SOUTH  AUSTRALIA

EIGHTY-SECOND REPORT

of the

LAW REFORM COMMITTEE
of
SOUTH AUSTRALIA

to

THE ATTORNEY-GENERAL

RELATING TO ADMINISTRATIVE APPEALS

1984

The Law Reform Committee of South Australia was established by Proclamation which appeared in the *South Australian Government Gazette* of 19th September, 1968. The Members are:

THE HONOURABLE MR. JUSTICE ZELLING, C.B.E., *Chairman.*

THE HONOURABLE MR. JUSTICE WHITE, *Deputy Chairman.*

THE HONOURABLE MR. JUSTICE LEGOE, *Deputy Chairman*

M. F. GRAY, S.-G., Q.C.

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EIGHTY-SECOND REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA RELATING TO ADMINISTRATIVE APPEALS

To:

The Honourable C.J. Sumner, M.L.C.
Attorney-General for South Australia.

Sir,

You have asked us to report upon the desirability of setting up a proper apparatus for review of administrative decisions in the State. We have done so in this report and have set out what we consider to be necessary reforms and amendments of the law consequential upon the setting up of new or better review procedures. A short conspectus of the contents of the report is as follows:—

Contents:

Reports
Additional Tentative Suggestions relating to the Proposed General Appeals Tribunal
Procedural Code
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Should an Appeal lie and if so to whom?
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Disciplinary Matters
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Rationalization of Tribunals and Review Bodies
Appeals to Ministers
Administrative Decisions (Judicial Review) Act
Damages
Administrative Review Committee.

Before moving on to deal with the subject in detail, we identify the basic problems and our basic proposals for reform:

Problems:

(1) Many administrative acts, especially the exercise of administrative discretions, have no form of appeal or review except on the narrow grounds provided by the prerogative writs where any of the prerogative writs are applicable.

(2) Administrative appeal or review bodies have been created haphazardly, as a particular need arose, over the years and without any philosophy of pattern or structure.

(3) There has been no recognised standard to which various administrative procedural provisons, including appellate or review procedures, have to conform.

(4) In some cases no appeal lies, or an appeal lies to an inappropriate body, from the exercise or non-exercise of administrative powers or discretions.

Basic Proposals for Reform:

(1) Questions of law can by the use of declarations, the prerogative writs, injunctions and other remedies, be brought in one way or another before the Courts. Questions of law therefore should be identified and isolated where possible for decision by the Supreme Court as speedily as is compatible with the other work of the Court. This may necessitate the creation of an administrative division of the Supreme Court. More importantly as we discuss later in our consideration of the Commonwealth Administrative Decisions (Judicial Review) Act 1977, it should require better and more amplified heads of jurisdiction and better procedures conferred by statute on our Supreme Court.

(2) The establishment of a General Appeals Tribunal to hear most administrative appeals.

(3) The enactment of a procedural code for such a tribunal.

(4) The retention of specialist appeal tribunals in the cases of bodies within specialised fields of discourse, but with amendments to prevent failures of natural justice or in-adequate hearing or review procedures.

(5) The enactment of a statute conferring jurisdiction on the Supreme Court in terms similar to those contained in the Commonwealth Administrative Decisions (Judicial Review) Act 1977.

(6) The establishment of an Administrative Review Committee.

Approaches to Reform in Other Jurisdictions:

Despite the fact that A.V. Dicey, the author of the Law of the Constitution, wrote that the notion of administrative law as a special type of law dealing with official bodies was "utterly unknown to" and "fundamentally inconsistent with" English law, traditions and customs, in the last seven decades most common law jurisdictions have recognised the growth of administrative law as "law" and have more recently decided that reform is needed in the field of appeals from administrative decisions.

England:

The arrangements for appeals from administrative decisions made by tribunals were reviewed in England in 1957 by the Committee on Administrative Tribunals and Enquiries (the Franks Committee). The Committee recommended that there should be—

(a) an appeal on fact, law and merits from a tribunal of first instance to a specialist appellate tribunal, except where the tribunal of first instance was exceptionally strong and well qualified.

(b) an appeal on a question of law to the courts, except in the case of a limited number of specified tribunals.

How one decides whether a first instance tribunal is "exceptionally strong and well qualified" is not explained. Presumably such an evaluation would alter from time to time with changes in the personnel of the tribunal, and with the treatment its decisions received in administrative appeals (if any) and decisions of the Courts. It seems a very imprecise concept as a discrimen and we do not recommend its use in this State.

To a limited extent these recommendations have been adopted in England. *Garner on Administrative Law (5th Edition)* says of the first recommendation at page 242:—

> "This recommendation has not been adopted in terms but is applied in practice in some cases (for example, from the local valuation courts in rating cases to the Lands Tribunal, from industrial tribunals to the Employment Appeal Tribunal and from the licensing authority to the Transport Tribunal in goods vehicle licensing)."

The second recommendation was dealt with in the Tribunals and Enquiries Act first enacted in England in 1958 and consolidated in 1971, which creates a right of appeal on questions of law from a number of tribunals.

Garner (supra) in a discussion of the present English administrative law system at page 244 posed the question "What then are the commonest defects of our administrative tribunals as they exist at present" answering the question in the following way:—

> "First, one could argue that the lack of a system leads to complication and therefore a lack of comprehension on the part of the ordinary public. There are so many tribunals sitting in different places at different times, and each subjected to different procedural rules that it needs an expert to say when, or whether, there may be a remedy . . .".

Despite the fact the Garner sees the fact that there are such a large number of tribunals in England as a problem, the option of creating a general administrative appeal tribunal was put to the Franks Committee, but rejected. The Franks Committee discussed this option at paragraphs 120-130 saying:—

> ". . . Professor Robson advocated the establishment of a general administrative appeal tribunal, with jurisdiction to hear not only appeals from tribunals or from decisions of Ministers under the second part of our terms of reference but also appeals against harsh or unfair administrative decisions in that considerable field of administration in which no special tribunal or enquiry procedure is provided. The main objects of this proposal appear to have been to provide a high level appellate tribunal outside the framework of the ordinary courts, and to provide some formal machinery for redress of cases of alleged maladministration.
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> We have much sympathy with the desire to provide machinery for hearing appeals against administrative decisions generally. As we have already explained in part 1, however, our terms of reference do not cover all administrative decisions but only those reached after a special statutory procedure involving an enquiry or hearing. It is therefore in relation to our limited terms of reference that any proposal for a general administrative appeal tribunal must be considered. On this basis the proposal seems to us to have several disadvantages. First a general tribunal could not have the experience and expertise in particular fields which, it is generally accepted, should be a characteristic of tribunals. Appeals would thus lie from an expert tribunal to a comparatively inexpert body, and we see little advantage in this. If, to meet this objection, it were proposed that the general administrative appeal tribunal should sit in several divisions corresponding to the main subjects within the jurisdiction of tribunals, the general effect would in practice, we think, differ little from the existing arrangements, and the essence of the proposal, a unified appellate body, would be largely lost.
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> A second disadvantage is that the establishment of a general appellate body would seem inevitably to involve a departure from the principle whereby all adjudicating bodies in this country, whether designated as inferior courts or as tribunals, are in matters of jurisdiction subject to the control of the superior courts. This unifying control has been so long established and is of such fundamental importance in our legal system that the onus of proof must clearly lie upon the advocates of change. We are satisfied that the case for change has not been made out.
>
> There is a third disadvantage. Quite apart from questions of jurisdiction, final determinations on points of law would be made by the general administrative appeal tribunal in relation to tribunals

but by the superior courts in relation to matters decided by the courts. Thus two systems of law would arise, with all the evils attendant by this dichotomy."

The Franks Committee's viewpoint has not been followed in the Commonwealth, New Zealand or New South Wales legislation. Their second and third points are met by the recommendations later in our report for appeals to the Supreme Court on questions of law from the Administrative Appeal Tribunal we recommend be set up, and by the enlarged jurisdiction which we recommend should be given to the Court by a State law analogous to the Commonwealth Administrative Decisions (Judicial Review) Act 1977.

The suggestion of a general administrative appeals tribunal was again brought up in England in 1961 when "Justice" published a report entitled *"The Citizen and the Administration—The Redress of Grievances"*. The Report recommended that a general tribunal be set up to deal with miscellaneous complaints against discretionary decisions where there is no specialised tribunal which can conveniently dispose of them. This conclusion was reached after examination of the Swedish "General Tribunal".

The method of defining the competence of the Swedish Tribunal is unusual. The statute which established it enumerated the types of appeal from discretionary decisions which should be dealt with by the Tribunal and authorised it to substitute its own discretionary decision for the original decision. Each year the Swedish Department of Justice sends a circular to all Government Departments requesting them to submit amendments to the list of subjects which come within the Tribunal's competence. On the basis of this annual survey, the enumeration of the matters falling within the jurisdiction of the Tribunal is continually revised and brought up to date. It appears that the proceedings of the Swedish Tribunal are for the most part in writing and only exceptionally is there an oral hearing.

The Justice Report recommended that a similar Tribunal be established in England, and that the members of such a tribunal would be required to have wider and more general experience of administration than members of a tribunal dealing with a limited class of appeals. The report further recommends that it might be practicable to enlarge the Tribunal by arranging for additional members with specialised experience to sit with the regular members of the Tribunal when appeals dealing with matters calling for specialised knowledge were brought before the Tribunal.

The Franks Committee in 1957 rejected a suggestion put to it that an Administrative Division of the High Court be created. This suggestion was taken up by another "Justice" Report, published in 1971 and entitled "Administration under Law".

This report proposed that a fourth division of the High Court be created as an Administrative Division, in which the Judges could sit with assessors when necessary. The Division would have both original jurisdiction exercised by a single Judge and an appellate jurisdiction, consisting of three Judges, from decisions of inferior courts and tribunals.

The report recommended that a right of action should be given in relation to an administrative decision from which no right of appeal to a specialist tribunal or to an inferior court exists, in favour of a person

particularly and materially affected by that decision in any of the following circumstances:

(i) if the decision was made in breach of any of the principles of good administration (the report recommended that such principles should be laid down).

(ii) if there was a material error in the facts upon which the decision was based.

(iii) if the decision was based on an error of law.

(iv) if the decision was not made in good faith.

(v) if the decision was required to be made in accordance with rules of natural justice and was made in disregard of those rules.

The Report also recommended that the Administrative Division have power to grant all the usual remedies which the High Court can grant such as declarations, and injunctions, and to suspend and quash decisions. In addition the Court should have the following powers—

(i) to remit a decision to the authority for reconsideration in accordance with the judgment of the Court.

(ii) to vary or reverse the decision.

(iii) to direct the authority to give a decision within a specified time, and

(iv) to award damages.

It was thought undesirable to have too many appeals. Therefore it was proposed that where a matter was on appeal to the Divisional Court and that had been the second appeal from the original decision an appeal should lie straight to the House of Lords with leave. Appeals from the decision of the Division in the exercise of its original jurisdiction, would however, lie to the Court of Appeal, and thence with leave to the House of Lords in the usual way.

One of the biggest reforms in England in the field of administrative law, was in the area of judicial review, rather than appeals. In 1976 the English Law Reform Commission recommended that there should be a form of procedure to be entitled "an application for judicial review" under cover of which an applicant could apply to the Court for any of the prerogative orders or in appropriate circumstances a declaration or an injunction. This recommendation was partially put into effect in 1977 by the placing in the Supreme Court Rules Order 53. (This Committee has recommended that a similar but not identical rule be adopted in the proposed revision of the South Australian Supreme Court Rules).

This new method of judicial review may however have indirectly led to the creation of an Administrative Law Division in England. With the removal of technical constraints in applications for judicial review, the number of applications materially increased. By 1980 there was a huge backlog of cases. In mid-1980 Donaldson L.J. (as he then was) was detached from general judicial duties in the Court of Appeal to preside over a two-judge Divisional Court to clear up the back-log of applications to that Court. Subsequent to this an attempt was made to identify other cases which might also be concerned with aspects of administrative law which might be suitable for hearing before the same court. The results of this exercise are to be found in the Directions issued by the Lord Chief Justice in July 1981. Paragraph 1 of those Directions establishes the Crown Office List, which encompasses the Order 53 cases. But there was an important departure. Provision is made for non-jury actions having an administrative flavour to be transferred into the Crown Office

List from the ordinary non-jury list. The Directions achieve the aim of bringing all administrative cases before the same tribunal. Thus as Louis Blom-Cooper comments in *1982 Public Law at page 260:*—

> "A specialised administrative court—albiet one which lacks the distinctiveness and constitutional status of a body like the French Conseil d'Etat has been established, even if it has been achieved by administrative stealth rather than by the democratic process of legislation."

Unfortunately this reform has been partly stultified by recent English decisions requiring all administrative appeals which could possibly be brought under their Order 53 to be so brought notwithstanding that some other procedure permissible by the general rules of Court might be more advantageous to the litigants in a particular case. The South Australian proposed rule expressly avoids this weakness in the English case law construction of their Order 53.

Whilst dealing with the English Tribunals legislation, we should add for completeness that we have not dealt in this report with the English Tribunals of Inquiry (Evidence) Act 1921. This Act deals mainly with inquiries into what Professor Wade aptly calls "administrative misdeeds by ministers of the Crown, civil servants, local authorities or the police". As he says *Administrative Law 4th Edn. 1977 page 829):* "An inquiry of this kind is a procedure of last resort, to be used when nothing else will serve to allay public disquiet, usually based on sensational allegations, rumours or disasters."

We felt that this topic was outside the scope of our report. If any such matter arises in this State, it will usually be dealt with by a royal commission set up under the Royal Commissions Act 1917 or under prerogative power.

New Zealand:

Soon after the publishing of the Franks report, New Zealand began to investigate the possibility of reform in administrative law.

In 1964 G. S. Orr prepared a report entitled *Administrative Justice in New Zealand.* The report recommended the establishment of an Administrative Court, the jurisdiction of which would include most appellate functions of the Supreme (now High) Court and Magistrates Courts in respect of tribunals and other administrative authorities, and in addition that a right of appeal should be granted from tribunals where none already existed. It was further suggested that the jurisdiction of the proposed Court need not be confined to hearing appeals from administrative tribunals, and that a right of appeal to the Court should be granted from some decisions of officials and administrative authorities other than tribunals. Apart from its appellate jurisdiction it was thought that the Supreme court should exercise a general supervision over inferior courts.

In 1966 a Public and Administrative Law Reform Committee was established, which since that time has produced a number of reports. The first report of the Committee was completed in 1968 and entitled *Appeals from administrative Tribunals.* In this report the recommendation of the 1964 Report relating to the creation of an Administrative Court was rejected. The Committee came to the conclusion that an Administrative Division of the Supreme Court was the logical and acceptable step in New Zealand.

The Report recommended—

(1) That the Administrative Division of the New Zealand Supreme Court (now High Court) hear appeals from certain administrative tribunals and also exercise the existing jurisdiction of the Supreme Court in administrative law.

(2) The Judges of the Administrative Division should be assigned thereto by the Governor-General and should also perform other Supreme Court work when required.

(3) Persons appointed to the Administrative Division should have a full appreciation of the need to give effect to the economic and social policies which the legislation they are considering was designed to implement, as well as possessing the other qualities appropriate to Supreme Court Judges.

(4) There should be no bar to the appointment of lay members or assessors to sit with the Court if and when desirable.

(5) The proceedings in the Administrative Division should not be more expensive than proceedings before the existing appellate administrative tribunals.

(6) The atmosphere in the new Division should not be more formal than that of appellate administrative tribunals.

(7) There should be a degree of specialisation among the Judges so that the virtue of consistency is not lost.

(8) In cases of special importance a full court of the Administrative Division should be able to sit.

(9) Where an appeal on a point of law from the Administrative Division is appropriate, it should lie to the Court of Appeal.

Mr. Orr, who had been strongly in favour of an Administrative Court when the 1964 Report was written, still held to that view in 1968, despite the fact that he was in the minority.

Among Mr. Orr's reasons for rejection of the majority proposal to set up an Administrative Division of the Supreme Court were:—

(a) Over judicialisation; proceedings would tend to be assimilated more closely to the adversary system which is not always suited to the adjudication of matters of social and economic policy. Procedures and evidentiary rules would tend to be strict and relevant statutes less likely to be adequately construed and applied.

(b) Judges of the Supreme Court would understandably be less inclined to make decisions which on occasions are necessarily controversial. Instead they would tend to adopt a more passive role in keeping with the tradition of the Supreme Court rather than implement social, economic or industrial policy in a constructive way.

(c) With relatively few exceptions all the powers likely to be vested in the Administrative Division would be value judgments on matters of social or economic policy. This is at a variance with the traditional and invaluable role of the Supreme Court of disinterestedness and impartiality which should be preserved.

(d) There would be a marked loss in informality and freedom of access to the Court and a likely increase in costs to litigants.

(e) There would be less likelihood of specialisation in particular areas and of the development of consistency in approach.

(f) The Court's relative inflexibility limits its usefulness in the wide field of administrative justice.

The Committee rejected the arguments put forward by Mr. Orr, for the following reasons:

(1) Many would inevitably regard the status of the Administrative Court as inferior to that of the Supreme Court, and as a result members of the public involved as parties would continue to suspect that they had been accorded second-class justice.

(2) In an attempt to meet the difficulties mentioned in (1) the suggestion was made of appointing the Judges of an Administrative Court as Judges of the Supreme Court, but entirely separating the two Courts in theory and almost entirely separating the Judges of the two Courts in fact. The Committee thought this a clumsy device, and expressed the view that it could not be right to appoint persons to the Supreme Court who are only nominally members of it.

(3) The establishment of a separate Administrative Court would raise problems as to its relationship with the Supreme Court. If an attempt were made to give it theoretically equal status, there would be a danger that the two courts would give conflicting and irreconcilable decisions.

(4) In general it is desirable that all administrative law cases at a certain level should be dealt with by the same group of Judges, for example, the Court which hears the statutory appeals should also in general hear the prerogative writ applications. The Committee was not prepared to recommend that the latter jurisdiction should be taken away from the Supreme Court and vested in a new type of Court.

The end result was that the majority view prevailed and the Judicature Amendment Act 1968 laid down the structure of the Administrative Division of the Supreme Court of New Zealand.

The Act differs from the recommendations of the Committee as far as the mode of appointment of Judges to the Division is concerned. The Committee recommended that the Judges be appointed by the Governor-General, whereas the Act provides for assignment by the Chief Justice. The Act does not provide a general right to initiate proceedings or appeals in the Administrative Division. The right only exists as provided in various enactments passed after the establishment of the Division. Jurisdiction in any particular field is to be given by amendment to the statutes dealing with the existing appellate jurisdiction whose jurisdiction is to be absorbed by the Division.

