THE TOWN PLANNING APPEALS TRIBUNAL — CONSTITUTION, PROCEDURES AND ROLE

BY JOHN E. MIDDLETON*

[*The Victorian Town Planning Appeals Tribunal was designed to cope with the problem of balancing private property rights and public good. In this article, Mr Middleton discusses the constitution, procedures and role of the Tribunal and evaluates the success with which it fullfils the function of appellate supervision.*]

I. INTRODUCTION

The twentieth century has seen the evolution of the modern administrative state, where hardly any sphere of life remains free from state interference.[1] One learned writer has observed that:

> The State today exercises a degree of control over the individual far exceeding, in scope and intensity, that of any other period in history.[2]

Whether the presence of the modern administrative state is to be acclaimed or denounced, it is a *fait accompli* that has to be accepted as a contemporary reality, with the Rousseauan image of a 'state governed by clerks' perhaps moving closer to reality also.[3] In this context one of the most important problems of our time is posed: the relationship between public order and personal rights.[4]

> Here one is concerned with a situation tantamount to warfare, an arena in which state and citizen meet.[5]

Designed to meet this need of ordering the relationship between the executive and the individual, there has been a rapid growth of administrative tribunals in recent years.[6] One such tribunal to come into existence is the Victorian Town Planning Appeals Tribunal.[7] In that Australian society places a great emphasis on private ownership of property,[8] with the

* LL.B. (Hons), Barrister and Solicitor of the Supreme Court of Victoria.

[1] A system of administrative law is thus important: Jennings W. I., *The Law and the Constitution* (1959) 217.

[2] Friedman W. G., *Law in a Changing Society* (1959) 485.

[3] See Parrington V. L., *Main Currents in American Thought* (1962) Vol. II.

[4] This conflict is not new: see for a historical summary Pound R., 'Liberty of Contract' (1909) 18 *Yale Law Journal* 454, 455-62.

[5] Henning P., 'Thoughts on Administrative Law' (1969) 2 *Comparative and International Law Journal of South Africa* 86, 88.

[6] See generally, Benjafield D. G. and Whitmore H., *Principles of Australian Administrative Law* (1971) 332 ff. Also, see *Age*, 1 June 1976.

[7] Hereinafter referred to as the 'Appeals Tribunal' or 'Tribunal'.

[8] As in England: Dicey A. V., 'The Paradox of the Land Law' (1905) 21 *Law Quarterly Review* 221, discusses this point well.

only limitation being expressed in the maxim *sic utere tuo ut alienum non laedas*,[9] the concept of zoning and town planning is a radical departure from traditional ideas of private property. After all, as Diplock L.J., in *Westminster Bank Ltd v. Beverley Borough Council*,[10] said:

> The whole purpose of planning control . . . is to take away private rights of property. Any refusal of planning permission does just this.

Therefore, the need for an 'arena' to deal with the problem of balancing private property rights against the public good is perhaps more pressing where aspects of land-use control are being considered, than in any other area of public law in countries where the 'functional theory' of property is adopted.[11]

Furthermore, it would appear that citizen participation and interest in the planning process ensures that this area of regional government is not attended by the apathy frequently accorded to other branches of the legislative and administrative process.[12] As Mr T. R. Morling Q.C. has written, '[b]y its very nature town planning tends to precipitate situations in which the landowner finds himself subject to irksome restrictions', so that litigation inevitably arises.[13] Consequently, one of the most important functions of the Appeals Tribunal is to provide such private citizens with a public forum which can correlate expert knowledge and experience both speedily and inexpensively.

II. THE ESTABLISHMENT AND CONSTITUTION OF THE APPEALS TRIBUNAL

In 1968, provision was made[14] for the establishment of the Appeals Tribunal to replace the appeal procedures contained in the Victorian Statutory Rules[15] made by the Town Planning Board.[16] However, despite the previous 'complex, confused'[17] and 'imaginary system cunningly planned for the evil purpose of thwarting justice',[18] devoid of any supervision upon the use of the Minister's power,[19] initially the establishment of the Tribunal was not universally acclaimed. Not only did some people fear

[9] In itself a vague restriction: *Sedleigh-Denfield v. O'Callaghan* [1940] A.C. 880, 903, but generally meaning that property may be used so as not to injure others.

[10] [1969] 1 Q.B. 499, 526.

[11] That is, where in general terms property ceases to be a right and becomes a duty: Paton G. W., *A Textbook of Jurisprudence* (1964) 488.

[12] See Williams N., 'Planning Law and Democratic Living' (1955) 20 *Law and Contemporary Problems* 317; and a survey on local government by Miss C. Fox, *Herald* 7 June 1973.

[13] Morling T. R., 'Conflict of Planning Legislation with Private Interests' (1970) 9 *University of Western Australia Law Review* 303.

[14] Town and Country Planning Act 1968, s. 14(1).

[15] As initiated by Rules 11 and 13, Victorian Statutory Rules 1946.

[16] See s. 6 of the Town and Country Planning Act 1961 (hereinafter referred to as the 'Act' or the '1961 Act') as to the current powers of the Board.

[17] Northey J. F., 'The Changing Face of Administrative Law' (1969) 3 *New Zealand Universities Law Review* 426, 436.

[18] Davis K. O., *Administrative Law Treatise* (1958) Vol. 3, 388.

[19] See Derham D. P., 'Interim Development Appeals' (1960) 2 *M.U.L.R.* 303.

the development of excessive legal technicalities,[20] but it was argued that 'the person who can afford a Queen's Counsellor will always win a case against a person who cannot afford such costly legal advice'.[21] Nevertheless, the more pressing argument to be put forward was that if public confidence was to be maintained, the administrative and judicial functions of the planning process had to be separated, independent review being the only method by which the conflict between the needs of the community and the desire on the part of the individual to protect his property rights could be resolved.

As to the composition of the Tribunal, it was clearly intended to be an 'expert' body.[22] As Anderson J. commented in the recent case of *Pentland Park Amusements Pty Ltd v. Melbourne and Metropolitan Board of Works*:[23]

> The Tribunal is a specialist body inquiring into the action of a responsible authority affirming what was done correctly or rectifying what has been done otherwise than in accordance with proper town planning principles.

Consisting of a Chairman, who is to be a barrister and solicitor of the Supreme Court of Victoria, a member having experience in town and country planning, and another member having knowledge of and experience in public administration, commerce or industry,[24] the Tribunal may sit in divisions.[25] At first sight, this may appear to cause inevitable inconsistencies between the decisions that are handed down by the differently constituted divisions of the Tribunal. However, it is considered that this problem is overcome by the requirement that the Tribunal cause a report or bulletin of important or typical determinations made by it to be published from time to time.[26] While it is the particular circumstances of the case that are all important, decisions upon previous planning appeals form a useful precedent and provide valuable guidance. The Tribunal in *Hajzler v. City of Heidelberg*[27] even went as far as to adopt the evidence given in an earlier planning appeal raising substantially the same issue.

