

THE AUSTRALIAN GOVERNMENT ADMINISTRATIVE APPEALS TRIBUNAL

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With the publication in 1971 of the Report of the Commonwealth Administrative Review Committee (the Kerr Committee) and in 1973 of the Report of the Committee on Administrative Discretions (the Bland Committee), the inadequacy of the traditional means for seeking judicial review of government decisions was officially acknowledged. Prime among these difficulties is the doctrine that courts only review the legality of administrative decisions, they will not allow an appeal on the merits. The Administrative Appeals Tribunal Act 1975 (Cth) sought to overcome this and other difficulties. In this article, Mr Pearce analyses the new act and highlights the composition, organization and jurisdiction of the new tribunal against the background proposals of the two committees. The simplicity of the procedure for instigating and maintaining the review process is evaluated. The author suggests that this new alternative to parliamentary or court review will enhance the quality of decision making in Australian government administration and may lessen the sense of grievance felt by dissatisfied citizens.

Introduction

Whilst the appointment of ombudsmen in the various jurisdictions in Australia has been attended by a considerable amount of publicity, the passage by the Australian Parliament of the Administrative Appeals Tribunal Act 1975¹ has gone largely unnoticed. This Act is, however, of very great significance both to the public at large and the legal profession in particular. The Act establishes a single, high-level, tribunal—the Administrative Appeals Tribunal—to review decisions taken within the Australian government. In so doing, it represents perhaps one of the most dramatic developments in administrative law in the common law countries. In addition, at a time when a number of the areas of law in which persons have traditionally turned to lawyers for assistance are being, or are under threat of being, curtailed—conveyancing, road accident compensation, family law—the Administrative Appeals Tribunal opens up a new area in which lawyers can be expected to play an important role.

The Administrative Appeals Tribunal found its genesis in the reports of the Commonwealth Administrative Review Committee (the Kerr Committee)² and the Committee on Administrative Discretions (the Bland Committee).³ These Committees had examined all issues relating to the review of administrative decisions taken by the Australian government. The Kerr Committee report was a wide-ranging overview of the whole question. The Bland Committee report looked at specific administrative discretions to

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¹ Act No. 91 of 1975.

² (1971) Parl. Pap. No. 144.

³ (1973) Parl. Pap. No. 316.

determine appropriate methods of review. The Committees were established largely because of dissatisfaction with the means available to review Australian governmental actions. The traditional judicial methods of review of administrative action were considered inappropriate as a means of examining many decisions. A second important factor was that, unlike the position in some other countries, notably the United Kingdom, the notion of review of administrative action by independent tribunals had not been very widely adopted in the Australian government.

The Kerr Committee endorsed the often repeated criticisms of the method of review of administrative action available through the courts. The judicial process, it was thought, did not provide a satisfactory means of calling the administration to account, because of (a) diversity and uncertainty of grounds of review; (b) interlocking and often complicated remedies; and (c) the cost to a complainant of having to bring an action in the Supreme Court.⁴

The Committee considered that a citizen affected by some administrative action should have available to him a cheap and easy means to obtain a review of that decision outside the ordinary departmental structure.⁵ The establishment of a review tribunal was a logical and expected response to this problem. However, the novel suggestion made by the Kerr Committee and reaffirmed by the Bland Committee was to recommend that review be undertaken by a central tribunal.⁶ This notion had been rejected in England by the Franks Committee⁷ in 1957 for a number of reasons. As outlined by the Kerr Committee,⁸ those reasons are, first, it was thought that the establishment of a centralized tribunal would impose too great a burden on that tribunal, having regard to the very large number of matters that it would be required to review. It was also considered that the review of different decisions might need different procedures, and that a centralized tribunal might lead to an undesirable rigidity in approach to the resolution of appeals; this would not occur if particular specialist appeal tribunals were established. Finally, and perhaps most importantly from a practical point of view, there were already a very large number of specialist appeal tribunals in existence dealing with appeals from specific administrative decisions, and it was considered appropriate to retain these tribunals.

The Kerr Committee considered that these matters did not give rise to the same degree of concern in Australia as in England because the number of discretions subject to appeal would be smaller and there were few specialized appeal tribunals in existence.⁹ Indeed, as mentioned, the inability

⁴ See note 2 *supra* at paras 20, 21, 28, 29, 42-58.

⁵ *Id.*, paras 253, 254, 289-291.

⁶ Kerr Committee Report, note 2 *supra* at paras 282, 289, 306, 348; Bland Committee Report, note 3 *supra* at para. 130.

⁷ Committee on Administrative Tribunals and Enquiries (1957) Cmnd. 218.

⁸ Note 2 *supra* at paras 230-232.

⁹ *Id.*, paras 229-233.

of people to obtain review of administrative decisions by an independent body was an instrumental fact in the establishment of the Committee in the first place. The Bland Committee, when it considered the application of the Kerr Committee's recommendations to specific discretions, retreated somewhat from the idea of a single tribunal. It recommended the adoption of three tribunals—a general administrative tribunal, a medical appeals tribunal, and a valuation and compensation tribunal.¹⁰ The Administrative Appeals Tribunal Act does not adopt this division but establishes one tribunal as was recommended by the Kerr Committee. But it does contemplate that the Tribunal will sit in divisions (section 19).

