ADMINISTRATIVE TRIBUNALS IN VICTORIA.

Presidential Address delivered to The Law Students' Society of Victoria by Mr. C. I. MENHENNITT, LL.M., April, 1935.

I PROPOSE to speak on the subject "Administrative Tribunals in Victoria." It would be impossible, in the time I have, to make a complete and comprehensive survey of every body in Victoria, which performs administrative functions of a quasi-judicial nature. I intend merely to select certain examples which are generally typical of the various tribunals that have been established, describe their functions, constitutions and practice, and examine whether, in the light of contributions to the subject of administrative law in England, America, and Australia, the type of tribunal that is commonly established in Victoria is satisfactory, and is surrounded by the legal safeguards generally admitted to be necessary.

Criticism is often levelled at the law course at the University, on the grounds that it is more than necessarily theoretical and remote from legal practice. Such criticism usually includes the subjects of Constitutional Law as among the rather "academic" portions of the course. When due consideration is given to the fact that the daily application of the law to the details of everyday sets of circumstances is liable to obscure for the practising lawyer the end which the legal rule was formulated to achieve, the criticism loses much of its apparent truth, but particularly so far as it is directed to Administrative Law does it seem unfounded.

In the first place, the number of occasions on which a legal practitioner has contact with administrative tribunals is growing, and is likely to continue to grow. One result of the crisis in the world's economic development during the past five or six years has been increasing control and direction of economic life. This control and direction emanates from legally constituted bodies, with directive and licensing powers of innumerable kinds. Sooner or later the practising lawyer is confronted with questions which necessitate familiarity with both the constitutional and administrative aspects of such bodies—the solicitor to advise as to rights and duties, prepare and present the various kinds of applications that are to be made before such bodies; the barrister also to advise and appear, and in addition test the correctness of interpretations of rights and duties.

In the second place, if this type of legislation is to increase, it is essential that the bodies established should conform to certain basic principles applicable to all administrative tribunals, which principles have as their central objective the due protection of individual rights. Members of the legal profession, as a trained group of individuals, should be in a position to pass judgment on this question in a more impartial and scientific manner than the layman, and, as pointed out above, the lawyer is liable to have more frequent contact with such bodies than most other individuals. It amounts almost to an obligation for the lawyer to indicate defects and suggest remedies in the

make up of such bodies with the object of ensuring that they will be satisfactorily constituted. Both on the grounds of practical utility and public policy, therefore, the importance of Administrative Law is apparent.

The bodies performing quasi-judicial functions which will be described are selected indiscriminately as examples of innumerable other similar bodies to which the conclusions suggested would apply generally. First, the Milk and Dairy Supervision Act will be examined in detail, and the various quasi-judicial functions provided for in it enumerated and contrasted. Secondly, the Licenses Reduction Board will be referred to, and thirdly, one aspect of the Farmers' Relief Board will be mentioned. From a consideration of these matters certain general conclusions will be suggested. Finally the Transport Regulation Board, as constituted by the 1932 and 1933 Transport Regulation Acts will be examined in the light of these conclusions.

The Milk and Dairy Supervision Act 1928 provides by its ninety-seven sections for twelve different quasi-judicial functions. Some of these functions are exercised by Boards formally constituted with all the trappings of a tribunal. Others of them are performed by individuals under the guise of inspection, coupled with compulsive powers of ensuring compliance with the inspector's decision. The latter are none the less judicial functions. The criteria of such functions are the duty to consider the circumstances of each case, and to make a determination on the facts considered, together with the power to enforce such determination and thus affect individual rights.

The Act by section 5 provides for the constitution of a Milk and Cream Graders' Board. This Board is the most clearly judicial body created by the Act, and it has three distinct judicial functions. In the first place, by section 8 it has a duty, which it can delegate, of holding examinations of candidates for certificates as testers or graders of milk and cream. Any person who passes the examination and pays the prescribed fee obtains a certificate constituting him a tester and grader, provided the Board is satisfied as to his general conduct and character. This is an example of the exceedingly common type of licensing powers with which our legislation is permeated, The Board has a judicial discretion with regard to the standard of the examinations, the passing or failing of persons submitting for the examinations, and the satisfactoriness of conduct and character. The decision of the Board on these matters is final and without review.

