A NEW CONSTITUTIONAL SETTLEMENT FOR AUSTRALIA

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In his 1974 Hamlyn Lectures, Lord Scarman urged:

> [a] new constitutional settlement that makes use of judicial power . . . to use the rule of law in resolving the conflicts that will arise between the citizen and the state in the newly developed fields of administrative-legal activity upon which the quality of life in the society of the twentieth century already depends.[1]

The theme was taken up in Australia by Mr Justice Brennan in 1979:

> But first, let me define what a constitutional resettlement of power may involve. It would not be merely an improvement in the procedures of judicial review. It would interpose the courts (or the judiciary, for I use the terms interchangeably) to control the exercise of some administrative powers, with jurisdiction to set right decisions affecting the interests of citizens which the courts think are wrong decisions, or not the preferable decisions in the circumstances of particular cases. The courts would have the power to substitute their own decisions for the decisions of the administrators.[2]

One of the central problems of the modern regulatory and welfare state is to find a satisfactory means of reconciling the competing interests of the state and the individual citizen. The interests of the state are not necessarily to be equated with the interests of the government of the day, although there is often a natural tendency of the executive to believe that the public interest is best served by that which serves the interests of the government of the day. Nor is the interest of the state to be equated with the short-term interests of the majority of the citizens of the state at any particular time. The interest of the state clearly transcends both the interests of the government for the time being and the interests of the majority of the citizens for the time being. The law has long recognised the problem of protecting the individual against the unlawful or arbitrary exercise of power by the executive government. The modern problem is more subtle. The Minister or other administrative official will not often seek to act outside the law, or to exercise power in an arbitrary fashion. To do so is usually contrary to the habits of mind and methods of working of the bureaucratic system. Action outside the law is often undertaken with the best of motives. The Home Office, in *Congreve* v. *Home Office*,[3] sought to produce a result which they thought to be in the best interests of the community and, in particular, to prevent an advantage being gained by a few who took the opportunity to renew their television licences ahead of time. The Minister in *Secretary of State for Education and Science* v. *Tameside Metropolitan*

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1 Lord Scarman, *English Law—The New Dimension* (1974) 75.

2 Brennan, "New Growth in the Law—The Judicial Contribution" (1979) 6 Monash University Law Review 1, 15-16.

3 [1976] 1 Q.B. 629.

Borough Council[4] was seeking to pursue an educational policy which he and his party thought to be in the best interests of the young. Short-term political advantage may, of course, also have an influence. In *Re The Hospital Contribution Fund of Australia and Minister for Health*,[5] it may be supposed, having regard to the evidence given before the Administrative Appeals Tribunal, that the political advantage in containing the costs of health insurance on the eve of an election played some part in the decision of the Government that the Minister should not approve an increase in health insurance contribution rates, notwithstanding that his Department had recommended the opposite.

These tend to be, however, the exceptional cases. What is more usual is the issue whether the official has acted upon full information or a proper assessment of the circumstances of the case and whether, in the exercise of his discretion, he has arrived at a decision which, although not totally unreasonable, is one which is demonstrably less preferable in the circumstances than some other decision. These issues are not readily susceptible of being dealt with by the traditional techniques which the law has made available to the citizen to challenge the exercise of executive power, nor are they manageable within the confines of a parliamentary debate in which a Minister is sought to be brought to account for his actions or the actions of his subordinate officers. What is required of our system of law, which provides machinery for the adjudication of the merits of disputes between citizen and citizen, is that it should likewise provide machinery for the adjudication of the merits of the disputes which arise between citizen and state in the course of the welfare and regulatory activities of the agencies of government.

The traditional view of the law is that the courts should not be concerned with this area. According to that view, a citizen who is dealt with by an administrative official who has kept within his legal powers, who has acted fairly and whose decision is reasonable, cannot look to the law for redress if he thinks that he should have been dealt with differently. That citizen has been expected to seek his remedy within the administrative-political processes of government. It has not been thought to be the business of judicial tribunals to be concerned with the merits of the exercise of administrative powers and, more particularly, with the exercise of discretionary powers. That view is still widely held. In speaking at the 21st Australian Legal Convention in Hobart in July 1981, the Lord Chief Justice of England, Lord Lane, expressed concern at the possibility of judges entering into the area of administrative discretion, notwithstanding that, at the same time, he also professed admiration at the Australian reforms in administrative law.[6] Other legal commentators continue to draw a sharp distinction between the province of law and the province of administration.[7]

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[4] [1977] A.C. 1014.
[5] (1977) 1 A.L.D. 209.
[6] "Change and Chance in England" (1981) 55 A.L.J. 383, 383-384.
[7] *E.g.* Churches, "Justice and Executive Discretion in Australia" [1980] Public Law 397, 426: "Administrative discretion is exercised with a view to policy and expediency, while the judicial function is to do that which is dictated by law and objective factors".

In this paper the term "judicial tribunal" is used, not in contradistinction to the term "court", but as comprehending both ordinary courts and other tribunals which, in respect of independence from the executive government, the procedures which they follow and the legal expertise they possess, are substantially indistinguishable from courts. Federal constitutional considerations may dictate that the powers given to "tribunals" must be distinguished from those given to "courts".