Another way in which the Act deviates from the Committee's report, is that the Administrative Division will not necesarily hear prerogative writ applications. The Act only gives the Division jurisdiction to hear such prerogative writ applications as are referred to it by the Chief Justice.

There is no appeal on fact or law from appeals of the Administrative Division, unless the Statute conferring the right of appeal to the Administrative Division itself so provides. The Judicature Admentment Act 1968 also provides for lay assessors to sit with the Judges in determining matters if the statute so provides.

Victoria:

The Victorian Statute Law Revision Committee was requested in 1964 to investigate and report on, among other things, "whether the existing provisions for appeal for decisions of [administrative] tribunals are satisfactory and, if not, what improvements thereof are desirable".

When reporting in 1968, the Committee concluded that appeals as to the legality, fairness and fact of an administrative decision were not appropriate to a regular courtroom presided over by a Judge sitting alone, for there must be considered administrative features of which a Judge could not be expected to have an intimate knowledge.

One proposal to deal with the problem which was put to the Committee was to set up an Administrative Appeals Court, consisting of a Supreme Court Judge as President and two Commissioners or assessors selected from a panel of persons specially qualified in some sphere or spheres of public administration or government. The then Chief Justice, when commenting upon that proposal, pointed out that although some functions akin to judicial may be involved, the substantial body of determinations would be concerned with policy or administration. The Chief Justice further commented that as the Court would operate in the Executive field of Government, the wisdom of giving it the form and garb of a judicial body was open to doubt, particularly as confidence in the Judicial arm of government might be threatened if the Judiciary was brought into an area of administration where public controversy often runs high.

The Committee recommended that an Administrative Appeals Tribunal be established, and that while the Tribunal should be independent of the Court it should be presided over by a person qualified for appointment as a Judge.

The Commonwealth:

In 1971 the Commonwealth Administrative Review Committee published a report known as the Kerr Report. Among other things the Committee recommended that an Administrative Review Tribunal be established. The Committee expressed the view that the Tribunal should be presided over by a Judge, and in addition there should be two other members, one of whom should come from the Commonwealth Department or authority responsible for administering the decision under review, and the other should be a layman drawn from a panel of persons chosen for their character and experience in practical affairs.

In 1975 the majority of the Committee's recommendations were put into effect by the enactment of the Administrative Appeals Tribunal Act. A significant feature of the Administrative Appeals Tribunal is that it is empowered to substitute itself for the primary decision-maker and to expercise all his powers in determining what decision should have been made under an enactment.

The Tribunal does not exist to hear argument as to whether the decision of the primary decision-maker was wrong. It listens to an applicant and to the decision-maker and determines what is the right or preferable decision in the circumstances. The argument presented by the parties is simply material which assists the Tribunal in deciding what decision should be made.

The Tribunal sits in divisions: general, medical, valuation and compensation, and such other divisions as may be prescribed by regulation. The Act provides for a President and Deputy President all possessing the qualifications for Federal judicial appointment; there is also provision for non-Presidential members who have qualifications relevant to the particular fields that come before the Tribunal.

In fact there are presently four Presidential members two of whom are Judges of the Federal Court and two who are practitioners. There are

two full time Senior Members one of whom has been Chief Justice of Nauru. There are two part time Senior Members one of whom has been a Judge of the Supreme Court of Papua-New Guinea. There are four part time members none of whom come from the judiciary.

The Tribunal is 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.

The Tribunal may only review a decision where jurisdiction to do so has been conferred pursuant to an enactment. Since 1975 more jurisdictions have gradually been added. However there is still a substantial amount of Federal Government decision-making which is not included in the Tribunal's jurisdiction.

A right of appeal lies on a question of law from the Tribunal to the Federal Court of Australia.

The jurisdiction of State Courts to review federal administrative acts is excluded by the Administrative Decisions (Judicial Review) Act 1977, Section 9. This means that if no appeal lies to the Administrative Appeals Tribunal or one of the specialised Commonwealth appeal tribunals, a person aggrieved by a non-appealable administrative decision has to invoke the original jurisdiction of the High Court of Australia under Section 75(v) of the Constitution. The present position was tenchantly critized by Deane J. in *In re Hayes and Mercury Marine Proprietary Limited, Ex parte Outboard Marine Australia Proprietary Limited (unreported 10th June, 1983).*

We deal in detail with the Administrative Decisions (Judicial Review) Act 1977 later in this paper.

New South Wales:

In 1973 the Law Reform Commission of New South Wales issued a report on appeals in administration, in which it was recommended that a Public Administration Tribunal be established.

The Commission recommended that the Tribunal be presided over by a Supreme Court Judge and that members of the Tribunal, other than judicial members, should be selected from a panel of persons having special experience in administration, commerce, industry or administrative law.

The Tribunal was intended to have two functions, namely to hold inquiries into the official actions of public authorities and to hear appeals. In the case of inquiries it was proposed that where a public authority takes official action, objection may be made to that official action by the Attorney-General or by any person who claims to be adversely and substantially affected by the official action. In some cases, the Tribunal must inquire into the official action. In other cases, the Tribunal may in its discretion decide that it will or will not inquire. It was recommended that the Tribunal might allow an objection to an official action where the official action was beyond the power of the public authority concerned or where the Tribunal was satisfied that the official action was harsh, discriminatory or otherwise unjust, and that the Tribunal might set the official action aside or remit it to the public authority concerned for action in accordance with the directions of the Tribunal.

The Commission recommended that rights of appeal to the Tribunal should be conferred by legislation other than the Act setting up the Tribunal. The Commission held the view that the greater part of the

jurisdiction of the Supreme and Local Courts to hear and determine administrative appeals could be transferred to the Tribunal, together with the jurisdiction of a number of ad hoc bodies which are not utilised enough to gain specific expertise in their field.

Whether the recommendations of the Commission will ever be adopted is unclear. However Section 53 (3B) of the New South Wales Supreme Court Act 1970-1981 did create an Administrative Law Division of the New South Wales Supreme Court. This Division has jurisdiction to hear a number of appeals relating to administrative decisions. It also has jurisdiction to hear proceedings involving a public body or a public officer where mandamus, prohibition, certiorari, injunction or declaration is being sought.

Western Australia:

In 1982 the Law Reform Commisson of Western Australia published a report entitled *"Review of Administrative Decisions: Appeals"*. The Commission in that report recommended that an administrative appeal system should consist of—

(1) The Full Court of the Supreme Court.
(2) An Administrative Law Division of the Supreme Court.
(3) An Administrative Law Division of the Local Court.
(4) A limited number of specialist bodies.

The Commission considered it important for the Supreme Court to be central to the administrative appeal system in the same way as it occupies a central position in relation to other areas of law. The Commission recommended that a separate Administrative Law Division be established in the Supreme Court for the purpose of developing a body with a special knowledge of administrative law and special expertise in dealing with administrative appeals.

The Commission also proposed that the Local Court should be an appellate body in the administrative appeal system, because the Commission believed that there may be matters, including those of a local nature, which could be dealt with adequately by the Local Court initially, with a further appeal to the Administrative Law Division of the Supreme Court on points of law.

The Commission recognized that there may be circumstances in which it would be desirable for the Administrative Law Divisions to have the benefit of persons with particular expertise and therefore recommended that provision should be made for the appointment of lay members to sit with a Judge or Magistrate on the Administrative Law Division. Where the number of appeals is such to warrant it, panels of lay members could be established. Where the Chief Justice or Chief Stipendiary Magistrate as the case may be, considered in a particular case that it would be desirable to have lay members as members of the division, he could select members of the panel for the purpose of the hearing and determination of the appeal. Appointments of lay members where no relevant panel existed could be made by the Chief Justice or the Chief Stipendiary Magistrate. Except on a question of law, the appeal should be decided according to the opinion of the majority. In the case of question of law, including the question whether a particular question is one of law, the question should be decided in accordance with the opinion of the presiding Judge or Magistrate.

The Establishment of a General Appeals Tribunal:

After examination of the reforms and proposed reforms in other jurisdictions, a number of options for reform in Administrative Appeals emerge. These as stated hereunder, are not mutually exclusive and a system using several of the nominated options may indeed produce the most beneficial effects.

1. The present system could be left basically as it is, but some rationalization could be carried out as in England, for example an attempt could be made to amalgamate tribunals if practicable, and also the procedure used for the various tribunals could be standardized as much as possible.
2. An administrative division of the Supreme Court (and perhaps also the Local Court) could be established as was done in New Zealand and was recently recommended in Western Australia.
3. An Administrative Court could be established, as was recommended to the Franks Committee by Mr. Robson, and to the New Zealand Public and Administrative Law Reform Committee by Mr. Orr.
4. An Administrative Appeals Tribunal along the lines of that recommended by the Victorian Statute Law Revision Committee, the Law Reform Commission of New South Wales, and the Commonwealth Administrative Review Committee, which in the case of the Commonwealth was later implemented by the Administrative Appeals Tribunal Act 1975.

The first option might be useful as a first step, provided it was treated only as a first step whilst a more comprehensive system was being implemented. The difficulty with this option is well set out by Garner as follows:—

> ". . . one could argue that the lack of a system leads to complication and therefore a lack of comprehension on the part of the ordinary public. There are so many tribunals sitting in different places, at different times, and each subjected to different procedural rules, that it needs an expert to say when—or whether—there may be a remedy." *Administrative Law 5th edn. at page 218.*

It is recognised that in some few instances present rights to appeal will be best left to lie to the appellate bodies presently in existence. However it is envisaged that a substantial percentage of present appeal rights would be better transferred to a new appellate body.

The characteristics traditionally attributed to Tribunals, such as cheapness, flexibility, informality, and specialised expertise, lead to a recommendation in favour of a General Appeals Tribunal, where questions of fact or questions of policy are concerned. Questions of law on the other hand are matters for the Courts and we shall later suggest an alternative method of bringing such quesions quickly and easily before the Supreme Court.

The Western Australian Commission said at page 31 of its Report on Review of Administrative Decisions: Appeals:—

> "The Commission recognizes that there may be circumstances in which the decision subject to review involves a wide discretionary power and where it was made in order to implement stated government or ministerial policy. This is not necessarily a reason for creating a general appellate body outside the Court system, but may provide a reason for creating a specialist appellate tribunal, especially where the policy concerned cannot reasonably be reduced to statutory

or regulatory form. Whether such a specialist tribunal is necessary in particular types of cases would be the subject of recommendations by the ongoing review body which the Commission recommends be established."

We think that the review tribunal should be set up now.

The duty of the ongoing review body should be, as in the case of its Commonwealth counterpart, the Administrative Review Council to identify new areas where an appeal should properly lie to the Administrative Appeal Tribunal and make recommendations to Parliament accordingly.

We think that it is undesirable that the judicial branch of Government should be involved in reviewing policy decisions any more than is absolutely necessary. As the then Victorian Chief Justice commented in the 1968 Victorian Report in a passage already cited in this report:

> "confidence in the Judicial arm of government may be threatened if the Judiciary is brought into the area of administration where public controversy often runs high."

In addition, it must be conceded that not all problems requiring the review of an administrative decision are readily susceptible of judicial review, and this must be a fortiori where the review is either of the exercise of a discretion or of the perceived implementation of government policy.

Consequently we recommend in South Australia an administrative appeal system, similar to that established in the Commonwealth sphere, by the Administrative Appeals Tribunal Act 1975. In addition, we think there should be a right of approach to the Courts wider and more flexible than the present prerogative writ procedures, based on the Commonwealth Administrative Decisions (Judicial Review) Act 1977. As will be seen later we have in some instances departed from the scheme of that Act. It must be kept in mind that by an amendment to the Federal Judiciary Act which came into force on January 1, 1984 the Federal Parliament has vested its prerogative writ jurisdiction in the Federal Court of Australia. We discuss this topic in detail later in the paper.

Jurisdiction of the Tribunal:

The new Tribunal should take over the jurisdiction of some existing appellate bodies. The Tribunal should also hear appeals from the exercise of discretions (including discretions exercised under subordinate legislation) from which presently there is in general no right of appeal, where it is decided that an appeal should lie. However if the "discretion" so called is in fact merely the implementation of policy at Cabinet or Ministerial level, then the review body should not have jurisdiction in such a case.

It may be that because of the diversity of subject matter coming before the projected tribunal that more than one Tribunal or more than one Division of the Tribunal should be provided for in the enabling statute. If this is not done, all proceedings will tend to be of the curial type, a tendency which is already visible in relation to Commonwealth Administrative Appeals and even more so in those set up under United States law. It should have power to review, reconsider, vary or recall its decisions from time to time as the necessities of the case may require. It should not be bound by the rules of stare decisis, or by the strict rules of evidence, but only by the necessity to treat like cases in a like manner.

It should have power to order costs unnecessarily, wastefully or contumaciously incurred to be paid by the party in default. Otherwise costs as between party and party should not lie.

The Tribunal should also have powers as a conciliator or mediator and be entitled to exercise compulsory powers of conciliation or mediation without affecting its powers or rights to hear the substantive appeal if conciliation or mediation proves unavailing. The powers of the present Conciliation Act 1929 could be adapted for this purpose.

Composition of the Tribunal:

Perhaps one of the most difficult questions relates to the membership of the Tribunal. The Commonwealth Administrative Appeals Tribunal Act provides for the appointment of a Federal Court Judge as President, and both the New South Wales Law Reform Commission and Victorian Statutes Law Revision Committee have suggested that under their proposed Administrative Tribunals the President or Chairman should be a Supreme Court Judge.

The Commonwealth provisions and New South Wales proposals make further provision for judicial or at least legally qualified members. The dangers inherent in having too much legal input into the Tribunal would be that it could easily develop court-like procedures and lose benefits attributed to tribunals such as flexibility and cheapness. On the other hand, the value of such a tribunal to the community depends greatly on its acceptance by the public and there is little doubt that a Chairman holding judicial rank does help to inspire public confidence in any tribunal.

There should therefore be a full time president who either holds judicial office or is a practitioner of say ten years standing. There should be a number of full-time deputy presidents, not all of whom need to be legal practitioners, and a number of part-time members some of whom at least do not need to be practitioners.

The Committee was equally divided on the question of whether the Chairman of a given panel should always be a legal practitioner.

No doubt the answer to this last question will, at least in part, depend on what areas of statute law come under the review powers of the tribunal and what size tribunal is ultimately decided upon. Whatever the answer is to that question, it will of course be necessary for the tribunal's acts and proceedings to be fully privileged and for the usual protections to be extended which apply to royal commissions and similar bodies.

As to expert members, while in some cases it may be necessary to have panels representing specific interests, it would be preferable to have panels with general expertise in the relevant field. Generally speaking, the ideal situation is for the expert to be at hand to be called upon by the tribunal to see that all relevant questions which relate to his expertise are put to the parties and witnesses, and to advise the members of the tribunal on technical issues.

A similar recommendation was made by the Victorian Statute Law Revision Committee, which recommended that their Administrative Appeal Body should be constituted of a Supreme Court Judge as President and two assessors or commissioners selected from a panel of persons specially qualified in some sphere or spheres of public administrator or government, and that the President would select and appoint two assessors who in his opinion have special qualifications to deal with the subject matter of the particular appeal.

While the Western Australian Law Reform Commission decided against recommending an administrative appeals tribunal and recommended that Administrative Law Divisions of the Supreme Court and Local Court be established instead, the Commission did conclude that there may be circumstances in which it would be desirable for the Administrative Law Divisions to have the benefit of persons with a particular expertise, saying at pages 43-44 of the Report:

> "The Commission recommends that provision should be made for the appointment of lay members to sit on the Administrative Law Divisions. Where the number of appeals is such to warrant it, panels of lay members could be established. A person could be appointed by the Governor to the panel if he has, in the opinion of the Governor, special knowledge or skill in relation to any class of decisions in respect of which an appeal may be made to one of the Administrative Law Divisions.
>
> Where the Chief Justice or Chief Stipendiary Magistrate, as the case may be, considered in a particular case that it would be desirable to have lay members as members of the division, he could select the members of the panel for the purpose of the hearing and determination of the appeal. Appointments of lay members where no relevant panel existed could be made by the Chief Justice or the Chief Stipendiary Magistrate."

Apart from the panels with their relevant expertise, it is envisaged that the Tribunal should be entitled to obtain expert assistance: see for example clause 66 of the New South Wales Draft Bill establishing a Public Administration Tribunal which provides—

> "66. The Tribunal may, for the purpose of determining any matter arising in any proceedings, obtain the assistance of an expert and act on his certificate."

Such assistance may include the calling of experts as witnesses of the Tribunal's own motion and the power to add additional members to a tribunal and to provide added expertise in a given area or areas. This means that the tribunal must have power to split up the issues on an appeal where necessary into two or more appeals. Otherwise the general rule would apply that all those who hear the appeal must participate in the decision making process and vice-versa: see clause 13 (3) of the New South Wales Bill—

> "The tribunal may be constituted differently for separate matters arising in the proceeding."

Consideration will also have to be given as to whether or not the tribunal is to have the capacity to decide by majority or whether unanimity is required. If the latter there will need to be power to reconstitute the panel on a division of opinion occurring. We would recommend that a majority decision be sufficient to decide questions of fact and that the Chairman, if legally qualified, alone decides questions of law.

The Chairman would have a number of extra powers and duties, including deciding the composition of the Tribunal at any given sitting, and the hearing of urgent or interlocutory applications in chambers.

Depending upon the workload of the Tribunal, it may be necessary to have Divisions as under the Commonwealth legislation (Section 19) or at least to provide that more than one sitting of the Tribunal may be held at the same time as provided in clause 12 of the New South Wales Bill. In the latter case it will be necessary to provide the quorum of each of the tribunal sittings.

If possible there should be some flexibility in the composition of the Tribunal: for example it could be provided that if the parties agree (or the statute provides) the Tribunal may be constituted of the Chairman sitting alone (or with experts or assessors).

Nature of the Appeal:

The method of disposing of an appeal would vary according to the subject matter of the appeal. In some cases a full hearing de novo would be required; in others the opportunity to make written submissions and to comment on the other party's submissions should suffice; and there will of necessity be many intermediate positions between those two extremes.

In hearing the appeal, the Tribunal would have all the powers and discretions that are conferred by the relevant enactment on the person who made the decision appealed from. The Tribunal would have the power to—

(1) affirm the decision

(2) vary the decision, or

(3) set the decision aside, and

(a) make a decision in substitution for the decision so set aside, or

(b) remit the matter for reconsideration in accordance with any directions or recommendation of the Tribunal:

(4) dismiss the appeal wholly or in part.

