ADMINISTRATIVE REVIEW ON THE MERITS: THE RIGHT OR PREFERABLE DECISION

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INTRODUCTION

We are going through a period when economic, emotional and other considerations urge a cut-back or at least a holding of the line in respect of the growth of public sector activity in Australia. A new acronym has burst upon the scene: the unloved quango.[1] In Australia, Britain, the United States and elsewhere it is suggested that the role of administration should be contained.

At the same time, the forces of science, technology and changing social values lead our busy parliaments and others to enact more and more legislation. In Australia, the number of statutes enacted each year has long since passed a thousand, to say nothing of the subordinate legislation, ordinances, regulations, by-laws and the like. It requires no special prescience to see that despite the calls for containment, the role of public administrators is likely to expand. The decisions committed to them will increase in number and importance. Consequently, as the 20th century moves to a close, there will be increasing pressure to submit much administrative action to effective review. The realization of this necessity is not confined to Australia. However, important initiatives have been taken in Australia, in the Commonwealth's sphere, that are already attracting interest here and overseas.

At the centre of the Australian experiment is the Administrative Appeals Tribunal (A.A.T.). The Tribunal has a novel jurisdiction. Although headed by judges, its powers extend well beyond the orthodox judicial review of administrative decisions. The Tribunal has now been operating for more than three years. The end of 1979 saw the resignation of the Tribunal's first President, Mr Justice Brennan, who returns to full-time duties on the Federal Court of Australia having seen the A.A.T. through its first innovative period. In 1978, I reviewed the initial 18 months of operation of the Tribunal, by reference to the reasoned decisions delivered to the end of 1977. In that review, after an analysis of the background, rationale and workload of the Tribunal, I sought to identify three themes

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[1] Quasi autonomous non-governmental organizations. The proliferation of these bodies (some 280 in the Commonwealth's sphere) is described in *Second Report of the Senate Standing Committee on Finance and Government Operations, Statutory Authorities of the Commonwealth* (Canberra, A.G.P.S., 1979).

as the principal features of the decisions of the A.A.T. emerging after 18 months.[2] The passage of a further two years has reinforced my view that a critique of the strengths and difficulties of the A.A.T. experiment can be usefully conducted by reference to those three themes. They are, in turn, the suggested superior ability of the A.A.T. to reach the right or preferable decision by:

(a) a superior capacity to gather and find the facts;
(b) an enhanced ability to identify, clarify and apply the relevant law; and
(c) most novel of all, the unique function to search out and review elements of discretion and policy, inherent in the administrative decision.

THE "RIGHT OR PREFERABLE DECISION"

The A.A.T. is not, or at least is not yet, the general administrative tribunal envisaged by the Kerr Committee Report.[3] Its jurisdiction is confined to those matters specifically conferred upon it either by the original statute or subsequently. The initial list contained in the Schedule to the 1975 Act remains the core of the A.A.T.'s jurisdiction. Whether for want of resources, concern at the full consequences of review or otherwise, there has been no accretion of significant jurisdiction (in terms of importance or quantity of workload) conferred on the Tribunal since 1975. Accordingly, the scope for influence of the Tribunal upon administrative decision-making is a limited one.[4] But within those limits, the functions and powers of the Tribunal are most ample.

Where jurisdiction is conferred, applications may be made to the Tribunal to review decisions.[5] For the purpose of reviewing a decision, the Tribunal may "exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision".[6] The A.A.T. simply steps into the shoes of the original decision-maker, reviews his decision and makes[7] the decision which the administrator ought, in its opinion, to have made in the first place.

The Federal Court has pointed out that in conferring these functions on the A.A.T., the Tribunal has been given a jurisdiction which goes beyond that normally exercised by judges:

[2] M. D. Kirby, "Administrative Law Reform in Action" (1978) 2 *U.N.S.W.L.J.* 203, 223.
[3] *Report of the Commonwealth Administrative Review Committee* (The Kerr Committee), Parl. Paper 144 (1971).
[4] Administrative Review Council, *Second Annual Report* 1978, 10 (paras. 43-46).
[5] *Administrative Appeals Tribunal Act* 1975 (Cth.) s. 25(1).
[6] Ibid. s. 43(1).
[7] In the case of deportation appeals, the Tribunal's power extends only to the making of a recommendation. See sub-clause 2(3) of Part XXII of The Schedule to the *Administrative Appeals Tribunal Act* 1975 (Cth.).

> "The function of the Tribunal is, . . . an administrative one. It is to review the administrative decision that is under attack before it. In that review, the Tribunal is not restricted to consideration of the questions which are relevant to a judicial determination of whether a discretionary power allowed by statute has been validly exercised. Except in a case where only one decision can lawfully be made, it is not ordinarily part of the function of a court either to determine what decision should be made in the exercise of an administrative discretion in a given case or, where a decision has been lawfully made in pursuance of a permissible policy, to adjudicate upon the merits of the decision or the propriety of the policy. That is primarily an administrative rather than a judicial function. It is the function which has been entrusted to the Tribunal."[8]

It is true that evaluative and judgmental considerations do affect the decisions of courts. But normally the courts have exercised self-restraint and operated within very narrow limits, harnessed by procedural rules which tend to restrict what they can do to control the administrative decision. Where jurisdiction is conferred on the A.A.T., the constraints are not readily to be found in the statute. The A.A.T. is invited to substitute its view for that of the administrator appealed against.

It was natural and inevitable that the A.A.T. should search for a methodology that could guide it in exercising such new and substantial powers. In the first deportation case, the President, Mr Justice Brennan, posed four questions as the intellectual path he would traverse in reviewing the Minister's decision to deport. It was in this passage that reference was first made to the test of what was "right or preferable":

> "There are four related but distinct issues which may arise in any application to review a decision to order deportation under s. 13(a) of the Migration Act 1958. First, is it a case where the Minister may order deportation under s. 13(a)? Second, if the Minister has a policy which governs or affects his exercise of the power, is that policy consistent with the Act? Third, if the Minister has such a policy, is any cause shown why the Tribunal ought not to apply that policy either generally or in the particular case? And finally, on the facts of the case and having regard to any policy considerations which ought to be applied, is the Minister's decision *the right or preferable decision*?"[9]

These four questions provide the three themes I have mentioned. Before I address them, in turn, it is important to note that the Federal Court has made it plain that the overall duty to reach the "right" or "preferable" decision imposes on the Tribunal a responsibility of reaching its own conclusions without necessarily being constrained by general government policy. The Court pointed out that the question for the Tribunal is not whether the decision which the decision-maker made was the "correct or preferable one" on the material before him. It is for the Tribunal to make

[8] *Drake* v. *Minister for Immigration and Ethnic Affairs* (1979) 24 A.L.R. 577, 589; 2 A.L.D. 60, 68.