The radical point of departure of the Kerr Committee[8] was its acceptance of the need for review on the merits of administrative decisions and its view that the appropriate body to conduct such a review is a judicial tribunal. Although radical, this view did not originate with the Kerr Committee;[9] and indeed, in Australia, there had been isolated examples of rights of appeal to the ordinary courts against administrative decisions, even decisions involving the exercise of administrative discretions.[10] The Kerr Committee does not seem to have been bothered by conceptual problems, or to have seen its proposals as involving an improper intrusion by the judiciary into the domain of the administrator.

The principal legislative response to this aspect of the Kerr Report has been the enactment of the Administrative Appeals Tribunal Act 1975 (Cth) and subsequent legislation extending the jurisdiction originally conferred on the Tribunal by the 1975 Act. The jurisdiction extends over significant, but nevertheless still limited, areas of Commonwealth administration. The areas of repatriation, taxation (other than customs and excise), student assistance, the regulation of restrictive trade practices and some others of lesser extent are served by special appeal tribunals differing to a greater or lesser extent from the judicial model of the Administrative Appeals Tribunal. Most migration-related decisions, citizenship and passport decisions and many decisions in the health areas are not subject to review on the merits and there are still significant areas of economic regulation which are likewise not within the system of review on the merits.

The Kerr Committee had recognised that not all administrative decisions should be subject to review on the merits:

> It will be a matter of policy what classes of decisions should be within such a system and what classes should be exempted and machinery will be necessary to select those cases which are suitable for the application of an appellate system.[11]

The Committee recommended the establishment of an advisory body which would have the task, amongst others, of proposing what classes of decisions should be suitable for review on the merits. The Committee envisaged that this advisory body would be established before the Tribunal machinery was set up.[12] In the event, the then Government established another Committee,

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[8] Commonwealth Administrative Review Committee: *Report* (1971) (the *Kerr Report*).

[9] *E.g.* Justice (Society) Report, *The Citizen and the Administration* (1961); Orr, *Report on Administrative Justice in New Zealand* (1964).

[10] *E.g. Steele* v. *Defence Forces Retirement Benefits Board* (1955) 92 C.L.R. 177.

[11] *Kerr Report, op. cit.* para. 225.

[12] *Id.* paras 283, 284.

the Bland Committee,[13] to advise on the appropriate machinery for review of decisions made under Commonwealth statutes.

Instead of the single Tribunal proposed by the Kerr Committee, the Bland Committee recommended the establishment of three tribunals. The report of the Committee listed a large number of administrative decisions as appropriate for review by one or other of its proposed tribunals. The Schedule to the Administrative Appeals Tribunal Act 1975, which sets out those classes of decisions in respect of which an appeal might be taken to the Administrative Appeals Tribunal, was based on the recommendations of the Bland Committee, but did not include all of those decisions recommended by the Bland Committee as appropriate for appeal. The Schedule was not included in the Bill as introduced into the Parliament; it was subsequently added as a consequence of Opposition pressure. The original intention of the then Government had been that the Tribunal should be established and a subsequent study undertaken of the detailed recommendations of the Bland Committee. When, in response to Opposition pressure that the legislation should do more than merely establish the tribunal machinery, the Government decided to introduce amendments to confer jurisdiction on the Tribunal, there was hurried consultation with the departments responsible for the administration of the legislation involved. It was not then practicable to obtain the agreement of all the departments to all of the recommendations of the Bland Committee, and only those matters in respect of which agreement could be reached quickly were included in the Schedule.

Subsequent additions to the jurisdiction of the Tribunal have been made on a pragmatic basis. As new legislation has been prepared, consideration has been given to the question whether discretionary powers proposed to be conferred by that legislation should be subject to review by the Administrative Appeals Tribunal. Some jurisdiction under subordinate legislation has been added as a consequence of recommendations of the Senate Standing Committee on Regulations and Ordinances.[14]

Other areas of jurisdiction have been added to the Tribunal as a consequence of decisions by the Government to extend a right of appeal to existing areas of decisions—the notable example being the conferring, in two stages, of rights of appeal under the Social Services Act 1947 (Cth), or to transfer the jurisdiction of existing tribunals to the Administrative Appeals Tribunal—in particular, the Commonwealth Employees' Compensation Tribunal. There have also been recommendations by the Administrative Review Council to extend the jurisdiction of the Tribunal.

It will thus be apparent that the present extent of the jurisdiction of the Administrative Appeals Tribunal has come about by a somewhat haphazard process, without a comprehensive identification of the principles, if any, upon which the identification of those classes of decisions suitable for review on the merits should be made.

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[13] Committee on Administrative Discretions: *Final Report* (1973) (the *Bland Report*).

[14] Not all of these changes have resulted from published reports of the Committee. Some have been agreed on in correspondence between the Committee and the Minister concerned.

