning any reason therefor". Similarly, the Transport Control Board has power to revoke licences "as an administrative act". Examples could be multiplied, but the short point is that there are many agencies which are expressly or impliedly directed or authorized to make decisions of significance without affording the potentially aggrieved individual even the most rudimentary right to put his side of the case.

It should further be observed that the specification of hearing procedures in the context of licensing tribunals is an all too rare phenomenon. Bearing in mind the fact that the right to a hearing in the case of an application for a licence may not exist in many situations³⁵, this omission places a very

long-standing controversy in that state. See, e.g., Patterson "Procedure Act Opposed" (1953) 16 Tex. B. J. 377; Administrative Law Committee, "Administrative Procedure Act: Reply to a Critic" (1953) 16 Tex. B.J. 736. The State Bar Committee on Administrative Law has drafted a proposed act for Texas and introduced it in the state legislature several times. See, e.g., "Administrative Procedure Act" (1953) 16 Tex. B.J. 14. The Act, however, has never been adopted.

33. *Id.*, at 15. Elsewhere the same author gives rather more qualified approval to this statute: III *Administrative Law Treatise*, s.24.06, at 430. The unusual care which was lavished on this statute is the subject of the following articles: Curran and Sacks "The Massachusetts Administrative Procedure Act" (1957) 37 B.U.L. Rev. 70; Segal "The New Administrative Procedure Act of Massachusetts" (1954) 39 Mass. L.Q. 31.
34. Orr, *supra* n.19, 69ff., relies on its provisions in making his proposals for New Zealand.
35. Particularly is this so in the case of "executive" licensing agencies, dispensing discretionary benefits on the basis of policy factors; see de Smith, *Judicial Review of Administrative Action* (2nd ed. 1968), 165, 209-210. Even in the case of licensing tribunals occupying the middle ground between on the one hand "fully-judicialised" licensing tribunals and "executive licensing agencies" on

considerable obstacle in the way of achieving administrative due process. Similarly, considerable difficulties may be encountered in seeking to apply the rules of natural justice to the proceedings of the numerous *advisory* agencies which are set up for the purpose of report and investigation. Although technically not making "decisions", the findings and recommendations of such bodies may have a considerable impact on the affairs of the individual; yet despite fairly exhaustive examination of these agencies, one was unable to discern any semblance of procedural due process provided for in their constituent legislation.

In the case of these latter licensing and advisory agencies, and those discussed at the outset of this section, a right to be heard is fundamental to the execution of administrative justice. It is urged, therefore, that this vital guarantee, and all matters ancillary to it, should be protected by making their proceedings subject to the operation of the proposed general code of administrative procedure.

(C) NOTICE

The Franks Committee recommended that the citizen should be given due notice of the proceedings of any tribunal. Indeed, it is once more a general axiom of our legal system that before a decision is taken by a competent authority affecting the rights of the individual, notice of the grounds potentially to be relied upon should be given to the individual affected. In some cases, tribunals, usually the professional bodies, have a general requirement of notice. In many instances, however, no specific provision is made in the relevant legislation for the giving of notice by the agency empowered to make the particular decision, so that it may be arguable whether the relevant tribunal was acting in breach of natural justice in failing to give notice³⁶. Rectification of this rather unsatisfactory situation could be achieved by enacting a provision in similar terms to sub-section 1 of section 11 of the Massachusetts Act which requires reasonable notice of an agency hearing to be accorded all parties, this to include statements of the time and place of the hearing. Parties must have sufficient notice of the issues involved to afford them reasonable opportunity to prepare and present evidence and argument. If the issues cannot be fully stated in advance of the hearing, they are to be fully stated as soon as practicable. In all cases of delayed statement, or where subsequent amendment of the issues is necessary, sufficient time must be allowed to afford

the other, the matter is by no means settled, the question "having hardly been asked in the English courts". (de Smith, *supra*, at 210). de Smith appears to vacillate a little on this point—compare his proposition at 210 with that appearing at 407. My own preference is for a presumption in favour of a hearing, with the proviso that no licensing agency should be forced in any procrustean manner into a standard procedural mould.

36. Moreover, it is possible to find other less than satisfactory instances of derogation from the essentially simple requirement of adequate notice. For example Regulation 11 (3) of Regulations made under the Land Agents Act, 1955-1964 with respect to the proceedings of the Land Agents Board (*Gazette*, Oct. 27 1960, pp. 1154 ff.) provides that an application for cancellation of a licence shall be in writing and shall state the grounds upon which cancellation is sought. Seven days' notice to the holder of the licence is required, but a rather unsatisfactory provision goes on to provide that the Board may deal with an application for cancellation *notwithstanding a failure to comply with the requirements as to notice*.

all parties reasonable opportunity to prepare and present evidence and argument upon the issues. It might, however, be necessary to adopt Orr's suggestion that in order to avoid successful appeals on technicalities, the essential question should be not the adequacy of the original or subsequent notice, but rather the overall fairness of the whole proceedings³⁷.

(D) EVIDENCE

As a general principle, administrative tribunals and agencies in this State do not observe the strict rules of evidence in their proceedings. This is so either because (as is the norm) the empowering statute makes no reference to the question, thus confirming by inference the view that the strict rules do not apply, or because it makes express provision that the relevant agency is not to be bound by the rules of evidence. It would clearly detract from the usefulness and efficiency of agencies and impose undesirable restraints on their sphere of operations, if they were permitted to accept only such evidence as was legally admissible. On the other hand, it is worth considering the formula of the Massachusetts Act, which would seem to impose a necessary restraint on the distasteful prospect of totally worthless evidence being admitted. S.11 (2) reads as follows:

"Unless otherwise provided by any law, agencies need not observe the rules of evidence observed by courts, but shall observe the rules of privilege recognised by law (e.g., against incrimination). Evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs. Agencies may exclude unduly repetitious evidence, whether offered on direct examination or cross-examination of witnesses."

Orr's comment on this provision is worth quoting in full, since it applies with equal force to the South Australian situation:

"Such a rule would leave tribunals with all the latitude reasonably necessary to carry out their task, but at the same time supply them with a standard which laymen should have no difficulty in applying. As matters stand, our legislation sets no limits to the admissibility of quite worthless evidence. Moreover, the Massachusetts provision insists that a decision be based only on evidence which falls within the limits specified in the section. This should ensure that all decisions are founded on reasonably reliable evidence"³⁸.

(E) RIGHT TO SUBPOENA AND TAKE EVIDENCE ON OATH: RIGHT TO CROSS-EXAMINE

Many writers take the view that the parties appearing before an administrative tribunal should have an unrestricted right to subpoena, and regard it as essential that testimony should be given under oath³⁹. Whether these are universally valid propositions or not⁴⁰, the position in South Australia is far

37. *Supra* n.9.

38. *Id.*, 70.

39. E.g., Wickham, *supra* n.19, 3.

40. It is arguable that restrictions should be placed on the right of "parties" to subpoena where the predominant character of the tribunal is inquisitorial rather than having the adversary system as an integral component.

from according with them, although in some cases the powers to subpoena witnesses and to administer an oath or affirmation are vested in tribunals. Again a general provision applicable to all tribunals dealing with these matters is required; no great problems of drafting arise, and nothing more need be said on this point.