[9] *Re Becker and Minister for Immigration and Ethnic Affairs* (1977) 15 A.L.R. 696, 699-700; 1 A.L.D. 158, 161. Emphasis added.

its own decision on the material before it.[10] In the absence of a statutory requirement binding the Tribunal to a formulation of policies made by the Minister (as may be done under the *Dairy Industry Stabilisation Act* 1977 (Cth.), ss. 11A and 24A) the Tribunal has to make up its own mind and, according to the Federal Court, if the right or correct decision leads to a result different to or inconsistent with government policy, then so be it:

> "It would be contrary to common sense to preclude the Tribunal, in its review of a decision, from paying any regard to what was a relevant and proper factor in the making of the decision itself. If the original decision-maker has properly paid regard to some general government policy in reaching his decision, the existence of that policy will plainly be a relevant factor for the Tribunal to take into account in reviewing the decision. On the other hand, the Tribunal is not, in the absence of a specific statutory provision, entitled to abdicate its function of determining whether the decision made was, on the material before the Tribunal, *the correct or preferable one* in favour of a function of merely determining whether the decision made conformed with whatever the relevant general government policy might be."[11]

This, then, is the present state of the art. Where the decision-maker may have regard to government policy, compatible with his lawful duties, so too may the A.A.T. But its overriding duty is to reach "the correct or preferable" decision. The Tribunal must act with judicial fairness and detachment. It must not exercise powers for purposes other than those for which the powers exist. It must have regard to relevant considerations and ignore matters "absolutely apart from the matters which by law ought to be taken into consideration".[12]

I now turn to comment on the strengths of the A.A.T. in reaching the "correct", "right" or "preferable" decision on the merits. In doing so I will mention certain problems which may warrant critical attention.

ASCERTAINMENT OF THE FACTS

In making an administrative decision affecting rights or privileges of individuals, some understanding of relevant facts must be had by the decision-maker. One of the recognized dangers of big administration is that relevant information about individuals may be missing, garbled, misunderstood, outdated or otherwise lacking in the appropriate measure of quality or quantity. Decisions relating to individual entitlements to social security benefits must be made in great number and, in the nature of things, speedily. While other areas of government decision-making may not be under quite the same pressures of time and number, the opportunities for contemplation and reflection are rare. Good administration generally requires prompt decisions, but also correct ones.

[10] (1979) 24 A.L.R. 577, 589; 2 A.L.D. 60, 68.
[11] Ibid. 590; 69-70. Emphasis added.
[12] Ibid. 589; 68.

The A.A.T. is undoubtedly armed with powers that go well beyond those enjoyed by most administrators, whose decisions are appealed from. For example, the Tribunal may require evidence to be taken on oath or affirmation,[13] enforce the attendance of witnesses, the answering of questions,[14] secure the production of documents[15] and, in certain circumstances, order the payment of fees for witnesses.[16] Even if the decision-maker did hold a hearing, either compulsorily or voluntarily, he almost certainly would not have the power to compel testimony as the A.A.T. can. Thus, it is entirely possible that the decision-maker will not have access, on some occasions, to all relevant information. Normally, administrative decisions are made on the basis of file information without anything approaching a formal hearing. Generally, then, the quantity of information collected, the time available for its evaluation and sometimes its quality (as improved by controverting cross-examination) will place the A.A.T. in a superior position to secure and appreciate all relevant facts.

If this is a strength of the A.A.T., it follows that the A.A.T. procedures, as developed after the adversarial mode, are most apt in those cases where detailed fact-finding is important and warranted to reach the right or preferable decision.

I have previously illustrated the value of the A.A.T. in eliciting detailed medical and other facts necessary to review and improve the primary decision in such matters as defence force retirement and death benefits.[17] The enlarged opportunity to produce lay and medical evidence before the A.A.T. and to test competing expert hypotheses has almost certainly, in this area, resulted in more accurate and just determination of rights.

But it is in the area of deportation cases that the superior fact-finding abilities of the A.A.T. are perhaps most clearly useful. One has only to read the decisions of the Tribunal in the rapidly expanding number of deportation cases to realize how varied are the facts and how evenly balanced, on occasion, are the competing claims of the general community to be free of aliens convicted of offences and of individuals in our midst who claim the opportunity to continue living in Australia. In these cases, the A.A.T. catalogues and evaluates the detailed facts about the life and offences of the proposed deportee, his employment and personal links to Australia, the opinions of others about him and his possible reform and rehabilitation. In *Becker*, Mr Justice Brennan called attention to the superior powers and opportunities of the Tribunal in these words:

[13] S. 40(2)(a).
[14] Ss. 40(1A), 61 and 62.
[15] Ss. 37, 38, and 40(1A).
[16] S. 67. See also s. 69 by which the Attorney-General can provide legal assistance. In the year ended 30 June 1979 the amount of assistance given by the Attorney-General was small ($2,459). See Attorney-General's Department (Cth.) *Annual Report* 1978-1979, 33.
[17] *Re Bos and Defence Forces Retirement and Death Benefits Authority* (1977) 1 A.L.D. 31.

> "[T]he Tribunal must ascertain the relevant facts of the case. This examination may frequently throw a new light on the case, for the Tribunal may compel the production of evidence and expose it to cross-examination and comment, an advantage which the Minister does not have. . . .
> In this case, the Tribunal has been furnished with the facts which were placed before the Minister and the policies which were thought to be applicable. In addition, it has had evidence from the applicant which was tested by cross-examination, and submissions from the legal representatives of the parties. . . .[18]
> In this case, I have had the advantage which was denied to the Minister of seeing the applicant and of forming an opinion as to his likelihood again to transgress. . . . In my judgment, deportation at the present time is not warranted."[19]

Having acknowledged this superior facility, it is appropriate to call attention to a number of problems. The first is the cost and delay which may often attend such an exquisite examination of factual material. This is not a problem confined to the A.A.T. It is one inherent in the continuous oral trial of the common law tradition. But the suggested long-term aim of administrative review on the merits is the improvement of initial decision-making. It would simply not be possible nor appropriate to have every administrative decision subjected to such manpower-intensive, time-consuming and expensive review procedures. Yet, the initial decision-maker must somehow seek to reach the right or correct decision, upon information available to him without recourse to compulsory process. Furthermore he must do so, if the business of government is to go on, in a time span significantly shorter than curial techniques typically require. Not only does the expenditure of time and expensive manpower limit the number of cases that can be handled in this fashion. The fact that only a few are so handled may make the impact of decisions in those cases of intermittent and limited value in improving administrative decision-making generally. What is the reaction of an administrator to a statement by the A.A.T. that the Tribunal has had a better opportunity, after several days, many witnesses, compulsory process and weeks for deliberation, to reach a better understanding of the facts? It cannot be that the administrator should adopt precisely the same techniques as the Tribunal. He does not have the same powers. He certainly does not have the same time. He may not have the same skills of syllogistic reasoning. He probably does not have the same temperament and training in the sifting of minute but relevant facts. He is more sensitive to government and public opinion than the A.A.T. may be. He is impatient with the rules of evidence and the trappings of formality.

I envisage at least three possible reactions to the assertion of superior fact-finding ability in the A.A.T. The first and preferable reaction is one of

[18] (1977) 15 A.L.R. 696, 701; 1 A.L.D. 158, 163.
[19] Ibid. 704; 166.

trying harder to secure the kinds of facts which the patient reasoned and publicly stated decisions of the A.A.T. suggest to be relevant. Not only will decisions resting on such facts be more likely to be upheld. The aim of the process is to improve the correctness of decisions. Thus, decisions based on considerations declared by the A.A.T. to be relevant may lead, in analogous cases, to a quite rapid ascertainment of the preferable decision.

The second reaction is that the administrator may accept the A.A.T. as an appropriate and convenient forum in which to resolve the relatively small proportion of particularly troublesome cases which emerge amongst the mass of administrative decisions he must make. The knowledge that the decision is reviewable may instil a greater sense of care and responsibility in making the decision in the first place. The existence of appeals may help to instruct the well-motivated administrator in the fair handling of future, similar cases.

