"ADMINISTRATIVE REVIEW
- THE EXPERIENCE OF THE FIRST TWELVE YEARS"

THE LAW SOCIETY OF THE AUSTRALIAN CAPITAL TERRITORY

BLACKBURN LECTURE

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My long-standing interest in our federal system of administrative law traces back to 1968. I then suggested to the Attorney-General (now Sir Nigel Bowen, Chief Justice of the Federal Court) that he establish the Commonwealth Administrative Review Committee (of which I became a member). Through the work of that Committee and later committees and the efforts of Mr Ellicott Q.C., who subsequently became Attorney-General, the system as we know it today came into being.

The federal system incorporates features of the review structures of the United Kingdom and the United States. As you know, the four elements in the federal system are:
1. the Administrative Review Council ("the ARC");
2. review by the Ombudsman; (3) judicial review under the Administrative Decisions (Judicial Review) Act 1977 (Cth) ("the ADJR Act"); and (4) review on the merits by the Administrative Appeals Tribunal ("the AAT").

There is also a fifth element - the creation of an obligation by s.13 of the ADJR Act and s.28 of the Administrative Appeals Tribunal Act 1975 (Cth) ("the AAT Act") on the part of the decision-maker to furnish on request by a party affected by a decision a statement setting out findings of fact, referring to the material on which those findings were based and the reasons for the
decision. The creation of this obligation, along with the subsequent enactment of the Freedom of Information Act 1982, was a dramatic advance in arming the individual with effective remedies in the overall scheme to ensure administrative justice. The common law does not impose a general duty on an administrator to give reasons for his decision, although there are circumstances in which he may come under a practical obligation to do so. The rules of natural justice may require a decision-maker to give a party an opportunity to answer possible grounds for deciding against him. And, in some circumstances, a decision-maker may be obliged to reveal his findings of fact. Nonetheless the absence of a general duty to give reasons meant that the administrator could, and at times did, frustrate judicial review of a decision by refusing to give reasons.

The obligation to give reasons enabled the issues to be defined and opened the way to the remedy of discovery, giving access to information available to the decision-maker. The imposition of the obligation has another and wider importance. It leads to more reasoned and principled decision-making. Yet bureaucratic objections to the requirement was, so it is said, the reason for delay in the coming into operation of the ADJR Act. Although those
objections may linger on, it is tempting to think that reasoned and principled administrative decisions are an indispensable element in a modern democracy.

The Ombudsman

Review by the Ombudsman follows the familiar Parliamentary model. The Administrative Review Committee had recommended instead the setting up of a Counsel for Grievances. The proposal was rejected, the Ombudsman being preferred. The decision gave Parliament a specific role in administrative review as the Ombudsman is required to report to Parliament. The Ombudsman's function is to investigate complaints and to recommend remedial action and he has dealt expeditiously with a very large number of complaints at a relatively low cost. In 1988 the present Ombudsman (Professor Pearce) received 22,000 complaints from persons affected by administrative decisions, of which 12,500 fell within his jurisdiction. Professor Pearce also states that almost 50 per cent of written complaints are dealt with within two months and almost 75 per cent within six months, the complainant obtaining some measure of advantage in the majority of cases. That is a very considerable achievement on the part of an office with a staff of 69. It is an
achievement that compares more than favourably with the Ombudsman's counterparts overseas, who are provided with much greater resources in proportion to the number of complaints investigated. Although the Ombudsman appears to have become a permanent feature of the federal landscape, he has stated that there is an unwillingness on the part of some federal agencies to implement his recommendations, notably for the payment of ex gratia compensation. Fortunately steps are being taken to resolve this problem.  