The second judicial function of the Board, closely related to the first, is a power under section 10 to suspend or cancel certificates issued. The grounds on which such cancellation or suspension may be made are the failure to carry out duties imposed on the holder, and the conviction of a felony or misdemeanour or offence against the Act. The Board has a discretion as to whether it will or will not take action if either of the conditions precedent is established, and the determination of whether there has been a failure to carry out

duties is a judicial function it has to perform. In contradistinction to the licensing provisions, there is an appeal to police magistrates from the decision of the Board cancelling or suspending a license, although none by any other person interested if the Board in its discretion does not disturb the certificate. The clearly judicial nature of these licensing and delicensing powers is indicated by the conferring on the Board of the powers under Sections 14 to 16 of the Evidence Act 1928[1]

The third judicial function of the Board is appellate and will be referred to in connection with inspection officers.

Just as the Board is a judicial body, so the persons granted certificates by it in their turn exercise quasi-judicial functions. Owners of factories are obliged to employ testers and graders who test and grade milk and cream.[2] The Act provides that any person who makes butter from milk or cream determined by a grader to be below the prescribed standard[3], or who mixes milk or cream with other milk or cream determined by a grader to be below standard[4], or who mixes butter of standard grade with butter determined by a grader to be below standard[5] shall be guilty of an offence. The determinations of the testers and graders in deciding whether milk cream or butter is below standard are, it is submitted, quasi-judicial functions. At first sight it may appear that there are none of the semblances of a judicial organ. But the considerations that facts are investigated, and determinations made which are binding and affect rights, give these functions the essentials of judicial discretions. It is to be noted that the determinations of testers and graders cannot be reviewed.

The third type of judicial unit dealt with by the Act is the inspecting officer. By Section 21 an inspecting officer, who is of opinion that a package contains dairy produce below the standard of the grade marked on it, may give notice that the owner is to refrain from selling the goods until re-marked with a grade which, in the officer's opinion, is the correct one. This function is similar in operation to the functions performed by testers and graders, and its essentially judicial character is indicated by the provision of an appeal to the Milk and Cream Graders' Board against the decision of the inspecting officer.[6] The decision of the Board is final and conclusive. By Section 22 the officer can seize goods in his opinion below standard, and the same appellate provisions apply. It is to be noted that, despite the close similarity of functions, the inspectors' decisions are appealable, whereas those of testers and graders are not.

The fourth chief group of judicial functions is in connection with licenses for dairy farms, dairies and factories under Sections 47 and 48. The application for license is made to the Minister of Agricul-

1. Milk and Dairy Supervision Act 1928, Sec. 11.
2. *Ibid*, Sec. 12.
3. *Ibid*, Sec. 13.
4. *Ibid*, Sec. 15.
5. *Ibid*, Sec. 20.
6. *Ibid*, Sec. 21.

ture or to the local Council in certain circumstances, and is accompanied by a fee which is refunded if the license is not granted. The discretion in granting licenses would seem to be unlimited, and like the licensing function of granting testers' and graders' certificates is unappealable.

Once a license has been issued it reissues annually until a report is received from a supervisor showing to the satisfaction of the Minister that the dairy farm, dairy or factory, is not in a suitable and sanitary condition.[7] It is then apparently incumbent upon the Minister to cancel the license. The comparison with certificates for testers and graders does not hold good in this case, however, because from the delicensing decision of the Minister, there is no appeal.

The Act next provides for the exercise of functions by supervisors. A supervisor, by Section 53, may, if he thinks a cow is deleterious to health or unwholesome, prohibit its use for two weeks. Having so prohibited it, he must notify the chief veterinary inspector who shall inspect the cow or cause it to be inspected by a registered veterinary surgeon, and the officer or surgeon may confirm, cancel, or modify the prohibition or make such prohibition permanent. This is a function analogous to that of testers, graders and inspectors. Apart from the reference from the supervisor to the chief inspector there is no review.