> This case is similar to that dealt with in *Bergamo v. City of Heidelberg* [1972] V.P.A. the decision in which was handed down on the 4th November, 1971. That appeal related to a site in St Elmo Road, Ivanhoe. . . . In that case evidence was given that if a proper sump system was installed on the land this would result in such delay of the outflow of stormwater that the strain on the street gutters would not be increased beyond that which would be caused by an ordinary residential development. In this case we propose to follow that decision.[28]

[20] Victoria, *Parliamentary Debates*, Legislative Assembly, 27 March 1968, 3489-90, 3890.
[21] *Ibid.* 3890.
[22] As in a number of other States: Stein L. A., *Urban Legal Problems* (1974) 541.
[23] [1972] V.R. 540, 548-9.
[24] S. 19A(2A) and s. 19A(7A) of the Act. What is the difference between 'having experience in' and 'having knowledge of and experience in'? In the latter case, need one have some qualification?
[25] S. 19A(7A) of the Act.
[26] S. 22A of the Act.
[27] [1972] V.P.A. 64.
[28] [1972] V.P.A. 64, 65. In *B.M.T. Holdings Pty Ltd v. City of Melbourne* [1974] V.P.A. 17 the Tribunal said it would ordinarily follow its previous decisions.

However, in an attempt to gain consistency, the Tribunal should not allow tests or guides which have been suggested by a court or itself in one set of circumstances, to be mechanically applied to other cases as if such were propositions of law.[29] While sufficient similarity of circumstances may permit a previous decision to be a useful precedent,[30] in that 'law . . . works by examples',[31] care must be taken not to allow the use of precedent to become obstructive and irrational, replacing the canons of logic and common sense.[32]

The chairman and one other member constitute a quorum, and may hear and decide appeals.[33] The decision of a majority of the members of the Tribunal governs, and where there is an equality of votes the chairman has a casting vote.[34] In that all decisions are discussed between the members in private, cases where members differ in their final opinion are rare. In any event, it is not the practice of the Tribunal to hand down dissenting decisions.[35]

The appointment of a lawyer as chairman obviously follows from the suggestion made in this regard by the Franks Committee in 1957.[36] It is of special significance where either or both of the parties are unrepresented, and provided the lawyer-chairman does not attempt to turn the proceedings into an adversary trial, the recommendations of the Franks Committee must now be accepted.[37] The lawyer's training and his ability to isolate the relevant facts should enable him to present the issues of importance to the other members of the Tribunal, so that their own expertise may be called upon. The present writer believes that lawyers and planners who act in concert as adjudicators equip each other for the task at hand.[38] Planning is a complex science,[39] and as the variety of institutions engaged in the

[29] Warned against in *Qualcast (Wolverhampton) Ltd v. Haynes* [1959] A.C. 743, 753-4 and *Park v. Warringah Shire Council* (1970) 20 L.G.R.A. 312.

[30] *Progress & Properties Ltd v. Woollahra Municipal Council* (1969) 18 L.G.R.A. 166, 171; *Rivett v. Melbourne and Metropolitan Board of Works* [1974] V.P.A. 240.

[31] Dixon O. D., 'Concerning Judicial Method' (1955) 29 *Australian Law Journal* 468, 472.

[32] Maher F. K. H., 'Common Sense and Law' (1972) 8 *M.U.L.R.* 587, 611-4.

[33] S. 19B(1) of the Act.

[34] S. 19B(2) of the Act.

[35] The present writer believes this to be a good thing, for only confusion will result if the Tribunal speaks with a plurality of voices; but see McWhinney E., 'Judicial Concurrences and Dissents: A Comparative View of Opinion-writing in Final Appellate Tribunals' (1953) 31 *Canadian Bar Review* 595.

[36] Victoria, *Report of the Committee on Administrative Tribunals and Inquiries* (1957) Cmnd 218, paras 55, 58.

[37] Whitmore H., 'The Role of the Lawyer in Administrative Justice' (1970) 33 *Modern Law Review* 481, 489-90. They have also been implemented in Western Australia and South Australia.

[38] The planner knows the community need, and the lawyer is there to implement that need: Pound R., 'Survey of Social Interests' (1943) 57 *Harvard Law Review* 1, 32-3.

[39] An insight may be gained by reading Fagin H., 'Planning for Future Urban Growth' (1965) 30 *Law and Contemporary Problems* 9, 14-20. See also the present writer's article 'Town Planning — A Means Not an End' [1974] *Summons* 47, and McAuslan J. P. W. B., 'Planning Law's Contribution to the Problems of an Urban Society' (1974) 37 *Modern Law Review* 134, 151.

planning process grow in number and complexity, so must the variety of institutions that control that process equally develop. With increased complexity must evolve increased knowledge, specialization and expertise, with both the lawyer and the professional planner contributing in his own field. Of course, there is no denying that lawyers and planners place varying degrees of weight on certain values. Planners, with their visions of 'beautiful cities' and 'picturesque rural belts', see clearance and redevelopment as essential for future growth, considering it burdensome to have to take notice of what those who are being planned for really want.[40] The lawyer, on the other hand, believes that public participation[41] and public inquiry is to be encouraged, for planning of land is not an end in itself; its purpose is to improve the standard of living. Just as the planner may be accused of being regimental and bureaucratic, the lawyer may be equally criticized for over-emphasising present land value and procedural technicalities. As Professor McAuslin once wrote:

> Both professions have their own sets of values and beliefs, the rule of law, or the virtues of physical redevelopment of the city leading to social redevelopment of the community, which they are concerned to sell to society at large.[42]

However, lawyers and planners are both concerned with one basic concept — change; and more importantly, its guidance and control. The present writer does not believe that either profession should change its outlook, but only moderate it.[43] One cannot talk of being concerned with people *qua* people, and at the same time dismiss the current emphasis on property rights and established procedures as archaic, when the relationship between citizens is based on those very things. Of course, the individual wants something better in the future than he has had in the past, but one doubts whether he is willing to give up all that he presently has for that hope. It is here that the lawyer has his role. While 'contributing to the fund of knowledge of the planner',[44] and helping to form a streamlined planning process, the lawyer can maintain the social equilibrium by representing the demands of the ordinary citizen. This does not mean that all demands will or should be met, but the arbitrariness of planning decision-making is removed, as hopefully that 'stink in the nostrils of the public'.[45]

Despite the above, lawyers as chairmen of tribunals have been said to be patronising in their attitude to the applicant before them.[46] Where this

[40] Dennis N., *People and Planning* (1970) chs 18-20.

[41] It is not possible within the scope of this paper to delve into this question fully; see references in Stein L. A., *Urban Legal Problems* (1974) 298, 345.

[42] McAuslan J. P. W. B., 'The Plan, the Planners and the Lawyers' [1971] *Public Law* 247, 273.

[43] Contrary view by Mandelker D. R., *Managing Our Urban Environment* (1966) 21: 'Planners and architects design cities; lawyers, historically, have restricted them'.

[44] McAuslan J. P. W. B., 'The Plan, the Planners and the Lawyers' [1971] *Public Law* 247, 275.

[45] Reference made to the planning process *per* Harman L.J. in *Britt v. Buckinghamshire C.C.* (1963) 14 P. and C.R. 318, 324.