This would invest the Tribunal with the same general powers as the Commonwealth Administrative Appeals Tribunal which enable it to arrive at what it considers to be the "correct or preferable decision: see Section 43 of the Administrative Appeals Tribunal Act and clauses 45 and 46 of the New South Wales draft bill.

Notice of Hearing:

The Tribunal shall give a party to the proceedings reasonable notice of the time and place at which it intends to hear those proceedings or if the review is to be conducted on written submissions, notice of the time and place by and at which submissions are to be lodged and where a copy of the other side's submission may be seen.

Evidence:

The Tribunal shall, where there is a viva voce hearing, allow parties a reasonable opportunity to present evidence and make submissions. The Tribunal may administer oaths or affirmations. Wilfully false evidence shall be punishable as in the case of wilful and corrupt perjury.

The Tribunal may receive and act upon as evidence such oral, documentary or other matter as the Tribunal thinks relevant, whether or not admissible by the law of evidence. Subject to the requirements of justice, the Tribunal may inquire into and inform itself of any matter relevant to the proceedings in such manner as it sees fit. If it is using material other than that supplied by the parties it must give the parties the opportunity to comment on and if necessary to supplement such material.

The Tribunal may also order any person whose evidence the Tribunal thinks may be relevant to attend for examination. It may make orders

for the production before the Tribunal of any document or thing which the Tribunal thinks may be relevant and for the detention inspection and preservation of evidence.

In some cases, especially if inquisitorial or semi-inquisitorial procedures are being used, the tribunal may need the right to apply to a Magistrate for the issue of a search warrant and consequential powers to make the warrant effective.

Representation:

The Franks Committee recommended that the right of a citizen appearing before a Tribunal to be able to call upon the services of a legal representative be only curtailed in the most exceptional circumstances, and as a result in England there is a right to legal representation before most Tribunals. In the United States a denial of the right to legal representation before an agency hearing would amount to a breach of "due process". This is confirmed in Section 6 *(a)* of the American Administrative Procedure Act 1946.

Section 32 of the Administrative Appeals Tribunal Act provides that at the hearing of a proceeding before the Tribunal, a party to the proceeding may appear in person or may be represented by some other person. No restrictions are placed upon the persons who may represent others at a hearing. It may be preferable to have a provision on similar lines to that found in Section 14 (4) of the Commercial Tribunal Act 1982, so that the authority appealed from may be represented by any "official or officer or counsel, and other parties may appear personally or by counsel, or with leave of the Tribunal, by some other representative".

Legal aid should be available in proper cases for solicitors and counsel to prepare and present the argument of a citizen who is a party to the proceedings.

It should be possible for other persons to appear as advocates with the permission of the Tribunal so long as they are not appearing for fee or reward. The formula used in the Commercial Tribunals Act might be useful in this regard.

Preliminary Conference:

The Act should provide for the ordering of a preliminary conference in the attempt to settle differences or at least to determine the matters in issue (see for example clause 67 of the New South Wales Draft Bill and Section 34 of the Commonwealth legislation).

Under the Administrative Appeals Tribunal Act, if the President thinks it desirable to do so (whether or not the parties so request), he may direct that a conference of the parties or their representatives be held. Such a conference may be presided over by the President or other Presidential member or a non-presidential member or officer of the Tribunal.

If at or after such a conference agreement is reached between the parties or their representatives as to the terms of a decision in the proceedings, the Tribunal is to make a decision in accordance with the agreement, provided that the terms of the agreement are reduced to writing and the Tribunal is satisfied that a decision in those terms would be within the powers of the Tribunal and that it is in the public interest to make that decision.

Unless the parties agree, evidence is not to be given at the hearing of a proceeding before the Tribunal of anything said or done at the prelim-

inary conference if the thing relates to any question to be determined by the Tribunal in the proceeding. Even if the parties agree at a preliminary conference on a matter pertinent to the application for review, that agreement is not binding on the Tribunal. The Tribunal's duty is to review the decision and it must make up its own mind what that decision should be: see *Re Impco Pty. Ltd. and Collector of Customs, Victoria (1980) 2 A.L.D. 843 at 845.*

There appears to have been no substantive comment on the utility of preliminary conferences held pursuant to Section 34 of the Commonwealth legislation; however many such conferences have in fact been held. On occasions the Administrative Appeals Tribunal has arranged for a preliminary hearing to be held by means of a telephone connection: see *Re Duncan and Director-General of Health (1980) 3 A.L.D. 18.*

Section 34 seems to contemplate that conferences may only be held prior to the commencement of the hearing of a proceeding before the Tribunal. Possibly the relevant section in the proposed legislation in this State could have wider application, as in the case of Section 67 of the New South Wales Draft Bill which provides:—

> "The Tribunal may, at any stage of any proceedings, order the parties to confer, either with or without a member or officer of the Tribunal, for the purposes of reaching agreement on any matter in question in the proceedings."

Hearings to be in Public:

All hearings should be in public except for limited classes of cases such as those affecting national security, medical questions, other intimate personal or financial matters, professional capacity and reputation or other case in which for good cause shown, the Tribunal thinks it expedient to make a total or partial exclusion order.

It may also be desirable to include a provision similar to Section 35 (2) of the Commonwealth legislation which provides that the Tribunal may exclude a party from the hearing. However to exclude a party from a hearing is even more serious than the exclusion of the public as the exclusion of a party denies him a full upportunity to cross-examine, to comment on, to controvert the case against him, or to instruct solicitors and counsel.

In *Re Pochi and Minister for Immigration and Ethnic Affairs (1979) 2 A.L.D. 33* the Administrative Appeals Tribunal recognized that the power to exclude should only be exercised sparingly, saying at pages 55 and 56—

> "To justify an order excluding the public there must appear a real possibility of doing injustice to, or inflicting a serious disadvantage upon, a party, a witness or a person giving information if the proceedings were in public; or it must clearly appear that publication of the proceedings would be contrary to the public interest; or it must appear that the information to be given in the proceedings is of a kind described by Section 36.
>
> To justify an order excluding a party a further criterion must be satisfied. As it must appear that the exclusion of the party is essential to preserve the proper confidentiality of the information needed to determine the application, it is necessary to show that the information is of such importance and cogency that justice is more likely to be done by receiving the information in confidence, and denying the party access to it, than by refusing an order to exclude the party."

Reasons for Decision:

A person aggrieved by a decision either of the Tribunal or the initial decision-making authority should be entitled to request and obtain reasons. *Flick* in *Federal Administrative Law at page 35* pointed to five factors which make reasoned decisions of value—

> "First, the requirement of a reasoned opinion provides considerable assurance that the decision will be better as a result of having been properly thought out. Second, reasons will enable a person who has a right of appeal to determine whether he has good grounds for an appeal and will inform him of the case he will have to meet if he does decide to appeal. In this regard, if an administrative determination is not the result of a unanimous vote of a decision-maker, the minority opinion may be of considerable value to an unsuccessful party. Third, reasons will make a tribunal more amenable to the supervisory jurisdiction of the courts and will ensure that a tribunal is acting within its powers. That is to say, reasons will inform a person why a decision has been made and will manifest any errors of law. Fourth, reasoned opinions will encourage public confidence in the administrative process. As was noted in a leading English case, even though a decision may be perfectly correct, if a party was not given reasons he 'was left with the real grievance that he was not told why the decision had been made': *In re Poyser and Mills Arbitration [1964] 2 Q.B. 467 at 478.* Fifth, reasons act as a check on the exercise of discretion and expertise and will ensure that a tribunal has performed its function of considering relevant factors and will prevent arbitrary action. Reasoned opinions also provide additional guidance to those who advise parties as to their future conduct."

Following recommendations made by the Franks Committee, Section 12 of the Tribunals and Inquiries Act 1971 (U.K.) imposes a duty "to furnish a statement . . . of the reasons for the decision if requested". In contrast Section 28 (1) of the Commonwealth legislation requires in addition to a written statement of the reasons for a decision, a statement which sets out the findings on material questions of fact and refers to the evidence or other material on which those findings were based.

These added requirements were considered by the Tribunal in *Re Palmer and Minister for the Capital Territory (1978) 1 A.L.D. 183,* where the Tribunal concluded that the Australian Commonwealth Parliament certainly intended that the citizen should be fully informed. The Tribunal also made the point that the citizen's entitlement to be fully informed was not merely an incident arising in the course of and for the purpose of a review by the Tribunal. It was a right which arose consequent upon a decision being made which is capable of review by the Tribunal. The reasons when properly given ensure that the citizen is sufficiently informed to determine whether he wishes to take the matter further, and if so whether to make representations to the decision-maker, proceed in the appropriate court of law or to seek a review by the Tribunal. Accordingly, the statement provided to the citizen must be intelligible to the layman.

A.N. Hall in an article entitled *Administrative Review before the Administrative Appeals Tribunal—A Fresh Approach to Dispute Resolution 12 F.L.R. 71 at 75* made the following comment about Section 28 of the Commonwealth legislation—

> "The significance of these provisions cannot be over-estimated. At one stroke they remove what was frequently an inseparable obstacle in the path of any successful challenge to the legality of administrative action."

As Deane J. observed in *Minister for Immigration and Ethnic Affairs v. Pochi (1980) 31 A.L.R. 666 at 685-6* in the context of an application for review before the Tribunal for an order for deportation made by the Minister:—

> "The Administrative Appeals Tribunal Act 1975 did not directly impose upon decision makers, whose decision it made subject to review, any substantive or procedural obligations to be observed in the making of such decisions. It did, however, effect a quiet revolution in general to such decisions. The Act lowered a narrow bridge over the moat of executive silence in that, subject to limited exceptions, it conferred upon a person entitled to apply to the Tribunal for a review of a decision, the right to be supplied with a statement in writing prepared by the person who made the decision and setting out the findings on material questions of fact, referred to the evidence or other material on which those findings were based, and giving the reasons for the decision (Section 28)."

Under the Commonwealth legislation reasons are not only required from the original decision-maker, they are also required of the Tribunal. Thus Section 43 of the Act provides—

> "(2) Subject to this section and to sections 35, 36 and 36A, the Tribunal shall give reasons either orally or in writing for its decision.
>
> (2A) Where the Tribunal does not give reasons in writing for its decision, a party to the proceeding may, within twenty-eight days after the day on which a copy of the decision of the Tribunal is served on that party, request the Tribunal to furnish to that party a statement in writing of the reasons of the Tribunal for its decision, and the Tribunal shall, within twenty-eight days after receiving the request, furnish to that party such a statement.
>
> (2B) Where the Tribunal gives in writing the reasons for its decision, those reasons shall include its findings on material questions of fact and a reference to the evidence or other material on which those findings were based.
>
> (3) The Tribunal shall cause a copy of its decision to be served on each party to the proceeding."

A similar provision should be placed in our State legislation.

Consideration could perhaps also be given to the inclusion of a provision along the lines of Section 28 (2) and (3) of the Commonwealth legislation which provides that the decision-maker may exclude material from a statement of reasons or refuse to furnish a statement of reasons if the Attorney-General certifies that the disclosure of the material would be contrary to public interest—

(a) by reason that it would prejudice the security defence or international relations of Australia, or

(b) by reason that it would involve the disclosure of deliberations or decisions of the Cabinet or of a Committee of the Cabinet; or

(c) for any other reason specified in the certificate that could form the basis for a claim by the Crown in a judicial proceeding that the contents of the statement should not be disclosed.

Subclause *(a)* of course except as to security does not normally apply to a State administration decision.

Where the Attorney-General gives a reason for non-disclosure under paragraph *(c)* as opposed to *(a)* or *(b)*, the Tribunal itself considers whether the information should be disclosed to all or any of the parties to the proceeding and, if it decides that the information should be so disclosed, the Tribunal makes it available.

Locus Standi:

The majority of the Committee are of the opinion that any person whose interests are affected by the relevant decision would have standing to appeal. While locus standi is currently being considered as a separate report by the Committee, some aspects of the Commonwealth legislation are worth noting.

Section 27 provides that an application may be made by or on behalf of any person or persons whose interests are affected by the decision. The Commonwealth or an authority of the Commonwealth, is designated a person for the purposes of the operation of the section. Under Section 27 (2) of the Commonwealth legislation, an organization or association of persons, whether incorporated or not, is to be taken to have interests that are affected by the decision if the decision relates to a matter included in the objects or purposes of the organization or association. The scope of this provision is however limited by Section 27 (3) which provides that the body referred to in Section 27 (2) is not to have standing for the purposes of challenging a decision if the decision was given before the organization or association was formed or before the objects or purposes of the organization or association included the matter concerned. By objects and purposes in this context must be meant principal and not ancillary objects and purposes. Nevertheless the word "purposes" is a word of wide import and should cover most situations where the organization or association has a real interest in challenging the decision in question.

Two members of the Committee who consider that the State legislation should follow the Commonwealth legislation in conferring jurisdiction only where other legislation specifically so provides take the view that the topic of locus standi should be specifically dealt with in each enactment conferring jurisdiction.

They regard the proposal to give a right of appeal to any person whose interests are affected as too uncertain in its operation. They believe that such a wide provision could give rise to much dislocation in the business of government and in commerce. They are particularly concerned that a person who apparently has a governmental decision in his favour may find that his plans are seriously disrupted or obstructed by an appeal from an unexpected quarter and that substantial losses might thereby be incurred. If the Government decides to give a general right of appeal subject only to specific exceptions, they are unable to suggest any straightforward way of limiting locus standi. They urge the Government if it does proceed by way of giving a general right of appeal to impose severe limitations so that Government and private business will not be seriously disrupted.

Notification of Right of Appeal etc.:

There is a danger that if citizens are given too much encouragement to appeal there may be substantial numbers of unmeritorious appeals lodged. However the right of aggrieved persons to appeal must be made

known, or there is not much point in the right existing. In any case the courts have ample power to control processes which are vexatious or an abuse of process and the Tribunal should be given similar powers.

In Germany public officials are required to give notice to the citizen of his right to appeal from an administrative decision and we recommend that there be a similar requirement in our legislation. Further, appeal booklets could be prepared and distributed to legal practitioners and legal aid officers for easy reference, explaining how an appeal is instituted, the method of carrying the appeal forward, the right to ask for reasons, and the procedure applicable on the hearing of the appeal. As much information as practicable should be available for appellants as to their rights of appeal and the procedure on appeal, especially if appellants wish to proceed in person without the aid of legal assistance.

In 1980, in order to assist applicants to prepare for hearings, the Administrative Appeals Tribunal produced a pamphlet entitled "Your Administrative Appeals Tribunal Hearing—What will it be like?" This pamphlet outlines in simple terms the procedure likely to be followed at a hearing and informs the applicant that he should bring all documents forwarded to him by the Registrar and that he can and should bring witnesses. It points out that the task of the Tribunal "is to decide what decision should be made in the light of all the facts and circumstances it can discover. So, if there is anything you think the Tribunal should know, tell it".

Applicants with enquiries are encouraged to telephone or write to the Deputy Registrar in their capital city. A similar approach could and should be adopted in this State.

Time for Appeal:

While it is important that citizens have adequate time to prepare an appeal against an administrative decision, it is also important for the smooth running of administration that appeals be instituted and disposed of reasonably quickly.

Most statutes provide an appeal period of one month. However, problems may arise where reasons for the decision have been requested as an applicant should not be expected to formulate his appeal until the reasons which he has requested have been delivered. Some statutes deal with this problem in similar terms to Section 69 (2) of the Education Act 1972 which provides—

> ". . . if the reasons for the decision making authority are not given in writing at the time of making the decision, and the appellant requests reasons, the time for instituting an appeal shall run from the time the appellant receives a written statement of reasons."

The Law Reform Commission of Canada in its Report recommended a period of fourteen days in which to apply for reasons and that the appeal be instituted within a further fourteen days after receiving those reasons.

A further saving of time would be available if a requirement similar to that of Section 28 of the Commonwealth Act was inserted into the legislation, which requires the person who made the decision, as soon as practicable, but in any case within twenty-eight days after receiving the request for reasons, to prepare and furnish the applicant with a statement of reasons.

We agree that a proper time limit for appeal would be fourteen days from the date of receipt of reasons.

Extension of Time Limits:

Section 29 of the Administrative Appeals Tribunal Act 1975 (Commonwealth) provides for extension of time, where necessary, in the following manner—

"29. (7) The Tribunal may, upon application in writing by a person, extend the time for the making by that person of an application to the Tribunal for a review of a decision (including a decision made before the commencement of this section).

(8) The time for making an application to the Tribunal for a review of a decision may be extended under subsection (7) although that time has expired.

(9) Before determining an application for an extension of time, the Tribunal may, if it thinks fit, require the applicant to serve notice of the application on a specified person or persons, being a person or persons whom the Tribunal considers to be affected by the applicant.

(10) If a person on whom a notice is served under subsection (9), within the prescribed time after the notice is received by him, gives notice to the Tribunal, as prescribed, stating that he wishes to oppose the application, the Tribunal shall not determine the application except after a hearing at which the applicant and any person who so gave notice to the Tribunal are given a reasonable opportunity of presenting their respective cases."

In comparison clause 72 of the New South Wales Draft Bill is in more general terms providing—

"72. Except to the extent that other provision is made by or under an Act—

(a) The Tribunal may, on terms, extend or abridge any time specified in this Act or the regulations, or fixed by an order of the Tribunal;

(b) time may be extended under paragraph *(a)* as well after as before the time expires, whether or not an application for extension is made before the time expires, and

(c) the period within which a person is required to do anything in or in connection with any proceedings before the Tribunal may be extended or abridged by consent without an order."

This would appear to be a better provision for extension of time and we recommend that it be adopted.

Where the appeal is to the Supreme Court, application for extension of time would be made to a single Judge in chambers, ex parte unless otherwise ordered.

Stay of Decision:

Where an appeal is instituted to the Supreme Court, there must be power to suspend the operation of the order of the Tribunal. This power

may rest only in the Supreme Court, or also in the Tribunal as in Section 18 of the Commercial Tribunal Act 1982 which provides—

> "18. (1) Where an order has been made by the Tribunal, and the Tribunal, or the Supreme Court, is satisfied that an appeal against the order has been instituted, it may suspend the operation of the order until the determination of the appeal.
>
> (2) Where the Tribunal has suspended the operation of an order under subsection (1), the Tribunal may terminate the suspension, and where the Supreme Court has suspended the operation of an order under subsection (1), the Supreme Court may terminate the suspension."

