KEY ISSUES IN JUDICIAL ADMINISTRATION, Brennan J

THE AAT - TWENTY YEARS FORWARD THE ADMINISTRATIVE APPEALS TRIBUNAL TWENTIETH ANNIVERSARY CONFERENCE (21 July 1976 - 21 July 1996)

CANBERRA OPENING ADDRESS

The Hon Sir Gerard Brennan, AC KBE Chief Justice of Australia 1 July 1996

It was a cold, crisp Canberra morning on Thursday 1 July 1976 when my wife and I walked down Northbourne Avenue and around London Circuit to the Wales building. The doors of the AAT were opened without ceremony. The bare space was interrupted by the occasional desk and powerpoint. The AAT name was on the noticeboard downstairs but months would pass before anybody needed to find it. Ron Mills, prised away from the Attorney-General's Department and his favoured Treasury, was on hand to command the Registry. So was Dianne Smith who, apart from her other talents, had a way with African violets, tea and cake. So we celebrated the opening of the Administrative Appeals Tribunal. I was escorted to my new chambers and met the efficient Delcia von Brandenstein whose presence was a tribute to her sense of adventure and to the sense of self-sacrifice of her previous boss, Frank Mahony, the Deputy Secretary of the Attorney-General's Department.

There was enthusiasm within that Department for this new creature, the AAT. Sir Clarrie Harders, the redoubtable permanent head, decided to expose me at lunch at the Commonwealth Club to the inspection of Sir Frederick Wheeler of Treasury and Sir Alan Cooley of the Public Service Board. As one who came from practice at the Bar to a tribunal charged with the review of administrative decisions on the merits, I encountered a steep learning curve. I had barely stepped upon its lowest point when we lunched that day. Sir Frederick Wheeler asked me how the tribunal would review a decision of the kind he was then contemplating, namely, a recommendation to his Minister to make an ex gratia payment. I had no idea whether the tribunal had any jurisdiction in such a matter but I knew that the Act required a decision-maker to state his reasons. So I responded weakly that, if there were jurisdiction to review such a decision, he would have to state his reasons and we would look at them and do the best we could!

The incident provided a valuable lesson. It showed that the AAT was bound first to ascertain its own jurisdiction and then it had to acquire sufficient experience or wisdom to review usefully primary decisions made by experienced officers who had the strength of departmental culture and research behind them.

Some time passed before the existence, much less the utility, of the AAT dawned on the community, particularly the legal community. In the early days, Ron Mills spoke to several interested groups - notably an association of customs agents - to inform them of the availability of the new jurisdiction to challenge particular classes of administrative decisions. In time, the customs jurisdiction was readily invoked and the Customs Tariff, which had previously been the subject of litigation only in the High Court and then only infrequently, became a regular subject of decision by the AAT. But the first case came across the registry counter in Brisbane. A tax agent, Mr Adams, challenged the cancellation of his registration by the Tax Agents' Board 1 . One ground for challenging the decision was that the relevant provision of the Income Tax Assessment Act 1936 (Cth) was invalid. To challenge the validity of a Commonwealth statute before an administrative tribunal was a brave step but, after all, the exercise of any power by an executive agency depends upon the validity of the law conferring power. The question raised by Adams' Case i llustrated the curious position of the AAT and its uneasy straddling of the divide between the exercise of executive power and the exercise of judicial power.

The fact that the AAT straddled that divide meant that there were two

models available for the AAT to follow. It could follow the administrative model and become, so to speak, a higher tier in the bureaucracy. Or it could follow the judicial model which would mark it as something standing outside the bureaucracy and beyond ministerial power to prescribe the policy it was to follow. It is no secret that the AAT followed the judicial method, nor that the period of my presidency was one in which that model was adhered to closely - perhaps too closely. At this time, on the 20th Anniversary of the AAT's foundation, we may reflect on whether the AAT has evolved in a way that, irrespective of the model, practically answers the needs of the community and of government administration.

Having been away from the coalface of the AAT for 17 years, I do not presume to pontificate on what or, more significantly, who the AAT should be today. But the singularity of the functions which it performs makes it a subject of continuing interest and enhances that lively concern for its continued vitality which I acquired with high hopes 20 years ago. So I shall indulge myself with some reflections that may be trite or out-of-date or irrelevant to the focus of today's Tribunal. But I excuse myself for taking this indulgence on the ground that the problems addressed by the Administrative Appeals Tribunal Act 1975 and by the Tribunal in its early years must be enduring problems because of the nature of the AAT's function. And this Conference is devoted to reflection on those functions in the light of 20 years experience.