Of considerably more importance is the question of cross-examination which is commonly and rightly regarded as essential for the testing of evidence and the resolving of issues of fact. Nowhere is there to be found a right to insist upon cross-examination which is conferred in terms, and whether or not cross-examination is allowed depends upon the customary attitude of each individual tribunal, or on the implication of this vital guarantee by a court on the ground that to exclude it would be in derogation of a "fair hearing"⁴¹. Certainly it is a fact that customarily some tribunals and agencies do permit cross-examination. Again, because of the significance of this matter, thought should be given to the enactment in the proposed general code of administrative procedure of a clause in similar terms to those of s.11 (3) of the Massachusetts Act, which provides that:

"Every party shall have the right to call and examine witnesses, to introduce exhibits, to cross-examine witnesses who testify, and to submit rebuttal evidence"⁴².

(F) OFFICIAL NOTICE

It is sufficient to adopt Orr's analysis of the problem, and his proposals for its solution which appear to be wholly applicable to the South Australian situation.

"Administrative tribunals in the course of their work develop, if they do not originally possess, an expert knowledge of their particular field. Over a period of time they accumulate a knowledge of many facts, general, technical or scientific, as the case may be, and of some of these, parties appearing before them in a given case, may well be ignorant. It is most desirable that tribunals should be free to utilise their specialised knowledge to the full, but it is equally undesirable that in doing so they should take notice of facts not within the knowledge of the parties.

41. On the right of cross-examination in the context of the "audi alteram partem" rule, see generally de Smith, *supra* n.35, 200-201; Benjafield and Whitmore, *Principles of Australian Administrative Law* (4th ed., 1970), 147-148; Reid, *Administrative Law and Practice* (Toronto, 1971), 80-85 which has a most useful collection of the numerous Canadian authorities on this point.

42. Orr notes at p.71 that the U.S. Federal Administrative Procedure Act, 1946, s.8, qualifies a somewhat similar provision by providing that in determining claims for money or benefits or applications for initial licences any agency may, when the interest of any person will not be prejudiced thereby, adopt procedures for the admission of all or part of the evidence in writing. In cases where such a provision seems necessary it would seem preferable that it should be specifically provided in the relevant agency's detailed procedural rules "rather than by a discretionary power applicable to all licensing authorities". Such a provision would appear particularly appropriate to proceedings which are better served by independent investigation, e.g. hearings for permits, certificates, etc., than by the adversary process.

The Federal Administrative Procedure Act 1946, (s.7(d)) and Model State Administrative Procedure Act (s.9) and the Massachusetts Act each contain a provision to regulate this situation. The Massachusetts Act (s.11(5)) provides:

Agencies may take notice of any fact which may be judicially noticed by the Courts, and in addition may take notice of general, technical or scientific facts within their specialised knowledge. Parties shall be notified of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed. Agencies may utilise their experience, technical competence and specialised knowledge in the valuation of the evidence presented to them.

The requirement of notice to the parties with a right to challenge is essential if tribunals are to be prevented from basing decisions either wholly or in part on material not introduced at the hearing. The last sentence of s.11(5) is an express recognition of what tribunals are expected to do in reaching a decision. The foregoing provision, with suitable modification, ought to be included in the general code of procedure for administrative tribunals⁴³.

(G) PUBLIC HEARINGS

There is no uniform provision requiring tribunals in South Australia to sit in public and yet it may equally be said that publicity of agency proceedings lies at the very core of administrative justice. Some, of course, adopt this procedure as a matter of practice; others prefer not to admit members of the press or public. In the few cases where tribunals are specifically required to sit in public, it is not unusual to find some residual discretion permitting them to close their proceedings where they consider it necessary in the interests of the parties or for some other reason to do so. The proceedings of the regular courts of law, save in the most exceptional cases, are held in public, and are subject to public scrutiny. The Franks Committee took the view strongly that the same principle should govern the operation of administrative tribunals:

"We have already said that we regard openness as one of the three essential features of the satisfactory working of tribunals. Openness includes the promulgation of reasoned decisions, but its most important constituent is that the proceedings be in public. The consensus of opinion in evidence received is that hearings before tribunals should take place in public except in special circumstances . . .

and

We are in no doubt that if adjudicating bodies, whether courts or tribunals, are to inspire confidence in the administration of justice which is a condition of civil liberty they should, in general, sit in public. But just as on occasion the courts are prepared to try certain types of case partly or wholly *in camera* so, in the wide field covered by tribunals,

43. *Ibid.* For a further attempt to deal with this problem, see section 1006 (e) of the A.B.A. Special Committee's Final (April 13, 1957) Draft of proposed New Code of Administrative Procedure.

there are occasions on which we think that justice may be better done, and the interests of the citizen better served by privacy"⁴⁴.

The Committee then considered three types of case in which tribunals would be justified in sitting in private. These were, first, cases where considerations of public security are involved. Secondly, and much more frequently, the case in which intimate personal or financial circumstances have to be disclosed. Social security applications and tax hearings are obvious examples. Thirdly, the type of case involving professional capacity and reputation.

Accordingly, the committee recommended that where a tribunal is of a class which almost exclusively deals with any of these three types of case the hearing should be in private. All other tribunals should sit in public "subject to a discretionary power in the Chairman to exclude the public should he think that a particular case involves any of these considerations"⁴⁵.

The principles enunciated by the Franks Committee apply with equal force to South Australian tribunals. A general rule reflecting these principles should be included in the code of procedure to govern all tribunals.

(H) LEGAL REPRESENTATION

A very few statutes expressly provide that parties may have legal representation before the relevant tribunals; some appear to allow it by implication, as for example a provision which permits appearance "in person" before the Board, a formula which, under the present trend towards greater justice in administrative adjudication, is likely to be regarded as co-terminous with a right to counsel⁴⁶. However, the great majority are silent on the matter and few forbid it.

Since the Franks Report, the right to legal representation before tribunals in this State has received greater recognition. By and large, however, the position with respect to representation is unsatisfactory. It is submitted that the strongly-expressed view of that Committee, viz. that:

"this right (to legal representation) should be curtailed only in the most exceptional circumstances, where it is clear that the interests of applicants generally would be better served by a restriction"⁴⁷

should be implemented here. Accordingly a rule in the general code of procedure should confer this right save in respect of named tribunals. That is to say, there *may* be grounds for asserting that in respect of the proceedings of certain tribunals the exclusion of a right to legal representation is unlikely to

44. Franks Report, paras 76-77, at 19.

45. *Id.*, para. 81, at 20.

46. Of course such a formula is ambivalent, and may be regarded by a tribunal as empowering it to refuse a person attending before it has access to counsel while allowing the person himself to remain. It is obviously preferable that the right to counsel should be concomitant with the right of personal appearance, and legislation is thus needed to dissipate the ambiguity which might permit the sort of capricious denial of the right referred to above. The reasons for excluding legal representation, and matters relevant to the questions of an implied right to legal representation are critically considered in de Smith, *supra* n.35, at 200.

47. Report of Committee on Administrative Tribunals and Inquiries, Cmnd. 218 (1957), para. 87, at 21.

prejudice the interests of the parties before the tribunal, while to permit it might very well prove disproportionately harmful to the work of the particular tribunal. For example it has been argued that "many tribunals deal with matters of a specialized and technical character about which lawyers have little or no knowledge. The presentation of a case to a tribunal that is concerned with evaluating policy rather than with determining whether evidence is true or false calls for techniques of a different kind from those of the ordinary lawyer." Certainly such claims are in need of greater verification particularly since in proceedings before the ordinary courts lawyers are frequently required to come to grips with highly technical matters of a "non-legal" character. This could only be provided after a close examination of the work of each tribunal. The concern of the writer is only to point out the existence of such arguments, and to preserve the rights, as it were, of those who argue for a limited range of exceptions to the general principle of legal representation⁴⁸.