It will also be necessary to give the Tribunal power to stay or suspend the order appealed against. Section 41 of the Commonwealth legislation allows application to be made to a presidential member or authorised senior member for an order or orders staying or otherwise affecting the operation or implementation of the decision or part thereof. Any such order may be varied or revoked. Before making an order, the Tribunal or presidential member must give the person who made the decision an opportunity to make a submission in relation to the application unless it is not practicable to do so by reason of the urgency of the case or otherwise. Any such order does not come into operation until notice is served on the person affected. Before varying or revoking an order, both the decision-maker and the person who obtained the order must be permitted to make submissions.

The Tribunal has held that an order staying the operation of a decision is not appropriate where the safety of persons and property would be endangered and where the public interest might be adversely affected by making the order: *Re Ramsay and Department of Transport (1977) 2 A.L.D. 97.* This element of public safety has been emphasised in other decisions; for example *Re Flynn and the Secretary, the Department of Transport (1st February, 1980).*

The Tribunal refused an applicaton to stay an order cancelling a private Pilot Licence (except to an extent to which the Department had no objection). During the course of the application for the stay order in advance of the hearing, Davies J. stated:—

> "I think that I should substantially refuse the application at the present time, but without prejudice to you renewing it should there be some particular flight which becomes desirable prior to the hearing of the proceedings. We are dealing with a matter of public safety, and I think that I could not myself determine that Father Flynn was a fit and proper person to perform the functions and duties of the holder of a Private Pilot's Licence without going into the facts of the matter in a great deal of detail. Really that is a matter than can only be dealt with at the hearing. I do not think that it would be proper for me to assume that he is so qualified when there has been a finding by a delegate of the secretary of the Department of Transport to the contrary. I must take public safety into account. I therefore think that I should not give a general stay of the order at the present time, and I make that ruling reserving to you liberty to apply for a stay of the order should it become necessary for your client to make some particular flight when the matter can be reviewed in the light of the particular flight that is desired to be made."

Stated Case:

Only a handful of South Australian statutes provide for a case to be stated to the Supreme Court, and none gives a power to parties to compel the relevant Tribunal to state a case.

In England, the ability to state a case on a point of law to a superior Court has been recognized as a useful tool in the field of Administrative Law.

As a result Order 94 rule 9 of the English Supreme Court Rules provides:—

> "(1) Any such tribunal as is mentioned in Section 9 (1) of the Tribunal and Inquiries Act 1958, may of its own motion or at the request of any party to proceedings before it, state in the course of proceedings before it in the form of a special case for the decision of the High Court any question of law arising in the proceeding.
>
> (2) Any party to proceedings before such a tribunal who is aggrieved by the tribunal's refusal to state such a case may apply to the High Court for an order directing the tribunal to do so."

Order 56 rules 7-12 set out a general code of procedure for applications under enactments for orders requiring Ministers, Government Departments, tribunals or other persons, to state a case or refer a question of law for the opinion of the Court.

A provision in the new Act creating the Tribunal could perhaps follow clause 42 of the New South Wales Draft Bill which provides that application may be made to the Supreme Court for a directon that a case be stated where the application has been made to the Tribunal, and the Tribunal either refuses the application or does not, within fourteen days after the date of the application, state a case in accordance with the application.

It is felt that this kind of a provision should extend throughout the administrative law field; if there is a right to appeal there should also be a right to request a Judge to make an order that the Tribunal state a case on a point of law to the Supreme Court. The Committee was divided on the point of whether there should be a power to state a case or to order one to be stated directly from the decision maker whose decision was being impugned.

The application for an order directing the relevant Tribunal to state a case would come before a single Judge in Chambers. As it is desirable that it be as cheap as possible to state a case, it is recommended that the stated case be determined before a single Judge of the Supreme Court, unless the Tribunal or Judge orders otherwise.

We shall return to the question of cases stated when we deal with a suggested State analogue to the Commonwealth Administrative Decisions (Judicial Review) Act 1977.

Quick Appeals:

It is envisaged that there will be a need for a "fast track" where for some reason or another it is imperative that the Appeal Tribunal be seized of and deal with the appeal as quickly as possible.

An obvious example where urgency could exist is in the area of licences or permits to use water. If a permit to use underground, riparian, or

irrigation water is revoked or refused, a considerable amount of loss may be sustained by the applicant or previous permittee between the time of revocation or refusal, and the time when the appeal is heard and a decision given. His plants will speedily shrivel and die and his whole crop be lost.

In suitable circumstances therefore, it ought to be possible to apply to the Chairman of the Tribunal (in Chambers) for an endorsement that the matter involves urgency, and seeking a time for hearing, along the lines of a Supreme Court summons for immediate relief.

A similar recommendation was made by the Law Reform Commission of Western Australia, in their report on Review of Administrative Decisions: Appeals, where the Commission said at page 54—

> "Where it is necessary to have an appeal brought on for hearing urgently, it should be possible for the appellant to apply to the appellate body for directions for the abridgement of the times for setting the appeal down for hearing, holding the hearing, filing documents and preparing the appeal book."

Policy:

Of considerable importance is the question whether the Tribunal should have the jurisdiction to review policy decisions. This in turn raises the question of the exact definition of policy. *Garner: Administrative Law (5th edition) at page 3* said:—

> "Finer has defined administration as being 'the governmental machine by which policy is implemented'. Unfortunately this at once introduces another difficulty of definition, as a distinction has to be made between administration and 'policy'. By policy is meant formation of a general line or course of action—the idea of leadership, and the taking of a major decision or a matter of discretion; administration involves the execution or implementation of that policy so formulated in accordance with general principles."

On the whole reform agencies have been in agreement that any appeal tribunal which may be established should not have jurisdiction in the area of general policy. The Commonwealth Administrative Appeals Tribunal therefore became quite a novelty when it rejected the limitations strongly advocated by both the Kerr and Bland Committees that the Tribunal should be excluded from reviewing the policy underlying the decision.

The Federal Court of Australia in *Drake v. Minister for Immigration and Ethnic Affairs (1970) 2 A.L.D. 60* made it plain that the Tribunal, in exercising its review jurisdiction, must not abdicate the function of determining whether the decision made was the correct or preferable one in favour of a function of merely determining whether the decision conforms to whatever the relevant general government policy might be.

Mr. Justice Kirby in an article entitled *Administrative Review: Beyond the Frontier Marked Policy Lawyers Keep Out: 12 F.L.R. 121,* in commenting on the power of the Tribunal to review policy said at page 124—

> ". . . the conferring of an ample power to review policy (including ministerial policy) on the A.A.T. occurred not primarily as a result of any novel claim by the judiciary for its own powers but as a result of legislation enacted by the Australian Federal Parliament in the most comprehensive terms establishing the A.A.T. and conferring on it jurisdiction of great scope. Every relevant report which had

preceded the establishment of the A.A.T. had cautions about the involvement of judges in the business of reviewing administrative policy. It was recognized that almost inevitably such policy would, from time to time, involve the consideration of governmental and even party political attitudes."

If the power of the Administrative Appeals Tribunal to review policy is considered to be too extensive, it may be that clause 32 of the draft bill contained in the New South Wales Report on Appeals in Administration provides an acceptable compromise.

Clause 32 (1) provides—

"Where, in an inquiry, there is put before the Tribunal a statement of the policy of the Government on a matter relevant to the inquiry, the Tribunal shall, to the extent to which the policy is within power, give effect to the policy."

Such statements of policy were to be in writing signed by a Minister of the Crown and were to contain an express statement that they represented a policy of the government. Provision was also made for statements of policy of a public authority. The tribunal, though not bound to give effect to such policy, was to "have regard" to it.

The Commission when explaining the proposal at page 159 of the report said—

"Government must be able, if authorized by law, to have the final say about the Legislative aspects of any official action: it is responsible to Parliament for the action and it must be in a position to accept that responsibility. On the other hand, most public authorities are not directly linked with Parliament and their policies do not carry the weight of Government policies. We propose, therefore, that the tribunal shall have regard to those policies but not be bound by them. Where a public authority feels so strongly about a policy that it wishes the Tribunal to be bound by it, the authority may seek the intervention of the responsible Minister. If the Minister is persuaded to the viewpoint of the authority, and the matter is one by law susceptible of control of Government policy, the way is open to him to have the authority's policy stated as a policy of the Government."

The Committee were equally divided on whether the New South Wales proposal should be adopted in this State.

Another possibility is for the legislation to provide for an appeal against a decision and to indicate that the Tribunal is to reach its conclusion in accordance with a statement of policy. An example is the Dairy Industry Stabilization Amendment Act 1978 (Commonwealth). This Act confers jurisdiction on the Administrative Appeal Tribunal to review the allocation of quotas. These are to be laid before Parliament and are to be binding both on the Minister and on the Tribunal.

It is envisaged that where policy underlying a decision is to be reviewed, the Tribunal should be composed of members from a panel with expertise in public administration, but that the Tribunal should not include any public official of the Department from which the appeal lay.

If it is decided to prevent the proposed appeal tribunal from considering or reviewing policy questions, this will have to be spelt out in the statute delineating its jurisdiction. The Commonwealth legislation did not refer to policy. However after some initial hesitation both the Tribunal and the Federal Court expressed the view that the Tribunal did indeed have the power to review policy. The Committee were divided on whether it

was either proper or feasible for the proposed Tribunal in this State to entertain reviews of questions of policy. However some questions of fact and policy are so inextricably mixed that it would be impossible to review one without also considering the other, and some thought must be given to covering this situation.

Lodgment of Documents with the Tribunal:

So that the Tribunal is in a position to substitute its own discretion for that of the original decision-maker, it must have all the relevant material before it.

The Commonwealth legislation makes provision for this in Sections 37 and 38 of the Act which provide that within twenty-eight days after receiving notice of an application for review of a decision, the decision-maker is required to lodge with the Tribunal six copies of:—

(a) a statement setting out the findings on material questions of fact, referring to evidence or other material on which those findings were based and giving the reasons for the decision; and

(b) every other document or part of a document that is in his possession or under his control and is considered by him to be relevant to the review of the decision by the Tribunal.

What is required under Section 37 is that the actual reasons for the decision and the findings on material facts relied upon at the time when the decision was made, must be set out, not other reasons or facts which may have subsequently come to light: *Re U.K. Family Reunion and Australian Postal Commission (1978) 2 A.L.D. 383 at 400.* A decision-maker may, if he wishes, place before the Tribunal in support of his decision additional findings of fact or reasons which depart from or go beyond those which he relied upon at the time of his decision but, in that event, the fact that they are additional findings or reasons must be clearly indicated.

It has been said that Section 37 (1) *(a)* recognises the way in which the decision-making process in fact operates, with the decision-maker frequently acting on recommendations, reports and results of investigations carried out by subordinate officers or appropriately qualified experts. This is so because that provision requires a statement setting out "the" findings on material questions of fact and giving "the" reasons for a decision, rather than a statement in subjective terms of "his" findings and "his" reasons: *Re Palmer and Minister for the Capital Territory (1978) 1 A.L.D. 183 at 191-192.*

The twenty-eight day period may be shortened if the Tribunal considers that an applicant would or might otherwise suffer hardship: Section 37 (1A).

The Tribunal may require further documents to be lodged (Section 37 (2)) or additional statements containing further and better particulars of findings on material questions of fact, adequate reference to the evidence or other material on which the findings were based or adequate particulars of the reasons for decision: Section 38.

Similar provisions could be adopted in this State, the number of copies in relation to any particular tribunal would of course depend on the number of members. In addition, in many cases the mere production of the relevant file would provide all necessary documentation.

Privilege:

A person should not be obliged to answer a question or to produce books, papers or documents if the answer or contents would tend to incriminate him. Provision should perhaps also be made for the protection of legal professional privilege: see for example Section 15 (4) of the Commercial Tribunal Act, 1982:

"(4) A person shall not be obliged to answer a question, or to produce books, papers or documents, under this section if—

(a) the answer to the question or the contents of the books, papers or documents would tend to incriminate him; or

(b) by answering the question the question or producing the books, papers or documents he would commit a breach of legal professional privilege."

It may be desirable to tackle directly the issue of Crown privilege, as in Section 36 of the Commonwealth legislation. Section 36 provides that the Attorney-General may certify that the disclosure of information concerning a specified matter or the disclosure of any matter contained in a document would be contrary to the public interest:

(a) by reason that it would prejudice the security, defence or international relations of Australia; or

(b) by reason that it would involve the disclosure or deliberations or decisions of the Cabinet or of a Committee of the Cabinet, or

(c) for any other reasons specified in the certificate that could form the basis of 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 is given, a person who would otherwise be required under the Act to disclose the information or to produce the documents to the Tribunal is not excused from so acting. But the Tribunal is placed under an obligation to ensure that there is no disclosure of the information or document to any person other than a member or officer of the Tribunal. A distinction, however, is drawn between the position where the Attorney-General's certificate specifies as the reason for non-disclosure one of the grounds mentioned in paragraph *(a)* or *(b)* above and where the basis of the certificate is a ground specified in *(c)*. In the latter case, the Tribunal is to consider whether the information or the contents of the document should be disclosed to all or any of the parties to the proceedings. If it considers that the information or the contents of the document should be so disclosed, then the party is to be given access to the information.

An appeal lies to the Federal Court against a decision of the Tribunal to withhold or to disclose information on a matter contained in a document or to allow or refuse the answering of a question.

Subparagraph *(a)* of Section 36 would of course have no application in this State.

Privilege also may concern the applicant in relation to his own documents and a possible claim of legal professional privilege or self-incrimination. The High Court has recently restated the rules relating to legal professional privilege in *Baker v. Campbell (unreported 26th October 1983)* and we do not think it necessary to discuss further the law on this matter in this report.

Refusal to Comply with Orders of the Tribunal and Contempt of the Tribunal:

Because it is desired to have an Administrative Tribunal rather than a Court, it may be felt that it is not desirable to allow it to order imprisonment for refusal to obey orders or other contempt. One solution would be to provide that the Tribunal can impose a substantial fine; see for example Section 15 (2) and (3) of the Commercial Tribunal Act 1982 which provides—

"(2) Subject to subsection (3), if any person—

(a) who has been served with a summons to attend before the Tribunal fails without reasonable excuse (proof of which shall lie upon him) to attend in obedience to the summons;

(b) who has been served with a summons to produce any books, papers or documents, fails without reasonable excuse (proof of which shall lie upon him) to comply with the summons;

(c) misbehaves himself before the Tribunal, wilfully insults the Tribunal or any member thereof, or interrupts the proceedings of the Tribunal; or

(d) refuses to be sworn or to affirm, or to answer any relevant question, when required to do so by the Tribunal,

he shall be guilty of a contempt of the Tribunal.

(3) A contempt of the Tribunal is a summary offence punishable by a fine not exceeding two thousand dollars."

The fine however would not solve any problems arising under sub-clauses *(a)* and *(b)* because there must be some power, which presumably would be entrusted to the Supreme Court, to compel the attendance of the witness or the production of the documents.

Alternatively, provision could be made for criminal contempts to be dealt with solely by the Supreme Court which has the power to imprison. *Garner: Administrative Law (5th edition) at page 242* explains the English position:—

> "Under the Rules of the Supreme Court, a divisional Court of the Queen's Bench has jurisdiction to protect an inferior court in proceedings for contempt. In *Attorney-General v. British Broadcasting Corporation [1978] 2 All E.R. 731* the Queen's Bench Division held that a valuation court was an "inferior court" for this purpose, having regard to the task performed, the procedure followed and how far its creation and duties were consistent with general ideas in this country of what is meant by a court. Applying these tests, it would seem that the Lands Tribunal, the Transport Tribunal and the Employment Appeal Tribunal are certainly courts for this purpose; so would be it seems, the industrial tribunals, the V.A.T. tribunals and the Agricultural Land Tribunals."

It would however be better to confer the jurisdiction expressly on the Supreme Court by statute.

The Committee considers that in general the Tribunal should only have power to deal with contempt in the face of the Court where it is a question of restoring order in the Court so that the instant case can proceed and that all other contempts should be dealt with by the Supreme Court.

Costs:

Opinion as to whether the Tribunal should be entitled to make orders as to costs varies widely.

Under the Commonwealth legislation costs are not to be awarded except in the field of compensation for Commonwealth employees. A senior non-presidential member of the Tribunal, Mr. R. K. Todd, in an article entitled *Administrative Review Before the Administrative Appeals Tribunal—A Fresh Approach to dispute Resolution 12 F.L.R. 95* has commented favourably on this rule. He said at page 110—

> "... across the broad sweep of the Tribunal's jurisdiction I firmly believe that the possibility of an award of costs would kill the Tribunal for the ordinary citizen. With the Tribunal, as with the Taxation Boards of Review, the citizen may come to it knowing that he can limit his costs. He may engage senior or junior counsel, or a solicitor or a lay advocate, or he may present the case himself. Very often the last is a wise course. It certainly puts a knowlegeable, responsible and responsive Tribunal on its mettle to ensure that the case is fully presented. Some judicial comment has, it is suggested, flowed from a lack of understanding as to how often it is essential for the Tribunal to do just this. The Tribunal often has to elicit the applicant's story after the manner of counsel in examination-in-chief. It is simply not possible to speak of the Tribunal not descending into the arena in the way in which one may speak of a court where both sides are represented by counsel. Because the Tribunal is prepared to help in this way it would be tragic for the ordinary person to be deterred from coming to the Tribunal to present his own case because of the fear of an order for costs being made against him."

Apart from providing that each party shall bear his own costs, other options include giving the Tribunal the power to make such orders for costs as the Tribunal considers just and reasonable, which is presently the position with a number of South Australian Tribunals.

A further alternative is to provide that there be a power to award costs against the authority and not the citizen. The suggestion of the Victorian Statutes Law Revision Committee appears to be worthy of consideration. Clause 11 *(b)* of the draft bill attached to their Report on Administrative Appeals provides:—

> *"(b)* the President and the Court shall have the power to award costs but shall not award costs against any appellant and in favour of any authority if of the opinion that the Appeal was reasonably justified."

There must also be a power to order costs to prevent malicious, delaying or contumacious behaviour. This was recognized by the Law Reform Commission of Western Australia in its report on Review of Administrative Decisions: Appeals, where the Commission said at pages 46-7:—

> "In order to ensure that neither party is inhibited from presenting its case, the Commission recommends that generally each party to an appeal should bear his own costs for the appeal or any remittal application. The appellate body should, however, be able to make an award of costs if it is of the view that there are special reasons for ordering one party to pay the costs of the other, for example, the appellant may have instituted the appeal frivolously or vexatiously or without reasonable cause to believe that the appeal was justified or the decision-maker may not have acted in a bona fide manner in making the initial decision."

The Committee regards the West Australian recommendation as being the best solution to the problem.