The third reaction is one of impatience and self-protection. There will doubtless be some who will dismiss the A.A.T. procedures as a lawyer's fancy, having no practical relevance to day-to-day decision-making. The result of this view will be resistance to the further accretion of jurisdiction to the Tribunal, defensive action to uphold those decisions which are appealed, or possibly worst of all, unconvinced abandonment of cases of appeal, writing them off as the litigious "chance factor" which has now been inflicted on the Public Service.

Because initial decision-making cannot afford the luxury of time-consuming ascertainment of facts after the adversarial model, I predict that, at least as an alternative or supplement to present procedures, there will be quite rapid moves towards more low-key, fact-finding techniques. If such techniques could be found, they could at once preserve the superior capacity of the A.A.T. to get rapidly to relevant facts whilst at the same time avoid the full-scale adversary trial which has tended to mark the first years of the A.A.T.

Paragraph 33(1)(c) of the *Administrative Appeals Tribunal Act* 1975 (Cth.) provides that in a proceeding before the Tribunal, it is not bound by the rules of evidence "but may inform itself on any matter in such manner as it thinks appropriate".

In some cases, the A.A.T. has undoubtedly stretched the rules of evidence and received material which would not ordinarily be admitted in evidence in a court. Thus, in *Beets and Minister for Immigration and Ethnic Affairs*[20] Mr Justice Davies had to consider the prospects of rehabilitation which the applicant would have if he were deported to New Zealand. A telegram from the applicant's father was received into evidence deposing

[20] *Beets and Minister for Immigration and Ethnic Affairs* (1979) 2 A.L.D. 33. Note that an appeal to the Federal Court of Australia has been heard but no judgment has yet been handed down.

to the extreme difficulty of the situation. The applicant and his sister gave evidence on the subject. A further telegram was submitted disclosing that a number of engineering companies had been telephoned, but they had no vacancies for welders, the employment of the applicant. Mr Justice Davies did not place much reliance on this information. He admitted into evidence an extract from a publication on monthly employment statistics produced by the New Zealand Department of Statistics showing that the unemployment rate in New Zealand was less than Australia.

On the other hand, the general approach of the Tribunal has been cautious. This reflects what normally happens, notwithstanding such statutory commands, when tribunals are established and manned, predominantly, by lawyers:

> "The Tribunal and the Minister are equally free to disregard formal rules of evidence in receiving material on which facts are to be found, but each must bear in mind that 'this assurance of desirable flexible procedure does not go so far as to justify orders without a basis in evidence having rational probative force', as Hughes CJ said in *Consolidated Edison Co* v. *National Labour Relations Board* 305 US 197 at p. 229. To depart from the rules of evidence is to put aside a system which is calculated to produce a body of proof which has rational probative force. . . . That does not mean, of course, that the rules of evidence which have been excluded expressly by the statute creep back through a domestic procedural rule. Facts can be fairly found without demanding adherence to the rules of evidence."[21]

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

> "Notions of fairness—notions which reflect our ability to give to aliens who lawfully settle here the security needed to establish a family, home and employment—require that an alien resident should not be deported without proof of the facts tending to show that his deportation is in the best interests of Australia. A family is not to suffer the banishing of a husband and father without such proof. Suspicion is wholly insufficient."[22]

In that case, the Tribunal had to adapt its procedures to receive, in the absence of the applicant but in the presence of his legal advisers, certain confidential information. But of course administrators in making discretionary determinations, quite often rely not only on facts, nor even on suspicion, still less on confidential material that cannot readily be disclosed and possibly incapable of proof. It is inherent in the administrator's functions that he, as any other person holding a responsible office, must act on hunch, guesswork and "feeling" which develops over many years of

[21] *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 26 A.L.R. 247, 256; 2 A.L.D. 33, 41. Note that an appeal to the Federal Court of Australia has been lodged.

[22] Ibid. 275; 58. Cf. *Drake* v. *The Minister for Immigration and Ethnic Affairs* (1979) 24 A.L.R. 577, 588; 2 A.L.D. 60, 67.

dealing with like problems. The A.A.T. may ultimately come to a similar expertise, though it is unlikely and may be undesirable. For the moment, at least, it acts virtually exclusively upon the material placed before it. Though not bound by the rules of evidence, it has shown some reluctance to move far from them.

In *Re Pacific Film Laboratories Pty Ltd and Collector of Customs*[23] the question arose as to whether the Tribunal would have regard to certain material which was undoubtedly before the original decision-maker and, some might think, rightly so. The Collector of Customs sought to tender in his case the transcript of evidence taken during a Tariff Board inquiry. Evidence had been given about the description of goods whose duty was in question, namely "bulk rolls" of photographic material. In support of the tender, the representative of the Department submitted:

> "that the Tribunal should not remain ignorant of the matters contained in the Report having regard to the fact that Parliament amended the Tariff to refer to 'bulk rolls' shortly after the Tariff Board Report was released on 2 June 1967. In fact, so our inquiries later disclosed, the Tariff was amended by Act No. 39 of 1968 which was assented to on 18 June 1968 and was given retrospective operation from 1 November 1967."[24]

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

> "Although under s. 33(1)(c) of the Administrative Appeals Tribunal Act 1975, Parliament has provided that, in a proceeding before the Tribunal, the Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate, we concluded that it may be unfair to the applicant if we were to have regard to the transcript of evidence taken during the Tariff Board inquiry when there had been no opportunity for the applicant to test relevant evidence in cross-examination. We indicated that any witness whose evidence might assist in establishing the trade meaning of 'bulk rolls' should be called before the Tribunal. . . . We invited submissions on behalf of the Collector whether the Tribunal could properly refer to the Report as an aid to interpretation of the Tariff but that invitation was not pursued. . . . We accordingly decided that we should not refer to the Report."[25]

In addition to being released from the rules of evidence, the Tribunal is instructed by paragraph 33(1)(b) of its Act to conduct its proceedings with as little formality and technicality and as much expedition as the requirements of the law and "a proper consideration of the matters before it" permit. Where a Tribunal is by statute established with the duty, on appeal, to step into the shoes of the administrator and virtually to make the decision he ought to have made, (though on the material before the A.A.T.) it

[23] (1979) 2 A.L.D. 144.
[24] Ibid. 151.
[25] Ibid.

deprives itself of its advantage in fact-finding by any slavish adherence to rules of evidence. Failure to consider a relevant Tariff Board inquiry (even at a price of permitting material in reply) seems to illustrate the danger of the Tribunal's depriving itself of information which, quite properly, would have activated the decision of the administrator.