[46] Whitmore H., 'The Role of the Lawyer in Administrative Justice' (1970) 33 *Modern Law Review* 481, 489-90.

leads to the applicant being ignored and discussions proceeding on the basis that he has nothing to contribute, the very purpose of having a public forum is drastically reduced. After all, as Sir Desmond Heap once remarked:

> Planning inquiries . . . are the 'shop window' of planning to hordes of people — the point at which the man in the street (thousands of him) comes into direct contact (and conflict) with planning and thereby learns for the first time something of what it is and almost all of what it means to him personally. Thus it is of the utmost importance that everything done in connection with planning inquiries should be such as to inspire public confidence because planning without public confidence is in for a bad time.[47]

It will be appreciated that the chairman of the Tribunal has an important function to perform — not only must he weigh up the value of the probative evidence and be conscious of the continuity of the legal system to which he belongs,[48] but he must give direction to the inquiry itself. The chairman must ensure that the proceedings are conducted with the minimum waste of time, while providing each applicant or objector with ample opportunity to state his case. For instance, where a community interest group or ratepayers' association comes before the Tribunal, the chairman usually requests that one member present the submissions of the whole group in order to avoid duplication. In some cases it would be impracticable to allow each person to put forward in his or her own way substantially similar views to those previously submitted.[49] Further, it is unlikely that mere numbers will favourably impress the Tribunal from the tactical point of view,[50] and there is the real danger that the propriety of the occasion may be lost. One must be careful to avoid the following situation as reported in the American decision of *American University v. Prentiss*:[51]

> Unfortunately, the atmosphere of the proceeding was not conducive to calm deliberation. Several organized bus loads of angry property owners filled the hearing room, and frequently interrupted witnesses and counsel by booing and hissing, and applauding.

However, total prior restraint is not the answer; every argument should be permitted, with the chairman focusing attention on the relevant issues by asking questions and indicating which points he feels to be pertinent.[52]

[47] [1955] *Journal of Planning and Property Law* 847-50. See also the interesting references in Megarry R. E., *Miscellany At Law* (1955) 234-5 and the general thesis of Weeramantry C. G., *The Law in Crisis* (1976).

[48] On the problem of fragmentation of the legal system where there are lay tribunals, see Goldring J., 'The Supervisory Jurisdiction of the Courts over Decisions of Law by Lay Tribunals' (1974) 9 *M.U.L.R.* 669.

[49] See de Smith S. A., *Judicial Review of Administrative Action* (1973) 169; and *Ladies of the Sacred Heart of Jesus v. Armstrong's Point Association and Bulgin* (1961) 29 D.L.R. (2d) 373.

[50] In *Wheatland v. Town & Country Planning Board* [1971] V.P.A. 253 the Tribunal granted a permit for the erection of two blocks of flats despite over 600 objections.

[51] (1953) 113 F. Supp. 389, 391.

[52] The chairman is not a 'judge', and may therefore descend into the arena: contrast *R. v. Mawson* [1967] V.R. 205.

III. THE QUESTION OF *LOCUS STANDI*

It will be appreciated that not every citizen has the right to appeal to the Tribunal, and the law discourages the professional litigant and the 'mere busybody'.[53] Parliament has thus restricted the right to appeal to 'any person who feels aggrieved',[54] despite the judicial protests against the continued use of this vague expression.[55]

In the Privy Council case of *Attorney-General of Gambia v. N'Jie*[56] Lord Denning said:

> The words 'person aggrieved' are of wide import and should not be subjected to a restrictive interpretation. They do not include, of course, a mere busybody who is interfering in things which do not concern him; but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests.

Adam J. in *Lilydale v. Albion Reid*[57] stated:

> I would have thought that the restriction of the right to appeal to a person who feels aggrieved by the decision was intended to preclude officious strangers to the proceedings with no real or direct interest therein from appealing against decisions that dissatisfy them, and not to preclude those with a real and direct interest in the decision having the opportunity of having it reversed on appeal.[58]

However, no one would suggest that these are definitive statements regarding *locus standi*,[59] for the question in each case is one of statutory interpretation.[60] The purpose for which a right of appeal is conferred in any particular situation will often be decisive in determining who is entitled to exercise it.[61] In that town planning affects a large community sector, as recognized in the concept of 'amenity',[62] it would be unduly restrictive to require all appellants to have been deprived of or refused something to which they are *legally* entitled,[63] or to have been subjected to a legal burden.[64] A householder, anticipating a serious loss of amenity as a result of an administrative decision to permit the building of a high block of flats nearby, should be entitled to appeal against the decision as a 'person aggrieved' although there is no question of any interference with a proprietary right.[65] However, the present writer does not favour the granting

[53] *R. v. Paddington Valuation Officer; Ex parte Peachey Property Co. Ltd* [1966] 1 Q.B. 380, 401 *per* Lord Denning M.R.

[54] S. 19 of the Act.

[55] *Ealing Corporation v. Jones* [1959] 1 Q.B. 384, 390; *Buxton v. Minister of Housing and Local Government* [1961] 1 Q.B. 278, 282.

[56] [1961] 2 All E.R. 504, 511.

[57] [1966] V.R. 481, 484.

[58] Relying on the authority of *Day v. Hunter* [1964] V.R. 845.

[59] See further, Rubinstein A., *Jurisdiction and Illegality* (1965) 95; Robertshaw P., '"Persons Aggrieved" and the *Locus Standi* Problem' [1971] *Public Law* 169; Benjafield D. G. and Whitmore H., *Principles of Australian Administrative Law* (1971) 208.

[60] As in *Gregory v. Camden L.B.C.* [1966] 1 W.L.R. 899.

[61] de Smith S. A., *Judicial Review of Administrative Action* (1973) 364.

[62] As to this concept see generally Stein L. A., *Urban Legal Problems* (1974) 524-30 and Gifford K. H., *Victorian Town Planning Handbook* (1973) 14-6.

[63] As required in *Re Sidebotham; Ex Parte Sidebotham* (1880) 14 Ch. D. 458, 465.

[64] As required in *Phillips v. Berkshire C.C.* [1967] 2 Q.B. 991.

[65] *Maurice v. London County Council* [1964] 2 Q.B. 362.

of an *actio popularis*; the appellant must still show a sufficient interest in the proceedings. How close, how serious and how personal this interest must be is the problem that must be resolved. 'No clear answer can possibly be given which would suit all cases',[66] the question being already 'shrouded in a mist of scattered and contradictory judicial utterances'.[67] Perhaps,

> one can only say, like an elephant, an 'interest' is a difficult animal to describe with exactitude but comparatively easy to recognise when one meets one.[68]

While the above principles are of general application, further difficulties arise where there is an appeal against the refusal of a permit or the failure to grant a permit,[69] for then the right of appeal is limited solely to the person who made the original application.[70] Consequently, it is of the utmost importance to determine who may apply for a planning permit under the current legislation.

Prior to the passing of the Town and Country Planning (Amendment) Act 1972, serious difficulties arose as to discovering who could apply to the Responsible Authority for a permit to use the land in a way not clearly permitted by the relevant Scheme or Interim Development Order.[71] Now it is clear that an application for a permit must be signed by the owner, or accompanied by evidence to the satisfaction of the Responsible Authority that the application is made with the 'knowledge'[72] of the owner of the property concerned.[73] However, while this is a necessary requirement,[74] it appears that it is not a sufficient one. Presumably, the decision of McInerney J. in *Wajnberg v. Raynor and the Melbourne and Metropolitan Board of Works*[75] to the extent that it requires the applicant to have 'sufficient interest', still applies notwithstanding the applicant's compliance with section 18(1A) of the Act. In that decision it was stated that:

> It may be that such an interest exists in a person who, though not owning an estate or interest or possessory right in or to the land at the time of the application, is a prospective purchaser or holder of an option with respect to the land, provided that he has, at the time of the application, an expectation (founded upon reasonable basis) of acquiring within a foreseeable time, an interest of that character in the land. . . . But the interest of a builder who has merely a prospect of being engaged in the development works if his prospective client is successful in purchasing the land and obtaining a permit for the proposed development may be too speculative.[76]

Although *obiter dictum*, the above reasoning has already been applied by the Tribunal to exclude a firm of architects as applicants.[77]

[66] Zamir Z., *The Declaratory Judgment* (1962) 245.
[67] Rubinstein A., *Jurisdiction and Illegality* (1965) 95.
[68] Garner J. F., '*Locus Standi* in Actions for a Declaration' (1968) 31 *Modern Law Review* 512, 519.
[69] S. 19(1)(a)(i) and s. 19(1)(a)(ii) of the Act.
[70] *Greenberg v. Sydney City Council* (1958) 3 L.G.R.A. 223, 227.
[71] As outlined in Barlow C. M., 'Town Planning: Practice in Relation to Applications and Appeals' (1972) 46 *Law Institute Journal* 374.
[72] But no written 'consent' is required.
[73] S. 18(1A) of the Act.
[74] Failure to comply does not make the application void, but such must be taken into account by the Responsible Authority: s. 18(1B) of the Act.
[75] [1971] V.R. 665.
[76] [1971] V.R. 665, 669.
[77] *Cliff v. City of Heidelberg* [1971] V.P.A. 4, 7-8.