It is of interest to note that, prior to the establishment of the Kerr Committee, New Zealand had rejected the idea of a general administrative appeals tribunal in favour of the establishment of an Administrative Division of the Supreme Court. The Kerr Committee, in fact, recommended the adoption of an Administrative Appeals Court, but considered that it was also necessary to provide for a body that could review appeals on the merits rather than on the various grounds available under ordinary administrative law rules.¹¹ Thus it can be seen that the Administrative Appeals Tribunal is a unique body. Doubtless its performance will be observed with interest by other common law countries.

Composition of Tribunal

The Kerr Committee and the Bland Committee differed somewhat in their recommendations as to the composition of the Tribunal. The Kerr Committee considered it would be appropriate if the Tribunal comprised a panel of three persons, one of whom was a member of the department administering the decision under review. The other members would be a judge of the Administrative Court that the Committee had recommended should be established, and a layman drawn from a panel of persons "chosen for their character and experience in practical affairs".¹² The Bland Committee thought there were considerable difficulties in having a public servant on the panel.¹³ It also thought that the chairman should be legally qualified but need not be a judge,¹⁴ and it agreed in general terms with the recommendations of the Kerr Committee in relation to the third member of the panel.¹⁵ The Tribunal as established by the Administrative Appeals Tribunal Act is closer to the Bland Committee recommendations than those of the Kerr Committee. But clearly its structure has been strongly influenced by the model of the Conciliation and Arbitration Commission.

The Tribunal is to comprise a President and such number of Deputy

¹⁰ Note 3 *supra* at para. 130.

¹¹ Note 2 *supra* at para. 227.

¹² *Id.*, para. 292.

¹³ Note 3 *supra* at paras 148-152.

¹⁴ *Id.*, para. 136.

¹⁵ *Id.*, paras 144-147.

Presidents and other members as are appointed under the Act.¹⁶ The qualification for appointment as a presidential member is that the person be a judge of a State or Federal court or a legal practitioner of at least five years standing.¹⁷ Presidential members are to be appointed full time—departing from the recommendations of the Bland Committee which contemplated the use of part-time presidential members. Non-presidential members may have one of a number of qualifications, including that of being a legal practitioner; having had “at a high level” experience in industry, commerce, public administration, government service, etc.; holding a law, economics or public administration degree; or having, in the opinion of the Governor-General, special knowledge or skill in relation to any of the matters in respect of which decisions may be brought to the Tribunal for review. No appointments have been made to the Tribunal at the time of writing,¹⁸ so it is not apparent to what extent non-legal qualifications are going to be taken into account in making appointments. At first sight the Tribunal looks, in my view, to be too lawyer oriented. The Kerr Committee was anxious to avoid the introduction into the proceedings of the Tribunal of any sort of adversary system, and saw this as being a likely consequence if there were too heavy an emphasis placed on the appointment of legal practitioners as members of the Tribunal.¹⁹ While it is undoubtedly advantageous that the Tribunal be presided over by a person having legal qualifications, it would be most undesirable if the Tribunal should be run along lines in any way comparable to those of a court. The whole idea of the Tribunal is to avoid court-like procedures and, more importantly, a court-like way of thinking. It is essential that the Tribunal should not be too daunting for a person coming before it. An applicant unfamiliar with formal proceedings can very easily become tongue-tied when faced with having to make out a case before a panel of judge-like persons. That tribunals can become extremely formal in their proceedings is well illustrated by the Taxation Boards of Review and it is to be hoped that this will be avoided by the Administrative Appeals Tribunal. The heavy emphasis placed in the Act on the appointment of judges and legal practitioners does not, however, give much comfort on this score.

Organization of Tribunal

The Tribunal is to sit in divisions.²⁰ The divisions are to be (a) a General Administrative Division; (b) a Medical Appeals Division; (c) a

¹⁶ S. 5.

¹⁷ S. 7.

¹⁸ The Act has not been proclaimed at the time of writing. In an address to the Melbourne Rotary Club on Wednesday 21 April 1976, the Prime Minister, Mr Fraser, announced that the Act would be proclaimed late in 1976 (and that the Ombudsman Bill would also be reintroduced). Mr Fraser also indicated in his address that the jurisdiction of the Tribunal would be widened considerably by the addition of new matters to the list of reviewable decisions in the Schedule to the Act (see S.M.H., 22 April 1976).

¹⁹ Note 2 *supra* at para. 293.

²⁰ S. 19.

Valuation and Compensation Division; and (d) such other divisions as are prescribed by regulation. A presidential member is eligible to sit in any of the divisions,²¹ but a non-presidential member is to be assigned to a particular division or divisions.²² The Tribunal is to be constituted for the exercise of its powers by a presidential member and two non-presidential members, unless the parties agree that the hearing should be conducted by a presidential member alone.²³ The presidential member is to preside.²⁴ If a question of law arises in the course of the proceedings, that question is to be determined by the presidential member. Other issues are to be determined by the majority of the members of the Tribunal or, if there is an even division on the Tribunal, then the question is to be decided according to the opinion of the member presiding.²⁵

An organizational problem that is not clearly dealt with in the legislation or documentation so far issued relates to the physical placement of the Tribunal. Is it to be a mobile body, or are there to be a series of Tribunal panels in the major centres? The Bland Committee contemplated the latter and for this reason suggested that all members of the Tribunal outside Sydney, Melbourne and Canberra should be part-time appointments.²⁶ As noted, this suggestion was rejected in regard to presidential members. This perhaps suggests that in regard to the review of some discretions the Tribunal will be a peripatetic body.