It might be noted that since 1975 three new appellate tribunals have been established—the Optometrical Services Review Tribunal,[15] the Repatriation Review Tribunal,[16] the Security Appeals Tribunal.[17] A fourth appellate tribunal is proposed under the Freedom of Information Bill 1981 (Cth) as passed by the Senate on 12 June 1981, the proposed Document Review Tribunal.[18]

I turn now to the main purpose of this paper, which seeks to examine some of the issues which are relevant to the question whether it is appropriate to provide for review on the merits of particular administrative decisions. It has already been noted that both the Kerr Committee and the Bland Committee proceeded on the assumption that review on the merits of administrative decisions was desirable in principle. For the Kerr Committee, the questions to be resolved were the nature of the reviewing body and the ascertainment of the classes of decision which should be subject to such a review. The Bland Committee was established to perform the latter task but did not question the basic assumption. That assumption has, however, not always gone without question. One of the most cogent statements of objection to it was contained in the 1941 Report of the United States Attorney-General's Committee on Administrative Procedure:

> It would destroy the value of adjudication of fact by experts or specialists in the field involved. It would divide the responsibility for administrative adjudications.[19]

The same concern about divided responsibility for administrative adjudication has been expressed in discussions with senior Australian officials. For example, it is arguable that review by the Administrative Appeals Tribunal of decisions under the Air Navigation Regulations (Cth) relating to the licensing of pilots and other air crew has divided the responsibility for the safety of air transport reposed by the relevant legislation in the Department of Transport.

With regard to the first objection of the Attorney-General's Committee on Administrative Procedures, practical experience has shown that, in many cases, hearings before the Administrative Appeals Tribunal have brought out relevant facts which were not before the primary decision-maker.[20] The Tribunal does not thus have available to it in these cases the benefit of the views of his experience on those new facts. That this opinion of the 1941 Report has been borne out in part at least in the experience of the Administrative Appeals Tribunal is not, of course, conclusive against a right of appeal. It is a matter to be taken into account in structuring the procedures of the Tribunal and the presentation of cases before it, as well as in the development of better primary fact-finding procedures.

It must be considered whether the review by a judicial tribunal of the merits of decisions, and particularly of discretionary decisions, is com-

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[15] Health Insurance Amendment Act 1977 (Cth).
[16] Repatriation Acts Amendment Act 1979 (Cth).
[17] Australian Security Intelligence Organisation Act 1979 (Cth).
[18] Freedom of Information Bill 1981 (Cth).
[19] Cited in Schwartz, *French Administrative Law and the Common-Law World* (1954) 193.
[20] Kirby, "Administrative Review on the Merits: The Right or Preferable Decision" (1979) 6 Monash University Law Review 171, 175.

patible with our system of responsible ministerial government. It is on this ground that the powers given to the Administrative Appeals Tribunal have come under the most serious and sustained challenge.[21] To give a detailed answer to the question would require a paper on its own, for it cannot be satisfactorily answered without a thorough examination of the concept of responsible government and of the way in which it works in practice in Canberra. For Canberra is not Westminster, and there are significant differences between the two. Failure to appreciate these differences leads to the application to Canberra of precepts thought to be applicable to Westminster in the final quarter of the 19th century and which perhaps have not been applicable even to Westminster for the last 75 years or more. Even in the United Kingdom there are nevertheless commentators who maintain the traditional view. The following statement, although made in the context of primary decision-making, illustrates the point:

> British insistence on ministerial responsibility to Parliament has greatly affected the subject-matter of administrative law as compared with that of the United States. By British criteria the 'independent' administrative agency of the American type is a constitutional monstrosity, since it is responsible to no one. If the government is to exercise power over the citizen, a Minister must answer for it in Parliament and Parliament must answer to the electorate. This is the indispensable democratic basis of the constitution.[22]

By way of contrast, the use of independent agencies with greater or lesser freedom from ministerial direction and control to carry out administrative tasks has been a common feature of Australian government. Significant areas of Commonwealth administration have been committed to bodies such as the Conciliation and Arbitration Commission (the decisions of which have major effects on economic policy), the Trade Practices Commission and the Trade Practices Tribunal (concerned with the regulation of business) and the Australian Broadcasting Tribunal (to which has been committed the task of determining where the public interest lies in the regulation of the broadcasting and television industry). Whatever therefore may be the position in the United Kingdom, it cannot be accepted as a fundamental principle in Australia that to commit the exercise of discretionary powers, whether at first instance or upon review, to an independent tribunal is inconsistent with our system of government.

That adjudication by an independent tribunal is not *per se* inconsistent with our system of government does not, of course, necessarily indicate that review of administrative decisions by such a tribunal may in all cases be consistent with that system. That further question needs to be considered, but it may be better considered after an examination of some of the issues involved in the independent review process. It may be that in some areas of administration the nature of the issues is such that Ministers and officials answerable to them must have the final power of decision in the exercise

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[21] Little, if any, of this criticism has been published, but it has been referred to by His Excellency the Rt Hon. Sir Zelman Cowen in his opening address to the 21st Australian Legal Convention of The Law Council of Australia, reported in (1981) 55 A.L.J. 369.