The model adopted by the AAT necessarily reflected the functions committed to it. At the beginning, Professor Harry Whitmore, who had been a member of the Kerr Committee, was an advocate of the administrative model. He had envisaged the AAT as a shopfront reviewer of administrative decisions in the large volume as well as small volume areas, righting the wrongs suffered by individual members of the public. Professor Whitmore did not envisage a high-powered institution engaged in statutory construction and the time-consuming enunciation of reasons for decision. But there were practical impediments to the implementation of an AAT based on the shop-front model. Shop-fronts would have been required in every part of the Commonwealth, staffed by persons on whom AAT powers had been conferred. It would have required a degree of training and sophistication on the part of all of those persons to equip them to deal with a variety of decisions and to do so with some show of tolerable consistency. Although the Tribunal was advantaged by the extraordinary administrative skills and bureaucratic capacity of Sir Clarrie Harders, Mr Frank Mahony and Mr Lindsay Curtis of the Attorney-General's Department, the resources required for the creation of such an AAT would not have been obtained in 1976. I doubt whether they would be obtained today.

More significantly, the Act gave a clear indication of the quasi-judicial character of the Tribunal envisaged by the Parliament. The reason why the Parliament gave the Tribunal this character can best be understood by reference to the five deficiencies that Sir Anthony Mason identified as distinguishing administrative from judicial decision-making 2:

" Experience indicates that administrative decision-making falls short of the judicial model - on which the AAT is based - in five significant respects. First, it lacks the independence of the judicial process. The administrative decision-maker is, and is thought to be, more susceptible to political, ministerial and bureaucratic influence than is a judge. Secondly, some administrative decisions are made out in the open; most are not. Thirdly, apart from statute, the administrator does not always observe the standards of natural justice or procedural fairness. That is not surprising; he is not trained to do so. Finally, he is inclined to subordinate the claims of justice of the individual to the more general demands of public policy and sometimes to adventitious political and bureaucratic pressures.

The five features of administrative decision-making which I have mentioned reveal why it is that administrative decision-making has never achieved the level of acceptance of the judicial process in the mind of the public."

As to independence, s 7(1) of the Administrative Appeals Tribunal Act p

rovided, as it continues to provide, that the President must be a Judge of the Federal Court. At first, the only presidential members of the Tribunal were Judges of the Federal Court. There was no provision for senior members. They were quickly introduced. Mr Keith Edmunds accepted appointment as a part-time senior member and gave the AAT the benefit of his experience both as a Judge of the Supreme Court of Papua New Guinea and as a senior member of the bureaucracy.

Other members had to have, as they are still required to have 3, specialist qualifications. These members were to serve part-time and were to constitute the tribunal with a presidential member in reviewing classes of decisions within their expertise.

The members of the Tribunal had to possess high qualifications and be independent of the influence of the parties to decisions under review. The Act did not prescribe independence as a requirement for appointment, but the practice was established of entrusting appointments to the Attorney General, not to the Ministers of the Departments whose decisions were to be subject to review.

The Tribunal thus had the authority of independent members of undoubted experience, knowledge and skill in the particular field. The presidential members would have the weight of their judicial office to support their determinations of questions of law and their enunciation of principles or policies that would ensure consistency in the reviewing of decisions even if no doctrine of strict precedent applied. The senior members would be lawyers of acknowledged capacity and independence. And so it proved to be.

Openness of decision-making was achieved by requiring the AAT ordinarily to hear matters in public: s 35. Reasons for decision could be obtained from a primary decision-maker by a person affected by the decision: s 28. And the AAT's obligation to state its reasons was spelt out by s 43(2) and (3) which, in 1976, read as follows:

" (2) The Tribunal shall give reasons in writing for its decision and those reasons shall include its findings on material questions of fact.

(3) The Tribunal shall cause a copy of its decision to be served on each party to the proceeding."

The AAT's obligation to accord natural justice was supplemented by an express statutory requirement to ensure that every party has an opportunity to present his case and make submissions: s 39. And, as to Sir Anthony's fifth point of distinction, the balance between the individual interest and public, political or bureaucratic interests was to be assured, so far as could be, by the openness and accountability of the procedure.