If there comes to be established a number of separate and largely self-sufficient panels, one of the problems that will warrant careful attention by the President is that of diversity of approaches between different panels. This is an issue which, I understand, bedevils the War Pensions Entitlement Appeal Tribunals established under the Repatriation Act 1920-1975 (Cth). Because there is no system of reported decisions, or interchange of membership, Tribunals sitting in different States give marginally differing interpretations to sections of the Act and deal with claims in respect of some diseases in varying ways. This has led naturally to criticism and demands for uniformity. But uniformity is not always easy to achieve, and the more the number of tribunal panels dealing with appeals relating to the one discretion the greater the problem. Any set of appeal tribunals is, of course, likely to have this problem,²⁷ but if it can be recognized and steps taken to ameliorate its worst effects so much the better. Regular meetings

²¹ S. 21(1).

²² S. 19(3).

²³ S. 21(2).

²⁴ S. 22.

²⁵ S. 42.

²⁶ Note 3 *supra* at para. 137.

²⁷ It also seems to be a problem affecting the success of the Social Security Appeals Tribunal established by administrative act in 1975. Early figures indicate a surprising disparity in the outcome of appeals to the tribunals in the different State offices—see J. Leonart, "Open Government in the Department of Social Security" (a paper to be published by the Royal Commission on Australian Government Administration). [Editor's Note: The Administrative Appeals Tribunal was proclaimed to commence on 1 July 1976. The Tribunal has established offices in Sydney, and Mr H. G. Brennan, Q.C., has been appointed President of the Tribunal.]

of Tribunal members seems desirable. Some form of reporting of decisions—particularly where interpretation of an Act is involved—is probably also necessary.

Jurisdiction of Tribunal

When the bill to establish the Administrative Appeals Tribunal was first introduced into the House of Representatives, it followed the recommendation of the Bland Committee in not setting out any jurisdiction for the Tribunal. The idea was that the appellate function of the Tribunal would be steadily built up by amendment being made to those Acts which gave an administrator a discretion. This would be done after an investigation of each discretion. A decision would then be taken whether or not the Tribunal should be empowered to review the exercise of the discretion. The bill, however, was amended in the Senate by the addition of a Schedule which sets out a number of discretions and constitutes the Tribunal the appeal body from the exercise of those discretions. Over eighty discretionary actions are listed in the Schedule: they cover a wide range of matters. There is a heavy emphasis on discretions that affect a person's vocation, for example, registration of patent attorneys, cancellation of a tax agent's licence, and registration as a marriage celebrant. Decisions and determinations of Ministers and senior governmental officials that affect a person's entitlement under a number of Bounty Acts are listed, as are a number of decisions of the Collector of Customs under the Customs Act 1901-1975, the Distillation Act 1901-1968 and the Excise Act 1901-1974. Some of the discretions are of considerable significance, for example, revocation of a radio or television station licence, or an order banning a person from appearing on radio or television. Others are likely to arise infrequently, for example, the revocation of the authority granted to a banker under the Australian Capital Territory Taxation Administration Act 1969-1973 to issue stamped cheques. The effect of the Senate amendment is that once the Tribunal is established, there will be a body of discretions from which appeal will lie to the Tribunal. This could lead to a period of some uncertainty while the Tribunal works out its procedures and approaches to its task. This was one of the reasons why the Bland Committee had recommended the Tribunal be established first and its specific appellate function be subsequently determined. But this could have been a very slow process, and the Senate's amendment does mean that the Tribunal will be an active functioning body as soon as appointments are made to it.

It is clear that the discretions included in the Schedule are not to be taken as the whole jurisdiction of the Tribunal—indeed they may well come to represent only a small part of that jurisdiction. Section 25 of the Act indicates that the original approach will continue to be followed, and that the Tribunal will steadily increase its jurisdiction as various discretions are examined and provision made in relation to them for an appeal to lie

to the Tribunal. The Bland Committee in its final report referred specifically to a very large number of administrative discretions under Commonwealth and Territory legislation, and made recommendations on the question whether review of the exercise of each discretion by the Tribunal would be appropriate. It can be anticipated that these recommendations will form the basis of future action on this issue. If the Bland Committee proposals were followed, the Tribunal would exercise appellate powers in relation to the majority of administrative discretions provided for in Commonwealth and Territory legislation.

It will be interesting to see the extent to which the Bland recommendations are followed. Many of the discretions listed for review involve an element of policy and, in the past, Australian governments have been reluctant to concede that policy questions can be considered outside the formal departmental structure. A notable example of this attitude is in regard to the issue and cancellation of passports. No right of review of decisions on these matters exists at present. The Bland Committee recommended that an appeal lie to the Administrative Appeals Tribunal against such decisions.²⁸ If effect is given to this recommendation, it could be seen as an acceptance by the government of the notion of Tribunal review being an integral part of decision-making in Australia. Equally, if the recommendation is not implemented, it will be clear recognition of the fact that there are to be areas of bureaucratic control in Australia that may be exercised arbitrarily, secretly and without effective external means of control.

