PROFESSOR H. WHITMORE*

May I first of all extend my congratulations to Mr Hall and Mr Todd for their interesting and to me at least, two very provocative papers. First of all I should like to express my delight in the fact that the new Commonwealth system of administrative law has now come into full operation. I do feel fortunate about that! I was beginning to think that the Judicial Review Act would never be proclaimed. In some of the papers and comments today I have been somewhat surprised to hear the system being described as "revolutionary", "important" and so on. At the time the Kerr Report was being drafted it seemed to me the proposals were merely a first step towards the achievement of administrative justice and indeed I still believe that to be so. I think there is a great deal still to be done—this is not an end, this is a beginning. So far as the Tribunal is concerned I have to say that I do not believe that the objectives of the Kerr Committee have been fully achieved. I think we were more concerned to establish a review jurisdiction that was relatively free from legalism and that would work quickly, informally and cheaply. Indeed we wished to see the development of new procedures attuned to the administrative process and free of the restrictions inherent in the adversary process. We certainly wished the Tribunal to be free of the rules of evidence and the party-party conflict. I am worried about that party-party conflict that now seems to be insisted upon by the Federal Court because I think that in the sort of situation where one is concerned with a disagreement between a private citizen and the government, it really is wrong to say that the government is a conflicting party. It is not really a conflicting party or it should not be. Again I think the procedures need to be tailored away from that idea of party-party conflict. So far as the papers are concerned, I have been encouraged by some of the material in them and I am afraid that I have been discouraged by some other material.

First to the good. I am very pleased to hear that preliminary conferences are becoming effective dispute solving methods. I personally believe that that is probably one of the most important aspects of the Tribunal's jurisdiction. I am also very interested in the telephone conferences. I knew that was happening but I did not realise the extent to which it was happening and I certainly welcome the idea that this is going to be used very widely in the social security area. It certainly solves some of the problems, as has already been said about, remoteness. It is good to hear too that the Tribunal does, in effect, shape its procedures so that unrepresented applicants may be heard in an informal way and be assisted by the Tribunal. Also I welcome the tailoring of procedures to fit particular problems, albeit that I certainly do not fully accept the heavy emphasis on adversarial procedures being taken to fit particular problems.

And that brings me to the criticism. At the outset I should like to say that I believe that the Tribunal should be using largely inquisitorial procedures and should whenever possible abandon adversarial techniques altogether—bearing in mind that there is a good deal of misunderstanding

* LL.B. (Syd.), LL.M. (Yale); Professor of Law, University of New South Wales.

about what inquisitorial procedures are all about. In many inquisitorial procedures they do use some of the familiar techniques of the common law such as cross-examination, when facts are in issue, and so on. It is not simply a question of a judge seeking information on his own. Also of course, at least in the French system, which I know fairly well, there is a good deal of natural justice built into the system. Having said that I have to concede that the procedures used initially and still being used now, have probably made the Tribunal much more acceptable to ministers and to the bureaucracy and that of course is a major gain. It may be that if we had gone in straight away for a new type of procedure, the Tribunal would not have got the jurisdiction which it has got now.

I would like to put forward some other fairly brief critical comments. First of all in the papers, and in other papers, there is a sharp distinction drawn between the reviewing powers of the court and the powers of the Tribunal. I believe that that distinction is largely fictitious. If the court wishes to substitute its decision for that of an administrator on the merits, it can do so in most circumstances. The only time it cannot is where there has to be an actual issue of a licence or an approval or something of that nature. Even in those cases the courts can so force the issue that the administrator really has no recourse but to issue the licence or whatever it is. This ability to penetrate to the merits was always true at common law and it is even more true under the Administrative Decisions (Judicial Review) Act. It would be a very unimaginative judge who could not review an administrative decision on the merits under that Act and I must say I was rather surprised at some of the drafting.

It simply is not true that the Administrative Appeals Tribunal Act compels the Tribunal to adopt the judicial model, and I strongly believe that it is imperative that the Tribunal should develop different procedures which are indeed cheap, quick and more suitable than the adversary process. Otherwise there will be a strong temptation, now the Federal Court is in operation, to go straight to the Court.

It is I think quite wrong for the Tribunal to rely so heavily on the parties to call evidence though I note that on rare occasions the Tribunal has itself called witnesses. One of the greatest failures of public law has been reliance on party-party conflict to produce the right evidence. As a result, in many areas the proper evidence about the wider public interest is never produced at all. This has been particularly so in New South Wales in relation to planning and environment decisions where there has been actual suppression of evidence by one of the parties—either the council or the developer as the case may be. I know that there is a difficulty here and this I think Mr Justice Brennan has said, that although the Kerr Committee recommended it, the Tribunal was never given research assistants. Such assistants probably would be necessary to ensure a more inquisitorial line. I know funds are short but I would have thought that the Federal government could have found enough money to supply research assistants to the Tribunal and possibly even to the Court as was originally envisaged. After all, the new Planning and Environmental Court in New South Wales does have research assistants and I hope it is going to use them to collect essential evidence about environmental matters. That at least is what was planned. So I think

it is simply a matter of, or should be simply a matter of, persuading the government to make funds available for the necessary research assistants.

I predicted that section 33 of the Administrative Appeals Tribunal Act would be got round and indeed I had a few words to say about the drafting of it originally. It is my view that the rules of evidence should not be applied by the Tribunal at all. The relevance rule is of course not really a rule of evidence—it is a rule of commonsense; and the hearsay rule in my view, should never be applied, and I personally am not over-persuaded by the "availability of cross-examination" argument. I object very strongly to the exclusion of evidence by the expert opinion rule. Surely the qualifications of the witness go to weight and in many circumstances it is a fact that non-expert opinion might be as good or better than so-called expert opinion. I might add that this is especially so in relation to matters like valuation of land and environmental issues. I also found it rather disquieting to read that counsel are appearing and "impose" on the Tribunal, "formality in curial terms". Surely the procedures of this important Tribunal should not be influenced by the fact that counsel prefer to play adversarial tactics. This means that the basic objectives of the Tribunal are, perhaps, being subverted to some degree by the legal profession. I fear that in the same way the objectives of the Land and Environment Court in New South Wales may be subverted. It is so difficult to persuade lawyers to get out of ingrown habits. The result is inevitable—extended hearings, delays and much higher costs, and of course these are the very things that the Tribunal was set up to avoid and the Land and Environment Court was set up to avoid.

I feel myself too in some disagreement with the general style of the Tribunal's decisions. It is true that the Tribunal is required to give reasoned decisions including findings on material questions of fact. But in my view that does not mean that decisions should be drafted in the style of a judgment of the Supreme Court as many of the Tribunal decisions are. I am sure that a good deal of time and money is spent in the preparation of these judgements and again, in my view, I do not believe that they are appropriate to most of the cases, I could not say all, but most of the cases, heard by the Tribunal. Finally, may I say that over many years I have examined tribunals operating in Australia and it has been my experience that most administrative tribunals, not all again, but most administrative tribunals operating in Australia, have struggled hard and long to turn themselves into courts. So far it does seem that the trend has been partially resisted by the Administrative Appeals Tribunal and it is my hope that their resistance to the temptation to become nothing different to a court will be resisted more strongly in the future.