What inference is to be drawn from the *Pacific Film* case? If the ultimate rationale of the creation of the A.A.T. is the improvement of administrative decision-making at the "grass roots" level, is the administrator to infer that, in case an appeal is lodged, he must not consider hearsay material which a potential appellant did not have the opportunity to cross-examine and to test?[26] A preferable course may be the reception of all relevant and reliable material, with ample opportunity to respond. Otherwise, the process of administrative review and the search for the so called "correct" and "preferable" decision may be distorted. There may be cases where it is convenient in the Tribunal's adjudicative setting, to exclude evidence that is embarrassing or otherwise unsatisfactory in order to ensure a fair hearing. Unreliable material or material proferred as confidential not to be disclosed to the applicant may be rejected in order to require the party to pursue some other method of proof. Thus in deportation cases, hearsay and rumour about the subject may be so unreliable and embarrassing that it should be rejected and put out of mind as much by the Tribunal as by the original decision-making. What must not happen, as it seems to me, is that the Tribunal becomes enmeshed in rules of evidence and seeks, however unwittingly, to impose a curial straightjacket on decision-makers who inevitably look for a wider range of information, probative though not admissible in the orthodox sense. There is in a strict approach to receiving evidence a danger of bifurcation which the statute provided against, viz. that the administrator and the A.A.T. reach decisions on material that is typically quite different.

FINDING THE LAW

It is to be expected that a Tribunal whose presidential members are all Federal Judges and whose senior members are experienced lawyers should evidence skill in clarifying the legal obligations of Commonwealth administrators. Almost every case coming before the A.A.T. involves the ascertainment of the legal basis for administrative action and the subsequent testing of the facts and of declared policy against the standard of that ascertained legal obligation. The A.A.T. has emphasized the importance of complying with the law, as ascertained and declared. In doing this, it has done nothing more than to uphold the Rule of Law which is central to our

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

kind of society. The A.A.T.'s functions of ascertaining and stating the law not surprisingly, show the A.A.T. at its best. It operates in much the same way as a court, even though it is not a court and may not exercise the judicial power of the Commonwealth because of the way in which the doctrine of the separation of powers has been interpreted. In a sense, the strength of the A.A.T. in clarifying and stating the law is ironic. In *The Collector of Customs (N.S.W.)* v. *Brian Lawlor Automotive Pty Ltd*,[27] the Federal Court by majority dismissed the contention that the A.A.T. could not review the basis in law of an administrative act that had been challenged. Had the argument succeeded, it could have resulted in a most inconvenient result by which the A.A.T. was prohibited from considering the lawfulness of the conduct of administrators. Although administrators must themselves comply with the law, the A.A.T. reviewing their acts and putting itself into their shoes would not, had the *Lawlor* case been otherwise decided, have been entitled always to review and clarify their lawful duty. Mr Justice Deane, who dissented, was unimpressed by this argument:

> "It may well be inconvenient that a person who wishes to litigate the question whether an enactment confers any power at all to make a decision, is unable to do so in the administrative tribunal which has authority to review decisions made under that enactment. Such inconvenience is not, however, an uncommon consequence of the division of judicial and executive powers."[28]

For the time being, the A.A.T. continues to perform extremely useful and instructive work in clarifying the legal duties of administrators and the rights and privileges of those dealing with them. Clearly, it is desirable, from the practical and social point of view, that the A.A.T. should continue to have this function. Administrators are not simply fact-finders. They too apply the law and any realistic and helpful system of review of their decisions cannot ignore that fact.[29]

A curious exception here, which may be explained as no more than an act of self-restraint, is the self-imposed refusal of the A.A.T. to consider the constitutional validity of a statutory provision upon which the administrator has acted. In an early case, Mr Justice Brennan, sitting alone, decided to "forbear from answering the question".[30] I have already expressed a view that it is difficult to distinguish such cases conceptually from others involving decisions upon the lawfulness or otherwise of administrative action. The position of the A.A.T. under Mr Justice Brennan was that constitutional challenges would not be entertained in the Tribunal but should be taken elsewhere. It seems probable that this decision will not hereafter be followed. In *Lawlor's* case, the Chief Judge, Sir Nigel Bowen,

[27] (1979) 2 A.L.D. 1.
[28] Ibid. 31.
[29] D. R. Woodward and R. M. Levin, "In Defense of Deference: Judicial Review of Agency Action" (1979) 31 *Admin. L.R.* 329, 339.
[30] *Re Adams and the Tax Agents' Board* (1976) 1 A.L.D. 251, 257-258. See also *Costello* v. *Secretary of Department of Transport* (unreported, 30 November 1979)

made it clear that the Tribunal has jurisdiction to decide all relevant questions including questions of constitutional validity, though he pointed out that the tribunal might endeavour to ensure that questions which are more appropriately determined by a court of law should be so determined.

There are many values in having a Tribunal such as the A.A.T. reviewing and clarifying legal obligations. It must never become a mere substitute for legal advice, even in Advisory Opinions.[31] However, there is always a risk that busy administrators will overlook, misinterpret or even ignore legal requirements. They may get too close to problems or be too mindful of bureaucratic convenience. In a country which adheres to enforceable observance of the law, the presence of the A.A.T. at the elbow of the administrator is both salutary and useful. Elsewhere, I have identified a number of cases where painstaking examination of legislation and subordinate legislation has laid down for the administrator a regime which is clear and which was previously misunderstood. Useful analogies are mentioned from other areas of the law. Instructive decisions are cited, notably from the United States courts and courts of Europe. Even in the face of recognised administrative inconvenience, the language of the legislation is explained and upheld. Thus, in the first *Hospital Contribution Fund of Australia Case*[32] an issue arose relating to the operative date of amendments to the rules of a medical care fund. The view had been taken in the past and was urged on the A.A.T. that the rate of contribution changed only from the date upon which a Minister's approval had been given. Mr Justice Brennan could not accept this practice to be consistent with the language of the Act.

> "The Minister's function is to approve or to refuse to approve the change, and though he has special statutory power to approve the change in part, he is denied the power to select a date for the commencement of the new rates which is different from that resolved upon by the organization. It is administratively inconvenient to adopt this construction of the legislation but it is a consequence of the form which the legislation takes."[33]

Apart from the practical value of clarification and instruction and the constitutional value of upholding the Rule of Law, there are other important functions which the A.A.T. plays in its law-finding functions. The value of the involvement of a tribunal here is the value of judicial

and comments in Kirby, op. cit. 219. Cf. Note "The Authority of Administrative Agencies to Consider the Constitutionality of Statutes" (1977) 90 *Harvard L.R.* 1682 and Bowen C.J. in *The Collector of Customs (N.S.W.)* v. *Brian Lawlor Automotive Pty Ltd* (1979) 2 A.L.D. 1, 7.

31 See *Re Reference under s. 11 of Ombudsman Act 1976 for an Advisory Opinion; ex parte Director-General of Social Security* (1979) 2 A.L.D. 86.

32 *Re The Hospital Contribution Fund of Australia and Minister for Health* (1977) 1 A.L.D. 209.