Appeal to the Supreme Court:

The Franks Committee had much to say on the subject of appeals. The Committee expressed the view that an appeal on facts should not lie to a court since it would constitute an appeal from a body expert in the particular subject to a relatively inexpert body. The ideal appeal structure for tribunals should be a general appeal to a second or appellate tribunal, i.e. an appeal on fact, law or merits, but that it would not be essential to set up an appellate tribunal if the first tribunal is so exceptionally strong and well qualified that an appellate tribunal would be no better qualified. We have already commented on the imprecision of this suggested test.

The Committee further recommended that all decisions of tribunals should be subject to review by the Courts on points of law either by proceedings for certiorari or by appeal. As an appeal on a point of law is wider in scope than certiorari it should in general be provided, and the appeal machinery should be simple, cheap and expeditious.

It is generally accepted that there should be an appeal on questions of law to the Supreme Court from administrative tribunals. However the question remains whether it is desirable to have wider appeal provisions to the Supreme Court. In appeals relating to occupations and professions, there is usually a full right of appeal to the Supreme Court, unless an appellate structure has already been set-up in which case an appeal may lie in law only. At this stage it is not proposed to alter the appeal system with respect to registration and discipline in the field of occupations and professions and so no comment will be made as to the suitability or otherwise of this fuller right of appeal to the Supreme Court.

Of interest to note is the proposed setting up of a Commercial Tribunal which will determine licensing and disciplinary matters in relation to a number of commercial occupations. Section 20 (2) of the Commercial Tribunals Act 1982 provides:—

> "(2) An appeal, if it involves a question of law, lies as of right, but otherwise lies only by leave of the Supreme Court."

Such a provision could perhaps be used to allow an appeal on a mixed question of law and fact to be heard by the Supreme Court, which in some instances at least may be desirable because quite frequently one point cannot properly be decided without a consideration of the other.

Under Section 44 of the Commonwealth legislation a party to a proceeding before the Administrative Appeal Tribunal may appeal to the Federal Court of Australia, on a question of law, from any decision of the Tribunal. The various rulings or adjudications made by the Tribunal along the way towards its ultimate decision are not subject to appeal. In contrast, clause 48 of the New South Wales Bill provides that an appeal shall lie from an interlocutory order or decision only with leave of the Supreme Court.

The Committee was equally divided on the question of whether any appeals should lie as of right or whether leave to appeal granted by the Supreme Court should be a prerequisite to the hearing of any appeal.

The requirement of an application for leave would slow down appeals and increase costs. In addition, where a question of law is involved, the question can by one means or another—prerogative writ or declaration being the obvious means—be brought to the Supreme Court. In any

event the question of law, be it wrong interpretation of a statute, or regulation, no evidence to support the impugned decision, misuse of power, or an answer so unreasonable that the decision could not have been properly arrived at, may well show up clearly without further consideration of questions of fact. Others felt that the requirement of leave was a brake on unmeritorious appeals and that most appeals involve questions of fact before the Court comes to the point of law. We can in the circumstances only report the cleavage of opinion to you.

The Federal Court has cautioned against too ready an interference with a decision of the Tribunal. In *Neal v. Secretary, Department of Transport (1979) 3 A.L.D. 97* Franki J. noted at page 100—

> "There is no appeal to this Court on anything other than a question of law and therefore the court is not concerned with whether or not it would have come to the same conclusion as the Tribunal came to, but only with the question of whether the Tribunal erred in law."

Fisher J. has stated that the Federal Court "should adopt a restrained approach". In His Honour's opinion, Parliament contemplated that only in exceptional circumstances should the decision of the Tribunal not be the final decision. Whilst it was the duty of the Court to intervene when an error of law was identified it was said that one should not attempt to magnify or inflate questions of fact into questions of law: *Blackwood Hodge (Australia) Pty Ltd v. Collector of Customs (1980) 3 A.L.D. 38 at 49.*

Section 44 (2) provides for an appeal to the Federal Court from a decision of the Administrative Appeals Tribunal holding that a person who seeks to make an application to the Tribunal, or who seeks to be made a party to proceedings before the Tribunal, is not a person whose interests are affected by the decision. Section 36 (8) and Section 36A (6) provide that a decision by the Tribunal as to whether or not information should be disclosed to parties, and whether or not the answering of a question would or would not be contrary to public interest, is a decision for the purposes of Section 44. This means that an appeal lies to the Federal Court against a decision of the Tribunal to withhold or to disclose information on matter contained in a document or to allow or refuse the answering of a question.

Subsections 36 (6) and 36A (3) provide that the question of whether information should be disclosed and whether the answer to a question would be against public policy are questions of law. Those provisions when taken with Section 44 seem to produce the position that an appeal lies to the Federal Court against a decision of the Attorney-General refusing access to information on the right to answer a question on one of the grounds set out in Section 36 (1) *(a)* or *(b)*. As we have said, questions relating to disclosure or answering of questions are deemed to be questions of law thereby attracting the right of appeal in Section 44.

Similar provisions should be considered in the South Australian legislation.

We will deal further with this aspect when we discuss a South Australian equivalent to the Commonwealth Administrative Decisions (Judicial Review) Act 1977.

Circuit of Tribunal:

The Tribunal should visit major centres at given times of the year, just as the Court goes on circuit, and the Tribunal would also be able to

sit in any place which it thought necessary to do justice (c.p. Supreme Court Act 1935 Section 45 (1)).

Reports:

There must be a reporting service for the Administrative Appeals Tribunal. This will no doubt follow the system of court reporting now in use.

Service of Process:

The Committee draws attention to the problem of serving the process of the tribunal out of South Australia. We do not think that the Commonwealth Service and Execution of Process Act which deals with curial process will help in this regard.

An Order 11 type section could be put in but this would only assist in the service of original process, not the service of subpoenas.

It would of course be possible to empower the Supreme Court to issue subpoenas in aid of the working of the Tribunal which would attract the operation of the Service and Execution of Process Act.

There are however so many tribunals in the various States today that the obvious remedy is to ask the Commonwealth Attorney-General to amend the Service and Execution of Process Act to deal with service of process and subpoenas issued by any tribunal including this Tribunal.

Additional Tentative Suggestions Relating to the Proposed Administrative Appeals Tribunal:

(1) That a legally qualified officer be responsible for the initial analysis of an appeal and for briefing the president and members constituting the Tribunal. If the appeal proceeds to a hearing he could, after consultation with the members constituting the Tribunal, ensure as far as possible that all relevant evidence would be before the Tribunal. This was suggested by Gillian Osborne in an article entitled *Inquisitorial Procedure in the Administrative Appeals Tribunal—A Comparative Perspective (1982) 13 F.L.R. 150 at 174.* A similar situation exists in France, where applications reaching the Conseil d'Etat are given to a rapporteur who is responsible for the preparation of the case. The aims of the preparation are to clarify in advance for the judges the essential points of each party's claims and to ensure that each party is given the opportunity to comment on the claims and submissions of the other party. The rapporteur may ask questions in writing of either party, and may ask the administration to supply its reasons for the decision or the file on which the decision is based. If the information supplied by the parties yields insufficient evidence, the rapporteur may ask the court to order a further measure of preparation; for example site visits, inquiries, expert opinions and the viewing of a film.

When the rapporteur considers that all parties have had their say, he will close the instruction. He will then draft his report in which he examines all the questions raised and proposes a draft judgment, setting out the findings of fact and the legal basis which justify his conclusion. The completed report and file go to the president of the section who studies it, and comes to his own conclusion. He then calls a meeting of the section where the rapporteur's report and the problems raised by the case are discussed, and the rapporteur's proposal is either accepted or modified, or less frequently, remitted to the rapporteur for further consideration.

While the system has some equivalent in Australia in the role of a judge advocate in Courts-Martial, the reportorial system is certainly foreign to our adversarial system and we make no recommendation one way or the other on it but simply draw it to your attention.

(2) Provision of research assistants for the Tribunal. The Commonwealth Administrative Appeals Tribunal does not have field officers or research assistants to pursue enquiries although the Kerr Committee expected it would have. It should receive very serious consideration for the better functioning of the proposed Tribunal in this State.

(3) The Tribunal could give directions and take evidence by telephone. This practice has been used quite frequently by the Commonwealth Appeals Tribunal. Directions hearings, applications for stay orders and even the substantial hearing of an application for review have been dealt with in this manner by the Commonwealth Tribunal. Such hearings take the form of a telephone conference linking the parties or their representatives and are conducted in a hearing room open to the public. For example in *Re Duncan and Director-General of Health (1980) 3 A.L.D. 18* the applicant resided in Cairns whilst the relevant witnesses were in Cairns, Brisbane and Sydney. A series of three-way telephone connections were held with the result that the Director-General conceded the applicant's claim when further evidence was adduced.

The Tribunal has also received the sworn evidence of an applicant for sickness benefit by means of a telephone hearing: *Re S.B. and Director-General of Social Services (1981) 3 A.L.N. 153.* However the Tribunal has observed that the question whether it would embark on such a course in other cases in the future would be determined solely by the circumstances of each particular case.

(4) Provision could be made for the joinder of persons whose interests are affected. Section 30 (1A) of the Commonwealth Administrative Appeals Tribunal Act provides:—

> "Where an application has been made by a person to the Tribunal for a review of a decision, any other person whose interests are affected by the decision may apply, in writing, to the Tribunal to be made a party to the proceeding, and the Tribunal may, in its discretion, by order make that person a party to the proceeding."

The phrase "whose interests are affected" is interpreted to mean an interest which a person has other than as a member of the general public and other than as a person merely holding a belief that a particular kind of conduct should be prevented or a particular law observed. The interest affected need not be a legal interest. However the person seeking joinder must be able to identify a relevant interest which is his.

In *Re Phillips and Secretary, Department of Transport (1978) 1 A.L.D. 34* the Tribunal said that a person applying to be joined as a party to a proceeding had to satisfy three criteria: *(a)* there must be an application to the Tribunal to be made a party, *(b)* the application must be made by "a person", and *(c)* the interest of the "person" must be affected by the decision. In that case the Tribunal said that once those criteria had been satisfied the Tribunal had no discretion to refuse the application for joinder. However this view was qualified in *Re Control Investments Pty. Ltd. and Others and Australian Broadcasting Tribunal (No. 1) (1981) 3 A.L.D. 74,* and the fact of discretion has since been made clear by the inclusion of Section 30 (1A) (supra). Obviously if the joinder would unnecessarily complicate the presentation of the appeal by the original parties or if it would introduce issues extraneous to those sought to be argued in the original appeal or for other similar reasons, a Tribunal

would necessarily have to be given a discretion to refuse joinder or to disjoin proceedings where joinder had already occurred.

(5) Provisions could also be made so that the Attorney-General may, on behalf of the State of South Australia, intervene in a proceeding before the Tribunal. A similar provision was inserted in the Commonwealth legislation in 1982—Section 30A.

(6) A statutory provision expressly excluding the common law rules of evidence and empowering a tribunal to inform itself on any matter in such manner as it thinks appropriate, does not act as a licence to act upon evidence that is not disclosed to the parties: *R. v. Metropolitan Fair Rents Board; ex parte Canestra [1961] V.R. 89 at 92.* If the Tribunal is to be free to inform itself, it should be made clear in the procedural code that the Tribunal must not act upon such evidence without disclosing it to the parties, as it is crucial that parties have an opportunity to refute or qualify information that the Tribunal has come by in this manner.

However, as Smillie points out in his article *"The Problem of Official Notice" 1975 P.L. 64 at 84*—

> " . . . an adjudicator's background of knowledge and experience includes such a diverse range of ingredients from such a wide variety of sources that it is neither feasible nor helpful to the parties to require disclosure of the knowledge and subjective reasoning upon which some kinds of judgments are based, even though those judgments may be of crucial importance to the final result."

Smillie suggests that where an adjudicator proposed to rely upon his knowledge of facts which are capable of being attributed to specific identifiable sources, those facts should be disclosed to the parties and an opportunity for rebuttal provided, regardless of the purpose for which the knowledge is used. Exceptions to this general rule would exist in respect of knowledge of which a court could properly take judicial notice, and in situations where the aggrieved party should clearly have anticipated the tribunal's intention.

Where the knowledge upon which the adjudicator relies is not or is no longer capable of being attributed to specific identifiable sources and can be regarded as having merged into his general background of accumulated knowledge and experience, the application of the disclosure requirement should depend on the purpose for which the knowledge is used, and the way in which it operates to influence the final result. Where such knowledge leads the tribunal to draw an inference or conclusion or form an opinion which is fully in accord with that openly advanced by one of the parties, disclosure should not be required. But where knowledge of this character provides the basis for an inference, opinion or presumption which was not raised at the hearing and reliance upon it leads the tribunal to reject as inaccurate, relevant evidence on a crucial point which was not challenged at the hearing, or was challenged upon grounds quite different to those raised by the tribunal, the tribunal should be required to disclose its objection and the reasoning behind it, and allow parties a fair opportunity of comment and rebuttal.

Where possible, the tribunal should disclose the details of any relevant material within its knowledge where the issues to which it relates are raised by the parties, or at least before the conclusion of the hearing, and allow the parties to present further evidence and argument on those issues. An adjournment may be necessary to allow the parties a fair opportunity to produce such further evidence. However, the tribunal may for the first time appreciate the relevance of certain information within its own knowledge, or formulate an opinion or principle crucial to the

determination of an issue, only after the conclusion of the oral hearing. In these situations the tribunal should provide the parties with written notice of the material within its personal knowledge which it intends to consider, and allow the parties a fair opportunity to challenge or comment on it. Unless a party prejudiced desires to present rebuttal evidence from a witness whose credibility will be an important factor in the final decision an opportunity to present written submissions in rebuttal will normally be sufficient.

(7) Reasons when requested of a lower level administrative officer, when given should be certified by a senior officer of the Department; so that the decision is to some extent checked by the Department before the applicant receives the reasons and makes a decision whether the appeal or not.

(8) Where a person takes a proceeding before the Tribunal frivolously, vexatiously or for an improper purpose, the Tribunal may—

(a) dismiss or annul the proceeding, and

(b) order the party by whom it was taken to pay any other party compensation for any consequent embarrassment, inconvenience and expense that he has suffered or incurred.

(9) Applicants should be entitled to legal aid, to present their case before the Tribunal, provided they fit the Legal Services Commission's income requirements.

Procedural Code:

Consistency in administrative procedure is desirable. However totally consistent procedural provisions are not always possible due to the variety of different matters which are covered by the word "administration".

A positive move towards greater consistency would be to enact a basic code of administrative procedure which encompassed all Tribunals and other bodies scheduled to the Act; or alternatively all such bodies unless enacted otherwise. Where any individual Tribunal required additional or different procedure it could be provided for in the Act or rules relating to that Tribunal.

Apart from anything else this would prove to be a time saving device. Present statutes would not need to be amended to accord with the procedural recommendations of this Report. As new statutes were enacted they would not need to include the standard two or three pages of procedural requirements, and when suggestions were made in the future to amend the procedure of Tribunals, it would not be necessary to amend all of the Acts constituting the various Tribunals.

An Administrative Procedure Act would have provisions covering such things as:—

(i) The requirement that adequate notice of the time, place and purpose of the hearing be given to all parties, and that such notice should indicate that the matter can be disposed of if the party fails to attend.

(ii) In disciplinary and other cases where the good character, propriety of conduct or competence of a party is in issue, the party should be given adequate particulars of the allegations.

(iii) Hearings should, as a general rule, be held in public, except where the desirability of avoiding the disclosure of certain matters in the interests of any person affected or in the public interest outweighs the desirability of adhering to that general principle.

(iv) As a general rule, any party should be able to appear in person or be represented by counsel or agent.

(v) The Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate. (This may not be suitable to all Tribunals, and should include the requirement that the Tribunal must inform the parties of the evidence and give them an opportunity to contest it).

(vi) The parties should have the right to call evidence and to cross-examine witnesses. However, the right of a party to present his case should be subject to the overall control of the Tribunal, which should have the power to exclude irrelevant or repetitive evidence, or to direct that evidence be given otherwise than according to the adversarial system in use in Court.

(vii) The Tribunal should have the power to require any person by summons, to give evidence and produce documents and to order discovery and inspection of documents.

(viii) Tribunals should have the power to administer an oath or affirmation to witnesses.

(ix) Tribunals should be able to deal with contempt to the limited extent canvassed earlier in this paper and to send to the Supreme Court contempt proceedings in all other cases.

(x) A person should not be obliged to answer a question or to produce books, papers or documents if the answer or contents would tend to incriminate him or where he can properly claim legal professional privilege.

(xi) Tribunals, and any other authority from whom an appeal or case stated lies should be obliged to give reasons to decisions adverse to the claims of a party, and indeed to all parties.

(xii) Parties should be informed of their rights to appeal against tribunal decisions.

(xiii) Tribunals should not have the power to award costs except in cases of delay, improper conduct or contumacy.

(xiv) The Supreme Court should have the power to suspend orders appealed from. Individual Acts constituting Tribunals may enable the Tribunal to suspend the operation of a decision or an exercise of discretion made administratively.

Privative Clauses:

One of the major recommendations of the Franks Committee was that legislation should be passed to abolish so called "exclusive" or "privative" clauses, so that judicial control by means of the remedies of certiorari and mandamus is secured. As a result a provision was placed in the Tribunal and Inquiries Act 1958 (now 1971). Section 14 of the 1971 Act provides:—

> ". . . . any provision in an Act passed before 1st August that any order or determination shall not be called into question in any Court, or any provision in such an Act which by similar words excludes any powers of the High Court, shall not have effect so as to prevent the removal of the proceedings into the High Court by order of certiorari or to prejudice the powers of the High Court to make orders of mandamus."

In 1968 the Victorian Chief Justice's Law Reform Committee recommended that legislation should be enacted with regard to privative pro-

visions to preserve the Supreme Court's remedies and which would protect the remedies from future as well as existing privative provisions. These recommendations were acted upon in 1978 when the Victorian administrative Law Act provided in Section 12:—

> "12. Any provision in an Act passed before the commencement of this Act that any proceedings shall not be removed, or that any decision of a tribunal or inferior court shall be final or shall not be quashed, or shall not be called in question, and any provision in any such Act which by any similar words excludes any of the powers of the Supreme Court, shall not, as from the commencement of this Act, prevent the removal of proceedings of a tribunal or inferior court into the Supreme Court, nor the quashing of a decision of a tribunal or inferior Court by that Court, whether for error of law on the face of the record or otherwise, in proceedings for certiorari, nor prejudice the powers of that Court to grant relief by way of prohibition, mandamus, declaration of invalidity or injunction in relation to a decision of a tribunal or inferior court or to make any order for review or other order provided for in this Act."