Finally, in regard to the Tribunal's jurisdiction, it is to be hoped that section 25 will have the effect that, in regard to administrative discretions included in new legislation, instead of there being no review or review by a specialist tribunal, provision will be made for review by the Administrative Appeals Tribunal.

Section 25(6) of the Administrative Appeals Tribunal Act must, however, be noted in regard both to new legislation and to amendment of existing legislation to provide for review of decisions by the Tribunal. That section contemplates that when provision is made for the Tribunal to review a discretion, the provision may, in relation to the particular discretion, modify the procedure set out in the Administrative Appeals Tribunal Act insofar as the review of that discretion is concerned.

Review by Tribunal

The power given to the Tribunal is to review "decisions" of administrators. What is a decision is defined at length in section 3(3) of the Act. While covering all positive actions taken by an administrator, the section also makes it clear that a refusal to take an action—for example, to issue

²⁸ Note 3 *supra* at Appendix H, p. 119.

a licence or a certificate—is a decision for the purposes of allowing review by the Tribunal.

One apparent hiatus in the Administrative Appeals Tribunal Act is that it makes no provision for review where the administrator does nothing—where he neither makes nor refuses to make an order. However, this gap will be covered when the Ombudsman Bill 1976 is eventually passed by the Federal Parliament. Clause 10 of the Bill sets out the procedure. If an administrator fails to take action under a provision and an appeal lies to the Administrative Appeals Tribunal for review of decisions taken under that provision, a complaint may be made to the Ombudsman about that failure to act. The Ombudsman then investigates the complaint. If he is satisfied that there has been an unreasonable delay by the administrator in taking action, the Ombudsman issues a certificate to the complainant setting out this view. For the purposes of an application then being made to the Administrative Appeals Tribunal, the administrator is taken to have made a decision not to do the act or thing the complainant is seeking and to have so acted on the date on which the Ombudsman's certificate was issued.

While this seems a most elaborate procedure for achieving the end desired, presumably it is intended to prevent persons lodging appeals with the Tribunal before an administrator has had any real time to consider an application. Without some sort of screening process, the Tribunal could have been flooded with applicants who were merely using an appeal as a device for expediting governmental action on their behalf. It is unfortunate, however, that there is no reference in the Administrative Appeals Tribunal Act to the Ombudsman's role on this issue. It is to be hoped that any explanatory papers issued by the Government will draw attention to the matter.

Two major problems at present facing a person wishing to challenge an administrative decision are, first, to know the basis on which the decision was reached, and secondly, to show that he has the requisite standing to obtain a remedy from the courts. Apart from the words of Barwick C.J. and Windeyer J. in *Giris Pty Ltd v. Commissioner of Taxation*,²⁹ there has been little indication that administrators are obliged to give reasons for their decisions. Without knowing the basis on which a decision was reached it is frequently difficult, if not impossible, to know whether any of the various grounds of review recognized by the courts can be established. On the question of standing, that required for the obtaining of the prerogative writs is perhaps not quite as demanding as that necessary to obtain one of the equitable remedies of injunction or declaration.³⁰ Nevertheless, a person has, in general terms, to show that he has been in some way affected by

²⁹ (1969) 119 C.L.R. 365.

³⁰ See D. G. Benjafield and H. Whitmore, *Principles of Australian Administrative Law* (4th ed. 1971) 208-210, 219-220, 224-228, 233-238.

the decision, and the courts have read this very much as having to show that he has been affected in some pecuniary way. Sections 27 and 28 of the Administrative Appeals Tribunal Act go a long way towards overcoming these two difficulties.

Section 27(1) defines the persons who may apply to the Tribunal in terms of any person "whose interests are affected by the decision". Without more this would look similar to the approach adopted by the courts in regard to the various remedies currently available. But sub-section (2) of the section provides that an organization or association of persons, whether incorporated or not, is to be taken to have interests that are affected by a decision if the decision relates to a matter included in the objects or purposes of the organization or association. This extension of the concept of standing will be of great advantage to organizations, such as conservation groups which at present can rarely challenge an administrative decision because the association itself is not affected by the decision. Sub-section (3) of the section qualifies this wide standing to some extent by limiting the right of challenge to organizations or associations that were formed before the decision was given. It is therefore not sufficient to form an association for the purposes of challenging a decision.

Section 31 then adds to section 27 by providing that, if the Tribunal decides that the interests of a person are affected by a decision, the decision of the Tribunal is to be conclusive. If the Tribunal decides that a person is *not* affected by a decision, section 44(2) allows an appeal to the Australian Industrial Court.

It is to be noted that section 27(1) makes it clear that "Australia or an authority of Australia" has standing to seek review of a decision—but again only if its interests are affected by the decision.

Sections 27 and 31 having determined the persons whose interests are affected by a decision, section 28 takes up the tale by allowing a person so affected to seek from the decision-maker a statement in writing setting out his findings on material questions of fact and the reasons for his decision. The decision-maker is required to supply this information within fourteen days after receipt of a request. It is to be noted that the person seeking reasons for a decision does not have to lodge an appeal against the decision before making his request. The only criterion is that he be a person affected by the decision. This section clearly places an applicant for review in a very much stronger position than would be the case if he were seeking review in a court of law. The difficulties of proving such things as the taking into account of irrelevant considerations, errors on the face of the record and so on disappear. The applicant can see whether or not he has grounds for complaint: a position which in many cases will be equally advantageous to the public servant whose decision is under examination. It should also have the great advantage from the public's viewpoint of forcing administrators to address their minds solely to those issues which should be

taken into account in reaching a decision. The standard of decision making ought therefore to improve.