[22] Schwartz and Wade, *Legal Controls of Government* (1972) 37.

of discretionary power. The Government originally maintained such a stand in respect of certain matters which would arise under the freedom of information legislation in relation to national security, defence, foreign relations and Commonwealth/State relations.[23] In the course of the debate in the Senate on the Freedom of Information Bill 1981, the Government agreed to the establishment of a special judicial tribunal to review decisions of Ministers in these matters and to recommend, in effect, whether a decision that a document relating to these matters should be treated as exempt from mandatory production ought to be set aside.[24]

There is, moreover, a serious question whether accountability through the parliamentary process is a satisfactory means of calling administrative officials to account for decisions affecting the rights and privileges of individuals. The accountability of a Minister to the Parliament is a political process, which will inevitably be dealt with on party lines. It is hardly appropriate, for example, that the question whether a criminal alien should be deported should be dealt with in this way. Accountability through the Parliament is appropriate for broad issues of policy, or the general conduct of a portfolio or to call a Minister to account for flagrantly improper conduct in a particular case. We need machinery which is less cumbersome and more easily set in motion by the persons aggrieved to deal with the generality of administrative decisions affecting individuals. Where it is appropriate to do so, that machinery can be designed to take account of government policy in the process of review.

Many administrative decisions are very like judicial decisions in that they require no more than the ascertainment of facts and the application of fixed rules to those facts. The power of the Commissioner of Patents to grant or to refuse an application for a patent is an example of a decision of this kind. Such decisions are clearly appropriate for review on the merits by an independent tribunal.

Another class of administrative decisions involves the ascertainment of facts, the formation of an opinion on the basis of those facts and the application of fixed rules on the basis of that opinion. An example of a decision of this kind was examined in the High Court in *Green* v. *Daniels*.[25] A third class of administrative decisions involves the ascertainment of facts and the application of discretion on the basis of facts so ascertained. An example of this class of decision is the power to deport a criminal alien under the Migration Act 1958 (Cth). A fourth class of administrative decisions involves the ascertainment of facts, the formation of an opinion on the basis of those facts and the application of a discretion on the basis of the opinion so formed. An example of this class is the power of the Director-General of Social Services to pay special benefits under section 124(1)(c) of the Social Services Act 1947 (Cth). Review on the merits in each of the latter three classes of decisions will involve consideration by the reviewing body of the formation of the opinion concerned or of the manner in which the discretion has been exercised.

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[23] Senator the Hon. P. D. Durack, Freedom of Information Bill 1981, Second Reading Speech, S. Deb. 1981, 1058-1062.

[24] *Id.* 2384-2388.

[25] (1977) 51 A.L.J.R. 463.

Review of the formation of an opinion on the ascertained facts may mean substituting the opinion of the reviewing tribunal for that of the experienced administrator. The formation of an opinion may not always be the result of a logical process; practical experience and, perhaps, intuition may play a significant part. Difficulties arise where the reviewing tribunal lacks the relevant experience in dealing with cases of the kind under consideration. It is, however, in the area of review of the exercise of discretion where most of the problems lie.

The exercise of a discretion involves a choice between possible solutions derived from ascertained facts or from the formation of an opinion on the basis of ascertained facts. The exercise of such a discretion is commonly regarded as the distinguishing characteristic of the administrative process, since it is not controlled by fixed rules. It is not, however, unique to the administrative process. Familiar examples of the exercise of powers by the courts involving such an application of discretion lie readily to hand. Family law provides a number of these examples. Decisions as to the custody of children, the settlement of property, the payment of maintenance, are not reached by the mere application of fixed rules of existing law to ascertained facts. In the criminal law, the sentencing process is not the characteristic judicial process; it is indistinguishable from the administrative process involving a choice from a range of possible options except in those few cases where the law requires a mandatory sentence. Indeed, it is in this area that the lawyer commonly uses the language of the administrator. Reference is made to the sentencing policy of the courts, and it is that policy which governs the exercise of the sentencing discretion. Just as the administrator must admit of exceptions to his policy to accommodate the exceptional cases, so also does the court in the application of sentencing policy. The decisions of the courts as to the discount rate to be applied in the assessment of damages provides another example of the exercise of discretion within the traditional judicial process.[26] These examples are cited to show that the exercise of discretion is not foreign to the techniques of a judicial tribunal.

At one end of the scale the exercise of a discretionary power may involve only considerations of policy, that is, considerations which do not depend upon expert knowledge or technical considerations, whether scientific, engineering, medical, economic or otherwise, but upon an assessment of public interest or public convenience, or of advantage or disadvantage to the government or the Minister, department or official responsible for the decision. At the other end of the scale, the exercise of a discretionary power may involve only considerations of what might be appropriately described as an operational kind. Policy is not involved. The issues depend on the application of expert knowledge or technical considerations of one kind or another. Many discretionary decisions will involve both policy and operational considerations, sometimes of a complex mixture. A decision to build a new airport and the choice of a site for it would involve such a complex mix of policy and operational considerations. A decision to refuse

[26] *Pennant Hills Restaurants Pty Ltd v. Barrell Insurances Pty Ltd* (1981) 55 A.L.J.R. 258.

a visa for permanent entry into Australia involves a discretion of a pure policy kind, although the actual form of the policy may involve secondary considerations of an operational nature, such as a policy to deny visas to persons whose state of health is such as to render them likely to be a burden on the Australian community. A refusal to grant a pilot's licence may involve considerations of an operational nature, notwithstanding that the administrative officials concerned may themselves describe a decision to adopt certain aviation standards as a "policy" matter.