Applicants for relief had to be persons whose interests are affected by the decision to be reviewed. The Tribunal was empowered to summon witnesses. It had to state the reasons for its decisions on review. Its decisions were then subjected to appeal on a question of law to the Federal Court to which the AAT might, if it chose, refer a question of law for determination. The model of the Tribunal was thus statutorily identified. It was to interpret and apply the relevant law. It was to ascertain the facts from witnesses in a court-like procedure. And its obligation to state reasons for decision was similar to the obligation of courts to state their reasons for judgment.

Although the AAT, like any other officer of the Commonwealth within the meaning of that term in s 75(v) of the Constitution, was subject to prerogative writs issued by the High Court, its decisions were also amenable to appeal on questions of law. It had no leeway for the making of decisions which, though erroneous in point of law, were within jurisdiction. Any decision that was made by the tribunal had to accord both to the applicant and to the decision-maker their precise legal entitlements and be based on their precise legal obligations.

The quasi-judicial nature of the Tribunal was emphasized by the conferring

of a power to stay a decision - a power similar to that exercised by a judge granting an injunction. In the very earliest days, when I was the only member of the AAT, I amused my wife by telephoning periodically as we were moving by road from our home in Brisbane to the frosty atmosphere of Canberra to see whether any applications had been made for urgent stay orders. "It would be wrong", I would say, "if an elephant were destroyed on a wharf because of an administrative error by the quarantine service!" No elephant was ever at risk, as far as I know. In those earliest days, the likelihood is that the only persons with knowledge of the AAT's jurisdiction were the members of the public service whose superannuation entitlements were to be protected by review by the AAT under s 154 of the Superannuation Act 1976. That section was proclaimed to come into effect on 1 July 1976.

If the AAT be reproached for judicialising administrative decision-making, it can be said that the Act required decision-making by the AAT to become more acceptable than primary decision-making by adopting some judicial characteristics. Of course, the rules of evidence were not to be binding and the AAT's procedures could and should be as informal and flexible as the nature of the case permitted (s.33) but the basic requirements of the Act could not be short-cut by the adoption of a procedure that brought into the review process the summary, and sometimes unsatisfactory, aspects of administrative decision-making.

However, a judicial model could not be adopted for the AAT without qualification. Courts declare and enforce existing rights and obligations; administrative decisions create or modify rights and obligations. Courts exercise their powers upon findings of fact made on evidence governed by legal rules; the AAT exercises its powers upon findings of fact made by reference to wider sources of information. But courts and the AAT are both bound by, and bound to apply, the law and to apply it precisely. The major distinction between courts and the AAT is that, generally speaking, the courts are not concerned with administrative policy whilst administrative policy is a core concern in some areas of AAT jurisdiction.

From the viewpoint of the judiciary, the participation of judges in the work of the AAT was a radical innovation - not so much because judges were asked to find facts or to apply law for the purpose of reviewing administrative decisions but rather because in making administrative decisions which were wholly or partly discretionary, they were involved in applying an administrative - sometimes ministerial - policy. Judges were accustomed to the exercise of judicial discretions, but such discretions were exercised by reference to ascertainable criteria supplied by the legislature 4, not according to broad policies which, if not idiosyncratic, were derived from or influenced by the will of the government of the day.

True, administrative policy must be consistent with the relevant statute but the policies which presented novel problems for the judicial mind were policies that were not prescribed by, or implied in, a statute. How could a series of decisions consistent one with another be made when consistency depended upon the application of such a policy? Should the judge accept a ministerial statement of policy? That would be an unusual step for a judge to take. Or should the tribunal without the benefit of administrative knowledge and experience and without that breadth of view which comes from a political balancing of contending interests endeavour to formulate a policy for itself?

Logically, the tribunal's jurisdiction to determine issues involving policy makes it an anomaly in our system of government. The theory of the system is that administrative policy is a matter for which ministers are responsible and for which they must accept political responsibility, answering for their policies before the Parliament. The Courts, on the other hand, must have some ascertainable benchmark by which to make a decision, albeit some element of discretion is involved. Absent the unifying influence of policy on decision-making, there is a risk that inconsistency brings the decision-making process into disrepute. In Drake v Minister for Immigration and Ethnic Affairs 5 the Full Court of the Federal Court held that in cases where the relevant statute permitted a

primary decision-maker to take account of government policy, the AAT was entitled to have regard to government policy. However, Bowen CJ and Deane J said 6 -

"the Tribunal is not, in the absence of specific statutory provision, entitled to abdicate its function of determining whether the decision made was, on the material before the Tribunal, the correct or preferable one in favour of a function of merely determining whether the decision made conformed with whatever the relevant general government policy might be.