There is one limitation on the effect of section 28, and that is that the Attorney-General may certify that the giving of reasons would be contrary to the public interest. This question is returned to below³¹ when considering the whole issue of production of documents to the Tribunal. Finally on this question, there is no limitation on the use that can be made of the reasons for decision supplied by the decision-maker. If a person thought it the better course to pursue, he could use the reasons given as the basis for seeking judicial review of the decision.

Where a person seeks to have a decision reviewed by the Tribunal, section 29 sets out the steps to be followed. They are quite straightforward—it is simply a matter of lodging a prescribed form and setting out the grounds of the application. There is one minor complication in that there is no indication in the Act what the grounds of the application are to be. This is done primarily for the purposes of ensuring the constitutional validity of the Tribunal.³² Presumably the applicant will merely set out the grounds for his disagreement with the decision of the administrator, and this will be the basis on which the Tribunal, at least initially, will approach the task of reviewing the decision. But, as is discussed below,³³ the Tribunal is put in the shoes of the decision-maker and would therefore seem to be obliged to take into account all relevant matters, and not simply those referred to by the applicant.

It is important to note that the mere fact of making an application for review of a decision does not operate as a stay of action to implement the decision (section 41). But power is given the Tribunal or a presidential member, on application by a party to a proceeding before the Tribunal to review a decision, to order that action to implement the decision be stayed. The Tribunal cannot act *ex parte* under this power, but is obliged to give the decision-maker a reasonable opportunity to make submissions to the Tribunal in relation to the matter. It is to be hoped that if action is taken to challenge a decision the government will not proceed to implement the decision in such a way as to make any review meaningless. If, however, it appears that a decision is to be implemented notwithstanding the lodging of an appeal, it may be necessary in emergency cases to have recourse to the courts for an interim injunction prior to making an application to the Tribunal under section 41.

The parties to a proceeding before the Tribunal for review of a decision are specified in section 30 of the Act. As might be expected they include the person who applies for review and the person who made the decision. But the right to be a party also extends to any person who would have

³¹ See text to note 38 *infra*.

³² See text to note 45 *infra*.

³³ See text to note 47 *infra*.

been entitled to apply to the Tribunal for review of the decision, provided that such a person makes an application to the Tribunal and the Tribunal orders that the person be made a party to the proceedings. It can be seen that this provision widens the scope of persons entitled to take part in proceedings before the Tribunal beyond those who would be parties in any judicial proceedings. In a court action a person interested would have to bring an action himself against the government and could not usually simply be added as a party in proceedings instituted by some other person.

Section 34 of the Act contemplates the holding of preliminary conferences (presided over by a presidential member, a non-presidential member or an officer of the Tribunal) with a view to resolving the dispute between the parties. The Act provides that if agreement is reached between the parties and the terms of the agreement would be within the powers of the Tribunal, then the Tribunal is to make a decision in accordance with those terms without holding a hearing. This could be a most valuable provision, because all too frequently the problems arising between the public and the government are the product of misunderstanding on one side or the other and, if the parties can get together with an independent chairman, resolution of the dispute should be possible in many cases.

Procedure at Hearing

The Act does not specify the procedure to be followed by the Tribunal but leaves this to be prescribed by regulation. However, the Act does say that the proceedings are to be conducted with as little formality and technicality and with as much expedition as the matter permits. The Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate.³⁴ The hearings are to be in public unless the Tribunal considers that it is desirable to sit in private because of the confidential nature of the evidence being given.³⁵

Section 32 of the Act expressly provides that parties before the Tribunal (including a hearing or preliminary conference) may appear in person or may be represented by some other person. Representation thus need not be by a legal practitioner although a legal practitioner could, and doubtless in many cases, will, appear for a party. This particular section is one of those which may be modified when the Tribunal is being assigned review functions in the future. Whether it will be so modified goes to the nub of an issue that has long exercised administrative lawyers—whether or not persons should be represented before administrative tribunals. The desirability of avoiding the formality which tends to creep in when lawyers are present is weighed against the difficulty many persons have in adequately presenting their cases without some sort of assistance. Both the Kerr Committee and the Bland Committee had recommended that persons

³⁴ S. 33.

³⁵ S. 35.

should be represented before the Administrative Appeals Tribunal.³⁶ The whole question has been fully discussed by Professor H. Whitmore in "The Role of the Lawyer in Administrative Justice".³⁷ Professor Whitmore concluded, not without some reservations, that legal representation before tribunals is desirable. But there are dangers, and excesses of legalism and forensic tactics will have to be carefully guarded against by the Tribunal.

Section 40 of the Act sets out the general powers of the Tribunal in regard to summoning persons, taking evidence, etc. Sub-section (4) is an interesting innovation in that it allows the Tribunal to permit a person who has been summoned to appear before the Tribunal to be represented.