(I) PRIVILEGE

Most statutes are silent on the question whether witnesses and advocates are to be absolutely protected from legal proceedings in respect of evidence or representations made at a tribunal hearing⁴⁹. The legal position is clearly established that witnesses and counsel appearing before regular courts have such an immunity. Such a rule is founded on the proposition that it is essential in the interests of justice to remove any inhibition on the freedom of expression so that the truth may be fully ascertained. The same principles, as the Franks Committee recognised⁵⁰, apply to proceedings before administrative tribunals. A general immunity should therefore be afforded in the code of procedure.

(J) FINDINGS AND REASONS

One would think that any tribunal making decisions affecting private rights ought to be obliged to state its findings upon all material questions of fact, law and discretion and give reasons for deciding in the way in which it does on these issues. Such utopian assumptions, however, are far from vindicated on examination of the actual situation. It is rare for the relevant legislation to require this, and just as infrequent in practice for such findings or reasons therefore to be provided⁵¹. The advantages of requiring a reasoned decision have been explained in the following way:

48. E. Wilhelm, "Legal Representation Before Administrative Tribunals" (1969) 43 A.L.J. 64 at 65. On the general topic of representation before administrative tribunals see further Wilhelm, *supra*; N. D. Vandyk, (1967) 41 Sol. Jnl. 642.

49. The legal position is by no means clear, although de Smith takes the view that "a narrow conception of 'judicial' has prevailed in cases where it has been sought to establish that the proceedings of administrative tribunals are judicial proceedings for the purpose of attracting absolute privilege. . . ." *Supra* n.35, 78-9.

50. Report of Committee on Administrative Tribunals and Inquiries, Cmnd. 218 (1957), para. 82, at 20.

51. The failure of legislation to require reasons to be assigned for decisions has on occasion been the subject of unfavourable judicial comment: e.g., Hardie J. in *Gosford Shire Council v. Bundale Pty. Ltd.* (1969) 89 W.N. (Pt. 1) N.S.W. 648, esp. at 653.

"If a reasoned decision is required, it is more likely to be a reasonable and satisfying one simply because the tribunal will necessarily have to evaluate the evidence and apply the relevant law in a rational way. In short, a reasoned decision is less likely to be arbitrary or capricious. Moreover, the aggrieved party can better assess the advisability of an appeal if he knows the grounds of the decision against him"⁵².

Orr summarises the American position in the following way:

"In America virtually all federal and state courts, irrespective of any statutory requirement, have insisted that administrative agencies state their findings of fact. This is principally to facilitate judicial review, which includes review of the facts on the basis of the 'substantial evidence' rule. Other reasons have to do with avoiding judicial usurpation of administrative functions, assisting parties to prepare their cases for rehearing or judicial review, and keeping agencies within their jurisdiction. The Massachusetts Act (s.11(8)) provides:

Every agency decision shall be in writing or stated in the record. The decision shall be accompanied by a statement of reasons for the decision, including determination of each issue of fact or law necessary to the decision, unless the General Laws provide that the Agency need not prepare such statement in the absence of a timely request to do so . . . The Federal Administrative Procedure Act 1946 (s.8(b)) requires: findings and conclusions, as well as the reasons or basis therefore, upon all material issues of fact, law or discretion presented on the record . . . to be included. Moreover, the United States Supreme Court has insisted on administrative agencies stating reasons in order to facilitate review"⁵³.

It should be noted, however, that the stringent requirements of the Massachusetts Act are relaxed when a statute provides that findings and reasons need not be given unless a timely request is made to the agency concerned. It would be placing an unduly onerous burden on some of our tribunals if in every case they were automatically required to give a fully reasoned decision; a similar relaxation accordingly appears justifiable in this State.

Other Proposals

(i) *The Committee on Ministers' Powers* (1932).

A recommendation of the Committee on Ministers' Powers in its report (commonly referred to as the Donoughmore report), presented to the United Kingdom Parliament in 1932, should also be adverted to briefly in this context. The Donoughmore Committee recommended in respect of decisions of all Ministers or ministerial tribunals to whom the function of adjudication is assigned that:

"(c) Any party affected by a decision should be informed of the reasons on which the decision is based; indeed it is generally desirable that the fullest amount of information compatible with the public interest should be given.

52. Orr, *supra* n.9, 74.

53. *Ibid.*

(d) Such a decision should be in the form of a reasoned document available to all parties affected. This document should state the conclusions as to the facts and as to any points of law which have emerged . . ."⁵⁴

(ii) *Franks Report* (1957).

In 1957 the Franks Committee recommended that "reasons should be given to the fullest practicable extent"⁵⁵. As a result of this recommendation the Tribunals and Inquiries Act 1958 (U.K.) (s.12(1) and (2)) requires any specified tribunal:

"to furnish a statement either written or oral, of the reasons for the decision if requested, on or before the giving or notification of the decisions, to give the reasons."

Now it will be recalled that the Donoughmore Committee called for a statement of conclusions *as to facts* as well as law in a reasoned decision. The Franks Committee, however, was less precise in its recommendation. The consequence of this is a somewhat ambivalent statutory provision reflecting the elliptical nature of the recommendation of the Committee, which fails to state expressly that material findings of fact are to be included in the statement of reasons.

On balance it seems clearly preferable that the general code of procedure should impose a specific obligation on all tribunals to state in writing their material findings of fact, law and discretion and reasons for their decisions⁵⁶ on these matters, unless exempted from this obligation by other legislation either absolutely or in the absence of a "timely request" to do so.

(K) NOTIFICATION OF RIGHT OF APPEAL

The Franks Committee regarded it as essential that parties not represented by counsel at the hearing should be personally advised of the tribunal's decision, and of their rights of appeal, if any⁵⁷. These matters are on occasion specifically prescribed in respect of some South Australian agencies, and there is no reason why this should not be made uniformly applicable to all tribunal and agency proceedings.

IV. An Administrative Procedure Act⁵⁸

(A) CONTENTS

Obviously no two tribunals are concerned with identical problems. The fact that in the performance of their functions they will be called upon to evaluate different sets of legal, political, social and economic factors and data

54. Donoughmore Report, Cmnd. 4060 (1932) at 100.

55. Para. 98, at 24.

56. The requirement of reasons for a "decision" is intended under this proposal to cover those agencies which make reports and recommendations following investigation. Although for technical reasons they have not in the past been treated as *decisions*, they are "tantamount to decisions to the extent that they are acted upon without further open inquiry". Wickham, *supra* n.19, 95.

57. *Id.*, para. 62, at 15.

58. What follows is based substantially on Orr, *supra* n.9, ch. 11, paras. 215-218, at 76-77.

in their decision-making processes militates against any single comprehensive code of procedure being imposed on all tribunals. However, recognition of these factors in no way refutes the proposition that it remains highly desirable to lay down certain minimum requirements. These standards should be formulated in an Administrative Procedure Act, which should list all tribunals to which the Act applies, either in the definition section of the Act, or in an appendix thereto. Tribunals should be exempted from the operation of the Act only to the extent that compliance with particular provisions would render their work ineffective.