It is not desirable to attempt to frame any general statement of the precise part which government policy should ordinarily play in the determinations of the Tribunal. That is a matter for the Tribunal itself to determine in the context of the particular case and in the light of the need for compromise, in the interests of good government, between, on the one hand, the desirability of consistency in the treatment of citizens under the law and, on the other hand, the ideal of justice in the individual case."

I attempted in the AAT hearing following this decision, that is, in Re Drake (No 2) 7 , to adopt a ministerial policy provisionally as a guide to AAT decision-making in order to provide both a benchmark for consistency and a recognition of ministerial and parliamentary authority in the definition and approval of executive policy. But, as subsequent experience has shown, the attempt could not produce consistency to the same degree as might be produced within a department under ministerial control. Nor should it do so. The "ideal of justice in the individual case" is a weightier factor than consistency.

Although policy has presented difficulties to the AAT, some benefits have resulted. By exposing ministerial or administrative policy to critical examination, a useful dialectic can be commenced between the Tribunal and the Executive government. At the same time, rigidities that would otherwise be productive of injustice in individual cases can be relieved by the Tribunal's authority to make the correct or preferable decision in the instant case even though the decision runs counter to existing policy.

The AAT was thus armed with authority to review every aspect of administrative decision-making: fact, law and discretion including policy. It is not surprising that the decisions reached by the AAT were frequently different from the decisions made by primary decision-makers. AAT decisions depended on evidence given before the Tribunal, and were frequently different from the information available to the primary decision-maker. And departmental opinions about or evaluations of particular facts were sometimes found to be deficient when exposed to the more open and authoritative views of the specialist members. Specialist qualifications, in fields as diverse as airmanship and actuarial assessment, contributed to the quality of AAT decision-making and the authority of the Tribunal. And, if I may add a personal note, the knowledge of the President was broadened and the pleasure of sitting was enhanced by working with varied groups, all of whom commanded respect.

The AAT was charged with the responsibility of blowing the winds of legal orthodoxy through the corridors of administrative power. Departmental culture and practice and departmental handbooks were to be brought into conformity with the governing statute, truly interpreted. Discretions which had become atrophied or distorted by departmental tradition were again to be exercised in cases contemplated by the legislature. In some areas of administration, the governing Act had become no more than a footnote to divergent practice. The AAT was intended not only to give better administrative justice in individual cases but also to secure an improvement in primary administrative decision-making. This had to be achieved by the quality of the AAT's reasoning. Departments, like any organised human activity, tend to have an inward focus and the corporate culture tends to be the most powerful influence on the conduct of individuals engaged in that activity. External review is only as effective if it infuses the corporate culture and transforms it. The AAT's function of inducing improvement in primary administration would not be performed merely by the creation of external review. Bureaucratic intransigence

would not be moved unless errors were clearly demonstrated and a method of reaching the correct or preferable decision was clearly expounded. AAT decisions would have a normative effect on administration only if the quality of those decisions was such as to demonstrate to the repositories of primary administrative power the validity of the reasoning by which they, no less than the AAT, were bound. Any effect that the AAT might produce in primary administration would depend upon the reasoning expressed in the reasons for AAT decisions.

The AAT was not needed to supply, nor would it have supplied, management skills. Those skills, essential to an efficient public service, were not discounted by the introduction of external merits review. The skills that were introduced were legal and specialist skills - by specialist skills, I mean skills in the particular discipline relevant to the diverse areas of jurisdiction. They were to be exercised in a procedure following a judicial model by members independent of the influence of the Department making the decision under review.

Now, all of this is probably all too familiar to the present audience. I am conscious that the problems of procedure, legal analysis, fact finding and policy application have been refined in the last twenty years. I am not competent to comment on those developments except to pay my respects to those whose insights I have detected by a skimming of the huge volume of material that has emerged. But I refer to the concepts that commanded attention at the beginning because the problems that were then encountered are the natural concomitants of vesting power in an independent tribunal to review on the merits administrative decisions made by Ministers or their departments in a Westminster system of government. It is the contemporary lessons, however, which are of present concern. I mention four topics: membership, jurisdiction, procedure and management.