33 Ibid. 212.

review generally. This is most especially the merit of having a number of generalists who are external to and independent of the administration, reviewing from time to time the actions of administrators. Sometimes, such review can help to ensure that general values of our society are not overlooked in the rush of administrative business. The deportation appeals are cases in point. Both the Federal Court in *Drake's* case[34] and Mr Justice Brennan in *Pochi's* case[35] have emphasized the radical interference with individual rights which deportation involves and the consequent care that must be observed in any review of the discretion to deport. Recent history, and not only in our country, illustrates the way in which administrators, sometimes reflecting the transient passions of their political masters, may overlook important conflicting values of society.[36] Speaking of judicial review, one Canadian writer has put it thus:

> "[T]he court was insisting that such a serious invasion of democratic and civil libertarian values be clearly authorized by the empowering statute. The generalist Court was reminding the specialist Agency that the Agency was not 'an island entire of itself' and that its work had to be brought into harmony with the totality of the law."[37]

If the A.A.T. has inherited the above strengths of judicial review, it has also adopted the orthodox Australian approach to that function, which attaches no special deference to the view of the administrator concerning the interpretation of the law he is applying. Mr Justice Brennan has said that it is neither assumed that the decision appealed from is right or wrong. The very assumption that there is a single "right" or "correct" decision in matters of legal interpretation has been criticised. In matters of interpretation of statutory powers it is not always the case that there is one clearly right and one wrong interpretation. Often it must be a search for the "preferable" view of the law. Most rulings of "law" tend to involve a compound of law, fact and policy.[38] The original decision-maker will often be aware of the legislative draftsman's actual intention. He may even be the person who gave the drafting instructions. Whilst that intention cannot be upheld in the face of clear statutory language which does not support it, cases do arise where a reasonable interpretation is open, consistent with the decision-maker's conduct, and another interpretation which is inconsistent. In the United States, the Supreme Court has endorsed an approach which is sympathetic to the administrator. It recognises that statutory

[34] *Drake* v. *The Minister for Immigration and Ethnic Affairs* (1979) 24 A.L.R. 577, 588; 2 A.L.D. 60, 67: "The making of a deportation order pursuant to s 12 of the Migration Act can involve drastic interference with the liberty of an individual. The powers conferred upon the Minister by the section should be strictly construed".

[35] (1979) 26 A.L.R. 247; 2 A.L.D. 33.

[36] See, for example, the Jehovah's Witnesses cases examined in P. W. Hogg, "Judicial Review: How Much do we Need?" (1974) 20 *McGill L.J.* 157, 167 ff.

[37] Ibid. 171.

[38] Ibid. 175; Woodward and Levin, op. cit. 337.

interpretation is not to be done in a vacuum and away from the purposes and expertise of the administrator:

> " 'Cumulative experience' begets understanding and insight by which judgments not objectively demonstrable are validated or invalidated."[39]

In the United States, courts reviewing administrative action have developed what has become known as a "presumption of validity".[40] The courts approach administrative interpretation with a measure of respect. This has developed not only because of the great bulk of administrative decisions and a recognition that judicial review is likely to be spasmodic and intermittent in effect, but also from a positive respect for the expertise of the administrator and the recognition that technical and policy matters which are relevant to interpretation may be better considered by administrators than by judges.[41] This so-called "doctrine of restraint" has its limits. The presumption of correctness is rebuttable. But it remains a presumption nonetheless:

> "The construction put on a statute by the agency charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed if it has a 'reasonable basis in law'. *N.L.R.B.* v. *Hearst Publications* 322 U.S. 111,131; . . . But the courts are the final authorities on issues of statutory construction. *F.T.C.* v. *Colgate-Palmolive Co.* 380 U.S. 374,385, and 'are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute'. *N.L.R.B.* v. *Brown* 380 U.S. 278,291 'The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia . . .'. *American Shipbuilding Co.* v. *N.L.R.B.* 380 U.S. 300,318."[42]

In Australia there has been no similar doctrine of "deference to reasonable administrative interpretations"[43] nor any similar doctrine of "restraint".[44] In Australian judicial practice, it was perhaps the absence of such a doctrine, and the fear of "artificial" or "unrealistic" interpretations of the law that led some critics to oppose the establishment of a judicialised tribunal to superintend administrative decisions:

> "Not everyone would accept the view that Australian administration should be made more judicial in character and some writers argue that Australia has already gone quite far enough in this direction. A notable feature of public administration in this country is the extent to which provision has been made by Parliament for direct judicial or adminis-

[39] *National Labor Relations Board* v. *Seven-Up Bottling Co.* 344 U.S. 344, 349 (1953).
[40] K. C. Davis, *Administrative Law Treatise*, (1958) para. 11.06; Woodward and Levin, op. cit. 332.
[41] Hogg, op. cit. 163.
[42] *Volkswagenwerk Aktiengesellschaft* v. *Federal Maritime Commission* 390 U.S. 261, 272 (1968).
[43] Hogg, op. cit. 172, 175. There has recently been the suggestion that there is a presumption of the constitutionality of Commonwealth legislation. See Murphy J. in *Bevelon Investments* v. *City of Melbourne* (1977) 12 A.L.R. 391, 407.
[44] Woodward and Levin, op. cit. 332.

> trative tribunal review of official action. To the administrator indeed it may often seem that efficiency has been sacrificed to fair play, and that conferring of judicial reviewing powers on the courts and the judicialisation of tribunals has gone too far. For such writers the emphasis in administrative adjudication and tribunals should be on skill, cheapness, informality and efficiency rather than legal membership and court-like procedures."[45]

In the orthodox activity of judicial review, the High Court of Australia and other Australian courts have shown a notable lack of interest in the interpretations adopted by inferior administrative bodies. The fact that such bodies have expertise, knowledge, possibly a detailed understanding of the operation of the law and even its initial intention has never seemed to account for much. The result, particularly in the industrial relations field, has been a series of decisions which, though they must be loyally accepted, are at least arguably wrong. Certainly they are inconvenient and reach conclusions contrary to those of the good sense applied below.

In *The King* v. *Hickman; ex parte Fox and Clinton*[46] national security regulations applying to matters relating to the Coal Mining Industry conferred jurisdiction on a Local Reference Board to settle disputes affecting employers and employees in that industry. A partnership of haulage contractors employed persons to haul coal. The local Reference Board decided that they were "employers in the coal mining industry". Prohibition was granted. Mr Justice Dixon stated the judicial dilemma thus:

> "The question raised is one which, it might be thought, would turn upon the common understanding, among people concerned with the coal industry and particularly with industrial matters, of the manner in which the words 'coal mining industry' are ordinarily applied. It may be that no such common understanding of the expression exists. If, however, the application of the words is established by usage, you would expect to find it evidenced by awards, determinations, reports and other papers dealing with the industrial side of coal mining. But we have not been referred to any such documents. On the contrary, we have been left to ascertain as best we may what is the denotation of the very indefinite expression 'coal mining industry'. It is, I think, unfortunate that it has become necessary to submit such a question to judicial decision. From a practical point of view, the application of the Regulations should be determined according to some industrial principle or policy and not according to the legal rules of construction and the analytical reasoning upon which the decision of a court of law must rest. As it is, however, the question must be decided upon such considerations. Applying them, I am of opinion that the operations of the employers, who are the prosecutors in this application, do not fall within the natural meaning of the expression 'coal mining industry'. This conclusion is contrary to

[45] R. Else-Mitchell, "Administrative Law" in Spann (ed.), *Public Administration in Australia* 1973, 273, 293. See also D. Pearce, "The Australian Government Administrative Appeals Tribunal" (1976) 1 *U.N.S.W.L.J.* 193, 196.
[46] (1945) 70 C.L.R. 598, 612.

> that adopted by the Local Reference Board and expressed in the decisions now in question. . . ."[47]

There are many other such cases[48] particularly in, but not confined to, labour law and industrial disputes. Without a policy of judicial deference to the administrator's decision or some other means of giving weight to reasonable interpretations of the law open to the decision-maker, the peril of judicial interpretation is that identified by Mr Justice Dixon with its consequent unsatisfactory features mentioned by him.