The following basic requirements, extrapolated from the earlier discussions, might with benefit be included in the proposed statute:

- (a) Notice of the time, place and issues to be given to all parties with adequate opportunity to prepare for the hearing⁵⁹.
- (b) Evidence: Tribunals need not observe the strict rules of evidence but should admit and act upon evidence only, in the words of the Massachusetts Act, "if it is the kind on which reasonable persons are accustomed to rely in the conduct of serious affairs"⁶⁰.
- (c) Evidence: All parties should have the right to call and subpoena witnesses, introduce exhibits, cross-examine, and call rebuttal evidence⁶¹.
- (d) Official Notice: Tribunals may take notice of general, technical or scientific facts within their specialised knowledge, provided they first give notice to the parties and an opportunity to contest such facts⁶².
- (e) Public Hearings: All hearings should be in public except for strictly limited classes such as those affecting national security, intimate personal or financial matters, and professional capacity and reputation⁶³.
- (f) Legal Representation: The right for parties to appear by counsel should be guaranteed save in the few cases where the parties have agreed otherwise⁶⁴.
- (g) Privilege: All witnesses and counsel appearing before the tribunals and the members thereof should be absolutely privileged from legal suit in respect of evidence given or statements made at tribunal hearings⁶⁵.
- (h) Findings and reasons should be given either as of right or on timely request⁶⁶. In this context the concept of a "reasoned decision" encompasses the reports and recommendations of investigating tribunals or agencies⁶⁷.
- (i) Notification of right of appeal: parties unrepresented by counsel should be advised of their rights of appeal and the time limits on appeal⁶⁸.

59. See text at notes 36 and 37.

60. See text after n.37.

61. See text after n.38.

62. See text after n.42.

63. See text after n.43.

64. See text at ns.46, 47, and 48.

65. See text at ns.49 and 50.

66. See text at and following n.51.

67. See n.56 *supra*.

68. See text at n.57.

The need for variation in the structure and composition of administrative tribunals is readily apparent and any attempt to impose a single uniform pattern will destroy their efficacy. Consistent with this need is the desirability of including in the Administrative Procedure Act provisions, previously stated:

- (i) Establishing a uniform method of appointment of members, preferably by the Governor in Council;
- (ii) Requiring the prior approval of the Attorney-General to the appointment of chairman and similarly at least in respect of those members in relation to whom no special qualifications are stipulated, and ideally it would seem even in respect of those required by the relevant legislation to have special qualifications;
- (iii) Requiring a fixed term of office, preferably not less than three years, to be stipulated in respect of membership of all tribunals, and rising to five years in the case of appellate tribunals.

(B) ADVANTAGES OF PROPOSED ACT

If tribunals are obliged in future to comply with these minimal procedural standards several advantages will accrue.

- (i) Parties and their legal advisers will know in advance the broad outlines of the procedure that must be followed by tribunals. It will no longer be necessary for them to wait until the hearing itself to find out how it will be conducted.
- (ii) Parties appearing before tribunals will have a greater assurance that the basic requirements for a fair hearing will be met.
- (iii) Tribunals will remain free to prescribe detailed rules.
- (iv) Public confidence in the work of tribunals will be enhanced by virtue both of fair procedures and the giving of reasoned decisions.
- (v) The work of appeal authorities will be facilitated by a more orderly procedure on the part of the inferior tribunals and the requirement that they give reasoned decisions.

This final point leads us to a consideration of the remaining matter to be discussed in this article.

V. Administrative Appeal Authorities

(A) INTRODUCTION

It is apparent after a fairly detailed examination of the relevant tribunals, agencies and functionaries operating in this State that by and large our system of administrative adjudication recognizes the desirability of a right of appeal, either to the ordinary courts, or to a specialised appellate administrative tribunal or agency⁶⁹. On closer examination, however, what confronts us

69. See unpublished thesis, *supra* n.1, chaps. one to seven and appendices thereto. The Franks Committee accepted this right as almost axiomatic in its Report of 1957, para. 104-105 at 25. The basic rationale of all review is that no body of persons, however fair, conscientious and proficient can claim infallibility; thus as a general proposition some form of appeal process constitutes a necessary and, some would say, an indispensable safeguard against abuse in the administrative process. Even so, in many instances there is no right of appeal provided, and

is a bewildering and somewhat incoherent variety of different statutory appeal formulae. Sometimes it is a general right of appeal; on other occasions appeal is permitted on matters of law only. This however is only the beginning of a process which exhibits an almost endless variety of formulae including appeal by way of *de novo* consideration; appeal as of right; and appeal by way of a rehearing. Moreover once exercised these appellate powers may lead to quashings, affirmances, variations, denials, substitutions, references back, directions, etc. Indeed one might fairly summarise the present position with the no doubt hyperbolic observation that for the man with an eye for detail, there would seem to be as many classes of statutory provision for review as there are administrative tribunals and agencies available for surveillance.

(B) JUDICIAL REVIEW

In this section discussion is centred primarily on the statutory review procedures which in varying degrees permit or envisage review of the merits of administrative decisions. It is well recognised that the scope of non-statutory (common law) review of the factual, legal and discretionary elements of administrative decisions is far more restricted than the scope of review permitted by some statutory rights of appeal on the merits⁷⁰. In Anglo-Australian administrative law the courts have jurisdiction to keep administrative agencies within their legally circumscribed limits, but no general jurisdiction to act as courts of appeal from them on the merits unless such jurisdiction has been conferred by statute. What is material therefore is not statutory, but inherent jurisdiction.

As a final observation it is worth noting that the scope for judicial review by courts in America is undoubtedly greater. Their powers encompass not only those traditionally held by courts in the exercise of their inherent supervisory mandate, i.e., determining whether an agency decision is vitiated by excess of jurisdiction or error of law; whether it involves constitutional questions (including due process), and whether or not it should be stigmatised as arbitrary or capricious, but encompass also the competence to determine whether the decision is supported by "substantial evidence". Although not entirely germane to the theme of the present article, it seems worth interpolating the exhortation, "*obiter*", as it were, that this salutary principle of review be incorporated into the agency-control weaponry of our own courts at the earliest opportunity.

(C) PRESENT APPEAL PROVISIONS

Just as there is an extraordinary variety of administrative tribunals so there is a wide range of appeal authorities, encompassing such disparate organs as,

in others it is specifically excluded. It is true that arguably no such right can sensibly be given unless the quality of the final decision may reasonably be expected to be at least as good as and preferably better than that of the original decision, or where it would be impracticable to do so. On the other hand, in many instances it does not appear that any such rational principles of practicability or necessity differentiate those tribunals in respect of whose decisions an appeal is given and those in respect of which an appeal is either not provided or specifically excluded. It is beyond the scope of the present article to pursue this further, but it is clearly a matter demanding of further attention.

70. For a comparison of statutory appeal and non-statutory review, see K. J. Keith, "Appeals from Administrative Tribunals" (1969) 5 V.U.W.L.R. 123, 153-159.

on the one hand, ministers of the Crown and ad hoc ministerial appointers, and on the other the Supreme Court⁷¹. In so far as any principle, or even the tendency towards the adoption of some principle, may be discerned, it is to create a special appeal authority where the number of appeals is thought to justify this course, but otherwise to assign the task to one of a number of inferior judicial bodies within the curial hierarchy, including special magistrates, local courts of summary jurisdiction, justices of the peace and finally the Supreme Court itself (including a judge thereof).

Magistrates and local courts, it is well known, were constituted to exercise limited jurisdiction in civil and criminal matters. The demands of these jurisdictions are ever-increasing, notwithstanding the recent setting up of an intermediate courts system in this State. As well as this, they have tended to acquire additional areas of responsibility over the course of time in such disparate fields as rent control and liquor licensing. In the light of this already considerable burden the wisdom of treating inferior courts and judicial officers as a ready-made or residual source from which to create administrative appellate bodies may be seriously questioned. Moreover, it is at least arguable that these inferior courts and judicial officers are vested with appeal jurisdiction not because they are regarded by the legislature on the basis of verifiable empirical data to be inherently better suited to adjudicate upon appeals from administrative bodies, but rather for reasons of expediency. If this is the case, serious doubts must inevitably arise as to whether they possess the necessary expertise adequately to determine these matters on appeal.