Membership

First, membership of the AAT. For the reasons just stated, the AAT is not strengthened by the addition of mere management skills. Managers may have other specialist skills that commend them for appointment but an ability to manage a diversity of programmes is a skill which, however valuable in administration generally, adds little to the ability of the AAT to perform its functions. I venture to suggest that the AAT should never be, or be seen to be, either a promotion or retirement opportunity for managers who do not possess the skills which really are relevant to the AAT's function. Let me give you an example. Two of our early part-time members were Messrs Vic Skermer and Mr Reg Stock. One had been Auditor-General; the other, a captain of commerce. Both had managerial skills but their contribution to the AAT lay in their understanding of the issues with which we had to deal, such as the Brussels Convention on the Valuation of Goods for Customs Purposes [8] .

The judicial membership of the AAT has, I suspect, become more attenuated than in earlier times. That was to be expected. Judicial participation in the work of the AAT was secured for two reasons. The first was to secure lawyers of judicial capability to contribute to the elucidation of legal principles. For that reason a Judge was usually asked to sit on the Tribunal in the first case that arose in a new area of the jurisdiction. The second, and associated, reason, was that the status, independence and authority of the judicial officer was thereby lent to decisions on the interpretation of statute and the limitation of powers arising under it. It needed judicial authority, albeit exercised in a non-judicial tribunal, to expose and correct errors which had formed part of departmental culture or practice or which were to be found in departmental manuals.

With the growing authority of the tribunal and its acceptance as a normative influence on decision-making in the executive branch of government, it was possible to reduce the demands made on the Federal Court. Presidential members have been appointed from among the Judges of the Family Court and permanent presidential members came to be appointed without judicial status. At this point I would like to pay a tribute to Messrs Alan Hall and Robert Todd, who not only carried enormous burdens as senior members and later as presidential members but demonstrated that

non-judicial presidential members, if selected with the requisite qualifications and experience, would perform the functions of that high office with efficiency, courtesy and conspicuous ability.

Although judicial influence in the tribunal has been diminished, the need for a high level of competence in decision-making in a judicial manner is in no way diminished. If legal rules are loosely or inaccurately stated, if their application is problematic or if their expression is unclear, the Tribunal will quickly lose the authority that has been gained by the assiduous application of the legal method. If departmental culture or practice or the departmental manual were to assume a paramountcy over the law enacted by the Parliament or prescribed under legislative authority, one of the main purposes of the Administrative Appeals Tribunal Act would be frustrated.

The legal method involves not only skill and knowledge; it involves independence and impartiality. These are qualities of mind and character which are not necessarily developed in the non-judicial branches of government as they are in the judicial branch. When the focus of occupational interest is on the management of programmes, individual interests and aspirations are not factors of compelling weight. There is an inevitable tension between protecting the public purse and securing benefits for individuals under programmes that are funded by the public purse. An officer who has been accustomed to the development of programmes beneficial to the majority of the Australian community may not be as attuned to the interests of individuals or of a minority as those who have been devoted professionally to the protection of individual interests. A fortiori, a mind which has been devoted to the achievement of ministerial goals will not find it easy to reach decisions which are out of kilter with government policy. One of the great purposes of the AAT is to strike a balance between the interests of the public and individual interests. That balance requires, on the one hand, sufficient flexibility in programme policies to cope with the almost infinite variety of circumstances that affect individuals and, on the other, vigilance to ensure that individuals do not undermine the protection or the benefits which a programme is intended to confer on the community generally by receiving greater protection or more benefits than the programme is intended to afford or bear. Independence, skill and impartiality of mind are essential to this task.

The Administrative Review Council Report No 39 "Better Decisions: Review of Commonwealth Merits Review Tribunals" contains the startling recommendation that "Save for the President, legal qualifications should not be a prerequisite for appointment" to a new unified tribunal 9 . The Council believes that some members of a new, unified tribunal would have legal qualifications 10 and it proposes that legal expertise can be contributed by persons whom Robert Todd has described as "barefoot lawyers" 11 , or by the tribunal's legal or research staff 12 or even by assistance from the President 13.