To overcome this peril in the operations of the A.A.T. and to avoid excessive "judicialization" of its operations and the reaching of decisions on legal matters in isolation, the Kerr Committee sought to graft expertise and knowledge onto the Tribunal. It recommended that one of the three members of the Tribunal should be an officer of the Department or authority responsible for administering that area of the administration which had produced the decision under review.[49] The Bland Committee rejected this idea for two reasons. First, it was feared that it might lead to an inferior officer's reviewing the decision of a superior. Secondly, it feared public suspicion and loss of confidence in a tribunal so constituted.[50] The A.A.T. legislation, the appointments made and more recently the Administrative Review Council's reports have accepted the approach of the Bland Committee.[51] The A.A.T. is substantially comprised of members who have gained their experience outside the Public Service. Even if the Kerr Committee approach had been adopted, it is probable that the legal and particularly the judicial members would have dominated decisions. The *Pacific Film* case is one illustration of the A.A.T. adopting a highly orthodox approach to the business of legal interpretation. Another is the decision of the majority in *Re Bailey & Commissioner for Superannuation*[52] where the Tribunal reacted sharply to the suggestion that it should adopt a "slightly more flexible and less restrictive view" of statutory interpretation. Referring to the endeavour of one of the parties to introduce an extract from Hansard including the Second Reading Speech of the Minister to explain the purpose of a relevant repealing Act, Mr R. K. Todd (Senior Member) and Mr W. J. Smith said:

> "This introduced of course some discussion of an old topic, which is conveniently discussed in Pearce, Statutory Interpretation in Australia (Butterworths) 1974, para. 68. It is unnecessary to reopen the whole topic here, but we do desire to refute a suggestion that was made that

[47] Ibid. 613-614.
[48] See e.g. *Ex parte Australia and New Zealand Banking Group Limited; re Portus* (1972) 46 A.L.J.R. 623. Cf. J. I. Fajgenbaum, "The Commonwealth Administrative Review Committee and Judicial Review" (1973) 47 *A.L.J.* 353, 359 ff.
[49] Kerr Committee Report, op. cit. fn. 3 para. 292.
[50] *Report of the Committee on Administrative Discretions* (the "Bland Committee"), Final Report, 1973 para. 149.
[51] Administrative Review Council, *Second Annual Report* 1978, 14 (para. 62).
[52] *Re Bailey and Commissioner for Superannuation*, No. 12031 of 1978, A.A.T., Mr R. K. Todd and Mr W. J. Smith, unreported, 11 May 1979.

this Tribunal viewed in terms of its functions, and having regard to the use made before it from time to time of policy statements, can adopt a slightly more flexible and less restrictive view for the purpose of ascertaining the intention of Parliament where there is some doubt in relation thereto having regard to the context in which the legislation was passed. This notion is, it seems to us, insupportable. As a matter of principle, there must be one approach to the interpretation of statutes. Whether one agrees or disagrees with the rules that have been evolved, they have in fact been evolved and it is simply not open, in our opinion, to administrators (which includes the Tribunal) to adopt an approach in relation to statutory interpretation that departs from the rules of law laid down for the interpretation of statutes by the Courts. The Tribunal's position in this regard is unaffected by the provisions of s. 33(1) of the Administrative Appeals Tribunal Act 1975."[53]

Calls for the adoption of restraint in judicial superintendence of administration have been made in Canada. However, Federal and Provincial legislation went the other way and extended the judicial power to review for error of law.[54] To the argument that lawyers are specially suited to the task of interpreting statutory language, one Canadian critic, himself a lawyer, answers thus:

"[T]he meaning of statutory language (or any language for that matter) always depends upon its context. It will be rare indeed to find a term in a statute which does not draw some colour from the purposes and policies of the statute of which it is a part. Judges who are not familiar with those purposes and policies or with the expectations of those familiar with the field of regulation may give a term its 'standard legal meaning' or its 'everyday popular meaning' in ignorance of the technical or policy implications of their decision. The field of labour law is replete with examples of judges assigning meanings to what they believed were everyday or standard legal terms, and thereby disturbing the longstanding and rational expectations of those working in the field."[55]

Just as in Canada arguments against judicial review of lawfulness have tended to fall on deaf ears, so in the United States has there been important recent moves away from the doctrine of judicial deference in the review of the legality of administrative action. Senator Dale Bumpers has introduced into the Congress a Bill (known as S. 111) designed to reverse deference, require *de novo* decisions on all questions of law and proof "clearly and convincingly" of the validity of any challenged rule or regulation.[56] The Administrative Law Section of the American Bar Association (A.B.A.) produced an expert report recommending the A.B.A. oppose S. 111. However, at the House of Delegates 1979 meeting the House rejected the report and adopted a recommendation favouring such

[53] Ibid. 14 ff.
[54] *Federal Court Act* 1970 (Canada) and *Judicial Review Procedure Act* 1971 (Ontario). See Hogg, op. cit. 162.
[55] Hogg, op. cit. 163.
[56] Proposed amendment to s. 10(e) *Administrative Procedure Act* 5 U.S.C. para. 706 (1976). The terms of the amendment are set out in Woodward and Levin, op. cit. 329-330.

legislation.[57] Critics pointed out that the Bill would create a presumption of invalidity, ignore agency expertise, be a major disincentive to formal rule-making and clog the courts with costly and dilatory proceedings which would hold-up socially beneficial government action. Nevertheless, the House by a vote of 146 to 116 reversed the expert recommendation and adopted precisely the opposite.

Armed with A.B.A. support, Senator Bumpers has pressed on with his Bill. On September 7, 1979 the Senate approved the proposed amendment to the Administrative Procedure Act after rejecting a motion designed to kill the measure by a vote of 27-51. Senator Edward Kennedy criticized the amendment as leading to further overloading of the judicial calendar. He produced a letter from the Chief Justice of the United States, Warren Burger, opposing change of the legal burden of proof required for challenging Federal Regulations. Republican Senator Robert Dole joined Kennedy. He said that judges were often ill-qualified to rule on technical regulations and asked:

> "What ultimate benefit do we reap as a society from expert agencies if their actions can be completely second-guessed by non-expert judges?"[58]

This debate is of interest to us in Australia, not only because of the creation of the A.A.T., with its functions, now endorsed, of reviewing and clarifying the lawfulness of administrative action. As well, the *Administrative Decisions (Judicial Review) Act* 1977 (Cth.) has been passed. When proclaimed to commence, it will expand and facilitate more judicial review of Commonwealth officers. Time will tell whether the courts, and the A.A.T., develop machinery for finding and giving proper weight to reasonable administrative interpretations of the laws under which they operate. Because A.A.T. decisions are reviewable by the Federal Court on questions of law, it seems likely that any move towards a more "realistic" approach to administrative interpretations would require a concurrent change both in the Tribunal and the courts. Otherwise an "expansive" Tribunal might be struck down by an "orthodox" Court. Plainly, such administrative interpretations cannot be conclusive. Likewise, it is inadmissible to give effect to what it is claimed Parliament intended to say or "should" for convenience have said, if this is not supported by the plain language of the Statute as enacted. Clearly, there must be no abdication of effective scrutiny of lawfulness and the need to uphold the Rule of Law. But equally, there may be a case for seeking guidance where the meaning of legislation is uncertain, technical or otherwise dependent upon expertise:

> "Nothing could be more wasteful, and more deleterious to coherent administration of a regulatory program, than to have courts duplicate

[57] American Bar Association, *Summary of Action of House of Delegates*, 1979 Annual Meeting (Dallas, Texas, August 14-15 1979: 19-20). See also (1979) 48 *U.S. Law Week* 2134.