As far as section 18(1A) of the Act is concerned, a problem still arises in determining the meaning of the term 'owner', defined in section 3 of the Act as follows:

> 'Owner' in respect of any land means the person for the time being entitled to receive or who if the same were let to a tenant at a rack-rent would be entitled to receive the rack-rent thereof.

In *Spurling v. Development Underwriting (Vic.) Pty Ltd*,[78] before Stephen J. of the Supreme Court of Victoria (where he then sat), it was contended that as certain land was owned by the City of Essendon and was in part leased to a certain company, the effect of the definitions of 'owner' and 'land' in the Act was that there were two 'owners' — the City of Essendon and the company. It was argued that the City of Essendon was clearly the owner of the freehold, but that one must go further and see who was the owner of the leasehold tenure. As the company had not sublet, it came within the second limb of the definition of 'owner' as being the one who if there had been a sublease at a rack-rent, would be entitled to receive that rack-rent. Stephen J. rejected this argument on the basis that the two limbs in the definition of 'owner' were strictly alternatives, and could not be applied concurrently.[79] However, His Honour treated the matter cursorily, and the question appears to be far from resolved.[80]

Even if one can define an owner with some legal exactitude, there is still the problem of practical identification. McInerney J. in *Wajnberg v. Raynor and the Melbourne and Metropolitan Board of Works*[81] was of the opinion that a certificate of title would be sufficient evidence if the question of ownership is not disputed, but once ownership becomes an issue other material must be considered.

Finally, one must consider the problem of *locus standi* in relation to 'resident action groups', which are increasing rapidly in numbers, and which are 'preparing longer range and more aggressive programmes on such matters as . . . participation in planning and the need for environmental control'.[82] Despite the decision in *R. v. Liverpool Corporation; Ex parte Liverpool Taxi Fleet Operators' Association*,[83] where it was held that an association representing local taxi licence-holders had *locus standi* to obtain an order of prohibition, and the Tribunal's decision in *Cliff v. City of Heidelberg*,[84] where it was suggested that an unincorporated association could be an 'owner' under the Act, the present writer contends that it is not possible for an unincorporated 'action group' to bring an appeal in its own right. The Act refers to a legal entity — an 'aggrieved person'. While the

[78] [1973] V.R. 1.
[79] [1973] V.R. 1, 19.
[80] Barlow C. M., 'Town Planning: Practice in Relation to Applications and Appeals' (1972) 46 *Law Institute Journal* 374, 377.
[81] [1971] V.R. 665; see also *Schiller v. Southern Memorial Hospital* (December 1975, unreported, *per* Dunn J.) on the issue of the applicant's identification.
[82] *Australian*, 30 March 1973.
[83] [1972] 2 Q.B. 299.
[84] [1971] V.P.A. 4.

expression 'person' is deemed to include a corporation pursuant to section 17 of the Acts Interpretation Act 1958, no mention is made of the unincorporated association. Stephen J. in *Spurling v. Development Underwriting (Vic.) Pty Ltd*[85] clearly recognized this problem when he decided that the Traders Association, being no 'legal entity',[86] could not forward an objection on its own behalf under section 18C of the Act.

Consequently, the only course open to an unincorporated association is to bring a class action, whereby under certain conditions, one or more persons may appeal on behalf of all interested parties.[87] Before such an action can be brought it must be shown that all the members of the class represented have a common interest and a common grievance, and that the relief claimed is beneficial to them all.[88] There is a dearth of authority in Australia on class actions, and the law is still obscure and difficult.[89] Nevertheless, provided that the class action procedure is 'treated as being not a rigid matter of principle but a flexible tool of convenience in the administration of justice'[90] objectors may find it an extremely effective instrument in forwarding their views.

IV. PROCEDURES BEFORE THE TRIBUNAL AND NATURAL JUSTICE

A. The Nature of the Appeal

Section 21(1) of the Town and Country Planning Act 1961 provides:

> On the hearing of any appeal the Appeals Tribunal shall act according to equity and good conscience and the substantial merits of the case without regard to technicalities or legal forms and shall not be bound by the rules of evidence but, subject to the requirements of justice, may inform itself on any matter in such manner as it thinks fit.

As was stated in *Pentland Park Amusements Pty Ltd v. Melbourne and Metropolitan Board of Works*:[91]

> It is to be borne in mind that the Tribunal proceeds in a very informal manner, it is not bound by the rules of evidence and such 'evidence' as the Tribunal receives is given not on oath but is comprised in statements by representatives of the interested parties; sometimes correspondence is tendered; counsel make submissions and sometimes give an abundance of 'evidence' from the Bar table and the Tribunal informs itself in such manner as it thinks fit.

However, while, when hearing an appeal, the Tribunal accords with the observation that the 'realities and merits of the case are of transcending importance',[92] certain set procedures are adopted.

[85] [1973] V.R. 1.
[86] [1973] V.R. 1, 14. See also *Playfair Meat Exports v. State Rivers and Water Supply Commission* [1975] 1 V.P.A. 363.
[87] *Hardie & Lane Ltd v. Chiltern* [1928] 1 K.B. 663; *Markt & Co. Ltd v. Knight S.S. Co. Ltd* [1910] 2 K.B. 1021.
[88] Alston P. A., 'Representative Class Actions in Environmental Litigation' (1973) 9 *M.U.L.R.* 307, 311.
[89] See Lloyd D., 'Actions Instituted by and against Unincorporated Bodies' (1949) 12 *Modern Law Review* 409.
[90] *John v. Rees* [1969] 2 W.L.R. 1294, 1306, *per* Megarry J.
[91] [1972] V.R. 540, 552.
[92] *Wilson Rothery Ltd v. Mt. Wellington Borough* [1967] N.Z.L.R. 116, 121.

While in a sense the Responsible Authority is the defendant in an appeal, the practice has developed that it is expected to present its arguments first. The reason for this is that the Responsible Authority has all the facts relating to the application, the zoning and objections in its possession, while one or more of the other parties may not have all this information. Therefore, at an early stage in the hearing the Tribunal has before it all the basic facts. Objectors are heard between the presentment of the case for the Responsible Authority and the presentment of the case for the applicant, the applicant himself being heard last. The Tribunal does give the parties a second opportunity to reply to any matters raised by another party, but mere recapitulation of previous argument is not allowed.