Subject to what is said below in relation to Crown privilege, the Tribunal, since it is reviewing a decision on the merits, understandably must be given all the documents that were referred to by the decision-maker. Section 37 of the Act requires the person whose decision is being reviewed to furnish the Tribunal with a statement setting out his findings on material questions of fact and the reasons for his decision and every other document or part of a document that is in his possession and is considered by him to be relevant to the review of the decision by the Tribunal. In addition, the Tribunal may ask the decision-maker to provide other documents or statements containing further and better particulars.³⁸ Subject to the limitations mentioned below, the parties to the hearing are entitled to have access to any documents to which the Tribunal proposes to have regard in reaching a decision in the proceeding, and to make submissions in relation to those documents.³⁹

It can be seen that if the right of the parties to access to documents supplied to the Tribunal were left unlimited, the parties would be able to view documents that might otherwise be regarded as confidential and unavailable to the public.⁴⁰ To deal with this question, the Act has included a number of provisions imposing limitations on the availability of documents—see sections 28(2) and (3), 35(2), 36 and 39. The effect of these sections is that documents will not be available to the parties, as distinct from the Tribunal, if the Attorney-General certifies in writing that the

³⁶ Kerr Committee Report, note 2 *supra* at para. 330; Bland Committee Report, note 3 *supra* at para. 172.

³⁷ (1970) 33 M.L.R. 481, 484-489.

³⁸ S. 38.

³⁹ S. 39.

⁴⁰ Whether or not general public access to such documents is desirable raises a wider question that it is not appropriate to consider in this article. The question has been discussed recently in two reports. The first was the Report of the Interdepartmental Committee on Proposed Freedom of Information Legislation (1974) established by the Whitlam Government to propose a legislative scheme for implementing the open Government promise made by Mr Whitlam in his policy speech in 1972. The second is a report published by the Royal Commission on Australian Government Administration. The publication includes a draft Freedom of Information Bill (which would grant a right of access much wider than that recommended by the Interdepartmental Committee) and a lengthy memorandum explaining and justifying the provisions of the Bill and commenting on the American Freedom of Information Act, 1967.

disclosure of the documents or of any information would be contrary to the public interest because of any one of three circumstances: (a) that it would prejudice the security, defence or international relations of Australia; (b) that it would involve the disclosure of deliberations or decisions of the Cabinet or a Committee of the Cabinet; or (c) that disclosure could form the basis for a claim by the Crown in right of Australia in a judicial proceeding that the information or the contents of the documents should not be disclosed. Where such a certificate has been given, the documents or information must still be given to the Tribunal, but the Tribunal is required to ensure that the contents are not disclosed to any person other than a member of the Tribunal and that the documents are returned to the person producing them when the Tribunal has completed its hearing. From this it can be seen that the Tribunal is not limited in the information that can come to it—again this accords with the general idea that the Tribunal is reviewing a decision on the merits, and it can only do that effectively if it is placed in the shoes of the decision-maker.

The Act, however, does allow some breach in this embargo on availability of information by providing that if the certificate of the Attorney-General does not specify as the reason for non-disclosure one of the matters listed as (a) or (b) above, the Tribunal is to consider whether the information or the contents of the documents should be disclosed to the parties to the proceeding. If it considers that the information or the contents of the document should be so disclosed, it is to make the information available. The Tribunal is directed by section 36(4), in determining the question of disclosure, to take as the basis for its consideration the principle that it is desirable in the interests of securing the effective performance of the functions of the Tribunal that the parties to the proceedings should be made aware of all relevant matters, but the Tribunal is to pay due regard to any reasons specified by the Attorney-General in the certificate as a reason why the disclosure of the information or of the contents of the document would be contrary to the public interest.

This places the Tribunal in a very similar position to a court in the post-*Conway v. Rimmer*⁴¹ period, but perhaps takes the matter even a little further. In *Conway v. Rimmer* it was contemplated that a large number of departmental documents should not be made available for perusal by the parties. Many of these would not, it seems, fall within the categories specified in paragraphs (a) and (b) above, but would nonetheless be protected in the courts on a claim of Crown privilege.⁴² Depending on the attitude taken by the Tribunal, parties before it may have access to a

⁴¹ [1968] A.C. 910.

⁴² Lord Reid in *Conway v. Rimmer* [1968] A.C. 910, 952 referred to as protected "all documents concerned with policy making within departments including, it may be, minutes and the like by quite junior officials and correspondence with outside bodies. Further, it may be that deliberations about a particular case require protection".

wider range of materials than would be available in judicial proceedings. It is suggested that the approach set out in the Act with regard to Crown privilege could be adopted with considerable benefit as the general basis on which privilege issues are resolved before the courts (provided of course that the use of the categories (a) and (b) is not abused).

Section 36(6) deems the resolution by the Tribunal of the question whether information or the contents of a document should be disclosed to the parties to a proceeding to be a question of law. The effect of this is to allow an appeal to be brought to the Australian Industrial Court against the decision of the Tribunal on this issue.⁴³ Such an appeal would lie at the instance either of the party wishing to obtain the information if the Tribunal had refused to order disclosure or of the government if the Tribunal had overruled the objection to disclosure.