[58] Senator R. Dole quoted in *Congressional Quarterly Weekly Report* Vol. 37, No. 37, 15 September 1979, 2014.

the efforts of agencies in applying legal concepts to every individual situation that comes along. The consistency of those legal concepts with the mandates of Congress should be, and is, scrutinized by the courts with only so much deference to the agency's construction as the circumstances warrant. But when that task is completed, we believe it is appropriate to leave the implementation of those judicially declared guidelines primarily to the specialists."[59]

POLICY REVIEW

Clearly, the unique and, to some, the surprising feature of the A.A.T. charter is its power to review policy questions where the original decision-maker has conferred upon him a discretion which he may exercise according to broadly stated (or in some cases unstated) criteria.[60] It is here that the functions of the A.A.T. go beyond those typically performed by a court. In certain minor matters, the A.A.T. has taken the opportunity of its careful examination of the facts to make comments on matters of administrative practice, suggesting ways in which such practice could be improved. This facility is equally available to courts. Like the courts, the A.A.T. has been sparing in its use of it. Doubtless it is conscious of the alternative of the Ombudsman, available to receive complaints of bad administration. Doubtless it has in mind the protections in the *Ombudsman Act* 1976 (Cth.) against premature or ill-conceived criticism of administrative practices.[61] Where matters of substantial policy are involved, not established by law, the A.A.T. may not abdicate its own review functions to the blind application of government policy. But it should not ignore and pay no heed to that policy.[62] Mr Justice Brennan has pointed out it is in this area that the A.A.T. may have its most important functions:

"The primary administrator may be bound by government policy or be bound to give great weight to government policy. The Tribunal, it seems, is not so bound unless an Act so provides expressly or by implication. There is consequently a prospect of departure from a primary decision made in the exercise of a discretionary power if the Tribunal considers that a different decision is the correct or preferable one to make.

The Tribunal's independence of the executive government is a significant factor in the review decision. Independence in exercising a discretion can ensure that the interests of an applicant are not unduly overriden by the objectives of government or its bureaucracy. Reciprocally, independence means that the objectives of government and its bureaucracy are susceptible of frustration by the Tribunal. . . . I venture to suggest that it is in the review of discretionary decisions that the greatest utility of the Administrative Appeals Tribunal will be found. It will be necessary to develop principles to regulate the occasions when the

[59] Woodward and Levin, op. cit. 338.
[60] Cf. Kirby, op. cit. 233.
[61] Notably, the requirement of consultation before reporting.
[62] *Drake* v. *The Minister for Immigration and Ethnic Affairs* (1979) 24 A.L.R. 577, 589-591; 2 A.L.D. 60, 68-71 (Bowen C.J. and Deane J.); 597 ff; 75 ff. (Smithers J.).

> Tribunal should intervene to alter the exercise of the discretionary power, else it may unpredictably confuse the due process of primary administration. These principles are emerging, tentatively and with growing appreciation on the part of the Tribunal and Government."[63]

What are the merits of conferring such great power on an independent judicialized tribunal? First, it may bring into the open policy guidelines which have hitherto been secret and hidden from public view, though they are the rules by which administrators have made decisions. In this sense, the A.A.T. is part of the growing machinery for increased openness of government. In the first deportation case, the ministerial policy was proved, in large measure, from a number of rather old ministerial press releases by which the statutory "may" was expanded and clarified for officers of the Immigration Department.

Secondly, the spotlight of litigious attention having been placed upon policy, the result has been, in some cases, a clarification of that policy and the more detailed spelling out of the discretionary factors which the primary decision-maker is to take into account. Thus, in the deportation cases, the initial bracing experience of A.A.T. scrutiny produced a ministerial statement of policy which has been transmitted to the Tribunal. Though not binding on it, the Tribunal, as evidenced in every case, pays due regard to the factors listed by the Minister and applied by the decision-maker. This openness and clarity of discretionary elements permits not only clearer and reasoned decisions from the Tribunal. It encourages more uniform and principled decision-making in the first instance. It also facilitates public debate, if the criteria are disputed as erroneous, ill-balanced, out-of-date or otherwise unfair.

The special function of the A.A.T. is to reach the "correct" or "preferable" decision. Unlike the initial decision-maker, it is usually released from any binding observance of the Minister's statement of policy.[64] This freedom permits a generalist body such as the A.A.T. to test the established governmental or bureaucratic values against more general principles of fairness, liberty and so on.[65] There are no sure guideposts for the way in which this "novel jurisdiction" to review a decision on policy or discretionary grounds, is to be exercised. Neither the Kerr nor the Bland Committee addressed this problem for the simple reason that each took the view that the Tribunal should not "be entitled to express opinions on government policy" or "to question the policy grounds on which a decision is based" or to question a decision "to the extent that it gives effect to policy".[66] In particular, neither considered the possible risks to the

[63] F. G. Brennan, "The Anatomy of an Administrative Decision" (1979) 9 *Sydney L.R.* 1, 9.

[64] I.e., Otherwise than in such cases as the *Dairy Industry Stabilisation Act* 1977 (Cth.) ss. 11A and 24A.

[65] Hogg, op. cit. 164.

[66] *Report of the Committee on Administrative Discretions* (The Bland Committee) *Final Report* 33 (para. 172(g)(iii)). Cf. The Kerr Committee report, op. cit. 89

perceived independence of the judiciary if Federal judges were required to decide between competing broad social policies. Plainly, the forensic medium and the background, expertise and available time of the A.A.T. puts limitations on the extent to which it can effectively find and evaluate policy considerations in competition with those clearly stated by the Executive Government. There are many, brought up in our tradition, who feel uncomfortable with the notion of A.A.T. members being at large on questions of policy and the considerations that should affect the exercise of discretion. This is not least because the primary decision-maker is not generally so released. A.A.T. review is most valuable if it exists to improve the way in which decisions are made "at the counter". The development of a review process which may operate on grounds significantly different from those operating on the original decision-maker's mind could be productive of chaos. Plainly, for reasons of democratic principle, administrative consistency, and available time and expertise, some sensible relationship must be worked out between the Tribunal and lawful statements of government policy, at least those made at a Ministerial level. Courts and court-like bodies, such as the A.A.T., are less responsive to political and popular will than administrators are.[67] This states both the limitation and opportunity of the A.A.T. It is limited by the paramountcy which we accord in Australia to popularly elected constitutional machinery. Its opportunity is to check injustice, discriminatory treatment, unfairness or other wrongful exercise of power where that leads to a primary decision which it feels is incorrect or one that is not preferable in the circumstances.

Clearly, it is not appropriate that every discretion and every policy should be committed to untrammelled A.A.T. review. Some discretionary decisions can be made according to fairly well-defined criteria upon which evidence can be taken or appropriate expertise included in the Tribunal itself. Cases involving insurance company accounts or an air pilot's licence are cases in point. Where, however, broad social or economic policy questions are at stake (as, for example, migration decisions or competing quota entitlements), the curial procedures, forensic technique, available personnel and relevant expertise throw doubt upon the suitability of the A.A.T. as a body sufficiently equipped to reach the decision which one can confidently assert will be more likely to be "correct", "right" or "preferable" than that of a decision-maker. In such cases, there may be other supplementary reasons why the A.A.T. is chosen to provide a forum of review. In the case of deportation decisions under the *Migration Act* 1958 (Cth.), Australia has a large migrant population. Deportation,

(para. 297). The Kerr Committee did envisage that the Tribunal might be empowered to express the opinion that government policy was operating "in an oppressive, discriminatory or otherwise unjust manner". Ibid. 89.