Submissions to the Tribunal may be made orally, but it is wise to tender written arguments. Mr F. H. Lonie, M.B.E., feels it is helpful if four copies of the written submissions are made available to the Tribunal, in addition to a copy for each of the parties.[93] He further considers that the following matters should be dealt with in a submission by a Responsible Authority:

1. A description of the land concerned.
2. Its zoning and the zoning of adjacent land. A map showing the zoning is helpful.
3. The application. A copy of this is usually in the appeal file but it is helpful if its date and contents are referred to.
4. Whether the Responsible Authority has required advertisement of the application under section 18B of the Act and whether this requirement has been complied with.
5. General particulars of any objections received.
6. The determination of the Responsible Authority and the grounds thereof.
7. The reasons for such determination.
8. A note of any previous similar applications in the area and their results.[94]

The hearing is thus not based on complete informality, and this is perhaps because it takes the form of an adversary rather than inquisitional system. As Professor Stein writes, complete informality is 'difficult because of the presence of a lawyer-chairman, legal counsel and antagonists: the appellant and the authority or objectors'.[95] Of importance in this regard is how the Responsible Authority itself represents the case on appeal — whether it be the antagonist or the informer. The Authority can either stand back and do no more than put the facts before the Tribunal, or it can call evidence, put forward argument and be legally represented in an all-out attempt to have the original decision upheld. Messrs J. Gobbo Q.C. and C. W. Porter believe that the ideal position is somewhere between these two stances.

[93] Lonie F. H., 'The Appeals Tribunal' at p. 2 of an unpublished paper presented at a Symposium held on 21 June 1972. Mr Lonie is one of the chairmen of the Tribunal.

[94] *Ibid.* 2-3.

[95] Stein L. A., *Urban Legal Problems* (1974) 544; as evidenced by the decision in *Re County of Strathcona No. 20 v. Maclab Enterprises Ltd* (1971) 20 D.L.R. (3d) 200.

> In substance the Responsible Authority should state the facts and set out the reasons why its decision should stand. It should also briefly make sure that its reasons meet the grounds in the notice of appeal.[96]

Of course, the Responsible Authority should be candid in the presentation of its case. It is in a very privileged position as it has access to considerable information that is not readily available to the citizen. Consequently, it should not show bias in its selection of data.

B. The Question of Evidence

It was said in *Wajnberg v. Raynor and the Melbourne and Metropolitan Board of Works*[97] that:

> [The Tribunal] is to decide according to the substantial merits of the case, but it must act 'according to equity and good conscience'. It is, therefore, not free to act capriciously or unconscionably. The direction that the tribunal should not be 'bound by the rules of evidence' but that it may 'inform itself on any matter as it thinks fit' obviously frees the tribunal from many of the restrictions imposed on ordinary courts by the rules of evidence. . . . But the provisions of s. 21(1) do not entitle the tribunal to act without evidentiary material or to draw inferences which do not follow fairly and reasonably from the material before it. . . . It is one thing to say that the tribunal is not bound by the rules of evidence and quite another thing to say that the tribunal can act without evidence or that it can act in disregard of evidence.

Therefore, the Tribunal could act upon hearsay evidence if that could be fairly regarded as reliable in the circumstances, and would be able to disregard restrictions 'based on some policy of the law'.[98]

On the other hand, the Tribunal must 'observe the requirements of natural justice'.[99] However, the difficulty confronted here is that the principles of natural justice are not to be found in a fixed body of rules, equally applicable at all times and in all circumstances. As Tucker L.J. in *Russell v. Duke of Norfolk*[1] said:

> The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth.[2]

Bearing this in mind, and also the fact that the concept of natural justice is constantly expanding, the following principles of natural justice relevant to this analysis will be considered.

1. THE RIGHT TO REPRESENTATION AND CROSS-EXAMINATION

Section 21(3) of the 1961 Act provides:

> Any party to an appeal may appear and be heard before the Tribunal personally or by a barrister and solicitor or by a person authorized in that behalf by the party.

[96] Gobbo J. A. and Porter, 'Municipality Defending Appeal Against its Decision' at p. 3 of an unpublished paper presented at a Symposium held on 21 June 1972. But note that the appeal is a hearing *de novo*, the onus of proof is on neither party: Stein L. A., *Urban Legal Problems* (1974) 545.

[97] [1971] V.R. 665, 678.

[98] *Ibid.*

[99] *Ibid.*

[1] [1949] 1 All E.R. 109, 118; endorsed since in *Ex parte The Angliss Group* (1969) 43 A.L.J.R. 150, 151 and in *R. v. Brewer Ex parte Renzella* [1973] V.R. 375, 379.

[2] See de Smith S. A., *Judicial Review of Administrative Action* (1973) 171 ff.

Therefore, no matter what the common law position may be,[3] the appellant's right to representation is assured by the above statutory provision. Whether legal representation[4] ought to be permitted presents serious questions of policy. As Professor de Smith writes:

> The reasons for excluding legal representatives . . . are various: they tend to introduce too much formality into the proceedings, which are apt to become unnecessarily long; they disturb witnesses and inexpert members of the tribunal by asking awkward questions and taking 'technical' points; their presence increases the likelihood of subsequent proceedings in the courts to impugn the decision, and judicial review is a bad thing.[5]

It should be noted that each of these points reflects not so much on the right to representation, but more on the quality of representation. Professor Whitmore has recognized this, commenting that some representation has been of such bad quality that it has influenced 'administrators, politicians, and even tribunal chairmen, to disfavour all legal representation in administrative matters'.[6] However, the present writer believes that as far as the private citizen is concerned, he is entitled to have his case presented to the Tribunal by an expert who can ensure that the appeal is properly presented and considered.[7] In the case of the Responsible Authorities, they are generally represented on appeals by their own officers, and this has proved to be quite satisfactory. The present writer respectfully adopts the comment and suggestion of Mr F. H. Lonie in this regard:

> [T]he Responsible Authority does not usually attend a planning appeal in the character of a one eyed litigant but mainly for the purpose of putting its point of view before the Tribunal and is in most cases quite content to accept the Tribunal's decision. In such cases I do not feel that legal representation is necessary. On the other hand in some cases the Responsible Authority may feel that a vital principle is at stake and in such cases I feel that it would be advisable for it to get the best legal representation it can.[8]

While the existence of the right to representation is clear, the question of cross-examination under the *audi alteram partem* principle in administrative law is still obscure. The English cases support a general rule that where witnesses are heard orally, the opposing party has a right to cross-examination.[9] The inquisitorial and informal nature of proceedings does not deny the existence of the right, and the only privilege so far granted has been where questions were directed to a public servant on the merits of

[3] See Alder J. E., 'Representation before Tribunals' [1972] *Public Law* 278; Benjafield D. G. and Whitmore H., *Principles of Australian Administrative Law* (1971) 147; de Smith S. A., *op. cit.* 186-7.

[4] Certain tribunals forbid it: see Willheim E., 'Legal Representation Before Administrative Tribunals' (1969) 43 *Australian Law Journal* 64, 66-8; Benjafield D. G. and Whitmore H., *op. cit.* 147.

[5] de Smith S. A., *op. cit.* 187-8.

[6] Whitmore H., 'The Role of the Lawyer in Administrative Justice' (1970) 33 *Modern Law Review* 481, 486.

[7] Willheim E., 'Legal Representation Before Administrative Tribunals' (1969) 43 *Australian Law Journal* 64, 65.

[8] Lonie F. H., 'The Appeals Tribunal' at pp. 13-14 of an unpublished paper presented at a Symposium held on 21 June 1972.