As Robert Todd has pointed out, the recommendation bespeaks a fundamental lack of appreciation both of the functioning and of the dynamics of external review as experienced by the AAT. The Council's recommendations in this respect would deny to the proposed tribunal the capacity to provide - and the continued assurance that the tribunal would provide - coercive correction if a primary administrator were to follow departmental guidance that does not conform to legal principle. If that capacity were lost, much of the raison d'être of external review is gone.

If legal expertise be discounted, perhaps management personnel with their ability to cover many fields would be offered as the presiding members. That would be an inversion of the conception of the AAT. Presiding officers with legal training - I do not say merely with legal qualifications - are (or ought to be) alert to the difference between legal rules which lie within their province and expertise which lies within the province of specialist members and pertains to issues of fact. Would presiding officers without legal training be comfortable with that division of function? Or would the contribution of the specialist members be depreciated by the universal skills of the managers?

As to specialist members, it is difficult to overstate their importance to the success of the AAT. Although the presiding members of the Tribunal are expected to possess the capacity to articulate reasons for a decision, the expertise of the specialist members contributes to the reasoning that has to be expressed. The Administrative Review Council has already noted 14 :

"4.4 ... that satisfaction with a tribunal's performance appears to be highly correlated with opinions as to the quality of its members, 15 and this point has been reinforced during the inquiry.

4.5 Applicants and the broader community must have reason to be confident that the members of review tribunals both have the skills required to provide merits review and will consider the merits of their cases in an impartial way, and make a different decision to that of the relevant government agency where they consider that appropriate."

The recommendation I have criticized is more surprising in the light of this statement. Unless the specialist members are seen to be contributing their expertise to the functions of the AAT, the confidence in decisions of the AAT will be seriously diminished.

Jurisdiction

With increasing experience of review in particular areas of jurisdiction, the need for frequent exposition of legal principle is diminished. With the expansion of AAT jurisdiction into large volume areas, fact-finding became an increasingly dominant function of the AAT. That does not mean that legal skills became irrelevant.

But the vesting of large volume jurisdictions raises a troublesome question. Is the AAT too high-powered, too expensive, too legalistic a tribunal to deal with essentially factual issues in cases such as social security or veterans entitlements in which relatively small amounts of money are usually involved? A variety of filters can be contemplated to respond to this problem: lower level tribunals such as the SSAT with more expeditious, less judicialised procedures is one solution. Internal review, required as a condition of a right to appeal to the AAT, is another. And, of course, mediation and preliminary conferences. Filtering mechanisms of these kinds must be provided, not only to effect economies of personnel and resources but also to ensure that the jurisdiction of the AAT is reserved for cases that warrant its intervention. As the ultimate tribunal for review on the merits, its intervention is needed when a decision will have a normative effect on primary administration. If the AAT were seen to be no more than a tribunal concerned with a wilderness of single instances, its ethos would grow closer to that of the departments; and questions would arise as to whether resources would be better channelled into departmental decision-making rather than to the AAT.

In large volume areas of jurisdiction, consistency in decision-making is an enduring problem. Where there is a large measure of discretion there will always be some unevenness in decisions by differently constituted tribunals; where such decisions are made in large volume, the unevenness is capable of undermining the confidence in tribunal decision-making. It is important that the AAT caseload be sufficiently limited to permit the development of principles or guidelines that will yield substantial consistency between decisions in similar cases in a given area.

At a time of economic constraint, the need to save costs is likely to inspire proposals which maximise the throughput of cases without too nice a regard for the means and mechanisms that have been previously adopted to improve the standard of administrative justice. In particular, the two features of AAT decision-making which gave the Tribunal its authority may be targeted for unacceptable reduction: the expertise of the legal members and the expertise of the specialist members.

I venture to suggest that, if those expedients of cost-cutting be adopted, the distinction between the functions of the AAT and the functions of the primary administrator will be blurred and, in time, the authority of the

AAT will be diminished. That would be a consequence which the AAT could not long survive, for it is of the essence of AAT decision-making that it contributes acknowledged independence and expertise to administrative decision-making.

In selecting areas of jurisdiction for the AAT, the criterion cannot be merely the importance of an exercise of the relevant power to the individual. The awarding of a multi-million dollar defence contract to an offshore contractor will be of immense importance to the contractor but the AAT is not fitted to review either the assessment of tenders or the political considerations that may affect the decision. The importance of a decision to the individual is one factor, but the critical factors are the elements that go into the making of a decision. The finding or evaluation of facts, the need for a clear application of legal principle and the scope and nature of any discretion are the factors that must be given the most careful attention.