[67] Woodward and Levin, op. cit. 341.

though not specifically a punishment, has serious implications for personal freedoms.

The operations of the Tribunal over the last three years have led to a growing appreciation of the scope of the A.A.T.'s "novel jurisdiction". So far, the reactions have been three. First, there has been a slowing down in the conferring of jurisdiction to review discretions in cases where, traditionally, a large element of policy has existed. For example, further jurisdiction under the *Migration Act* 1958 (Cth.) and jurisdiction under the *Passports Act* 1938 (Cth.) have not been conferred. Secondly, there has been a statutory reaction, in one Act, by which it is sought to confine the Tribunal to a court-like application of ministerial policy, as openly declared. Outside such cases, *Drake's* case[68] makes it plain that the A.A.T. may not simply apply ministerial or government policy without performing its own independent judgment and reviewing the policy. Thirdly, the A.A.T. itself has sought to spell out the approach that should be taken and the considerations that should be taken into account in reviewing broad discretions. It seems likely that the future will see further adjustment here. An important issue of political power is at stake. Consistent with the *Drake* decision, it seems likely that the A.A.T. will pursue a policy of restraint. Its role in a democratic community and its value as an external review mechanism may require nothing less.

CONCLUSIONS

The A.A.T. has continued to demonstrate a skilful use of its manpower, resources and expertise in finding facts and clarifying the law upon which administrative decisions should be made. In reviewing discretionary decisions, it has helped to "flush out" hitherto secret criteria affecting the rights and obligations of people living in Australia. It has also encouraged reformulation and clarification of such criteria. These are developments beneficial to greater openness of government and observance of the Rule of Law. Without known rules, susceptible to discovery, application and evaluation, it is empty to speak of the Rule of Law in administrative action.

The A.A.T. decisions are uniformly written to a high standard of clarity. This enhances their value as a means of guiding administrators towards relevant fact-finding, proper methods of statutory interpretation and principled approaches to the exercise of discretion.

The aim of establishing the A.A.T. is ultimately the improvement of original decision-making. Unless the A.A.T. achieves this aim, it will fail in its chief purpose and it may even do a mischief because of the costs, delays, uncertainties and other inconveniences inherent in any appeal system. The test of success is the extent to which A.A.T. operations result

[68] *Drake* v. *The Minister for Immigration and Ethnic Affairs* (1979) 24 A.L.R. 577; 2 A.L.D. 60.

in more "right", "correct" or "preferable" decisions being made, without recourse to its machinery.

To some extent, the effectiveness of the A.A.T. is outside its own control. So limited is its jurisdiction and so disjointed the catalogue of decisions committed to its review, that it is simply not possible for it to have the universal impact on administration that was envisaged by its progenitor, the Kerr Committee. This limitation of the Tribunal to little more than the original package included in the 1975 Act will have to be carefully watched lest such a circumscribed body by its specialized, intermittent and highly specific jurisdiction should distort rather than improve Commonwealth public administration as a whole. The causes for concern were identified long before the A.A.T. was created. They include the cost to the public and litigants, the judicialized technique and the delays in hearing and adjudication of appeals. So far as the costs are concerned, the Public Service Board has evidenced its anxiety by securing the agreement of the Prime Minister and the Attorney-General to the creation of a new Inter-departmental Committee on Machinery for Review of Administrative Actions. This Committee was established in late 1978 and its purpose is stated to be:

> "To monitor the effects on Commonwealth administration of developments in administrative law and practice and of changes of administrative decision making procedures and to provide advice to the Government on such matters. Its work is particularly directed towards the impact on the workload, resources and costs in departments and authorities of developments in administrative law."[69]

So far as fact-finding is concerned, the A.A.T. undoubtedly has powers and skills superior to those of most initial decision-makers. Where fact-finding is important for decision-making, a case for review by the A.A.T. is strongest. On the other hand, the A.A.T.'s techniques are not always available to or appropriate for administrators. They act on a wider range of information than could be proved before the Tribunal. An attempt to shackle administrators by the constraints of provable evidence may impede effective decision-making, at least in some areas. The time-consuming procedures of the trial process, whether by adversary or inquisitorial techniques, may render the A.A.T. unsuitable for mass jurisdiction such as social security appeals, repatriation appeals and the like.

The advantage which the A.A.T. has to escape technical rules of evidence and its duty to review on the merits and to avoid technicalities may require greater willingness to receive relevant and probative material even though this would not be accepted in a court of law.

In the clarification of the law, the A.A.T. has special advantages, as it is presently composed, and has shown self-confidence and facility in the

[69] Public Service Board (Cth.) *55th Annual Report* 1979, 8.

performance of this task. Apart from professional skill, this is an area where the A.A.T. can bring to bear the value of an external, civilized critic which is conscious of the place of administrative law in the wider legal system and the need to subject administrative efficiency, on occasion, to overriding notions of fairness and civil liberties.

The likelihood that the A.A.T. and the courts will have an expanded role in the clarification of administrators' statutory duties suggests that new attention may be needed to the approach that should be taken where the administrator has reached the decision which is reasonably open to him on one interpretation of the law. Without embracing unreservedly the American doctrine of "deference" to such decisions, it may be time to heed Mr Justice Dixon's lament concerning the inadequacies of approaching such matters of interpretation in a vacuum, removed from the administrator's relevant expertise and practical knowledge.[70]

So far as the review of policy decisions and discretionary considerations are concerned, the A.A.T. has undoubtedly succeeded in bringing publicity and clarity to previously unavailable rules or vague and ill-considered criteria. Working out the proper and acceptable relationship between the A.A.T. and elected government is at once the most difficult and vital task for the period immediately ahead. Unless an accommodation can be reached which acknowledges and upholds the superiority of decisions openly arrived at, according to law, by elected officials, it seems certain that the A.A.T. will atrophy or be confined to a limited class of case where fact-finding or legal interpretation, but not policy review, are important. This result would be profoundly disappointing. A prime reason for the establishment of the A.A.T. was precisely to bring openness and principled decision-making into discretionary decisions.[71]

The A.A.T. experiment continues to be one of Australia's most novel and important contributions to law reform. Visitors from Britain, Canada, New Zealand and elsewhere are coming to this country to study the operations of the new experiment. It is many years since Australia was last an exporter of significant law reform ideas. The A.A.T. and its operations will continue to command close attention in this country and beyond. It deserves success because the task upon which it is engaged is one supremely important for our time: the striking of a just balance between the needs of the machinery of government and the interests of the individual.[72]

[70] The reference is to Dixon J. in *The King* v. *Hickman; ex parte Fox and Clinton* (1945) 70 C.L.R. 598, 612, 613-614. See supra.

[71] Cf. Brennan J. in *Re Drake and The Minister for Immigration and Ethnic Affairs (No. 2)* (unreported, Administrative Appeals Tribunal, 21 November 1979).

[72] F. G. Brennan, Foreword, Administrative Review Council, *First Annual Report* 1977.