By Section 61 supervisors have extensive powers to order the cleansing of dairy farms, dairies, factories and implements on the premises, the purification of the water supply, and the isolation of persons affected with contagious diseases, and to forbid the removal of dairy produce and utensils.

Section 62 empowers a supervisor to seize dairy produce which he is satisfied is unfit for human food or is being removed sold or delivered contrary to the provisions of the Act. The judicial nature of what might be called these "corrective" functions of supervisors under Sections 61 and 62 is recognized by the provision in Section 66 of the Act of an appeal to Courts of Petty Sessions.

The Minister for Agriculture is entrusted by Section 63 (2) with a further duty. He is empowered to give notice to the owner of a dairy farm dairy or factory that better construction and drainage of the premises and proper disposal of drainage be provided. The Minister's decision is unappealable.

The final judicial function is found in Part 3 of the Act, which creates a Milk Supply Committee,[8] and provides for the establishment of milk depôts.[9] The Committee is empowered to issue certificates to producers and sellers of milk specifying the grades of milk which each producer is authorized to supply or each seller to sell,[10] and is further empowered to cancel any certificate, whether proceedings under Section 93 against the holder have been taken or not. Neither the licensing nor the delicensing powers can be reviewed.

7. *Ibid*, Sec. 48 (5).
8. Milk and Dairy Supervision Act 1928, Sec. 89.
9. *Ibid*, Sec. 87.
10. *Ibid*, Sec. 93.

Turning now to the provisions of the Licensing Act 1928, the Licenses Reduction Board is by that Act empowered to delicense premises at the request of the owner and occupier[11] and to award compensation to delicensed owners.[12] It is incumbent upon the Board to consider certain matters, but otherwise its discretion is final and conclusive, and without appeal. It has further been decided in *The King v. The Licenses Reduction Board, ex parte The Carlton Brewery Limited*[13] that although proceedings of the Board cannot be removed by *certiorari* to the Supreme Court,[14] on the other hand prohibition lies.

Quasi-judicial functions established by recent legislation are vested in Courts of Petty Sessions by the Unemployed Occupiers and Farmers' Relief Act 1931. From the decision of the Court granting or refusing a protection certificate against execution by creditors there is no appeal on questions of fact.[15]

The above instances, while not being examples of every type of quasi-judicial body or function in Victoria, are, however, typical of two of the most important of such functions—the licensing and delicensing functions on the one hand and what I have termed the "corrective" functions on the other. From the point of view of normal judicial safeguards the above instances might be summarised as follows:—Of the four licensing functions—the Milk and Cream Graders' Board granting testers' and graders' certificates, the Minister or Council granting milk licenses, the Milk Supply Committee granting certificates for sellers, and the Farmers Relief Board granting protection certificates, the decision of the body in each case is unappealable. Of the four delicensing functions, there is an appeal to a police magistrate from the Milk and Cream Graders Board's suspension or cancellation of a license, there is no appeal from delicensing by the Minister or the Milk Supply Committee, while prohibition will lie against the proceedings of the Licenses Reduction Board, but not *certiorari,* and the decisions cannot be reviewed. Of the corrective functions there is no appeal from decisions of testers and graders, there is an appeal to the Milk and Cream Graders Board from an inspecting officer's determination, and a supervisor's decision with regard to cows is subject to the decision of the Chief Inspector, whose decision, however, is final, a supervisor's decision with regard to dairies and food can be reviewed in a Court of Petty Sessions, and finally a decision of the Minister on the suitability of buildings cannot be reviewed.

This review of some of the quasi-judicial functions established in only three statutes reveals the extremely unsatisfactory state of the law. In the first place there seems no justification in principle for extremely dissimilar provisions covering closely analogous functions.