Section 35(2) of the Act should also be noted when considering disclosure of information. That section contemplates that the Tribunal has an overriding power separate from the question of Crown privilege to give directions prohibiting or restricting the publication of evidence given before the Tribunal. In particular, the Tribunal may prohibit or restrict the disclosure to some or all of the parties of evidence given before the Tribunal, or the contents of a document lodged with the Tribunal. This provision seems to embrace a concept of general confidentiality which is distinct from Crown privilege. It would presumably be used if information relating to a person's private or business affairs came before the Tribunal. A provision of this kind is obviously desirable, but it must be used with considerable care. It is all too easy for a Tribunal in the interests supposedly of one of the parties to decline to make, for example, medical reports available, when in fact they go to the very basis of the applicant's case.

Review by Tribunal of Decisions

The type of review that can be undertaken by a body in Australia is affected markedly by the limitations included in the Constitution on the bodies that may exercise judicial power. The *Boilermakers* case⁴⁴ made it clear that there could be no mixing of judicial and non-judicial powers in the one body. However, the *Shell* case⁴⁵ indicated that an administrative tribunal, in that case, the Income Tax Board of Review, could be established, provided that it did not exercise the judicial power of the Commonwealth. The Administrative Appeals Tribunal has, with this precedent in mind, followed very closely the pattern adopted in the establishment of the Taxation Boards of Review. This approach is reflected primarily in two ways. First, the Act does not set out any grounds on which the person

⁴³ S. 44.

⁴⁴ *Attorney-General of Commonwealth of Australia v. The Queen* (1957) 95 C.L.R. 529.

⁴⁵ *Shell Co. of Australia Ltd v. F.C.T.* (1930) 44 C.L.R. 530.

wishing to challenge a decision has to base his case and, secondly, the Tribunal cannot finally determine questions of law.⁴⁶

The effect of the first provision is intended to ensure that the Administrative Appeals Tribunal is seen as a part of the administration itself. If grounds of review were set out, they would almost certainly raise issues that went to the jurisdiction of the administrator—using jurisdiction in the wide sense defined in *Anisminic*⁴⁷—and this would in turn inevitably raise questions of law. If this approach were adopted, the *Boilermakers* case would point to invalidity of the Tribunal. So what is done is to place the Tribunal in a position where it can substitute its discretion for that of the administrator. Section 43 of the Act makes this clear by providing that 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”. On review of the decision, the Tribunal is given plenary powers. It may affirm the decision, vary it, set it aside and make a decision in substitution for it, or remit the matter for reconsideration to the administrator in accordance with any directions or recommendations of the Tribunal.

An important provision is section 43(6) which provides that a decision of a person as varied by the Tribunal, or a decision made by the Tribunal in substitution for the decision of a person, shall be deemed to be a decision of that person and, unless the Tribunal otherwise orders, has effect or shall be deemed to have had effect on and from the day on which the decision under review has or had effect. In short, the order of the Tribunal is a substitution for the order appealed against and not a setting aside of it. But note that it is backdated. This could raise problems if action were taken on the strength of a decision subsequently set aside by the Tribunal. One is very much into the area of the void-voidable issues that arise in regard to the question of the application of the rules of natural justice.⁴⁸ Would a person who suffers damage as a result of an action taken under a decision subsequently set aside by the Tribunal have an action against the government? Perhaps this is a factor that will be taken into account when determining whether or not the Tribunal should order that its decision have effect from a day other than the day on which the decision under review took effect.

What is not apparent from the Act is upon whom the onus of showing that a decision be set aside lies. In the ordinary circumstances the applicant for review presumably would have the onus of proof thrust upon him. But section 43(1) says that the Tribunal may exercise all the powers and discretions that are conferred by the enactment on the person who made

⁴⁶ Ss 42, 44.

⁴⁷ *Anisminic Ltd v. Foreign Compensation Commission* [1969] 2 A.C. 147.

⁴⁸ See Benjafield and Whitmore, note 30 *supra* at 153 and the differing views of the writers there cited.

the decision. Does this not put the Tribunal in the situation of having to consider how it would have acted if the facts had been brought before it in the first instance? While it is of course proper to take into account the views of the decision-maker, is it not that his views are to be accorded only the same weight as would those of any officer in the departmental hierarchy? If this view is correct, there is no onus on the applicant for review and indeed the decision-maker is placed very much in the position of having to defend his decision. It will be interesting to see the approach adopted by the Tribunal on this question. It could have a marked effect on the degree to which both the public and the government accept the Tribunal. If confirmation of decisions is found to be the usual result of an appeal because too heavy an onus is thrust on applicants for review, it can be expected that persons affected by decisions will be more likely to adhere to traditional methods of review, such as the courts. On the other hand, if decisions are too easily reversed, the amendment of Acts in the future to refer decisions to the Tribunal for review may be resisted by the administration.⁴⁹

The second requirement to comply with the *Shell* case test is, as mentioned, that the Tribunal must not be the final arbiter on questions of law.⁵⁰ Section 44 of the Act picks this up by providing that an appeal lies to the Australian Industrial Court on a question of law from any decision of the Tribunal. No attempt is made in the Act to define that nebulous concept "a question of law". One can therefore expect the continuance of the present somewhat confused position whereby it seems that a court can review decisions on questions of law when unhappy with the decision on the merits.⁵¹

The power of the Industrial Court on hearing a question of law is set out in sub-sections (4) and (5) of section 44. Sub-section (4) permits the making of such orders as the Court thinks appropriate by reason of its decision. Sub-section (5) provides that without limiting, by implication, the generality of sub-section (4), the orders that may be made by the Australian Industrial Court on appeal include an order affirming or setting aside the decision of the Tribunal and an order remitting the case to be heard and decided again. There is no right for the Industrial Court to substitute its own order for that of the Tribunal.