[9] *R. v. Newmarket Assessment Committee* [1945] 2 All E.R. 371, 373; *R. v. Edmonton Justices; Ex parte Brooks* [1960] 1 W.L.R. 697.

government policy.[10] In Australia, the case of *R. v. War Pensions Entitlement Appeal Tribunal; Ex parte Bott*[11] is generally cited as authority for the proposition that the right to cross-examine is a matter for the discretion of the tribunal itself. It could be argued that Bott, while denied the right to cross-examine two opposing witnesses, had been otherwise given ample opportunity to present his case, and thus in line with *Osgood v. Nelson*[12] had been accorded natural justice. Alternatively, one may argue that *Bott's* case[13] 'was wrongly decided and that . . . the *audi alteram partem* rule does give a *right* to cross-examination where oral evidence is given before a statutory tribunal'.[14] After all, no one could deny that in an adversary common law system cross-examination of witnesses is basic to deriving the truth — either by weakening the case of the opponent or by establishing one party's own case through the opponent's witnesses.[15]

2. CALLING AND RECEIVING WITNESSESS

The right to call witnesses has not been a matter of dispute in Australia,[16] and if the issue arose it would have to be determined *res integra*. It is clear that pursuant to section 21(1) of the Act, the Tribunal is not bound by the rules of evidence, and as a general principle it is equally clear that the Tribunal is not bound to observe court procedure.[17] However, at all times a party must be allowed an adequate opportunity to put forward his case.[18]

Griffith C.J., in *R. v. Board of Appeal; Ex parte Kaye*,[19] commented that where a statute grants in general terms a person aggrieved a right to appeal,

> [t]hat seems to suggest that witnesses may be called and examined and cross-examined. . . . [A]n appellant is entitled, not only to be heard before the Board, but to conduct his case before them in such a way as to ascertain the actual facts.[20]

This approach is highly sensible and further ramifications on its scope, such as its application being dependent upon the value of the witness's evidence,[21] would only serve to introduce technicalities into what is already an appropriate solution.

It should not be thought that the Tribunal could compel attendance of

[10] *R. v. Brighton & Area Rent Tribunal* [1950] 2 K.B. 410, 419; *Re Trunk Roads Act 1936* [1939] 2 K.B. 515.
[11] (1933) 50 C.L.R. 228.
[12] (1872) L.R. 5 H.L. 636, 646, 650.
[13] (1933) 50 C.L.R. 228.
[14] Benjafield D. G. and Whitmore H., *Principles of Australian Administrative Law* (1971) 148.
[15] Gobbo J. A., *Cross on Evidence* (1970) 264 .
[16] In *Vye v. Vye* [1969] 1 W.L.R. 588, it was held that there may be circumstances where witnesses should be called in the interests of justice.
[17] *Wajnberg v. Raynor and the Melbourne & Metropolitan Board of Works* [1971] V.R. 665, 678; *R. v. Local Government Board* (1882) 10 Q.B.D. 309.
[18] *R. v. Woking Justices; Ex parte Gossage* [1973] 2 W.L.R. 529.
[19] (1916) 22 C.L.R. 183.
[20] *Ibid.* 185. Similarly *G.M.C. v. Spackman* [1943] A.C. 627, 638.
[21] As stated in *Byrne v. Kinematograph Renters Society Ltd* [1958] 1 W.L.R. 762, noted (1958) 21 *Modern Law Review* 661.

witnesses by subpoena, or for that matter require that evidence be taken on oath. The Tribunal is a statutory body, and as such is regulated by the Act under which it is established. In that the Evidence Act 1958 does not apply to the Tribunal, and in that the same Act is not incorporated into the Town and Country Planning Act 1961, the provisions of the Evidence Act 1958 would seem to have no relevance to procedures before the Tribunal.[22]

The receiving of expert opinion is not hampered by the rigid rules that are encompassed within the normal principles of evidence.[23] However, the evidence submitted must be relevant, and be substantive to have any direct bearing on the Tribunal's decision. Therefore, town planning experts should not direct criticism towards the policy behind the planning scheme, but should deal with the specific application before the Tribunal.[24] Furthermore, mere statistical information resultant upon a questionnaire forwarded to ratepayers may be of little substance in itself, it being 'notorious that the value of statistical information is very directly related to the ability with which it is interpreted'.[25] Consequently, unless the specialized information speaks for itself, which will rarely be the case, the Tribunal invariably expects the expert to be available for questioning.

Problems do arise where an objector appears in person, or the Responsible Authority appears through its officer, for the Tribunal usually treats the objector or officer as though he is an advocate, and is thus not obliged to answer questions. Representatives of the Responsible Authority, however, are often engineers or town planners, and it may be that they express opinions that are plainly intended to be their own as experienced experts. In that event, they are more than mere advocates; they are expert witnesses. It is wrong in principle and unfair that such representatives cannot be tested as to the value of their statements.[26] It may be that expert representatives should either confine themselves merely to stating policy and refrain from stating their own personal views, or make it clear that they appear as advocate and witness. In the latter case, they would be exposed to cross-examination.

3. THE TRIBUNAL'S OWN KNOWLEDGE AND EXPERIENCE AS EVIDENCE

The Tribunal may 'inform itself on any matter in such manner as it thinks fit'. It may adopt inquisitional procedures,[27] consult independent experts,[28] use its own technical and local knowledge[29] and past experience,

[22] Contrast s. 18(1) of the Ombudsman Act 1973, where the provisions of the Evidence Act 1958 are incorporated.

[23] Generally, Gobbo J. A., *Cross on Evidence* (1970) 455 ff.

[24] *Samuel Wood Pty Ltd v. Sydney City Council* (1961) 6 L.G.R.A. 288, 300.

[25] *Wheatland v. Town & Country Planning Board* [1971] V.P.A. 253, 260.

[26] There is no reason in law to prevent counsel from being called as a witness: *Pioneer Concrete Gold Coast Pty Ltd v. Cassidy (No. 2)* [1969] Qd. R. 290.

[27] *R. v. Medical Appeal Tribunal* [1958] 2 Q.B. 228, 240-1.

[28] *R. v. Deputy Industrial Injuries Commissioner; Ex parte Jones* [1962] 2 Q.B., 677.

[29] *Croften Investment Trust Ltd v. Greater London Rent Assessment Committee* [1967] 2 Q.B. 955.

which may be based on evidence given in previous cases.[30] Even so, at all times the Tribunal is obliged to act in accordance with natural justice. Consequently, the Tribunal must not take evidence 'behind the back' of one of the parties,[31] by either holding private interviews with witnesses,[32] or receiving evidence *ex parte* which is not later fully disclosed,[33] or by holding inspections in the presence of one party only.[34]

Of importance in this context is the Tribunal's practice of making unaccompanied inspections to the site which the application concerns.[35] The proposition that a tribunal is not entitled to act on evidence other than that adduced by or given in the presence of the parties is too wide where the tribunal is not subject to the rules of evidence.[36] However, the Tribunal must not place a party at a disadvantage by depriving him of an adequate opportunity of commenting on material relevant to its decision if it is gleaned from an outside source or evidence given in earlier cases.[37] Therefore, while the Tribunal may hold unaccompanied inspections for the purpose of obtaining evidence, the parties must be notified thereafter of the information or advice received.[38]