It is attractive to suggest that the question whether the exercise of a discretionary power should be subject to review on the merits might depend on whether the considerations determining the manner in which the power is to be exercised are policy or operational considerations. The argument can be put that where a decision is made on policy grounds the person who is responsible for the policy should exercise the final power of decision. All that should be done by way of independent external review is to ensure that all relevant findings of fact have been made, that the decision conforms to law and, perhaps, that it fits within established policy. That was the view of the Bland Committee.[27] It is a view commonly expressed by senior administrators in relation to the jurisdiction of the Tribunal and it would enjoy a good deal of support amongst those lawyers who continue to draw distinctions between administration and law.

One significant factor of which this view fails to take account is that the application of policy may also involve its interpretation and the interpretation of policy is a matter of concern to those responsible for it. A number of the deportation decisions of the Administrative Appeals Tribunal have turned on the question whether the facts of the case concerned fell within the special circumstances allowed by the policy adopted by the Minister in relation to deportation as an exception to the general rule for the deportation of drug offenders.[28] The Minister and his advisers would undoubtedly be concerned lest a generous interpretation of the exception should substantially erode the policy.

The application of operational considerations is not adapted to control by the processes of political accountability, even assuming these to be more effective than they are in practice. Decisions based on operational considerations are capable of being reviewed on objective grounds. Where particular expertise is desirable, it may be supplied by evidence to the reviewing tribunal, or by that tribunal having amongst its members some person who has the requisite knowledge. The notion of reviewing the merits of discretionary decisions involving operational considerations only therefore raises little difficulty in principle, although practical considerations such as cost and delay in reaching final conclusions may be significant.

In the event, the policy content of a discretionary power has not been used, or at any rate consistently used, as a criterion for deciding whether review by the Administrative Appeals Tribunal is appropriate. A detailed examination of the role which the Tribunal has played in the review of

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[27] *Bland Report, op. cit.* para. 172(g)(iii); *cf. Kerr Report, op. cit.* para. 297.

[28] *E.g. Re Jeropoulos and Minister for Immigration and Ethnic Affairs* (1980) 2 A.L.D. 891.

decisions involving policy is discussed by Mr Justice Kirby,[29] but it is appropriate to enter into some discussion of the issues here as part of the examination of the appropriateness of conferring a review jurisdiction upon a judicial tribunal.

The deep mistrust of administrative policy by the common law has been reflected in a number of the decisions of the Tribunal.[30] It is only recently that the courts have acknowledged the role that policy has to play in sound and consistent administration.[31] For what is policy in this sense but the statement of principle by which the exercise of a discretion will be ordered? Without such a statement the exercise of discretion may amount to no more than a wilderness of arbitrary single instances. Where an administrative official, having authority to do so, spells out the policy by which his exercise of a discretionary power will be guided and fails to apply that policy in a particular case, then his decision in that case may well appear to be an arbitrary and unjustified use of that power unless he shows at the same time that it would not have been appropriate to apply the policy to the particular case.[32] This is the counterpoise to the rule that an administrative official entrusted with the exercise of a discretionary power may not lawfully fetter the exercise of the power by the adoption of a rule that does not admit of the consideration of the special circumstances of a particular case.[33] This latter aspect has hitherto been dominant in Anglo-Australian administrative law. Unless due weight is given both to consistency in the exercise of discretionary power and the proper consideration of individual circumstances it is unlikely that we will achieve effective review on the merits of decisions involving the exercise of discretion.

It may be understandable that the courts have hitherto stressed the importance of considering the individual case without, at least prior to *British Oxygen Co. Ltd* v. *Minister of Technology*,[34] paying due regard to consistency of decisions. The cases in which the exercise of discretion is challenged come before the courts intermittently and haphazardly. The courts have no involvement in and experience of the broad sweep of administrative decision-making. Only those cases come to attention where the person affected considers he has been wrongly treated and has the means and tenacity to launch a challenge. Those who fit comfortably within the policy adopted by an administrator do not challenge his exercise of discretion. It is only those whose circumstances are such that the policy does not fit comfortably who will bring a challenge, and it is therefore

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[29] Kirby, "Administrative Review: Beyond the Frontier Marked 'Policy—Lawyers Keep Out'" (1981) 12 F.L.Rev. 121.

[30] *E.g. Re Gungor and Minister for Immigration and Ethnic Affairs* (Administrative Appeals Tribunal 30 May 1980, unreported decision of Smithers J.).

[31] *Drake* v. *Minister for Immigration and Ethnic Affairs* (1979) 24 A.L.R. 577, 590 *per* Bowen C.J. and Deane J.: "Indeed, the consistent exercise of discretionary administrative power in the absence of legislative guidelines will, in itself, almost inevitably lead to the formulation of some general policy or rules relating to the exercise of the relevant power".