(D) THE SUITABILITY OF THE SUPREME COURT AS A REVIEW FORUM

The Supreme Court (including the Land and Valuation Court) has been constituted the administrative appeal authority in respect of some forty agencies in this State. By and large its powers of review are contained in general appeal provisions which envisage review of the merits of the relevant agency's decision, although on occasion the formula limits appeal to "questions of law" or in some other way. The difficulty with general appeal provisions, however, is that they can be very differently interpreted by different judges. They can be seen as authorizing a wide ranging "de novo" investigation of the merits of the whole question, or they can be read narrowly as permitting no more than a determination whether the agency has erred in law, or made a mistake of principle.

(E) CONTRASTING APPROACHES

(a) *The "Wrong Principle" Approach*

Under this approach, superior courts have given considerable weight to the fact that the decision appealed from is not that of a regular court but of an expert body which is relying to a large degree upon its specialist knowledge of a particular area of concern. The courts have characterised the process of adjudication by such bodies as involving "a discretion". An outstanding

71. Of the two hundred odd tribunals, agencies and functionaries elsewhere considered by this writer (see unpublished thesis, *supra* n.1, both text and appendices), a right of appeal to a court (superior or inferior) or special appeal body was found to exist in eighty-nine cases.

example of this approach is afforded by the judgement of Finlay J. in the *Motor Spirits Licensing Case*⁷².

In an appeal to the Supreme Court from the decision of the Motor Spirits Licensing Appeal Authority, which had reversed a decision of the Licensing Authority granting a retail licence, Finlay J. placed strict limits on the appellate functions of the Supreme Court. He construed the statute, which on its face appeared to authorise full review, as conferring jurisdiction to determine only the question of whether or not the discretion of the Appeal Authority had been exercised according to law. His reason for so narrowly construing the scope of the appeal was that:

“The subject-matter of the appeal is essentially a matter of administration involving the exercise of discretion of an ad hoc body. The Licensing Authority must be assumed to have, and no doubt, has a knowledge of the whole business of vending of petrol, including a knowledge of all its incidents. The exercise of the functions of the authority necessarily postulates its knowledge of that knowledge. A similar knowledge must be attributed to the Appeal Authority. Any question concerning the sale of petrol which comes before the Licensing Authority or the Appeal Authority comes, therefore, before a tribunal having an instructed mind qualified, in consequence, by special knowledge to reach a wise and just conclusion on all questions of administrative discretion or policy. None of the regular Courts of the country can have that special knowledge and must always feel under some disability in determining questions in which policy and discretion are involved . . . It is, to say the least, unlikely that the Legislature intended to clothe the Supreme Court, which has no specialized knowledge of the matters involved with jurisdiction to determine in respect of matters of policy or administration, which of the two Authorities having the specialized knowledge, has exercised the statutory discretion the more wisely or properly”⁷³.

Australian courts have also on occasion adopted a similarly restrictive approach, notwithstanding the fact that the words by which the right of appeal was conferred were general in nature⁷⁴.

(b) *The “Complete Substitution” Approach*

Under this approach a general appeal provision is interpreted according to what appears to be the plain meaning of the language. Thus in a number of New Zealand decisions, judges have taken the general words of appeal provisions not simply as empowering but placing them under a duty to decide appeals from administrative tribunals “de novo”⁷⁵.

72. *Central Taxi Depot (Rotorua) Ltd. v. New Zealand Retail Motor Trade Assn.* [1959] N.Z.L.R. 1167.

73. *Id.*, at 1168-1169 (emphasis added).

74. E.g., *In Re Thompson's Application* [1964] Tas. S.R. 129, at 134ff.; *Kalliontzis v. Citrus Industry Organisation Committee* [1966] S.A.S.R. 294 (Travers J.).

75. See Wilson J. in *Re Lee's Appeal* (No. 2) [1965] N.Z.L.R. 1002, at 1003; and see further cases cited and discussed by Keith, “Appeals From Administrative Tribunals” (1969) 5 V.U.W.L.R. 123, 143-145, 146-148.

(c) *A "Via Media"*

In a most valuable article, Keith⁷⁶ suggests that there are several factors relevant to the scope of appellate review of the exercise of a discretion; this means in consequence that one may arrive at an approach which, according to the mix of these factors, will lie at a point somewhere along a continuum between two extreme attitudes; viz. at the one end what may be characterized as the "wrong principle" approach, and at the other what may be characterized as the "de novo" approach. These factors expressed "seriatim" are:

- (i) the legislative language;
- (ii) the composition, experience and independence of the original body;
- (iii) the nature of the appellate body;
- (iv) form of proceedings of original authority;
- (v) form of proceedings of appeal court;
- (vi) the interests involved;
- (vii) uniformity of administration;
- (viii) width of discretion conferred⁷⁷.

Keith's view is that once these factors are admitted, "providing for a general appeal in respect of such decisions will be only a short first step in the working out of the appropriate scope of review between the appeal court and the tribunal"⁷⁸.

Whether the Supreme Court continues to act for the time being in the capacity of an appellate authority on an "ad hoc" basis, or whether in future we acquire a system of administrative courts, either integrated with or entirely separate from the existing Supreme Court structure, these are matters which would always appear to be relevant in the determination of appeals from administrative agencies⁷⁹.

Finally, so long as the legislature intends to continue with its present "ad hoc" approach to the administrative appellate structure, it might be desirable if it were to attempt to give a direction to the appeal court or tribunal as to which role it should adopt. Possible legislative formulae are the following:

- (i) appeals on all questions of law;
- (ii) (general) appeals (as if) from the exercise of a discretion (which might not differ in practice from (i));
- (iii) general appeals from a decision which is characterised as one of law application;
- (iv) appeal by way of a "de novo" rehearing as if the proceedings had been properly and duly commenced in the appeal court or tribunal⁸⁰.

76. *Supra* n.75.

77. *Id.*, 148-153.

78. *Id.*, 151.

79. Some of the factors involved in determining the proper scope of review on appeal from a specialist administrative agency are mentioned in the recent N.Z. Court of Appeal judgments in *Boots (N.Z.) Ltd. v. Tews Pharmacy Ltd.* [1969] N.Z.L.R. 890, at 904-905, 913-914, 922-923.

80. Keith, *supra* n.75, 161.

(F) REFORM OF THE REVIEW PROCESS: A PRELIMINARY PROPOSAL — THE NEED FOR A CENTRAL REVIEWING TRIBUNAL

The existing appeal structure in this State for review of the merits of decisions of tribunals is in many respects haphazard and fragmented. There are many reasons why, with the continued growth of administrative tribunals, we should seriously consider consolidation and rationalisation of this disparate congeries of appeal rights. Until we do so, administrative justice will continue to be administered unevenly. The method proposed in this article is the creation of a central reviewing body into which would be channelled all appeals from the decisions of the tribunals in respect of whose decisions an appeal was thought to be appropriate⁸¹.

Leaving for the moment the precise nature of this central agency and the matter of its relationship to the ordinary courts, it is appropriate first to consider the advantages of such a body. In the first place it would do much to improve the quality of fact-finding; and the application of policy in the light of the facts found. It would obviously make the appeal structure more efficient, both in terms of logistics, and in terms of reducing the present relatively isolated state of one appeal authority from another. It would promote the interaction and exchange of ideas amongst its personnel, and should substantially contribute to the creation of a body of settled principle which will be valuable for the integrity and development of the administrative process. Finally, it should do much to restore the waning faith of the public in administrative justice. A haphazard and unco-ordinated system must inevitably produce dissatisfaction, and in view of the importance of tribunal decisions, it is imperative that the public should be convinced that they are receiving the best justice available. A central co-ordinating body of high calibre is the best way of securing this conviction before it becomes too late. What form should his body take, and what would be its relationship to the ordinary courts?