It is true that Courts construe privative clauses restrictively and have been doing so for over a century following the decision of the Privy Council in *Colonial Bank of Australasia Ltd. v. Willan (1874) L.R. 5 P.C. 417.* So, too, "finality" clauses have often failed to achieve their object: see the judgment of Denning L.J. (as he then was) in *Re Gilmore's Application [1957] 1 Q.B. 574.* Courts have dealt in similar cavalier fashion with clauses apparently intended to oust all judicial review: see the speeches in the House of Lords in *Anisminic Ltd. v. Foreign Compensation Commission [1969] 2 A.C. 147.* Nevertheless it is a fundamental tenet that Parliament can by the use of sufficiently clear language oust, wholly or partially, the jurisdiction of the Courts. If administrative appeals are to function effectively, Parliament must make it equally clear that no ouster of jurisdiction or review is to be effective to bar the review powers of the Appeal Tribunal or the Courts on appeal. Accordingly a section like the Victorian section 12 quoted above should be enacted in South Australia and applied to the Administrative Appeal Tribunal as well as to the Courts.

Subordinate Legislation:

In some instances administrative discretions are exercised pursuant to regulations or other subordinate instruments. It is recommended that new subordinate legislation and all existing subordinate legislation should be examined to ensure that all discretions given under subordinate legislation are subject to review by the Appeal Tribunal and by the Courts on appeal.

In the Commonwealth sphere, some jurisdiction under subordinate legislation has been added to the jurisdiction of the Administrative Appeal Tribunal as a consequence of recommendations of the Senate Standing Committee on Regulations and Ordinances and of the Administrative Review Council.

Should an appeal lie, and if so to whom?

Some ground rules or preliminary principles need to be laid down. The following general principles are therefore suggested as criteria as to whether review should be available:

(i) The general presumption should be that the administrative act or discretion called in question is reviewable by the Appeal Tribunal and in a proper case by the Court.

(ii) However if Parliament desires that there should be no right of review it should have to say so in express terms so that the exclusion can be properly debated in Parliament.

(iii) Some matters may be considered unworthy of a right of review because of their relatively trivial nature: for example approval of a horse, cattle or sheep brand under the Brands Act 1933.

(iv) The Government may give power without review to regulate activities to ensure the health and safety of citizens; for example, directions may be given as to the loading of explosives, fire bans on days of high fire risk and directions in other similar situations in which the safety of the citizen must take precedence over all other considerations, and decisions must take effect at once.

To Whom should the appeal lie?

In order to determine the question of where an appeal should lie, it is necessary to examine what are seen to be the functions of tribunals and what are seen to be the functions of Courts. The general distinction which is usually made is that courts exercise judicial powers, while tribunals usually exercise non-judicial or administrative powers.

When one comes to apply this supposed dichotomy to any given set of facts or any given tribunal, this distinction becomes very difficult to draw and the cases on what is judicial power well reflect this notorious crux in public law. The distinction drawn in the *Boilermaker's case (1956) 94 C.L.R. 254 and (1957) 95 C.L.R. 529* appears likely to be reviewed by the present High Court on some convenient occasion, so that it would be unwise to rely on the criteria laid down in that case or the earlier cases which it purported to follow.

While the doctrine of strict separation is generally held in Australia not to apply in the State sphere notwithstanding the decision of the Privy Council on appeal from Ceylon in *Liyanage v. R. [1967] 1 A.C. 259,* the distinction does have at least semantic uses. This necessitates the definition of "judicial" and "administrative" functions rather than powers.

There are many positive features that are essential to judicial power, although by themselves they are not conclusive of it. Some of the tests include the presence of a lis inter partes, and the "trappings" and procedures of a court. Judicial power involves the declaration of existing rights as opposed to the creation of new rights. An administrative body can interpret and apply the law but it cannot conclusively determine the law. As has been shown earlier, it is on many occasions concerned with "policy" rather than with law stricto sensu. We need not here discuss how far "policy" may itself be law either in the Austinian sense or in the writings of more modern legal philosophers.

While both courts and administrative tribunals exercise discretions, an exercise of judicial discretion must be regulated by the rules developed by the common law or those laid down by statute in a particular area.

In 1932 the Committee on Ministers' Powers (The Donoughmore Committee) discussed the difference between judicial, quasi-judicial and administrative decisions. The Committtee said at pages 72-73—

> "A true judicial decision presupposes an existing dispute between two or more parties, and then involves four requisites:—
>
> (1) The presentation (not necessarily orally) of their case by the parties to the dispute; (2) if the dispute between them is a question

of fact, the ascertainment of the fact by means of evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the parties on the evidence; (3) if the dispute between them is a question of law, the submission of legal argument by the parties, and (4) a decision which disposes of the whole matter by a finding upon the facts in dispute and an application of the law of the land to the facts so found, including where required a ruling upon any disputed question of law.

A quasi-judicial decision equally presupposes an existing dispute between two or more parties and involves (1) and (2), but does not necessarily involve (3), and never involves (4). The place of (4) is in fact taken by administrative action, the character of which is determined by the Minister's free choice. For example, suppose a statute empowers a Minister to take action if certain facts are proved, and in that event gives him an absolute discretion whether or not he will take action. In such a case he must consider the representations of the parties and ascertain the facts—to that extent the decision contains a judicial element. But, the facts once ascertained, his direction does not depend upon any legal or statutory direction, for ex hypothesi he is left free within his statutory powers to take such administrative action as he may think fit: That is to say the matter is not finally disposed of by the process of (4). Whereas it is of the essence of a judicial decision that the matter is finally disposed of by that process and nothing remains to be done except the execution of the judgment, a step which the law of the land completes automatically, in the case of the quasi-judicial decision the finality of (4) is absent; another and a different kind of step has to be taken; the Minister—who for this purpose personifies the whole administrative Department of the State—has to make up his mind whether he will or will not take administrative action and if so what action. His ultimate decision is "quasi-judicial", and not judicial, because it is governed, not by a statutory direction to him to apply the law of the land to the facts and act accordingly, but by a statutory permission to use his discretion after he has ascertained the facts and to be guided by considerations of public policy. This option would not be open to him if he were exercising a purely judicial function.

It is obvious that if all four of the above-named requisites to a decision are present, if, for instance, a Minister, having ascertained the facts, is obliged by the statute to decide solely in accordance with the law, the decision is judicial. The fact that it is not reached by a court so-called, but by a Minister acting under statutory powers and other specialized procedure, will not make the decision any the less judicial."

The Committee at page 81 explained the distinction between administrative and judicial decisions as follows:—

"Decisions which are purely administrative stand on a wholly different footing from quasi-judicial as well as judicial decisions and must be distinguished accordingly . . .

In the case of the administrative decision, there is no legal obligation upon the person charged with the duty of reaching the decision to consider and weigh submissions and arguments, or to collate any evidence, or to solve any issue. The grounds upon which he acts, adn the means which he takes to inform himself before acting, are left entirely to his discretion . . . [sed quaere today].

But even a large number of administrative decisions may and do involve, in greater or less degree, at some stage in the procedure

which eventuates in executive action, certain of the attributes of a judicial decision. Indeed generally speaking a quasi-judicial decision is only an administrative decision, some stage or some element of which possesses judicial characteristics."

One can only say after citing that passage that the certitudes of 1932 have become very much muddled and unclear fifty more years further on.

A year later Gordon in *Administrative Tribunals and the Courts 49 L.Q.R. 94 and 443* gave a simpler explanation of the distinction between judicial and administrative powers saying at pages 106-7:—

> "... every judicial tribunal is concerned with legal rights and liabilities, which mean rights and liabilities conferred or imposed by law; and law means statute or long-settled principles. These legal rights and liabilities are treated by a judicial tribunal as pre-existing. Such a tribunal professes merely to ascertain and give effect to them, it investigates the facts by hearing evidence (as tested by long-settled rules) and it investigates the law by consulting precedents...
>
> In contrast, non-judical tribunals of the type called "administrative" have invariably based their decisions and orders, not on legal rights and liabilities but on policy and expediency."

One must interpolate to say that "invariably" both in 1933 and today states the position in absolute terms, not warranted by the practice of many administrative tribunals then and now.

Then at page 116 Gordon goes on:—

> "... it is clear that tribunals with the trappings of Courts, or even with many of their powers, are not necessarily judical. These incidentals are all inconclusive; the only sound test is to see what it is that a tribunal administers, to see whether its function is to ascertain legal rights and liabilities or to create them, whether it is to apply the law or policy and expediency."

Gordon pointed out that problems may arise when the language of the statute has left it unclear whether Parliament intended the powers given to be administrative or judicial, and that a further complication arose from the fact that it was quite common for a tribunal whose functions are mainly judicial to be given administrative functions and vice versa.

Ultimately, as we are dealing in this report with State law only, one can say no more than that if the functions are confided to a Court they are "judicial" and if they are confided to a body not forming part of the Court system they are within the ambit of this report.

We turn now to some areas where consideration should be given as to whether appeals should lie from the administrative body concerned to the new proposed Administrative Appeals Tribunal.

1. *Taxes and Duties:*

Land Tax Act 1936
Payroll Tax Act 1971
Stamp Duties Act 1928
Financial Institution Duties Act 1983
Succession Duties Act 1929 (if operational).

One possibility is to set up a Tax and Duty Review Committee, along similar lines to the Board of Review established under the Commonwealth Tax Acts. The Committee could have changing membership to deal with

the different applications for review, but have the same Chairman in all cases.

A person dissatisfied with an assessment of tax or duty would have the choice of appealing straight to the Supreme Court or of lodging an application for review with the review committee. If dissatisfied with the decision of the Review Committee a right of appeal should exist to the Supreme Court.

Alternatively, the present appeal provisions could merely be standardized as far as practicable to follow Stamp and Succession Duty practice, so that in all cases either *(a)* an application for review lay to the Treassurer, who would refer the matter to the Solicitor-General or Crown Solicitor for consideration, and if the Solicitor-General's or Crown Solicitor's opinion was adverse to the taxpayer, he could then appeal to the Supreme Court, or *(b)* the taxpayer could in the first instance appeal directly to the Supreme Court.

2. *Appeals relating to Government Employees and quasi-governmental employees:*

Public Service Act 1967
Education Act 1972
Savings Bank of South Australia Act 1929
Police Regulation Act 1952.

The appeal procedures available in this State relating to government employees, differ and are somewhat complicated. It is tentatively suggested that consideration might be given to the establishment of a Government and Related Employees Appeal Tribunal along the lines of the Tribunal of that name established in New South Wales in 1980.

The New South Wales Tribunal deals with appeals against decisions relating to promotion and discipline involving the police, teachers, electricity commission employees, public service employees and various other similar employees.

The Tribunal is constituted of a Chairman, an employers' representative selected from a panel and an employees' representative selected from a panel. If the Government has appointed more than one Chairman, then more than one sitting of the Tribunal may be held at the same time.

If a similar Act were to be enacted in this State it could simplify matters by allowing all governmental employees to appeal in the same way, under the same Act, and to the same Tribunal (which would be differently constituted for each case).

If there is to be such an appeal tribunal the Committee considers it to be of the utmost importance that there should be representation on the Tribunal by members of the public who are neither public servants nor members of the police force. For reasons set out later in this report we have made no recommendations with regard to local government employees.

3. *A Quicker and Cheaper Alternative to the appeal to the Land and Valuation Division of the Supreme Court:*

Coast Protection Act 1972
Crown Lands Act 1939
Eight Mile Creek Settlement (Drainage Maintenance) Act 1959
Highways Act 1926

Land Acquisition Act 1969
Mining Act 1971
Pastoral Act 1936
Renmark Irrigation Trust Act 1936
Sewerage Act 1929
South Australian Meat Corporation Act 1936
Valuation of Land Act 1971.

Under a number of Acts application may be made to the Land and Valuation Division of the Supreme Court to determine compensation payable, or for example to hear an appeal against valuation or rates. Where only a modest sum is in dispute it often does not appear to be worth pursuing the matter in the Supreme Court except where it amounts to a test case due to the expense and time involved in an application or appeal before the Land and Valuation Division. This problem could be dealt with by providing for a Compensation and Rate Appeal Board in instances where the matter in dispute was less than, for example, $2 500. Alternatively provision could be made along similar lines to the present duties acts, so that notice of objection or appeal could be given to the Treasurer, who would refer the matter to the Solicitor-General or Crown Solicitor (as in the Succession Duties Act) and if the intending appellant was dissatisfied with the Solicitor-General's or Crown Solicitor's opinion, and was prepared to risk the disproportionate costs involved, he would then have a further right of appeal to the Land and Valuation Division.

Similarly there are provisions in the next three acts mentioned providing for alternative options which might well be preserved. Under Section 80 of the Lower River Broughton Irrigation Trust Act, the assessee may appeal from the assessment either to the Trust or to a Local Court within twenty-one days and the Act provides for a further appeal from the Trust to a Local Court. Under Section 85 of the Renmark Irrigation Trust Act, the assessee may appeal against the assessment either to the Trust or to the Land and Valuation Division, or alternatively from the Trust to the Land and Valuation Division.

Especially in cases where simple arithmetical errors may have been made in assessment, it seems desirable that there be some method of getting the assessment reviewed before going into a full scale appeal which may be such a costly exercise that it cannot possibly be worth the taxpayer's while to pursue the matter.

The two option approach has also recently been taken in the Financial Institutions Duty Act. By Section 53 appeals against assessments may be made either to the Supreme Court or as an objection in writing to the Treasurer. If dissatisfied with the decision of the Treasurer, the taxpayer has a further right of appeal to the Supreme Court.

In the case of all State taxes and duties it is feasible as we have noted to set up a State Tax and Duty Review Committee to which written objections could be sent, prior to or instead of appealing to the Supreme Court along similar lines to the Taxation Board of Review.

4. There are also some specialized areas where it may be better to preserve a specialist appeal tribunal.

5. We have not dealt with specialist appeals tribunals covering sporting bodies such as racing, trotting and dog racing. The present tribunals are generally speaking deficient in that stewards are accusers, givers of evidence in person publicly or privately and judges, and those three functions are incompatible. A typical example of the problems is shown by *Beale v. South Australian Trotting League (Incorporated) (1963) S.A.S.R. 209.* The

reason why we have not dealt with them is because their decisions are not strictly within the bounds of administrative law as that term is generally understood. It is however a topic on which reform is urgently necessary because men's livelihoods are at stake as a result of such decisions. It would be a proper subject for a further reference to this Committee, if you so desire it.

We have not dealt in this report with review of decisions by a Mining Warden. This is a highly specialized area in which there is a considerable body of law which appears to be working satisfactorily.

We should add that we have not in this report dealt with discretions under the Local Government Act or with review tribunals in relation to that Act. The reason is that we understand that a new Local Government Act is to be enacted shortly. It is certainly a segment of the law which ought to be dealt with in a report such as this. If after the new Act has come into force you desire us to do a supplementary report on this aspect of the subject, we shall be pleased to do so.

Similarly we have not dealt with discretions arising under the Community Welfare Act. They are specialized in nature and a majority of us think that no useful purpose would be served by bringing them into this paper.

Appeals to Ministers:

A reasonably common avenue of appeal given by various statutes is the right of appeal to a Minister. This method of appeal has been criticized however. In 1932 the Donoughmore Committee developed two major arguments in favour of transferring appellate jurisdiction from Ministers to a tribunal:— first "that it was inappropriate for a quasi-judicial function to be performed by a Minister who as a politician may either be influenced or appear to be influenced by political considerations"; second, that it was wrong that an appeal made from the decision of an Authority appointed by the Minister and heard by an inspector appointed by the Minister, should finally be determined by him. This was held to constitute an appeal from the servant, through the agent, to the master, whereas the appellate authority should both be independent and be seen to be independent.

The Donoughmore Committee, in arguing that Parliament should always be extremely reluctant to entrust "Ministers or Ministerial Tribunals" with purely judicial powers, conceded that there might have to be exceptions, in which the decision of Parliament should normally depend on what is "the dominant aspect of the problem or class of problem to be solved". The more that policy was the dominant aspect the more probable it is that adjudication—certainly appellate adjudication—would be kept within a Department.

Further problems which may arise from appeals to Ministers include the fact that the Minister concerned may just not have sufficient expertise of either legal principles and/or the particular factual matters in issue. Particular Ministers may despatch appeals both quickly and expertly; however not all elected politicians will possess those requisite skills. Therefore, we recommend the implementation of the suggestions of the Donoughmore Committee and only provide for appeals to Ministers in future where there is nothing other than a question of policy involved. Even so, there may be some cases in which an appeal from a Minister's decision to a review body should be given. The paradigm case is *Franklin and Others v. Minister of Town and Country Planning [1948] A.C. 87* where a weak House of Lords treated the result of a public enquiry which

went to an obviously biassed Minister (as subsequent events clearly demonstrated) as being simply something merely to inform his mind which he could disregard at will, and therefore that the public inquiry was a sham and biassed was irrelevant. It is probable that an Australian Court would come to a different conclusion especially if the Minister's power to act is dependent upon the inquiry's report: *Brettingham-Moore v. St. Leonards Municipality (1969) 121 C.L.R. 509* and the discussion by Stephen J. in *The Queen v. Collings, ex parte A.C.T.U. (1976) 50 A.L.J.R. 471 at 473.* Notwithstanding the apparent conflict of opinion, which it is not necessary to pursue further in this report, we think that the mere fact that it is a Minister's decision or indeed that of the Governor-in-Council which is sought to be impugned, should not prevent an opportunity of review being given to the aggrieved citizen in proper cases.

Administrative Decisions (Judicial Review):

In addition to the remedies proposed by the preceding sections of the paper, we think that the jurisdiction of the Supreme Court to review administrative decisions directly should be widened as has already been done in the jurisdiction conferred on the Federal Court by the Commonwealth Administrative Decisions (Judicial Review) Act 1977.

Sections 3-7 of that Act are the relevant sections for the purpose of the conferral of jurisdiction. They read as follows:—

'3. (1) In this Act, unless the contrary intention appears—

"Court" means the Federal Court of Australia;

"decision to which this Act applies" means a decision of an administrative character made, proposed to be made, or required to be made, as the case may be (whether in the exercise of a discretion or not) under an enactment, other than a decision by the Governor-General;

"duty" includes a duty imposed on a person in his capacity as a servant of the Crown;

"enactment" means—

(a) an Act other than the Commonwealth Places (Application of Laws) Act 1970;

(b) an Ordinance of a Territory; or

(c) an instrument (including rules, regulations or by-laws) made under such an Act or under such an Ordinance, and includes a part of an enactment;

"failure", in relation to the making of a decision, includes a refusal to make the decision;

"order of review", in relation to a decision, in relation to conduct engaged in for the purpose of making a decision or in relation to a failure to make a decision, means an order on an application made under section 5, 6 or 7 in respect of the decision, conduct or failure;

"Rules of Court" means Rules of Court made under the Federal Court of Australia Act 1976;

"the Court or a Judge" has the same meaning as in the Federal Court of Australia Act 1976.