A different conclusion would result if the view of the scene was taken not as evidence itself, but merely 'for the purpose of enabling the tribunal to understand the questions that are being raised, to follow the evidence, and to apply the evidence'.[39] It is respectfully suggested that Lord Denning in *Goold v. Evans and Co.*[40] was incorrect when he characterized the nature of all information derived from an inspection as 'real evidence': much depends upon the purpose of the visit.[41] If, as was the case in *Elgin Scrap Metals Pty Ltd v. City of Melbourne*,[42] the object of the view is to enable the members of the Tribunal to 'decide upon the evidence of their own senses',[43] then it is clearly evidence, and should be presented as such to all parties concerned. If, on the other hand, the inspection is for the purpose

[30] de Smith S. A., *Judicial Review of Administrative Action* (1974) 181.
[31] *Errington v. Minister of Health* [1935] 1 K.B. 249.
[32] de Smith S. A., *op. cit.* 179.
[33] Benjafield D. G. and Whitmore H., *Principles of Australian Administrative Law* (1971) 149.
[34] *Goold v. Evans* [1951] 2 T.L.R. 1189.
[35] Or even to comparative sites: see *Elgin Scrap Metals Pty Ltd v. City of Melbourne* [1970] V.P.A. 60.
[36] *Salsbury v. Woodland* [1970] 1 Q.B. 324; de Smith S. A., *Judicial Review of Administrative Action* (1973) 181; *contra*: *Denton v. Auckland City* [1969] N.Z.L.R. 256.
[37] *R. v. Deputy Industrial Injuries Commissioner; Ex parte Moore* [1965] 1 Q.B. 456.
[38] Benjafield D. G. and Whitmore H., *Principles of Australian Administrative Law* (1971) 149.
[39] *London General Omnibus Co. v. Lavell* [1901] 1 Ch. 135, 139.
[40] [1951] 2 T.L.R. 1189; *contra*: *Scott v. Numurkah Co.* (1954) 91 C.L.R. 300.
[41] *J. H. M. Nominees v. City of Malvern* [1975] 1 V.P.A. 404, 409 explains the general purpose of a view being taken. See also Solomon E., 'Views as Evidence' (1960) 34 *Australian Law Journal* 46, 66; *Tito & Ors. v. Waddell & Ors.* (unreported *per* Megarry J.) noted (1976) 50 *Australian Law Journal* 53. Clearly, a great deal will depend upon the nature of the Tribunal.
[42] [1970] V.P.A. 60.
[43] *Clarke v. City of Edmonton* [1928] 2 D.L.R. 154, 248, *per* Beck J.A.

of enabling the Tribunal 'to better understand the evidence'[44] already presented, such as the layout of the area as depicted on a map, the present writer believes that the Tribunal is not required to further notify the parties pending the final decision. Here, the parties are not materially disadvantaged in putting their case as all the evidence has been considered, with the Tribunal merely placing itself in a better position to draw the appropriate inferences from the evidence already presented. While the distinction may well be 'artificial and undesirable',[45] the above propositions are far from untenable having regard to the current state of the law. Of course, as a matter of practice, it may well be wise for the Tribunal to inform the parties of the consequences of all inspections prior to reaching a final decision, if only for the purpose of promoting good public relations. As with courts of law, the success and standing of the Tribunal depends largely upon the confidence which the public holds in its impartiality and ability to dispense justice.[46]

4. THE REASONS FOR A DECISION

While it has often been said that there is no duty to state reasons for judicial or administrative decisions at common law,[47] that rule cannot now be stated categorically.[48] However, the uncertainty of the common law has been removed by the imposition of a statutory duty upon the Tribunal, provided by section 22(2) of the Act:

> The Tribunal shall, if requested to do so by a party, furnish him with a statement of the reasons for its determination.

The request must be made before, or within fourteen days after, the Tribunal's determination;[49] section 22B(3) of the Act protecting prospective appellants by providing that where reasons are requested appeals may be lodged within twenty eight days of the reasons being provided.

Mr C. M. Barlow considers that these provisions cause some difficulty in relation to section 18C(1)(c) of the Act,[50] where it is provided, *inter alia*, that:

> If the responsible authority determines to grant the permit, the permit shall not come into force or be issued to the applicant . . . until the appeal has been determined by the Appeals Tribunal.

Where the Tribunal determines to grant the permit, if an objector desirous of an appeal to the Supreme Court of Victoria requests a statement of the reasons, he may find in the interim that the Responsible Authority, relying

[44] *MacDonald v. Goderich* [1948] 1 D.L.R. 11, 20 *per* Roach J.A.
[45] *Power v. Winter* (1952) 30 M.P.R. 131, 152 *per* Dunfield J.
[46] Emerson T. I., *The System of Freedom of Expression* (1971) 5-12.
[47] *R. v. Gaming Board of Great Britain; Ex parte Benaim and Khaida* [1970] 2 Q.B. 417; Akehurst M., 'Statements of Reasons for Judicial and Administrative Decisions' (1970) 33 *Modern Law Review* 154.
[48] See *Giris Pty Ltd v. Commissioner of Taxation* (1969) 43 A.L.J.R. 99, 106, *per* Windeyer J. and *Lock v. Gordon* [1966] V.R. 185, 187, *per* O'Bryan J.
[49] S. 22(2A) of the Act.
[50] Barlow C. M., 'Town and Country Planning (Amendment) Act 1972' (1973) 47 *Law Institute Journal* 84, 88.

on the fact that the appeal has been 'determined', has already issued a permit. Such an objector would presumably have to apply to the Supreme Court for a stay of proceedings. The better solution, as suggested by Mr Barlow, is for the legislature to amend section 18C(1)(c) of the Act, so as to provide that a permit shall not come into force until the statutory period for appeal to the Supreme Court has expired.

The degree of detail required in a statement of reasons[51] was discussed by Megaw J. in *Re Poyser and Mills' Arbitration*:[52]

> The reasons that are set out must be reasons which will not only be intelligible, but which deal with the substantial points that have been raised. . . . I do not say that any minor or trivial error, or failure to give reasons in relation to every particular point that has been raised at the hearing, would be sufficient ground for invoking the jurisdiction of this court. I think there must be something substantially wrong or inadequate in the reasons that are given in order to enable the jurisdiction of this court to be invoked.

These comments have been approved of recently, although the actual decision has been distinguished on the facts.[53] It would appear that any ambiguity or contradition must be resolved through the ordinary rules of interpretation;[54] although if that is not possible, the statement of reasons will be held not to comply with the statute.[55] Consequently, the drafting of a full and proper statement of reasons will necessarily take a certain amount of time, but the present writer respectfully agrees with Dr M. Akehurst that any inconvenience is 'more than offset by increased fairness in judicial and administrative processes, and by increased public confidence in the fairness of such processes'.[56]

5. THE PROBLEM OF BIAS

It is not within the scope of this paper to delve into the full content and effect of the maxim *nemo judex in causa sua*.[57] However, in that it is the practice of the Tribunal to arrive at a conclusion on the substantial merits of the case irrespective of its inability through some technicality finally to determine the appeal,[58] the decision of Lush J. in *Ewert v. Lonie*[59] is of some importance.

[51] There is no general rule requiring the reasons to be in writing: Rubinstein A., *Jurisdiction and Illegality* (1965) 190-1. The new s. 22(2) of the Act does not like the old provision refer to 'written' reasons, and maybe such a requirement is not imposed by the statute.

[52] [1964] 2 Q.B. 467, 478.