The central appellate body might take a number of forms; a short⁸² consideration of the merits and demerits of a number of possible proposals is now appropriate.

(a) *The Supreme Court*

The grant of a general right of appeal from administrative tribunals to the Supreme Court has one great disadvantage. Most administrative tribunals have been established because as autonomous expert bodies with specific functions they can handle the issues more competently than the ordinary courts. It is inconsistent with the legislature's original decision to delegate these functions to expert bodies thereafter to allow general appeals on the merits from such tribunals to the Supreme Court. In short "appeals would lie

81. In other words, the creation of the central reviewing organ would provide an opportunity to rectify any anomalies in the existing appellate structure, particularly in regard to providing a future right of appeal where none is presently given, but appears nevertheless to be both practicable and desirable.

82. Any adequate examination of the precise nature of this central agency, i.e., its composition, powers and procedures, and the crucial matter of its relationship to the ordinary courts would demand a full length article in itself. What is herein offered is no more than a preliminary examination of the more important merits and demerits of some possible models which might be looked at in evaluating the proposal for a central appellate agency.

from expert tribunals to an inexpert general appellate body"⁸³. From this it would appear necessarily to follow that if the legislature has established a tribunal for its expertise, its decision on the merits should as a general proposition only be reviewable by a body of at least equal and preferably greater expertise.

The great advantage of the Supreme Court as a review forum is that it enjoys "universal, even if sometimes grudging confidence" because of "the impartiality, incorruptibility and bias in favour of the freedom of the subject which characterises our judicial system"⁸⁴, a matter which assumes considerable importance in later proposals to be considered.

(b) *A general administrative appeal court (or tribunal) separate from the Supreme Court.*

The Statute Law Revision Committee of the Victorian Parliament in its Report of 12 February, 1968, recommended the creation of an Administrative Appeals Tribunal to hear appeals from many of the State's administrative tribunals⁸⁵. This proposal is significant in the present context for the reason that it favoured an appeal body which would be outside the normal court structure. In reaching this conclusion the Committee was guided by the arguments of the Chief Justice for keeping such an appeals tribunal formally outside the framework of the Supreme Court. His Honour's reasons are summarised in paragraphs 36 and 37 of the Report, and included inter alia the proposition that as the tribunal would be operating in the field of the executive branch of government, it would be unwise to give it the character of a judicial body, particularly as confidence in the judicial branch of government might be weakened if the Judiciary were brought into an area of administration where public controversy often runs high. By and large the Committee does not seem to have been impressed by the Franks Committee's reasons for rejecting a similar proposal in 1957, although it does appear to have taken the point that the courts should retain control over questions of *jurisdiction* by tentatively recommending an appeal to the Supreme Court from the appeals tribunal on questions of law⁸⁶.

The Victorian Committee's proposal has been justly praised as "an important and constructive contribution in an area in which Australia has been making appallingly slow progress"⁸⁷. It reflects very closely a well-argued proposal by Mr. G. S. Orr for an Administrative Court for New Zealand separate from the Supreme Court⁸⁸, and might ultimately be considered appropriate for this State with or without modification. In this writer's opinion, however, it has a number of disadvantages. First, an administrative appeals tribunal separate from the Supreme Court, and thus formally constituting part of the administrative structure is less likely to attract confidence and respect

83. Franks Committee Report, para. 125.

84. "Federal Administrative Agencies and the Citizen", a position paper presented by Mr. Justice Zelling to the Executive of the Law Council of Australia (1969), 4 Law Council Newsletter (Pt. 4), 25, 26.

85. Report, para. 40, at 9.

86. Report, para. 38.

87. (1968) 42 A.L.J. 38, 39.

88. See Orr, *supra* n.9, ch. 13.

than if it were attached to the judicial branch of government. In other words, the grounds for arguing that it should not appear to be "operating in" the field of the executive government appear to be at least as cogent as those which would exclude it from the judicial hierarchy. Second, it would appear desirable that quite apart from its appellate powers, such a tribunal should exercise a general supervision over inferior administrative tribunals, e.g., for jurisdictional error, error of law and breach of natural justice. At present these would provide grounds for the issue of the prerogative and equitable remedies by the Supreme Court, and yet there are powerful arguments favouring an *exclusive* supervisory jurisdiction for the appeals tribunal. While solution of this problem is probably not insurmountable⁸⁹, it is nevertheless a difficult matter which could easily be resolved by making the appellate tribunal part of the Supreme Court. Third, as was pointed out by the New Zealand Public and Administrative Law Reform Committee in 1968⁹⁰, such a tribunal would be regarded as inferior to the Supreme Court and would not, therefore, attract the best qualified persons to sit on it, nor create the confidence of the parties subject to it. Finally, it might well give decisions which were inconsistent with decisions of the Supreme Court.

(c) *An Administrative Division of the Supreme Court*

This is the proposal with the greatest attraction for the writer. It is the solution which after long and careful consideration of a number of proposals, including that of G. S. Orr previously referred to⁹¹, commended itself to the New Zealand Public and Administrative Law Reform Committee, whose report was subsequently enacted into law by the Judicature Amendment Act, 1968. It seems appropriate to examine this proposal in order to determine whether there are any features which render it peculiarly appropriate or inappropriate as a model for this State⁹².

The central feature of the New Zealand proposal is that the appellate body is a division of the Supreme Court, staffed by Supreme Court judges. This raises "in limine" the controversial matter of *expertise*. The view has been expressed that "prima facie" *total* review of the merits of a decision is wasteful. The taking of effect of the original decision is usually delayed and time and money are expended in going through the same material to reach a second or even a third opinion⁹³. Positive reasons for this apparently wasted effort must therefore be adduced. The most compelling of these reasons is that the

89. See Orr, *supra* n.9, 87.

90. See note by D. E. Paterson in (1968-69) 3 N.Z.U.L.R. 351, at 354.

91. *Supra* n.89.

92. The following literature on the New Zealand proposal may usefully be referred to: D. E. Paterson, note on the First Report of the Public and Administrative Law Reform Committee (Judicature Amendment Act, 1968), (1968-69) 3 N.Z.U.L.R. 351; J. F. Northey, "An Administrative Division of the New Zealand Supreme Court—A proposal for Law Reform" (1969) 7 Alberta L.R. 62; J. F. Northey, "The Changing Face of Administrative Law" (1968-69) 3 N.Z.U.L.R. 427 at 436-439; J. R. Macken, "The Supreme Court—An Administrative Division" (1968) N.Z.L.J. 97. For a somewhat censorious view of this development see J. A. Farmer "Administrative Division of the Supreme Court—An Experiment in Administrative Suicide" (1969) N.Z.L.J. 106.

93. See K. J. Keith "Appeals from Administrative Tribunals" (1965) 5 V.U.W.L.R. 123, at 162.

further opinion is likely to be better. The quality of an administrative decision is in large measure determined by the expertise of the administrative tribunal, and is unlikely to be improved by granting a general right of appeal to the ordinary courts, which are inexpert bodies. The charge of lack of expertise does not, however, seem to be irrefutable when considered in the light of the New Zealand proposal.