[32] *Atchison, Topeka and Santa Fe Railway Co.* v. *Witchita Board of Trade* (1972) 412 U.S. 800.

[33] *R.* v. *Port of London Authority; ex parte Kynoch, Ltd* [1919] 1 K.B. 176.

[34] [1971] A.C. 610.

only those cases which claim some special distinguishing feature which will come before the courts.

The deportation cases coming before the Administrative Appeals Tribunal have uniquely presented a judicial tribunal with the opportunity to participate in the exercise of discretion in a substantial number of instances within the same field. Of course, the Tribunal does not see those cases in which the Minister has decided not to deport. To that extent, the experience of the Tribunal is necessarily a partial one. Nevertheless, as Mr Justice Kirby has shown,[35] sufficient cases have come before the Tribunal to enable it to develop a substantial understanding of the implications of policy for sound and consistent administration. Whilst some decisions of the Tribunal have revealed an impatience with the constraints of policy, the Tribunal in other cases has shown a sensitivity to the need to accommodate individual cases with the requirements of consistent administration.[36]

If the review of discretionary power is to work effectively, there must be an accommodation on the part of both administrator and reviewing tribunal and a recognition by each of the proper role of the other. It may not be practicable, nor may it be desirable, to spell out the terms of that accommodation in legislative form. The accommodation may differ from one area of administration to another, and it may well be that only experience in any one area will show what should be the accommodation in that area. It has been deemed suitable to embody in statutory form the relationship between Minister and Administrative Appeals Tribunal in the application of government policy under the Dairy Industry Stabilization Act 1977 (Cth). It should not be inferred that a like formulation would be appropriate in deportation cases or, should the Tribunal be given a review jurisdiction, in citizenship or passport cases. Likewise, the circumstances in which the Director-General of Social Services and his officers exercise discretion to grant or to terminate special benefit payments under the Social Services Act, which discretion is reviewable by the Tribunal, may not be capable of reduction to a formula having legal effect:

> Even when rules can be written, discretion is often better. Rules without discretion cannot fully take into account the need for tailoring results to unique facts and circumstances of particular cases. The justification for discretion is often the need for individualized justice.[37]

A finding by a reviewing tribunal that a policy or guideline adopted by an administrative official is inappropriate, as distinct from unlawful, would not be binding on the official unless the relevant legislation made it so. The question of appropriateness of a policy may not be properly determined without a much more wide-ranging inquiry than is available within the confines of a particular case coming before a tribunal. It may require a study of those cases which are allowed under the policy as well as those which are denied to determine the appropriateness of the policy. An individual appellant may be unjustly treated if the outcome of his appeal

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[35] Kirby, *op. cit.* n. 29.
[36] *E.g. Re Becker and Minister for Immigration and Ethnic Affairs* (1977) 1 A.L.D. 158.
[37] Davis, *Discretionary Justice—A Preliminary Inquiry* (1969) 17.

has to await such a general inquiry. Special provisions would therefore be necessary to enable such an inquiry to take place beyond the determination of a particular appeal. To confer such a power on a reviewing tribunal raises even more critical questions as to the relationship between Tribunal and Minister and Tribunal and Parliament in a system of responsible government. The Commonwealth Ombudsman is expressly empowered to report, eventually to the Parliament if necessary, upon any rule or practice which he considers to be unreasonable, oppressive, unjust or improperly discriminatory, but he does not have authority to substitute his own view of what the policy ought to be.[38]

In the case where a reviewing tribunal is not empowered to set aside a policy as inappropriate but nevertheless expresses an opinion on the matter within the context of its decision in a particular case, the administrative official involved should be prepared to reconsider his policy or at least the relevant aspects of it. Likewise a reviewing tribunal should be careful not to venture further than is required for the decision in the particular case before it. Thus to urge proper caution is only to emphasise what has always been regarded as the proper role of judicial bodies in the decision of particular cases. It is likely that a reviewing tribunal will be able to dispose of most cases covered by a policy by considering whether it is appropriate that the policy should be applied in the particular case, an obligation still required by the decision in *British Oxygen Co. Ltd* v. *Minister of Technology*.[39] Where a succession of cases coming before the Tribunal shows, however, that the policy is a faulty one, the Tribunal will then be in a sound position to express a general opinion on the appropriateness of the policy.

There will, of course, be cases in which it is readily apparent, without general inquiry, that a policy is not an appropriate one. Given the general high standard of Commonwealth administration, it is likely that those cases will be rare. Many of them may coincide with the cases in which the policy would be unlawful as not being within the objects of the relevant statute.