In the second place the ancient canon that the law should be

11. Licensing Act 1928, Sec. 272.
12. *Ibid,* Sec. 272.
13. [1908] V.L.R. 79.
14. Licensing Act 1928, Sec. 277.
15. Unemployed Occupiers and Farmers Relief Act 1931, No. 3962.

certain is entirely disregarded. No individual can be expected to know all the provisions of statute law dealing with semi-judicial units, and with the entirely haphazard distribution of appeals it is equally impossible to anticipate with regard to any such unit whether the determination can be reconsidered. Mr. G. Sawer in a thesis entitled, "The Division of Powers in the Government of Victoria," concludes from a survey of Victorian legislation that whereas the majority of licensing bodies are not the subject of review, some sort of appeal is in the majority of cases provided from delicensing functions. No rules of universal application, however, exist.

Considering the growing importance of this branch of the law, and in the light of such contributions to this subject as C. K. Allen's "Bureaucracy Triumphant," Mr. P. D. Phillips' "Is it a New Despotism?" in the Proceedings of the Victorian Regional Group of the Institute of Public Administration, Vol. I, No. 3, Mr. T. M. Cooper's "Limitation of Judicial Functions of Public Authorities," and Dr. I. G. Gibbon's "Appellate Jurisdiction of Government Departments," both published in "Public Administration" (1929) at pages 260 and the following pages, it is submitted that rules with universal application should apply. The following are suggested.

It is generally admitted that in at least some instances appeals on questions other than of law should lie from administrative determinations. The present appeals are sometimes to Boards, sometimes to the lower Courts. The most satisfactory appellate body would, it is submitted, be an administrative appeal board, to which alone appeal would lie from quasi-judicial units of first instance. To the objection on grounds of finance, the reply is that with the increasing number of administrative functions the inferior Courts will soon be unable to cope with the work, particularly if review provisions apply uniformly to all such functions. If the work is to involve the employment of more individuals, a specialised body would be the most efficient and eventually the most economical. In any case the necessity for uniform review itself outweighs such financial considerations.

The extent of the appeal to such a body is an extremely contentious matter. Consideration on the one hand of the growing policy of establishing licensing provisions relative to established industries, such as the road transport industry, whereby firmly established individual rights are destroyed, and on the other hand of the vital consequences of delicensing and corrective powers on what are often valuable business undertakings, might at first sight lead to the conclusion that the appeal should be unlimited in extent. For reasons set out below this would seem unwise and unnecessary. It is submitted, however, that in every case the administrative unit of first instance should be compelled to state the facts on which the decision was given, the policy which was applied, the conclusion which was arrived at, and the determination on any questions of law, and that mandamus should lie to ensure the correct statement of these matters.

It is submitted that an appeal should lie to the appellate board on questions of fact, that no appeal should lie in regard to policy, that

the question whether the policy as expressed was properly applied to the facts should be appealable to the Board, and that questions of law should be the subject of review in the Supreme Court.

In regard to the facts the criticism suggests itself immediately that the appellate board would be inundated with dissatisfied individuals, and that the appeal should accordingly be limited at the most to the question whether there was sufficient evidence to support the findings of fact. The reply to this is that the usual deterrent—the obligation of the unsuccessful appellant to pay the legal costs of the party opposing the appeal—should be imposed. This would ensure caution and produce the result that few appeals would be instituted without the precaution of taking advice as to the prospects of success. More important, however, is the consideration that administrative units whose findings of facts are final are more liable to be the subject of error than Courts, because in numerous instances, particularly of corrective officials, the individuals have had no training of any kind in sifting evidence and have no knowledge of rules of evidence. The possibility of autocracy in the case of corrective units is also not a remote one. Despite all other safeguards, if questions of fact are not subject to review there are constant possibilities of error.