In the first place, there is no inherent reason why a legal training should not at the same time impart to lawyers a real understanding of the policy considerations implicit in the administrative process and of the economic and social questions which are attempted to be solved by many legislative schemes. Those appointed to the new Division would naturally be chosen for their acuity and expertise in the relevant areas of public administration, as well as for their general legal acumen. Moreover, there is no reason why they should not in appropriate cases be able to invoke the assistance of experts when advice might be needed in technical matters beyond their competence. In the second place, it is not simply pride of profession which induces the belief that a sound academic and practical training in the law develops a capacity to identify and appreciate the breadth, significance and interaction of the relevant issues, and to attain insights necessary to achieve appropriately balanced and just results. These, of course, are qualities which should be borne in mind in making the judicial appointments to the new division. Finally, there is the unique capacity of a court to integrate and synthesise; it is submitted that in this regard coherence in the administrative process is just as desirable as coherence in the general legal system. As Sir Richard Wild expressed it: "It is a question whether the really important decisions affecting the citizen are being made by the men best qualified by training and experience to make them; whether the community is losing the benefit of the influence of the courts in moulding the law in action"⁹⁴. The answer is that the courts are at the moment *too far* from the administrative decision, hence their lack of expertise in the administrative field. The New Zealand proposal appears to answer the charges of inexpertise while at the same time providing the structure of administrative adjudication with the unique gifts of the judicial branch of government.

One other point worth making is that once it is conceded, as the creation of an Administrative Division implies, that the inferior tribunal does not have a monopoly of expertise, there is even less justification for the enactment or retention in the legislation setting up tribunals of privative clauses which to a greater or less degree purport to oust review of their acts and decisions.

(d) *The Administrative Division of the New Zealand Supreme Court*

The following description is taken from Dr. Paterson's summary of the New Zealand Committee's proposal⁹⁵. It is suggested that it forms a very valuable starting point for reform proposals in this State; it is further suggested that the basic concept, viz. that of integration *within* the Supreme Court structure,

94. Rt. Hon. Sir Richard Wild, C.J., "The Place of the Administrative Tribunal in 1965", Proceedings of the Third Commonwealth and Empire Law Conference, 1966, 80.

95. (1968-69) 3 N.Z.U.L.R. 351, at 354, 355.

should be incorporated into any reforms which may subsequently be initiated here⁹⁶. The relevant passages read as follows:

'A number of ancillary recommendations were made by a majority of the Committee . . . flowing from their basic recommendations as to the conferring of appellate jurisdictions upon some judges of the Supreme Court. They recommended that those judges should be collectively described as the Administrative Division of the Supreme Court and that any one such judge could exercise the powers of the Division although 'in cases of special importance we envisage that a full court (probably comprised of three judges) of the Administrative Division could sit'. The majority suggested that judges should be assigned to the Administrative Division by the Governor-General but that judges so assigned should have, in addition to the qualities appropriate to judges of the Supreme Court. 'A full appreciation of the need to give effect to the economic and social policies the legislation was designed to implement'. It considered that a *degree of specialization* by judges of the Division 'is clearly desirable so that the virtue of consistency is not lost', and that the judges would when necessary travel throughout the country. The committee stated that there should be no bar to the appointment of lay members or assessors to sit with the court 'if and when desirable', although it made no attempt to indicate when that would be. Two recommendations of a general nature were made about the procedure of the Administrative Division: it 'should not be more expensive . . . (nor) more formal than that of appellate administrative tribunals' (para. 36 (iv) and (v)) . . .

. . . The majority of the Committee . . . recommended that the inherent jurisdiction of all judges of the Supreme Court to control official action by way of the extraordinary remedies should be exercised by the judges of the Administrative Division alone, on the ground that 'in general it is obviously desirable that all administrative law cases at a certain level should be dealt with by the same group of judges' (para. 34). The judges of the Administrative Division would of course retain all the jurisdiction of a judge of the Supreme Court and 'would also perform other Supreme Court work when required' (para. 36 (i)).

There should 'generally' be a right of appeal from the Administrative Division to the Court of Appeal⁹⁷ . . . but only on *questions of law*⁹⁸.

By and large these proposals have been enacted into law by the Judicature Amendment Act 1968. One significant deviation from the Report concerns the

96. Indeed, it would already appear to have gained acceptance since the presiding judge of the Land and Valuation Court is a Supreme Court judge and the court itself is designated "a *division* of the Supreme Court of South Australia"; s.62c(i) Supreme Court Act, 1935-1969. The work of this newly-created jurisdiction would automatically constitute one of the specialist categories or divisions of the new Administrative Division.

97. There is so far no separate Court of Appeal in this State, but there is no reason why the Full Court should not be substituted if appeal is considered desirable.

98. Thus, perhaps of necessity, but nevertheless in some respects unfortunately, introducing into the proposal the perplexing and controversial fact—law dichotomy: *vide* Northey (1969) 7 Alberta L.R. 62, at 68. The Committee deliberately declined to define the term, and in the case of *land valuation matters* recommended a full appeal on all aspects, fact, law and discretion, to the Court of Appeal.

method of appointment of judges to the Division. The Report contemplated a Division of up to four judges appointed by the Governor-General in Council from those judges and lawyers who were best equipped to give effect to the economic and social policies of the legislation. The Act provides for assignment to the Division of not more than four Supreme Court judges by the Chief Justice, avowedly to avoid any possible suggestion of political influence. It is apparent, however, that this is a compromise solution designed to avoid the appointment of additional Supreme Court judges at a time when the jurisdiction of the Division would not be sufficiently demanding to warrant their appointment. Regrettably, therefore, the possibility of appointment of special-ists not already judicially entrenched has been foreclosed⁹⁹; this solution would not, however, necessarily have the same pragmatic urgency in South Australia.

(e) *Other Proposals*

(i) *The French Conseil d'Etat*

Any discussion of the appropriate curial structure for review of the decisions of administrative tribunals inevitably conduces to a discussion of the merits and demerits of that great monument to Napoleon's administrative genius, the Conseil d'Etat. In this article the philosophy of a separate system of administrative courts has been rejected, and for that reason alone it is not proposed to consider in detail the workings of the French exemplar of such a system. Moreover, even if one were to accept the concept of a separate hierarchy of administrative courts, it would seem to be inappropriate and unwise to attempt to reproduce in this State features of the French and other systems called into existence by historical, political, social and economic factors which have no ready analogy with our own experience¹⁰⁰. On the other hand, there are many aspects of that institution which most certainly demand our attention, and provide insights into how our own system may be improved. For example, it would undoubtedly prove valuable to examine the organizational and training structure which has produced judges possessing such a high degree of administrative expertise. This has been one of the important factors which have given to the working of that Court the qualities which have been so widely admired. Furthermore, we might with equal benefit study its jurisdictional concepts and substantive grounds of review, its procedures and remedies, and its ability to control and supervise the acts and decisions of various bodies, e.g., of local authorities. Such a survey is, however, beyond the scope of the present article¹⁰¹.

(ii) *The Franks Committee's proposal*

The Committee concluded that "in general the appropriate appeal structure is a general appeal from a tribunal of first instance to an appellate tribunal,

99. For a further comment see Farmer, *supra* n.92, at 107.

100. For a discussion of the difficulties involved in transplanting this and other institutions, see Sawyer, *Ombudsman* (Melbourne, 1964), 15-19; J. F. Northey in Rowat, *The Ombudsman: Citizen's Defender* (1965), ch. 6; Marx, *id.*, at 255.