Some discretionary powers may be quite open-ended and capable of being used to give effect to policies which have no apparent connection with the purposes of the statute establishing those powers. A typical example is the power conferred on the Secretary of the Commonwealth Department of Transport to permit the importation of aircraft, aircraft being prohibited imports in the absence of such consent.[40] This provision is one of the essential building blocks of the domestic airline policy of the Government. The maintenance of controlled competition in domestic interstate scheduled air services has no apparent connection with what might be deduced from the Customs Act 1901 (Cth) as the purpose of that legislation. Nevertheless, the High Court has held as valid the exercise, for the purpose, of powers conferred under the Customs Act.[41] If it be the function of a reviewing tribunal to consider the appropriateness of a policy,

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[38] Ombudsman Act 1976 (Cth), s. 15(1)(a)(iii), s. 17.
[39] [1971] A.C. 610.
[40] Customs (Prohibited Imports) Regulations (Cth), Third Schedule.
[41] *R.* v. *Anderson; ex parte Ipec-Air Pty Ltd* (1965) 113 C.L.R. 177.

as distinct from its lawfulness, then it is difficult to find an objective basis upon which the appropriateness of such a policy might be considered. Nor is it easy to see how the application of such a policy to a particular case might be the subject of independent review.

A part of the accommodation between a judicial tribunal and the administrative official might, however, be that a policy would only be called into question by the reviewing tribunal where the policy was demonstrated to be unreasonable, unjust, oppressive or improperly discriminatory. This would leave the reviewing tribunal free to consider whether the application of a policy which was not itself unreasonable, unjust, oppressive or improperly discriminatory might produce such a result in the circumstances of a particular case.[42] Such could be the basis for review on the merits. Nevertheless the possibility remains that the application of a policy might be unreasonable or unjust for a particular individual, but that is the price that must be paid in the circumstances for a larger public good. The cases of *Secretary of State for Education* v. *Tameside Metropolitan Borough Council*[43] and *Laker Airways Ltd* v. *Department of Trade*[44] might well be argued to be in that category when seen in a larger perspective than is permitted by the blinkers of judicial review. How far judicial tribunals are appropriate instruments to balance private harm against public good is clearly a relevant question, but one which does not admit of an easy answer.

Seen from the standpoint of ministerial responsibility, the answer would be to exclude any role for a review tribunal in such a case. The Minister is seen as the guardian of the public interest and therefore the proper exponent of what is required to protect the public interest. The "therefore" is often assumed, but it is that consequential connection which needs to be examined, even if the major premise be accepted. In deciding whether the interests of the individual should be subordinated to the public interest, the Minister or official acts as both prosecutor and judge no less than he does in any other case where he is empowered to make a decision affecting the interests of a person. The power to review the propriety of the exercise of a policy in a particular case by a judicial tribunal may result in a substantial shift of power from the executive where the power of review extends so far as to enable the tribunal to substitute its view of the proper balance of private harm and public good. This is an issue which is involved in the deportation decisions which have been analysed by Mr Justice Kirby.[45]

It is apparent that the simple approach of the Bland Committee, that the Tribunal "should not be entitled to question the government policy grounds on which a decision is based or a decision to the extent to which it gives effect to policy"[46] is both superficial and unsatisfactory. Much more analysis is needed to get the answers right to the questions of appropriate balance between judiciary and executive.

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[42] *Cf.* Ombudsman Act 1976 (Cth), s. 15(1)(a)(ii) and *Kerr Report, op. cit.* para. 297.
[43] [1977] A.C. 1014.
[44] [1977] 1 Q.B. 643.
[45] Kirby, *op. cit.* n. 29.
[46] *Bland Report, op. cit.* para. 183.

Moreover, a thorough-going commitment to a policy of review on the merits requires much more than a passive acceptance of existing statutory discretions and an apportionment of them into reviewable and non-reviewable categories. That is, by and large, the task which the Kerr Committee proposed for the Administrative Review Council and which was performed by the Bland Committee. What is required is a positive approach to the structuring of discretionary powers. Whilst recognising, as already noted, that it is not always practicable or desirable to specify in legislation the criteria for the exercise of a discretionary power, nevertheless an attempt should be made to do so in those cases where it is practicable and desirable. Further, experience in the exercise of a power may enable policies and guidelines to be developed which can, in the long run, mature into statutory form as fixed rules binding upon both primary decision-maker and review tribunal. For example, where the power to permit the importation of an aircraft is exercised in relation to safety standards capable of objective determination, there is no *a priori* reason why that exercise of the power should not be subject to review on the merits even though it may not be appropriate to commit to an independent tribunal the power to decide whether the importation of an aircraft capable of operating a scheduled interstate passenger service should be permitted.

The issue of the appropriateness of submitting the exercise of a discretionary power to review by a judicial tribunal is linked with the powers which the tribunal may exercise where it finds grounds for review. The Administrative Appeals Tribunal has held that its power extends to considering what is the "correct or preferable decision".[47] This view of its function has not only been confirmed by the Federal Court of Australia; that Court has held that it is the *duty* of the Tribunal to come to such a decision.[48] What the Federal Court has said about the obligation of the Tribunal to consider the propriety of policy is discussed by Mr Justice Kirby[49] and need not be dealt with here. What is relevant in the present context is whether the "correct or preferable decision" test results in too great a shift of authority from administrator to reviewing tribunal.