In furtherance of the general notion that the Tribunal cannot finally determine questions of law, section 45 allows the Tribunal to refer questions of law to the Australian Industrial Court. When an appeal is instituted or

⁴⁹ It is understood that the Taxation Board of Review requires the applicant before it to discharge the onus of proving some reason why the Commissioner's discretion should be varied in some way.

⁵⁰ (1930) 44 C.L.R. 530, 543.

⁵¹ Cf. *Edwards v. Baird* [1956] A.C. 14; *British Launderers' Research Association v. Hendon Borough Rating Authority* [1949] 1 K.B. 462; *F.C.T. v. Pechey* (1975) 5 A.L.R. 352.

a question of law referred to the Court, section 46 of the Act requires the Tribunal to send to the Court all documents that were before the Tribunal in connection with the proceedings. The section then makes provision in similar terms to section 36 in regard to non-disclosure of certain information.⁵²

Pursuing the notion that the Tribunal is not a judicial body, section 59 of the Act enables the Tribunal to give advisory opinions on matters or questions referred to it if an enactment so provides. Clause 11 of the Ombudsman Bill 1976 builds on this section by allowing the Ombudsman to recommend that a department refer a question relating to the manner of exercising a discretion to the Tribunal for an advisory opinion. The notion of advisory opinions would, of course, be unavailable if the Tribunal were a judicial body.⁵³

Miscellaneous

The Act also makes provision for matters essential to the conduct of proceedings before a Tribunal⁵⁴—members of the Tribunal have the same protection and immunities as a High Court judge; barristers, solicitors and other persons appearing before the Tribunal have the same immunity as if the proceedings were in the High Court; witnesses are protected in the same way as High Court witnesses. Persons who fail to attend on summons are subject to penalties. Persons who decline to give information are also subject to penalties. Section 63 provides for contempt of the Tribunal.

One of the more interesting provisions is section 69 which enables a person who has made or proposes to make an application to the Tribunal or who is a party to a proceeding before the Tribunal to seek legal assistance from the Attorney-General. The extension of legal aid into this area may well provide a substantial avenue of employment for lawyers.

No provision is made in the Act for the award of costs to either side. While this may be desirable as a means of not discouraging persons from applying to the Tribunal, it takes away the only effective sanction that can be employed against the vexatious litigant. There is nothing in the Act to prevent a person applying repeatedly to the Tribunal for review of a decision. It may become necessary to introduce some means of screening applications so that only if worthwhile new evidence is produced will a person be able to bring an appeal again before a Tribunal. Permission from a presidential member after written application could well be adopted as a prerequisite to a Tribunal inquiry in cases of this kind.

Administrative Review Council

While this article is concerned with the Administrative Appeals Tribunal, it would be remiss not to mention the body called the Administrative

⁵² See text following note 39 *supra*.

⁵³ *In re Judiciary and Navigation Acts* (1921) 29 C.L.R. 257.

⁵⁴ See ss 60, 61, 62.

Review Council that is established under Part V of the Administrative Appeals Tribunal Act. This body is modelled to a large extent on the United Kingdom Council on Tribunals.⁵⁵ Section 51 of the Act sets out the functions of the Administrative Review Council. In broad terms the section requires the Council to exercise an overview of the working of administrative discretions in the Australian government and to make recommendations relating to the review of those discretions. Particular powers include the power to examine and make recommendations relating to the procedure of tribunals, courts and other bodies engaged in review of administrative decisions; and to consider whether decisions subject to review by tribunals other than the Administrative Appeals Tribunal should be made the subject of review by that Tribunal.

It is difficult to predict the impact the Council is likely to have on administrative law at the Federal level. But if it is an active body, it has sufficiently wide powers to make recommendations that, if adopted, would ensure that the exercise of governmental power at the Federal level was subject to essential but appropriate controls.

Conclusion

The Kerr Committee in its Report said:

We accept that the administration must, in the modern community, bear the burden of power and duty thrust upon it by circumstances and the legislature. There must, however, as we see it, be a concomitant acceptance of responsibility to correct administrative error and the improper exercise of administrative power. Just as the exercise of judicial power has, over the years, been recognised as requiring provision for correction of error so the exercise of administrative power affecting the citizen is recognised nowadays as needing corrective machinery.⁵⁶

The Administrative Appeals Tribunal gives promise of being a body that will carry out this task of correcting administrative error most effectively. Doubtless it will encounter problems in its dealings both with the administration and with persons seeking review of decisions. But with understanding on the part of all persons involved in the review process, the Tribunal should become a major institution ensuring a high quality of decision-making and an acceptance by the public of the competence and fairness of the Australian governmental administration.

⁵⁵ For a description of the working of that body see J. F. Garner, *Administrative Law* (3rd ed. 1970) 190-192.

⁵⁶ Note 2 *supra* at para. 363.