101. For a useful review of the development, structure, and powers of the Conseil d'Etat see the Memorandum of the International Commission of Jurists (Victorian Division) on Administrative Justice in Victoria, 35-39; recent articles on this body are to be found in (1966) Public Law 209; 117 New L.J. 867; (1968) 43 Tulane L.R. 46; 1969 Vanderbilt International 73.

followed by an appeal to the courts on points of law"¹⁰². Reasons have already been adduced in support of a central appeal authority. Suffice it to say that the main argument in support of this highly fragmented, or stratified approach, viz. the peculiar expertise of the appellate body, is not excluded by the other proposals previously examined (with the exception of the Supreme Court). Since its main advantage is not a unique one, it is submitted that the manifestly obvious dangers of unco-ordinated pluralism count heavily against this proposal.

VI. Conclusion

In the foregoing section attention has been drawn to what appear to be two significant deficiencies in the process whereby original decisions of administrative tribunals may be subjected to review on appeal. First, there are at the moment quite disparate powers of review vested in the relevant appeal authorities—the earlier description of this phenomenon as “a bewildering and somewhat incoherent variety of different statutory formulae” does not on reflection appear to have been too strongly expressed. Second, the existing appeal structure is revealed upon examination and analysis to be highly fragmented and lacking coherence.

In the writer's opinion the remedy for both these major defects lies in the same reform package; namely the creation of a central reviewing authority. The setting up of such a body may be regarded as an indispensable first step towards the introduction of a properly structured and defined system of administrative law for the working of administrative tribunals and other agencies within this state¹⁰³. Thus, in postulating the need for some form of central reviewing authority, one is further postulating by and large that its role should be not merely that of ensuring the legality of administrative decision-making, but should also, *where appropriate*, involve a review of the merits of those decisions¹⁰⁴. The caveat implied in the use of the expression “where appropriate” should be explained. Rather than assert baldly that *all* administrative decisions, and in the context of this article, particularly those taken by administrative tribunals, shall henceforth be reviewable by the central agency whether or not there is an existing right of appeal to a special appellate tribunal, one is required to adopt a more subtle, less doctrinaire, approach involving a close examination of the workings of each tribunal. The guide-

102. Report, para. 126.

103. Similar arguments were adduced in support of its proposed two-tier institutional structure of an Administrative Court and an Administrative Review Tribunal by the Commonwealth Administrative Review Committee in its Report of August 1971, (Parliamentary Paper No. 144). For example, para. 357: “We have taken the view that the time has come when a general system of administrative law should be introduced in the Commonwealth and administrative, institutions, including those for review of administrative decisions affecting rights, should be established.”

104. The rationale for review of the merits of administrative decisions is well-expressed in para. 11 of the Report of the Commonwealth Administrative Committee (*supra*, n.103.):

“ . . . when there is vested in the administration a vast range of powers and discretions, the exercise of which may detrimentally affect the citizen in his personal rights or property, justice to the individual may require that he should have more adequate opportunities of challenging the decision which has been made against him . . . in appropriate cases by obtaining review of that decision.”

lines were well expressed in the Report of the Commonwealth Administrative Review Committee:

“Once it is decided to have a general administrative review tribunal, an important function which a body similar to the Council on Tribunals (U.K.) could well perform could be to examine the range of existing administrative decisions in order to consider whether review is desirable in particular cases, and if so whether the review should be by the general administrative review tribunal or by a specialist tribunal. In cases where review is already provided for and a specialist tribunal established, doubtless in some cases the existing and functioning machinery of review would be retained though in some cases examination may show that the function of review could better go to the general tribunal¹⁰⁵.”

Clearly a similar body would have to undertake the same sort of investigation in this State before a final allocation could be made of those tribunals whose decisions should be subject to review by the central authority.

Finally, given the need for a central reviewing agency, we have still to resolve the question of the precise nature of this body, in particular its composition and its relation to the existing institutional structure of government. All that has been attempted in this article is a preliminary evaluation of some possible models. Any extended analysis in depth provides the subject matter for another article. In essence, however, one has four choices:

- (a) that of a general appellate authority quite separate from the existing superior judicial structure.
 - (b) that of a general appellate authority forming part of the superior judicial hierarchy, i.e., an administrative division for the Supreme Court.
- The disadvantages of this proposal (which may be contrasted with the advantages which it is argued would flow from having a separate administrative appeal tribunal) are said to be over-judicialisation; less constructive decision-making; loss of impartiality; loss of informality; less specialisation; loss of flexibility. These are powerful objections. Suffice it to say

105. *Supra* n.103, para 282. The Committee's chosen instrumentality to perform this investigatory task was an Administrative Review Council (see especially Report, ch. 13, 81-85; ch. 18, 103-104). The Committee's recommendation that the setting up of this Council or a similar body be regarded as a matter of priority has been heeded. A Committee on Administrative Discretions is now in the process of considering submissions made to it, particularly in the area of discretionary powers which, as the Administrative Review Committee pointed out (Report, para. 16), have not hitherto been made the subject of thorough-going research, and which, just as much as the decisions of tribunals "vitally affect the daily lives of citizens." (*Ibid.*) Regardless of the findings of the Committee on Administrative Discretions with respect to the desirability of retaining or abolishing existing specialist appellate tribunals in favour of a general appeal tribunal, the Administrative Review Committee considered that it would unearth a sufficient number amongst the many discretions conferred by Commonwealth law to justify the establishment of a general appeal tribunal. (*Id.*, paras 280-281). The topic of discretionary powers conferred under South Australian law has not, of course, been specifically considered in this article. However, the writer would be prepared to found his proposal for a general appeal tribunal upon the same hypothesis with respect to discretionary powers in the South Australian context as the Commonwealth Administrative Review Committee, and has indeed collected a considerable amount of evidence in support of this view.

that it is thought that these problems could be overcome or at least rendered less damaging in practice than is suggested. In particular the objections appear to give too little weight to the fact that the administrative division could make use of assessors or experts, and that the consequent acquisition of expertise combined with the traditional independence of the judicial branch of government might tap sources of public confidence in the efficiency of administrative justice which it would be beyond the power of a body, manifestly fitting uneasily into the traditional tripartite structure of government (unless to be aligned with the executive!) to invoke. In short, a crucial question in making a choice between these two proposals will be which institutional form will attract the greater degree of public confidence.

- (c) A two-tier structure comprising a superior court (or division) to pass upon questions as to the legality of administrative decisions, and a review tribunal, outside the judicial structure, to review the merits of administrative decisions. Such a scheme was preferred by the Commonwealth Administrative Committee in its Report¹⁰⁶ both on the ground of constitutional expediency and, so it would appear¹⁰⁷, as a matter of principle. As one would expect from so distinguished a body, the case for such an approach is cogently argued. To this writer's mind, however, a major difficulty with this proposal lies in the attempt to separate questions as to the legality or "vires" of decisions from questions of the substantive quality of decisions. Experience has at times taught some hard lessons about the illusory quality of the law-fact dichotomy.
- (d) The retention, and where necessary, creation, of an indeterminate number of specialist appeal tribunals. The objection to this approach is that since its main advantage, viz. the peculiar expertise of the appellate body, is not a unique one, the consequent dangers of wasteful and unco-ordinated pluralism count against it.

Thus, the writer expresses an initial preference for a review process integrated with the existing judicial hierarchy, provided always that this proves adequate to give effect to the underlying rationale of the separatist approach, viz. the inculcation of habits of thought, techniques and expertise adding up to "an administrative law mentality", able to cope with the rapid growth of *sui generis* administrative law problems.

106. *Supra* n.103. For a general *précis* of the Committee's Report see "Towards Administrative Justice" (1972) 46 A.L.J.1.

107. *Vide e.g.* Report, *supra* n.103, para 247.