The AAT has been immensely successful, and it would be regrettable if its utility were prejudiced by the conferring of jurisdiction in areas that are not appropriate to external review. It would be equally regrettable if the resources of the AAT were insufficient to allow it to exercise the jurisdictions vested in it. Far better that jurisdictions be withdrawn than that the quality of AAT decision-making, and hence its authority, be compromised.

If the AAT is thought to be too expensive, too high-powered to deal with a given area of jurisdiction, and resources are too scarce to allow of an efficient exercise of the AAT jurisdiction, would it not be better to channel such resources into internal review at a lower level than to provide a statutory pretence of higher level external review?

Procedure

The disadvantage of the judicial model is that curial procedure is presented as the natural means of fact-finding. Of course, some of the trappings or indicia of curial proceedings were easily dispensed with. The traditional description of a case as being one party versus another was not adopted; a hearing room in the round with a minimum elevation of the bench was created. But, more significantly, the variety of decisions falling for review by the AAT quickly broke down the traditional curial procedure. The statutory admonition to provide each party with a reasonable opportunity to present a case required some formality but new, less formalized, procedures were devised in and before hearings, particularly during the distinguished and innovative presidency of my successor, Justice Daryl Davies.

However, informality, when it comes to fact-finding, can be taken only so far or it will start to infringe upon the requirement of natural justice. It must be kept firmly in mind that the issue in an AAT appeal is inevitably one in which an applicant's interests are affected by the decision under review: that is the criterion of an entitlement to apply. If the decision is defended there is a conflict of interest and adversaries are, to that extent, created. If that cannot be avoided, the importance of the preliminary conference is obvious. A sense of grievance arises often from sheer misunderstanding and an opportunity for explanation given in an impartial atmosphere is likely to remove a large proportion of the contest that would otherwise have to be determined. Preliminary conferences, unlike hearings, are not intended to have a normative effect on administration. They need only the moderating influence of a mediator who, whether legally qualified or not, is familiar with the field.

Management

The growth of large volume jurisdiction has necessarily produced a bureaucracy of the AAT itself. I notice from the AAT Annual Report 1994-1995 a diagram of the large bureaucracy under the control of the Registrar. No doubt, having regard to the heavy caseload which the AAT now bears (as the statistics for that year demonstrate), a large bureaucracy

spread throughout Australia is required. I hope that the need for this core of personnel and the inevitable closeness of their working relationship with the members, especially the permanent members, is not conducive to a cast of mind that subjects the independence of the members to the corporate memory or knowledge or advice of the AAT bureaucracy.

On looking back over these pages, I can see that I have been guilty of the offence committed by parents and grandparents: giving advice to those who are living their own lives, over whom the adviser has no authority and for whom he or she bears no responsibility. Forgive me as I offer an explanation or, at least, an excuse.The AAT occupies a precarious and, to some extent, anomalous position in our system of government. The Kerr and Bland Committees conceived it as a brilliant solution to the problems of the rapid expansion of administrative decision-making in a complex society. Its success depends on the maintenance of nice distinctions between the departmental lines of ministerial responsibility and the interventionist function of external merits review. I readily acknowledge that the experience of 20 years ago is inadequate to determine the functions and methodology of external review today. But that experience threw up the issues I have mentioned and which, I suggest, require principled responses in the conditions of 1996.

1Re Adams and The Tax Agents' Board (1976) 1 ALD 251.

2"Administrative Review: The Experience of the first Twelve Years" by Sir Anthony Mason, AC, KBE, (1989) 18 Fed.L.Rev.122 at 130.

3s 7(2).

4See per Kitto J in R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd (1970) 123 CLR 361 at 376-377.

5(1979) 24 ALR 577.

6(1979) 24 ALR 577 at 590-591.

7Re Drake and Minister for Immigration and Ethnic Affairs (No 2) (1979) 2 ALD 634.

8Re Renault (Australia) Pty Ltd and Bureau of Customs (1977) 1 ALD 19.

9Recommendation 91 at 149.

10par 8.32.

11AIAL Forum No 7 at 33.

12par 4.14.

13par 4.19.

14par 4.4.

15Administrative Review Council Review of Commonwealth Merits Review Tribunal - Discussion Paper, Australian Government Publishing Service, Canberra, 1994, par 4.53.