[53] See *Westminster Bank Ltd v. Beverley Borough Council* [1969] 1 Q.B. 499, 508, *per* Donaldson J.; *Re Allen and Matthews' Arbitration* [1971] 2 Q.B. 518; *Mountview Court Properties Ltd v. Devlin* (1970) 21 P. & C.R. 686.

[54] *Earl of Iveagh v. Minister of Housing and Local Government* [1964] 1 Q.B. 395.

[55] *Givaudan v. Minister of Housing and Local Government* [1967] 1 W.L.R. 250.

[56] Akehurst M., 'Statements of Reasons for Judicial and Administrative Decisions' (1970) 33 *Modern Law Review* 154, 169; where the reasons are inadequate, mandamus lies to enforce the statutory duty: *Parrish v. Minister of Housing and Local Government* (1961) 59 L.G.R. 411.

[57] See Reid R. F., 'Bias and Tribunals' (1970) 20 *University of Toronto Law Journal* 119; de Smith S. A., *Judicial Review of Administrative Action* (1973) ch. 5.

[58] *E.g. Weigall Constructions Pty Ltd v. Melbourne and Metropolitan Board of Works* [1971] V.P.A. 226.

[59] [1972] V.R. 308.

One Ewert appealed to the Tribunal against a decision to grant a permit for the use of land as a lion park. Ewert won the appeal on purely technical grounds, and the Tribunal commented adversely on the merits of Ewert's case. When the matter again came before the Tribunal, with the grounds of appeal basically similar to those considered by the Tribunal at the first hearing, and with the Tribunal consisting of the same members as previously, Ewert applied for an interlocutory injunction to restrain the handing down of the Tribunal's decision.

Lush J. considered the various relevant principles,[60] and placed great emphasis on the circumstances of the hearing:

> I think . . . that an assessment of the existence of reasonable grounds for suspicion must take into account, besides the nature of the Tribunal, the nature of its work and the persons, by type or interest, who come before it. Some Tribunals may operate in a more sensitive atmosphere than others. I see no reason for thinking that the Appeals Tribunal operates in an especially sensitive atmosphere. . . . In this case, the reasonable onlooker might have thought that the appellants would not have much chance of succeeding, but this is not the same thing as feeling or believing that they would not get a proper hearing. It is not a characteristic of the law's reasonable man either to be irrationally suspicious of every institution or authority or to think that every cynical appraisal represents the absolute truth.[61]

Consequently, His Honour held that the allegation of bias had not been made out against the Tribunal. While an observer might well consider that it was more than likely that the Tribunal would adhere to its previously expressed views, this did not entail that the second hearing was a 'sham'.[62] There was neither a 'real likelihood' or 'reasonable suspicion' of bias.[63]

V. CONCLUSION

Few people today would contest the need for town and country planning.

> That we should think out beforehand what we are going to do, that a sensible ordering of our lives demands that we should have a clear conception of our aims before we start acting, seems so obvious that it appears difficult to believe that the demand for planning should ever be wrong.[64]

Yet, as a matter of legal and political philosophy, the weightiest objection to the present licensing system is that it puts the individual very much at the mercy of the licensing authority. Consequently, it has been realized that with greater interventionist government action, there is a need for greater safeguards against officiousness and corruption. Even the 'difficulty and polycentricity of administrative decision-making alone requires it'.[65]

[60] As expounded in *Metropolitan Properties Co. Ltd v. Lannon* [1969] 1 Q.B. 577; *Ex parte The Angliss Group* (1969) 43 A.L.J.R. 150; *Franklin v. Minister of Town and Country Planning* [1948] A.C. 87.

[61] [1972] V.R. 308, 311-2, 313.

[62] Note, (1972) 46 *Australian Law Journal* 528.

[63] The difference between the two phrases is of little practical importance: *Hannam v. Bradford City Council* [1970] 2 All E.R. 690.

[64] Luderssen K., 'Planning and the Legal System in Germany' (1971) 20 *International and Comparative Law Quarterly* 75.

[65] Stein L. A., 'The Municipal Power to Zone in Canada and the United States' (1971) 49 *Canadian Bar Review* 534, 555.

Care should thus be taken to provide regularized review proceedings — but the main controversy is whether such should be presided over by the judiciary, by some other body, or by an Ombudsman.

Any scrutiny of administrative action will necessarily involve a determination of the true purpose for which a power can be exercised, the actual purpose for which it was exercised, and thus, whether the exercise fulfilled the objectives for which it was created. However, in the case of planning this type of review is difficult to apply in that it is not possible adequately to define and enunciate each objective that is validly within the scope of the planning power.[66] On this basis alone, the present writer believes that a body like the presently constituted Tribunal is the most appropriate forum for determining the conflict between planning legislation and private interests. The experts on the Tribunal at least have a 'feel' for the scope of planning, being aware of the different concepts enumerated by their contemporaries, while the inquiry is properly guided by the legal chairman. While not denying that judges are confronted with various fields of expertise every day, planning is becoming more and more complex, and more policy oriented.[67]

> [P]lanning . . . cannot [now] be explained in every day language through the use of such down to earth artifacts as land, maps and people, but needs to make use of mathematical symbols, computers, flow-charts, data banks, the 'new' disciplines of cybernetics, and/or systems analysis and/or linear programming.[68]

It has been argued that the parties to an appeal are more likely to be satisfied with the decision if it comes from the judiciary rather than from a tribunal which, however fair in its approach, does not have that mark of impartiality which characterizes the Bench.[69] With respect to those who hold this view,[70] the present writer considers that making a group of lawyers, who have been drawn from a narrow stratum of society, the final arbiters on planning matters will cause more resentment than admiration.[71] Criticisms have been repeatedly directed towards the supposed anachronistic attitude of lawyers in this sphere,[72] who are said to emphasise proprietorial rights and procedural niceties at the expense of the wider question of public interest. The danger is that the courts, as contrasted to the Tribunal, may approach planning problems out of the ordinary range

[66] For an attempt at a comprehensive listing, see Fagin H., 'Planning for Future Urban Growth' (1965) 30 *Law and Contemporary Problems* 9, 19-20.

[67] See generally, Erber E. (ed.), *Urban Planning in Transition* (1970), and especially Gans H. J., 'The Need for Planners trained in Policy Formulation' in Erber E. (ed.), *op. cit.* 240.

[68] McAuslan J. P. W. B., 'Planning Law's Contribution to the Problems of an Urban Society' (1974) 37 *Modern Law Review* 134, 151.

[69] Morling T. R., 'Conflict of Planning Legislation with Private Interests' (1970) 9 *University of Western Australia Law Review* 303, 321.

[70] See also Gifford K. H., *The Victorian Town Planning Handbook* (1973) 311.

[71] Already some resentment: Mandelker D. R., *Managing Our Urban Environment* (1966) 21.

[72] See McAuslan J. P. W. B., 'The Plan, the Planners and the Lawyers' [1971] *Public Law* 247.

of understanding, the decisions themselves being so artificial and so academic in their reasoning, that they may not fail to engender feelings of misapprehension or even distrust in the mind of the average citizen.

Notwithstanding which proposal deserves the most merit, it is essential that there be prompt and inexpensive review of all administrative action. There will always be procedural problems connected with any inquiry, with a constant battle to depart from doubtful legal and social tradition. Nevertheless, an individual must have the right to plead his case to an impartial body wherever he is vulnerable to the opinions, prejudices and predelictions of governmental officials. It is the role of the Victorian Appeals Tribunal to fulfil this function of appellate supervision.