(2) In this Act, a reference to the making of a decision includes a reference to—

(a) making, suspending, revoking or refusing to make an order, award or determination;

(b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;

(c) issuing, suspending, revoking or refusing to issue a licence, authortiy or other instrument;

(d) imposing a condition or restriction;

(e) making a declaration, demand or requirement;

(f) retaining, or refusing to deliver up, an article; or

(g) doing or refusing to do any other act or thing,

and a reference to a failure to make a decision shall be construed accordingly.

(3) Where provision is made by an enactment for the making of a report or recommendation before a decision is make in the exercise of a power under that enactment or under another enactment, the making of such a report or recommendation shall itself be deemed, for the purposes of this Act, to be the making of a decision.

(4) In this Act—

(a) a reference to a person aggrieved by a decision includes a reference—

(i) to a person whose interests are adversely affected by the decision; or

(ii) in the case of a decision by way of the making of a report or recommendation—to a person whose interests would be adversely affected if a decision were, or were not, made in accordance with the report or recommendation; and

(b) a reference to a person aggrieved by conduct that has been, is being, or is proposed to be, engaged in for the purpose of making a decision or by a failure to make a decision includes a reference to a person whose interests are or would be adversely affected by the conduct or failure.

(5) A reference in this Act to conduct engaged in for the purpose of making a decision includes a reference to the doing of any act or thing preparatory to the making of the decision, including the taking of evidence or the holding of an inquiry or investigation.

(6) A document or a statement that is required by this Act to be furnished to a person or a notice that is required by this Act to be given to a person may be posted to the person by a pre-paid letter—

(a) where the person has furnished an address at which documents may be served—to that address; or

(b) where no such address has been furnished—

(i) in the case of a person not being a company—to the address of his place of residence or business last known to the person posting the document, statement or notice; or

(ii) in the case of a company—to the address of the registered office of the company,

and, if a document, statement or notice is so posted, then, for the purposes of this Act, the document or statement shall be deemed to be furnished, or the notice shall be deemed to be given, as the case may be, at the time when the document, statement or notice is so posted.

4. This Act has effect notwithstanding anything contained in any enactment in force at the commencement of this Act.

5. (1) A person who is aggrieved by a decision to which this Act applies that is made after the commencement of this Act may apply to the Court for an order of review in respect of the decision on any one or more of the following grounds:—

(a) that a breach of the rules of natural justice occurred in connexion with the making of the decision;

(b) that procedures that were required by law to be observed in connexion with the making of the decision were not observed;

(c) that the person who purported to make the decision did not have jurisdiction to make the decision;

(d) that the decision was not authorized by the enactment in pursuance of which it was purported to be made;

(e) that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made;

(f) that the decision involved an error of law, whether or not the error appears on the record of the decision;

(g) that the decision was induced or affected by fraud;

(h) that there was no evidence or other material to justify the making of the decision;

(j) that the decision was otherwise contrary to law.

(2) The reference in paragraph (1) *(e)* to an improper exercise of a power shall be construed as including a reference to—

(a) taking an irrelevant consideration into account in the exercise of a power;

(b) failing to take a relevant consideration into account in the exercise of a power;

(c) an exercise of a power for a purpose other than a purpose for which the power is conferred;

(d) an exercise of a discretionary power in bad faith;

(e) an exercise of a personal discretionary power at the direction or behest of another person;

(f) an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case;

(g) an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power;

(h) an exercise of a power in such a way that the result of the exercise of the power is uncertain; and

(j) any other exercise of a power in a way that constitutes abuse of the power.

(3) The ground specified in paragraph (1) *(h)* shall not be taken to be made out unless—

(a) the person who made the decision was required by law to reach that decision only if a particular matter was established, and there was no evidence or other material (including facts of which he was entitled to take notice)

from which he could reasonably be satisfied that the matter was established; or

(b) the person who made the decision based the decision on the existence of a particular fact, and that fact did not exist.

6. (1) Where a person has engaged, is engaging, or proposes to engage, in conduct for the purpose of making a decision to which this Act applies, a person who is aggrieved by the conduct may apply to the Court for an order of review in respect of the conduct on any one or more of the following grounds:—

(a) that a breach of the rules of natural justice has occurred, is occurring, or is likely to occur, in connexion with the conduct;

(b) that procedures that are required by law to be observed in respect of the conduct have not been, are not being, or are likely not to be, observed;

(c) that the person who has engaged, is engaging, or proposes to engage, in the conduct does not have jurisdiction to make the proposed decision;

(d) that the enactment in pursuance of which the decision is proposed to be made does not authorize the making of the proposed decision;

(e) that the making of the proposed decision would be an improper exercise of the power conferred by the enactment in pursuance of which the decision is proposed to be made;

(f) that an error of law has been, is being, or is likely to be, committed in the course of the conduct or is likely to be committed in the making of the proposed decision;

(g) that fraud has taken place, is taking place, or is likely to take place, in the course of the conduct;

(h) that there is no evidence or other material to justify the making of the proposed decision;

(j) that the making of the proposed decision would be otherwise contrary to law.

(2) The reference in paragraph (1) *(e)* to an improper exercise of a power shall be construed as including a reference to—

(a) taking an irrelevant consideration into account in the exercise of a power;

(b) failing to take a relevant consideration into account in the exercise of a power;

(c) an exercise of a power for a purpose other than a purpose for which the power is conferred;

(d) an exercise of a discretionary power in bad faith;

(e) an exercise of a personal discretionary power at the direction or behest of another person;

(f) an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case;

(g) an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power;

(h) an exercise of a power in such a way that the result of the exercise of the power is uncertain; and

(j) any other exercise of a power in a way that constitutes abuse of the power.

(3) The ground specified in paragaph (1) *(h)* shall not be taken to be made out unless—

(a) the person who proposes to make the decision is required by law to reach that decision only if a particular matter is established, and there is no evidence or other material (including facts of which he is entitled to take notice) from which he can reasonably be satisfied that the matter is established; or

(b) the person proposes to make the decision on the basis of the existence of a particular fact, and that fact does not exist.

7. (1) Where—

(a) a person has a duty to make a decision to which this Act applies;

(b) there is no enactment that prescribes a period within which the person is required to make that decision; and

(c) the person has failed to make that decision,

a person who is aggrieved by the failure of the first-mentioned person to make the decision may apply to the Court for an order of review in respect of the failure to make the decision on the ground that there has been unreasonable delay in making the decision.

(2) Where—

(a) a person has a duty to make a decision to which this Act applies;

(b) an enactment prescribes a period within which the person is required to make that decision; and

(c) the person failed to make that decision before the expiration of that period,

a person who is aggrieved by the failure of the first-mentioned person to make the decision within that period may apply to the Court for an order of review in respect of the failure to make the decison within that period on the ground that the first-mentioned person has a duty to make the decision notwithstanding the expiration of that period.'

It will be seen that the jurisdiction conferred on the Court is wider than that currently exercised by our Supreme Court.

Sections 8 and 9 of the Commonwealth Act are immaterial for the purposes of this paper.

Section 10 deals (inter alia) with the discretions the Court has in relation to proceedings under this Act and proceedings dehors the Act. It reads as follows:—

"(1) The rights conferred by sections 5, 6 and 7 on a person to make an application to the Court in respect of a decision, in respect of conduct engaged in for the purpose of making a decision or in respect of a failure to make a decision—

(a) are in addition to, and not in derogation of, any other rights that the person has to seek a review, whether by the Court, by another court, or by another tribunal, authority or person, of that decision, conduct or failure; and

(b) shall be disregarded for the purposes of the application of subsection 6 (3) of the Ombudsman Act 1976.

(2) Notwithstanding subsection (1)—

(a) the Court, or any other court, may, in a proceeding instituted otherwise than under this Act, in its discretion, refuse to grant an application for a review of a decision, conduct engaged in for the purpose of making a decision, or a failure to make a decision, for the reason that an application has been made to the Court under section 5, 6 or 7 in respect of that decision, conduct or failure; and

(b) the Court may, in its discretion, refuse to grant an application under section 5, 6 or 7 that was made to the Court in respect of a decision, in respect of conduct engaged in for the purpose of making a decision, or in respect of a failure to make a decision, for the reason—

(i) that the applicant has sought a review by the Court, or by another court, of that decision, conduct or failure otherwise than under this Act; or

(ii) that adequate provision is made by an enactment other than this Act under which the applicant is entitled to seek a review by the Court, by another court, or by another tribunal, authority or person, of that decision, conduct or failure.

(3) In this section, "review" includes a review by way of reconsideration, re-hearing, appeal, the grant of an injunction or of a prerogative or statutory writ or the making of a declaratory or other order."

Sections 11-13 of the Act control the procedures for making applications and obtaining reasons from the body whose decisiion is sought to be reviewed. They read as follows:—

"11. (1) An application to the Court for an order of review—

(a) shall be made in such manner as is prescribed by Rules of Court;

(b) shall set out the grounds of the application; and

(c) shall be lodged with a Registry of the Court and, in the case of an application in relation to a decision that has been made and the terms of which were recorded in writing and set out in a document that was furnished to the applicant, including such a decision that a person purported to make after the expiration of the period within which it was required to be made, shall be so lodged within the prescribed period or within such further time as the Court (whether before or after the expiration of the prescribed period) allows.

(2) Any other application to the Court under this Act shall be made as prescribed by Rules of Court.

(3) The prescribed period for the purposes of paragraph (1) *(c)* is the period commencing on the day on which the decision is made and ending on the twenty-eighth day after—

(a) if the decision sets out the findings on material questions of fact, refers to the evidence or other material on which those findings were based and gives the reasons for the decision—the day on which a document setting out the terms of the decision is furnished to the applicant; or

(b) in a case to which paragraph *(a)* does not apply—

(i) if a statement in writing setting out those findings, referring to that evidence or other material and giving those reasons is furnished to the applicant otherwise than in pursuance of a request under sub-section 13 (1) not later the twenty-eighth day after the day on which a document setting out the terms of the decision is furnished to the applicant—the day on which the statement is so furnished;

(ii) if the applicant, in accordance with sub-section 13 (1), requests the person who made the decision to furnish a statement as mentioned in that subsection—the day on which the statement is furnished, the Court makes an order under subsection 13 (4) declaring that the applicant was not entitled to make the request or the applicant is notified in accordance with sub-section 14 (3) that the statement will not be furnished; or

(iii) in case—the day on which a document setting out the terms of the decision is furnished to the applicant.

(4) Where—

(a) no period is prescribed for the making of applications for orders of review in relation to a particular decision; or

(b) no period is prescribed for the making of an application by a particular person for an order of review in relation to a particular decision,

the Court may—

(c) in a case to which paragraph *(a)* applies—refuse to entertain an application for an order of review in relation to the decision referred to in that paragraph; or

(d) in a case to which paragraph *(b)* applies—refuse to entertain an application by the person referred to in that paragraph for an order of review in relation to the decision so referred to,

if the Court is of the opinion that the application was not made within a reasonable time the decision was made.

(5) In forming an opinion for the purpose of sub-section (4), the Court shall have regard to—

(a) the time when the applicant became aware of the making of the decision; and

(b) in a case to which paragraph (4) *(b)* applies—the period or periods prescribed for the making by another person or other persons of an application or applications for an order or orders of review in relation to the decision,

and may have regard to such other matters as it considers relevant.

(6) The applicant for an order of review is not limited to the grounds set out in the application but, if he wishes to rely on a ground not so set out, the Court may direct that the application be amended to specify that ground.

(7) The Court may, on such terms as it thinks fit, permit a document lodged with a Registry of the Court in connexion with an applicantion under this Act to be amended and may, if it thinks fit, direct such a document to be amended in a manner specified by the Court.

(8) The Rules of Court may make provision for and in relation to service on appropriate persons of copies of documents lodged with a Registry of the Court under this Act.

(9) Strict compliance with Rules of Court made for the purposes of this section is not required and substantial compliance is sufficient.

12. (1) A person interested in a decision, in conduct that has been, is being, or is proposed to be, engaged in for the purpose of making a decision, or in a failure to make a decision, being a decision, conduct or failure in relation to which an application has been made to the Court under this Act, may apply to the Court to be made a party to the application.

(2) The Court may, in its discretion—

(a) grant the application either unconditionally or subject to such conditions as it thinks fit; or

(b) refuse the application.

13. (1) Where a person makes a decision to which this Act applies (other than a decision in relation to which section 28 of the Administrative Appeals Tribunal Act 1975 applies or which includes, or is accompanied by a statement setting out, findings of facts, a reference to the evidence or other material on which those findings were based and the reasons for the decision), any person who is entitled to make an application to the Court under section 5 in relation to the decision may, by notice in writing given to the person who made the decision, request him to furnish a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision.

(2) Where such a request is made, the person who made the decision shall, subject to this section, within 14 days after receiving the request, prepare the statement and furnish it to the person who made the request.

(3) A person to whom a request is made under sub-section (1) for the furnishing of a statement in relation to a decision may apply to the Court, within 14 days after receiving the request, for an order declaring that the person who made the request was not entitled to make the request.

(4) Where an application is made for an order under sub-section (3), the person who made the decision is not required to

furnish the statement before the Court gives its decision on that application and—

(a) if the Court makes an order declaring that the person who made the request was not entitled to make it—the person who made the decision is not required to furnish the statement; or

(b) if the Court refuses the application—the person who made the decision shall prepare the statement, and furnish it to the person who made the request, within 14 days after the decision of the Court.

(5) A person to whom a request for a statement in relation to a decision is made under sub-section (1) may refuse to prepare and furnish the statement if—

(a) in the case of a decision the terms of which were recorded in writing and set out in a document that was furnished to the person who made the request—the request was not made on or before the twenty-eighth day after the day on which that document was so furnished; or

(b) in any other case—the request was not made within a reasonable time after the decision was made,

and in any such case the person to whom the request was made shall give to the person who made the request, within 14 days after receiving the request, notice in writing stating that the statement will not be furnished to him and giving the reason why the statement will not be so furnished.

(6) For the purposes of paragraph (5) *(b)*, a request for a statement in relation to a decision shall be deemed to have been made within a reasonable time after the decision was made if the Court, on application by the person who made the request, declares that the request was made within a reasonable time after the decision was made.

(7) If the Court, upon application for an order under this sub-section made to it by a person to whom a statement has been furnished in pursuance of a request under sub-section (1), considers that the statement does not contain adequate particulars of findings on material questions of fact, an adequate reference to the evidence or other material on which those findings were based or adequate particulars of the reasons for the decision, the Court may order the person who furnished the statement to furnish to the person who made the request for the statement, within such time as is specified in the order, an additional statement or additional statements containing further and better particulars in relation to matters specified in the order with respect to those findings, that evidence or other material or those reasons."

Section 14 deals with the non-disclosure of material contrary to the national interest and reads:—

"(1) If the Attorney-General certifies, by writing signed by him, that the disclosure of information concerning a specified matter would be contrary to the public interest—

(a) by reason that it would prejudice the security, defence or international relations of Australia;

(b) by reason that it would involve the disclosure of deliberations or decisions of the Cabinet or of a Committee of the Cabinet; or

(c) for any other reason specified in the certificate that could form the basis for a claim by the Crown in right of the Commonwealth in a judicial proceeding that the information should not be disclosed,

the following provisions of this section have effect.

(2) Where a person has been requested in accordance with section 12 to furnish a statement to a person—

(a) the first-mentioned person is not required to include in the statement any information in respect of which the Attorney-General has certified in accordance with sub-section (1) of this section; and

(b) where the statement would be false or misleading if it did not include such information—the first-mentioned person is not required by that section to furnish the statement.

(3) Where, by reason of sub-section (2), information is not included in a statement furnished by a person or a statement is not furnished by a person, the person shall give notice in writing to the person who requested the statement—

(a) in a case where information is not included in a statement—stating that the information is not so included and giving the reason for not including the information; or

(b) in a case where a statement is not furnished—stating that the statement will not be furnished and giving the reason for not furnishing the statement.

(4) Nothing in this section affects the power of the Court to make an order for the discovery of documents or to require the giving of evidence or the production of documents to the Court."

Some parts of Section 14 of the Commonwealth Administrative Decisions (Judicial Review) Act are not appropriate to be placed in the proposed State Act as they concern matters peculiar to the Commonwealth. For this reason Section 14 (1) *(a)* should be deleted in the proposed South Australian Act, as it deals with the security, defence or international relations of Australia, which are not the concerns of this State.

In Section 14 (1) *(c)* Crown in right of the Commonwealth would need to be altered to Crown in right of the State.

In Section 14 (2) the reference to Section 12 should in fact be Section 13 (which deals with applications for reasons for decisions).

Possibly subsections (1) and (2) of Section 14 could be combined, so that the section would read:—

"14. (1) If the Attorney-General certifies, by writing signed by him, that the disclosure of information concerning a specified matter would be contrary to public interest either—

(a) by reason that it would involve the disclosure of deliberations or decisions of the Cabinet or of a Committee of the Cabinet; or

(b) for any other reason specified in the certificate that could form the basis for a claim by the Crown in

right of the State in a judicial proceeding that the information should not be disclosed,

then a person who has been requested in accordance with section 13 to furnish a statement is not required to include in the statement any information in respect of which the Attorney-General has certified in accordance with this subsection, or alternatively to furnish that statement at all, in cases where the statement would be false or misleading if it did not include such information."

The Commonwealth Section 14 (3) could also be altered, so that it would provide—

"14. (2) Where by reason of subsection (1), information is not included in a statement or a statement is not furnished at all, the person to whom the request was made shall give notice in writing of that fact, and the reason for such failure, to the person who requested the statement.

(3) Nothing in this section affects the power of the Court to make an order for the discovery of documents or to require the giving of evidence or the production of documents to the Court."

Sections 15 and 16 deal with the powers of the Court in relation to a stay and the making of orders. They read:—

"15. (1) The making of an application to the Court under section 5 in relation to a decision does not affect the operation of the decision or prevent the taking of action to implement the decision but—

(a) the Court or a judge may, by order, on such conditions (if any) as it or he thinks fit, suspend the operation of the decision; and

(b) the Court or a Judge may order, on such conditions (if any) as it or he thinks fit, a stay of all or any proceedings under the decision.

(2) The Court or a Judge may make an order under subsection (1) of its or his own motion or on the application of the person who made the application under section 5.