The submission that policy should not be subject to review is made for the following reasons. The original body or individual can inform its mind on questions of policy by all means of any kind open to it, including *inter alia* knowledge culled from text books, articles, experience and former cases. It would then be contrary to the whole object of creating expert bodies, if their policies were to be subject to review by a board which, in view of the number of the other bodies it would have to review, would be incapable of making itself expert as to the function of any one of them. But, even on policy, the appeal board should have the function of determining whether there were any grounds at all for the original body to decide upon the policy it has stated, from a consideration of the terms of the discretion granted by the Act, and whether the body considered any matter in formulating its policy which it was not entitled to consider. These are possibly questions of law, but the appellate board would be an appropriate body to have at least jurisdiction to hear them.

If policy is to be left unfettered, however, the practice of the legislature on this point should in many cases be drastically reformed. Legislation sometimes confers discretion, which is practically unlimited, and thus places in the hands of individuals enormous uncontrolled power. Policy being of the essence of the legislation should be defined with extreme precision and clarity, and wherever possible only the less fundamental issues should be left to the administrative unit. Otherwise practically legislative power is conferred on one or a few individuals.

The third point—whether the policy was correctly applied to the facts—is more contentious. There is much to be said for the view that the only reviewable question should be whether on the facts there was sufficient evidence to reach the conclusion, not what con-

clusion the appellate board would give. On the whole, however, the reasons and safeguards suggested in connection with findings of fact sufficiently outweigh other contentions.

Finally it would seem desirable to submit all questions of law directly to the Supreme Court, thus obviating the necessity of an appeal on points of law from the appellate board.

One suggestion is made which applies generally. The advisability of giving either original or appellate jurisdiction to Ministers of the Crown is open to strong criticism. The burden on the Minister often becomes exceedingly onerous, but from the point of view of justice the obvious possibilities for jobbery and lobbying and, where the function to be performed is a contentious party political issue, the almost certainty of see-saw changes of policy accompanying changes of government, make the Minister most unsuited to be clothed with such duties.

It may be said generally, also, that the necessity for appeal is greater with regard to delicensing and corrective functions than with regard to licensing, because established rights are more likely to be interfered with in the former cases, although the issues at stake where a restrictive licensing system is introduced for an established industry are just as important.

In conclusion, it is proposed to apply some of the above suggestions to the Transport Regulation Acts 1932 and 1933. Those Acts create a Transport Regulation Board of three members[16], and then go on to provide that no person shall operate a motor vehicle carrying passengers for separate and distinct fares or goods for hire or reward, unless the vehicle comes within the scope of certain other legislation[17]. Provision is made for licenses being granted as of right for vehicles being used for certain prescribed purposes.[18] As to all other vehicles the Board has a discretion whether it will or will not grant the application of the owner for a license.[19] An applicant for a license is obliged to file with the Board a schedule setting out details of the service he proposes to provide with his vehicle, details of past operations (if any), and other information relative to his application.[20] Any person interested in the granting of the license (such as another operator on the same road route, and the Victorian Railways Commissioners) may object to the granting of the license.[20] Licenses when granted (apart from temporary licenses and permits) are for a period of two or three years[21], and thereafter are renewable unless for some sufficient reason to be stated in writing by the Board.[22]

The Act provides that, before granting or refusing a license, the Board shall consider certain matters. Section 11 of the 1933 Act provides the matters which are to be considered in the case of passenger vehicles, and Section 26 the matters in regard to goods vehicles.

16. Transport Regulation Act 1933, Sec. 2.
17. *Ibid*, Secs. 6, 7 and 23.
18. *Ibid*, Sec. 22.
19. *Ibid*, Secs. 8 and 24.
20. *Ibid*, Secs. 10 and 25 and Regulations.
21. *Ibid*, Secs. 15 and 30.
22. *Ibid*, Secs. 16 and 31.

In the cases of *Nicholson v. Victorian Railways Commissioners,* and *McCartney v. Victorian Railways Commissioners,* the Full Court[23] and the High Court[24] in effect held that the discretion conferred by those sections did not entitle the Board to consider the deficit of the Victorian Railways as within the ambit of the words, "the interests of the public generally," in hearing applications. This makes it clear that the discretion of the Board is not unbounded. But Mann J. said,[25] "But I wish to add that in my view Section 26 is not a section limiting the purview of the Board. A direction to "have regard" to certain things is not a discretion to regard nothing else, and where, as in this Act, the discretion entrusted to the licensing authority is absolute, the authority must itself be the judge of what is relevant to a wise decision, provided its deliberations are not affected by any erroneous view of the law." The discretion is thus limited only as to certain definable matters; otherwise it is absolute.