The test, stated in the abstract, may not pay sufficient regard to the experience of the primary decision-maker. The experience and expert knowledge of primary decision-makers have long been recognised in other areas of appeal.[50] Moreover, it can be argued that the Administrative Appeals Tribunal and the Federal Court have adopted an interpretation of the Tribunal's function which does not accord sufficient weight to the fact that it is an "appeal" tribunal as against a first instance tribunal. The function of the Tribunal as so interpreted is a much more ample one than is assumed by appellate courts in exercising appellate jurisdiction where discretionary powers are involved. Where the facts before a reviewing tribunal do not differ materially from those considered by the primary decision-maker, it should be open to the tribunal to see its function as that

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[47] *Re Becker and Minister for Immigration and Ethnic Affairs* (1977) 1 A.L.D. 158, 162.
[48] *Drake* v. *Minister for Immigration and Ethnic Affairs* (1979) 24 A.L.R. 577.
[49] Kirby, *op. cit.* n. 29.
[50] *Disco-Vision Trade Mark* [1977] R.P.C. 594.

of deciding whether the decision-maker's view of the correct or preferable decision was reasonable. The reviewing tribunal does not start with a clean sheet; it begins with the administrative decision under review.

There are, moreover, problems lurking in the concept of "preferable". The competing considerations involved in the making of a primary decision are often fairly evenly balanced. If the reviewing tribunal is to make a new determination in such a case, there is no necessary guarantee that its view of the competing considerations will be "better" than that of the primary decision-maker.

Concern about a shift of authority away from Ministers and officials to a reviewing tribunal might be lessened if the tribunal is seen to give rather more weight to the views of primary decision-makers than is suggested by the "correct or preferable decision" formula. It would be a useful exercise to analyse the decisions of the Administrative Appeals Tribunal to see how far in fact that concern is justified in the light of actual experience.

The judicial techniques are adapted to examine the exercise of powers by administrative officials where that exercise is concerned with the rights, obligations or privileges of particular persons. That the exercise of such a power also involves a discretion does not, of itself, render that exercise unsuitable for review on the merits by a judicial tribunal. The issue is not whether there should in principle be such a review of discretionary powers, but how that review should be structured so that due weight is given to policy which guides the administrative official in the exercise of the discretion, and particularly to policy for which a Minister, or the Government as a whole, can be called into account in the Parliament. The entry of the law into the adjudication of disputes between citizen and administrator about the exercise of discretionary powers requires the law to recognise that, in a system of government in which the executive depends on the maintenance of a parliamentary majority—which is the political substance of responsible government—Ministers and departmental officers do not work in a policy vacuum. Nor are they free to adopt whatever policies they choose, either as a matter of personal preference or of abstract justice. In the system of cabinet government, a Minister is bound, in practice and by convention within the limits allowed him by law, to exercise his discretionary powers to give effect to the policy of the Government of which he is a part. Although the matter has been little explored judicially, it may be that that practical and conventional obligation assumes, in the Australian federal sphere at any rate, the status of a legal obligation.[51] The issue is mentioned here; it requires a fuller exposition which would go beyond the confines of this paper. But the recognition of the issue is critical to exploring the limits of the new constitutional settlement proposed by Lord Scarman and Mr Justice Brennan.

This is particularly the case where, as with the Administrative Appeals Tribunal, the reviewing tribunal is put by statute in the shoes of the primary decision-maker. If the primary decision-maker is bound by law

[51] *Ansett Transport Industries (Operations) Pty Ltd* v. *The Commonwealth* (1977) 139 C.L.R. 54, 61-62 *per* Barwick C.J.; 87 *per* Murphy J.; *Salemi* v. *Mackellar (No. 2)* (1977) 137 C.L.R. 396, 403 *per* Barwick C.J.

to apply government policy, then it may be that the Tribunal is subject to a like obligation.

The judicial techniques may not, however, be suited to the resolution of disputes between citizen and government concerning issues broader than the rights or privileges of particular individuals. A decision to build a freeway will usually affect quite directly the rights of individuals to the enjoyment of property, but the merits of the decision cannot be ascertained only by examining the arguments and evidence submitted by those individuals as to the detriment to their rights. Whilst the technical or "operational" considerations involved in making such a decision may be exposed by a judicial inquiry, as distinct from adjudication, a dispute between government and citizen about the decision itself is not susceptible to adjudication by a judicial tribunal.[52] The resolution of disputes about these broader issues must be left to the political-administrative processes of dispute settlement.

In conclusion, it is clear that there is a role for the independent judicial tribunal in the adjudication of disputes arising out of the activities of the regulatory and welfare state. Experience so far with the Administrative Appeals Tribunal has demonstrated that that role can extend into the area of discretionary powers, at least to the extent to which the area of the dispute is broadly confined to the circumstances of particular persons. At the other end of the scale, there are clearly discretionary powers of government, disputes as to the exercise of which lie beyond the capacity of judicial tribunals to resolve. But it does seem that the division between what is appropriate for a judicial tribunal and what is not is unlikely to be a sharp line, but a territory of uncertain extent.

[52] *Cf.* the considerations canvassed in *Bushell* v. *Secretary of State for the Environment* [1980] 3 W.L.R. 22, particularly *per* Lord Diplock, 31 and 32.