16. (1) On an application for an order of review in respect of a decision, the Court may, in its discretion, make all or any of the following orders:—

(a) an order quashing or setting aside the decision, or a part of the decision, with effect from the date of the order or from such earlier or later date as the Court specifies;

(b) an order referring the matter to which the decision relates to the person who make the decision for further consideration, subject to such directions as the Court thinks fit;

(c) an order declaring the rights of the parties in respect of any matter to which the decision relates;

(d) an order directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the Court considers necessary to do justice between the parties.

(2) On an application for an order of review in respect of conduct that has been, or is proposed to be, engaged in for the purpose

of the making of a decision, the Court may, in its discretion, make either or both of the following orders:—

(a) an order declaring the rights of the parties in respect of any matter to which the conduct relates;

(b) an order directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the Court considers necessary to do justice between the parties.

(3) On an application for an order of review in respect of a failure to make a decision, or in respect of a failure to make a decision within the period within which the decision was required to be made, the Court may, in its discretion, make all or any of the following orders:—

(a) an order directing the making of the decision;

(b) an order declaring the rights of the parties in relation to the making of the decision;

(c) an order directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the Court considers necessary to do justice between the parties.

(4) The Court may at any time, of its own motion or on the application of any party, revoke, vary, or suspend the operation of, any order made by it under this section."

Section 17 deals with the problem where the person who made the decision is not the person holding that office at the time of taking proceedings or any later time during the review process. It reads:—

"Where—

(a) a person has, in the performance of the duties of an office, made a decision in respect of which an application may be made to the Court under this Act; and

(b) the person no longer holds that office,

this Act has effect as if the decision had been made by—

(c) the person for the time being holding or performing the duties of that office; or

(d) if there is no person for the time being holding or performing the duties of that office or that office no longer exists—such person as the Minister administering the enactment under which the decision was made, or a person authorized by him, specifies."

Section 18 gives the Attorney-General a right of intervention and reads:—

"(1) The Attorney-General may, on behalf of the Commonwealth, intervene in a proceeding before the Court under this Act.

(2) Where the Attorney-General intervenes in a proceeding in pursuance of this section, the Court may, in the proceeding, make such order as to costs against the Commonwealth as the Court thinks fit.

(3) Where the Attorney-General intervenes in a proceeding in pursuance of this section, he shall be deemed to be a party to the proceeding."

Section 19 gives power to exclude classes of decisions from the operation of the Act and reads:—

"(1) The regulations may declare a class or classes of decisions to be decisions that are not subject to judicial review by the Court under this Act.

(2) If a regulation is so made in relation to a class of decisions—

(a) section 5 does not apply in relation to a decision included in that class;

(b) section 6 does not apply in relation to conduct that has been, is being, or is proposed to be, engaged in for the purpose of making a decision included in that class; and

(c) section 7 does not apply in relation to a failure to make a decision included in that class,

but the making of the regulation does not affect the exclusion by section 9 of the jurisdiction of the courts of the States in relation to such a decision, such conduct or such a failure.

(3) Regulations made for the purposes of sub-section (1) may specifiy a class of decisions in any way, whether by reference to the nature or subject-matter of the decisions, by reference to the enactmeent or provision of an enactment under which they are made, by reference to the holder of the office by whom they are made, or otherwise.

(4) A regulation made in pursuance of sub-section (1) applies only in relation to decisions made after the regulation takes effect."

Section 20 is the standard regulation making power.

With two additions which we canvass below, we recommend that the provisions of the Commonwealth Administrative Decisions (Judicial Review) Act 1977 be incorporated in our proposed legislation, probably as a separate Act. Such an Act would greatly enhance the present powers of the Court to do complete justice.

The addition we propose is that where a question of law is involved in a decision the decision-maker shall be required, on application by the citizen or any of the citizens involved in the decision, to state a case on the question of law for the consideration of the Supreme Court. If the decision-maker fails to do so, he should be compellable to do so by mandamus.

This would in many cases provide a "fast track" to get the real problem before the Supreme Court quickly and before any final decision is made which would otherwise have to go up under the review procedures we have set out previously in this report.

The other is to give the Court a right to grant damages as a remedy in judicial review actions.

In 1976 the English Law Commission completed a report on Remedies in Administrative Law, which apart from recommending more simplified procedure to apply for prerogative orders, made recommendations that the Court be entitled to award damages in appropriate cases. The Commission recommended that where the Court, having decided on an application for judicial review that illegality had occurred (in respect of which a claim for damages has been joined with the application), is satisfied that such a claim is in law maintainable, and that there is no dispute that the damage resulted from the illegality or as to the fact or extent of

damage or as to the quantum of damages, it should be able to make a formal award of damages,and if there is dispute as to any of these matters the Court should have power to give appropriate directions for their separate determination. Illegality in this sense includes all orders made beyond power, mala fide, in breach of the rules of natural justice or by détournement de pouvoir.

In 1977 the recommendations of the Law Commission's Report were put into effect by being placed in the English Supreme Court Rules: Order 53. Similar recommendations have been made by this Committee in the draft Supreme Court Rules which are now being considered for this State.

Of interest to note is the approach taken by the New Zealand Public and Administrative Law Reform Committee in its Fourteenth Report published in 1980. The Committee recommended at page 31 that—

> " . . . whenever a new statute confers powers that, if exercised unlawfully will cause economic loss, consideration should be given to the inclusion of a provision relating to compensation for losses flowing from any unlawful decisions given by the donee(s) of the power . . . We would propose that new statutes be examined with the aid of the following guidelines for the Committee and others concerned:
>
> *(a)* how great is the risk that innocent persons will suffer loss as the result of legally erroneous decisions taken in good faith. . . . .
>
> *(b)* . . . . . .
>
> *(c)* whether the common law already provides an adequate remedy? In such a case, it is unlikely that we would recommend the imposition of statutory liability.
>
> *(d)* whether the imposition of liability in the particular instance is seen as analogous to circumstances where liability already exists."

Whether there should be a ceiling on such awards of damages such as is adverted to in the New Zealand Report is a matter of policy on which we express no opinion.

Administrative Review Committee:

Finally we turn to the question of setting up an Administrative Review Committee.

One of the major recommendations of the Franks Committee was the setting up of a Council on Tribunals, which should, according to that Committee, be—

> "A standing body, the advice of which would be sought whenever it was proposed to establish a new type of tribunal, and which would also keep under review the constitution and procedure of existing tribunals."

This recommendation was accepted and implemented by the Tribunals and Inquiries Act 1958. The Council is an advisory and consultative body only, having itself no adjudicatory or executive powers. Its duties are now set out in Section 1 of the Tribunals and Inquiries Act 1971.

Garner in *Administrative Law 4th edition page 203* had the following to say about the working of the Council:—

> "The most successful of the work undertaken by the Council has undoubtedly been that connected with the drafting of rules of procedure for the various tribunals. Sometimes these rules have been

incorporated at least in part in the statute itself, and in other instances the rules are to be found in a statutory instrument, frequently the result of many consultations between the Council and its officers, Government Departments and interested bodies. As a general observation, it may be said that the Council's views have always been received appreciatively by Government Departments concerned, although there have been a few cases of disagreement with them.

Professor Street, in his Hamlyn lectures, *Justice in the Welfare State,* has been critical of the functions of the Council on Tribunals, pointing out that their activities have been principally concerned with the "procedural" aspects of the working of tribunals:

> "Far and away the most important questions are the kinds of decisions [a Tribunal] is making and whether it has the appropriate powers and scope. This is not the Council's business, and it is nobody else's." (p.63)."

The strengths and weaknesses of the English Council on Tribunals are well discussed in *Legal Control of Government by Schwartz and Wade (1972) chapter 7.*

An agency was also established in the United States in 1968. Called The (Federal) Administrative Conference of the United States, the agency consists of a paid Chairman appointed by the President of the United States, a Council of ten unpaid persons, also appointed by the President, and some eighty members, representing the Ministries and Federal Agencies and including lawyers and persons in public life. The main statutory responsibility of the Conference is to study and make recommendations for improvement of procedures in all Federal agency functions which involve "the determination of the rights, privileges and obligations of private persons through rule making, adjudication, licensing or investigation. Like the Council on Tribunals, the Conference does not interfere with particular agency decisions but on occasion it will investigate citizen complaints about agency procedures.

In New Zealand the Public and Administrative Law Committee is continually researching and making recommendations as to Administrative Law, while the New South Wales Law Reform Commission when recommending the establishment of a Public Administration Tribunal, also recommended that a Commissioner for Public Administration and an Advisory Council be appointed to review powers exercisable by public authorities and recommend changes in law and procedure relating to those powers.

The Commonwealth when establishing the Administrative Appeals Tribunal also established an Administrative Review Council. Section 51 of the Administrative Tribunals Act sets out the functions of the Council in general terms. The Council is to examine, and keep under review, the exercise of administrative decisions, and the review processes applicable to those decisions. It is to make recommendations to the Attorney-General on matters arising out of its examination. The Council is particularly directed to consider whether new methods of review should be adopted in respect of the exercise of particular decisions and this extends to suggesting that decisions be made subject to review by the Administrative Appeals Tribunal. The Council also considers matters referred to it by the Attorney-General for advice.

Members of the public may set in motion an enquiry by the Council if a complaint to the Council raises a general issue of policy that the Council thinks should be pursued. The Council will not consider the actual decision which might have given rise to a citizen's grievance,

however, where a decision reveals that the processes of decision-making are defective or that there is an absence of appropriate appeal or review rights, then it may recommend to the Attorney-General that the law or practice be changed to ensure that the discretion is exercised in a just and equitable manner.

Given that so many jurisdictions have considered that there is a need to have a general supervisory body, the question of whether such a body is necessary in this State should be considered.

Administration is growing with ever increasing speed. As a result some sort of supervision appears to be necessary to ensure both that Tribunals are not created ad hoc without considering whether jurisdiction could be given to a Tribunal already in existence, and also that adequate procedural safe-guards exist. Continuing consideration will have to be given to new discretions as they are given to Government officials. They will need to be checked to ensure that there is a right to appeal from all exercises of discretion from which there ought to be that right.

The Annual Reports of the Commonwealth Administrative Review Committee show clearly how valuable such a body can be in this area. We recommend the setting up of a similar body with similar responsibilities, powers and duties in this State.

We have the honour to be

HOWARD ZELLING

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Law Reform Committee of South Australia

11th April, 1984.

BIBLIOGRAPHY

Reports:

Donoughmore Committee: Committtee on Ministers Powers Report, 1939.

Franks Committee: Committee on Administrative Tribunals and Enquiries Report 1957.

Justice: The Citizen and the Administration—The Redress of Grievances 1961.

Justice: Administration Under Law 1971.

Law Commission (England): Remedies in Administrative Law 1976.

Orr Report: Administrative Justice in New Zealand 1964.

Public and Administrative Law Reform Committee:

1. Appeals from Administrative Tribunals 1968.
2. Appeals from Administrative Tribunals 1969.
3. Administrative Tribunals: Constitution Procedure and Appeals 1970.
4. Administrative Tribunals: Constitution Procedure and Appeals 1971.
5. Administrative Tribunals: Constitution Procedure and Appeals 1972.
6. Administrative Tribunals: Constitution Procedure and Appeals 1973.
7. Administrative Tribunals: Constitution Procedure and Appeals 1974.
8. Administrative Tribunals: Constitution Procedure and Appeals 1975.
9. Administrative Tribunals: Constitution Procedure and Appeals 1976.

New Zealand Public and Administrative Law Reform Committee:

11. Standing in Administrative Law 1978.
14. Damages in Administrative Law 1978.
16. Appeals on Questions of Law from Administrative Tribunals 1982.

New South Wales Law Reform Commission: Appeals in Administration 1972.

Victorian Statute Law Revision Committee: Appeals from Administrative Decisions and Proposals for an Ombudsman 1967-8.

Law Reform Commission of Canada: Obtaining Reasons before Applying for Judicial Scrutiny—Immigration Appeal Board.

Kerr Committee: Committee on Administrative Review 1971.

Bland Committee: Committee on Administrative Discretions 1973.

Administrative Review Council: First Report 1977.

Law Reform Commission of Western Australia: Report on Review of Administrative Decisions: Appeals.

Authorities

Articles:

K.H. Henry: The Tasks of Tribunals: Some Thoughts (1982) 1 Civil Justice Quarterly 253.

Taylor: Administrative Appeals Tribunal Act 1975 3 Monash L.R. 69.

Pearce: The Australian Government Administrative Appeals Tribunal 1 Uni. N.S.W.L.J. 193.

Brennan: The Anatomy of an Administrative Division: 9 Syd. L.R. 1.

Wild: The Administrative Division of the Supreme Court of New Zealand (1972) 22 Uni. Toronto L.J. 258.

Caldwell: Locus Standi in Administrative Law 1982 N.Z.L.J. 21.

Practice Notes: Flexibility in the Procedure of the Administrative Appeals Tribunal 54 A.L.J. 752.

The Commonwealth Administrative Appeals Tribunal Commences to Function 50 A.L.J. 381.

Griffith: Committee on Administrative Tribunals and Enquiries 21 M.L.R. 73.

Goldring: Responsible Government and the Administrative Appeals Tribunal 13 F.L.R. 90.

McElroy: A Remedy in Damages for Administrative Wrong-doing 1983 N.Z.L.J. 9.

Osborne: Inquisitorial Procedure in the Administrative Appeals Tribunal—A Comparative Perspective (1982) 13 F.L.R. 150.

Hall & Todd: Administrative Review Before the Administrative Appeals Tribunal—A Fresh Approach to Dispute Resolution 12 F.L.R. 71.

Kirby: Administrative Review: Beyond the Frontier Marked "Policy-Lawyers Keep Out" 12 F.L.R. 121.

Pearce: Judicial Review of Tribunal Decisions—The Need for Restraint 12 F.L.R. 167.

McElroy: The Protection of the Individual against Authority by means of Administrative jurisdiction: 1978 N.Z.L.J. 2.

Powles: The Procedural Approach to Administrative Justice 1965 N.Z.L.J. 79.

Orr: Administrative Justice 1965 N.Z.L.J. 83.

Harlow: Remedies in French Administrative Law 1977 P.L. 227.

Smillie: The Problem of "Official Notice": Reliance by Administrative Tribunals on the Personal Knowledge of their Members 1975 P.L. 64.

Alder: Representation before Tribunals 1972 P.L. 279.

Farmer: Tribunal Procedure Reform: A Process of Consultative Investigation 1970 N.Z.L.J. 124.

Davis: English Administrative Law—An American View 1962 P.L. 139 and 407.

Crossland: Rights of the Individual to Challenge Administrative Action before Administrative Courts in France and Germany 24 I.C.L.Q. 707.

Jaffé: Research and Reform in English Administrative Law 1968 P.L. 119.

Taylor: The New Administrative Law 51 A.L.J. 804.

McAuslan: Administrative Law, Collective Consumption and Judicial Policy: 46 M.L.R. 1.

Pakuscher: Control of the Administration in the Federal Republic of Germany 24 I.C.L.Q. 453 at 459.

Evans: French and German Administrative Law with some English Comparisons 14 I.C.L.Q. 1104.

McBride: Damages as a Remedy for Unlawful Administrative Action.

Griffiths: Mickey Mouse and Standing in Administrative Law (1982) 41 Cambridge Law Journal 6.

Marshall: Maladministration 1973 P.L. 32.

Griffiths: Legislative Reform of Judicial Review of Commonwealth Administrative Action 9 F.L.R. 42.

Carr: Administrative Law (1935) 51 L.Q.R. 58.

Wright: Beyond Discretionary Justice 81 Yale L.J. 575.

Pearce: Courts, Tribunals and Government Policy 11 F.L.R. 203.

Goldring: Accountability of Commonwealth Statutory Authorities and Responsible Government 11 F.L.R. 353.

Flick: Opportunity to Controvert Adverse Testimony in Administrative Proceedings: A Search for Criteria 28 Uni. Toronto L.J. 1.

Wexler: Discretion: The Unacknowledged Side of Law 25 Uni. Toronto L.J. 120.

Arthurs: Jonah and the Whale: The Appearance, Disappearance and Reappearance of Administrative Law 30 Uni. Toronto L.J. 225.

Curtis: Judicial Review of Administrative Acts 53 A.L.J. 530.

Harris: South Australian Administrative Law: A Survey of Developments 6 Ad. L.R. 77.

Harris: Administrative Law—Master's Thesis 1971—Adelaide Law School.

Cane: The Function of Standing Rules in Administrative law.

Robson: Justice and Administrative Law Reconsidered 1976 Current Legal Problems 107.

Paterson: First Report of the Public and Administrative Law Reform Committee: 3 N.Z.U.L.R. 351.

Northey: The Changing Face of Administrative Law 3 N.Z.U.L.R. 426.

Robson: Administrative Justice and Injustice: A Commentary on the Franks Report 1958 P.L. 12.

Brennan: The Future of Public Law—The Australian Administrative Appeals Tribunal 4 Otago Law Rev. 286.

Arthurs: Rethinking Administrative Law: A Slightly Dicy Business 17 Osgoode Hall L.J. 1.

Suzman: Administrative Law in England: A Study of the Report of the Committee on Ministers Powers (1932) 18 Iowa L.R. 160.

Wade: Administrative Tribunals and Administrative Justice 55 A.L.J. 374.

Flick: Reasons for Decisions: The Australian Experience 1979 N.Z.L.J. 24.

Campbell: Judicial Review and Appeals as Alternative Remedies 9 Monash Uni. L.R. 14.

Hall: Aspects of Federal Jurisdiction: The Administrative Appeals Tribunal (Commonwealth) 57 A.L.J. 389.

Craig: Compensation in Public Law: 96 L.Q.R. 413.

Willis: Canadian Administrative Law in Retrospect 24 Uni. Toronto L.J. 225.

Garner: The Reform of Administrative Law 120 Sol. Jo. 343.

Mullan: The Federal Court Act: A Misguided Attempt at Administrative Law Reform 23 Uni. Toronto L.J. 14.

R.N.D.H.: After Franks 102 Sol. Jo. 407, 426.

Street: Report of Franks Committee: The Constitutional Viewpoint 101 Sol. Jo. 669.

Kirby: Administrative Review on the Merits: The Right or Preferable Decision (1980) 6 Monash Uni. L.R. 171.

Books:

Wraith & Hutcheson: Administrative Tribunals (1973).

Flick: Federal Administrative Law (1983).

Butterworths: Australian Administrative Law Service.

Hewart: The New Despotism (1929).

Spann: Government Administration in Australia (1979).

Garner: Administrative Law (4th and 5th editions).

deSmith: Judicial Review of Administrative Action.

Schwartz & Wade: Legal Control of Government.

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