Section 37 of the 1933 Act provides for appeals from decisions of the Board. Any applicant if he feels himself aggrieved by a decision as being erroneous in point of law or fact, may, after depositing £10 with the Board, obtain a statement in writing of the grounds of the decision for the opinion thereon of the Supreme Court. The statement is transmitted to the Supreme Court, and the appeal set down. The Court hears and determines the question or questions of law and fact arising on the statement so transmitted, and can make such order as it thinks fit, including reversal, amendment or affirmation of the decision, or remission of the matter to the Board with the opinion of the Court thereon. In the cases of *Nicholson and McCartney v. Victorian Railways Commissioners,* the Courts considered the extent of the appellate power. With reference to facts the Full Court decided that the section did not give it jurisdiction to consider the evidence and reverse finding of fact set out in the Board's statement, unless there were a question of fact arising on the statement. In just what circumstances a question of fact "arises" on the statement was not made clear, but it would seem that, if the Board expressed doubt as to a finding of fact in its statement and referred to the evidence, the Court would be competent to resolve the issue. Otherwise the findings of the Board on facts appear to be not subject to review.

Certain criticisms of this legislation suggest themselves. In the first place the discretion given to the Board is an example of extensive undefined discretion granted by the legislature, leaving the determination of broad principles to the decision of members of the Board. The policy which the Board might pursue could range from one of extreme restriction of road transport to one of almost unlimited licensing of road transport, confining the Board's restrictive functions to the regulation of conditions. The policy might vary according to the emphasis placed by the Board on the importance of the

23. [1935] V.L.R. 51.
24. [1935] A.L.R. 221.
25. [1935] V.L.R. 66.

various interests concerned—the interests of urban users of transport, or of country users, or of the Victorian Railways, or of road operators themselves, or of any other persons concerned. With a change in the personnel of the Board the policy pursued might be radically altered. Further, the power placed in the hands of the members of the Board is exceptionally large. In the interests of everyone it would seem desirable that the policy to be pursued by the Board be much more clearly and narrowly defined, either by laying down principles of policy, or by indicating the importance to be placed on the interests of the various parties interested. There would then be no possibility of mistaking the policy which Parliament intended in passing the legislation.

In the second place it is submitted that the Appeal Board suggested above would function appropriately in reviewing decisions of the Board. The Board is exercising the licensing function, but for an established industry, and the individual rights affected are very great, often involving large capital investments and firmly established goodwill. Hence every precaution should be taken to ensure that there shall be no erroneous findings of fact, on the basis of which decisions may be given. Policy, particularly if it is more clearly defined, should not be the subject of review, as the Board may formulate its policy only after *inter alia* long deliberations, experience and the reading of general contributions on the subject of transport. It is inappropriate for an appeal board to attempt to reconsider all these matters. The question of the application of policy to the facts, on the other hand, might well be reviewed. Finally, questions of law might well go direct to the Supreme Court as at present.

A third point arises. It is submitted that it is most inadvisable, for the reasons set out above, for a Minister to be invested with the right to review the Board's decisions. Apart from all other considerations, if the Board's determinations are made always subject to his approval, all the functions of the Board are being merely duplicated. And, without the safeguard of costs, it is most probable that every person whose submissions are not acceded to by the Board would ask for the Minister's determination.

In conclusion I would reiterate the one feature of universal application to all quasi-judicial tribunals, which is the determining factor in all that has been said above. As the policy of planned social and economic life is developed, every precaution should be taken to ensure that individual rights are interfered with only in accordance with the intention of the legislature, and after every possible opportunity has been given to the individual to show cause why his rights should be left undisturbed.