The ADJR Act

The principal purpose of the ADJR Act was to simplify and clarify the grounds and the remedies for judicial review, thereby facilitating access to the courts and enabling the individual to challenge administrative action which adversely affected his interests. The ADJR Act achieved this objective. In the 1960s and 1970s there was reason for apprehending that the technicalities associated with the traditional remedies - I exclude declaratory relief - would frustrate a just claim for relief in some instances. The ADJR Act did not displace the traditional remedies, which may be granted by both the Federal Court and the High Court.
Since the ADJR Act came into operation, the role of the courts in judicial review has expanded as the result of the development of the common law. The old rule that the acts of the Crown or its representative cannot be impugned has no application to the exercise of a statutory discretion by the Crown in council or by a Crown representative. Some decisions made in the exercise of prerogative power may well be susceptible to review. In England the House of Lords has so held. The Federal Court has decided that executive action is not immune from judicial review simply because the action was taken pursuant to a power derived from the prerogative rather than statute. This is consistent with the proposition, favoured by myself and by Lord Scarman that the susceptibility of a decision to review depends upon the subject-matter of the decision and the grounds of review rather than the source of the decision in the prerogative. Decisions of the personal representatives of the Crown are now subject to judicial review for procedural fairness and for improper purpose and mala fides.

In exceptional circumstances, judicial review may conceivably extend to a Cabinet decision or to a decision which is based on, or gives effect to, a Cabinet decision. Statements in the High Court and the Federal Court suggest
that, in exceptional circumstances, a Cabinet decision
directly determinative of the rights of an individual might
possibly be the subject of such review. 15 But I should
emphasize that the point has not yet been determined by the
High Court. In the Peko-Wallsend (Kakadu) Case, where
judicial review was refused by the Federal Court, and
special leave to appeal was refused by the High Court, the
Cabinet decision related to a matter of foreign affairs, the
implementation of the World Heritage Convention. That was a
complex political matter involving international and
domestic policy considerations, rather than a determination
of matters personal or particular to Peko-Wallsend.

So the availability of judicial review may ultimately
depend, not so much on the character of the decision-maker,
as on the nature and subject-matter of the decision that is
made. After all, a decision, be it that of an official, a
Minister or the Executive Council, is basically a decision
of the Executive government. The fundamental question is
whether, having regard to its nature and subject-matter, the
decision should be subject to judicial review. The answer
to that question may possibly depend on whether the decision
is essentially political or determinative in character and
whether it lends itself to judicial review. In saying this
I do not suggest that we should return to the rigid
distinction between judicial, legislative and executive
functions. Perhaps a more appropriate criterion is to be
found in a new concept of justiciability: whether the issue
is determinative rather than political in character, that
is, of a kind that invites a judicial, rather than a
political, solution. The answer to that question in a given
case would depend on a number of factors, not least of them
being the nature and importance of the policy considerations
and the degree to which it can be said that the decision is
determinative of the rights or interests of an individual.\textsuperscript{16}

If the decision is entrusted to a political body such as
Cabinet, then that is a plain indication that it is
political in character. But, if the decision simply
determines the rights of an individual and involves no
policy or political factors, and would ordinarily attract
judicial review, adopting the expedient of making the
Governor-General in Council or even Cabinet the
decision-maker might not avail to exclude judicial
review.\textsuperscript{17} If Parliament wishes to exclude judicial review,
it should do so explicitly by express provision. Just how
effective such a provision would be in the context of
s.75(v) of the Constitution is a matter that has often been
discussed in the cases. Such a provision would limit, but not completely exclude, judicial review. The developments in the principles of review that I have been discussing are not confined to the ADJR Act. They are elements in the common law of judicial review picked up by s.75(v) of the Constitution and s.39B of the Judiciary Act, though review under the ADJR Act does not extend to decisions made outside statutory authority.

In the long run it may be that the ADJR Act has achieved more than mere simplification and clarification of the grounds and remedies for judicial review. It may have played a part in assisting the judicial elaboration of the common law principles of review. It would be a mistake to assume that this development of common law principles has come to an end. In the past the common law has demonstrated its capacity to adapt to new situations and to mould itself in such a way as to protect the interests of the individual and enhance the quality of democratic decision-making.

On the other hand, it would be a serious mistake to think that judicial review, whether at common law or under the ADJR Act, comprehends review on the merits. The traditional distinction between judicial review and review
on the merits, such as that undertaken by the AAT, was explained by Bowen C.J. and Deane J. in *Drake v. Minister for Immigration and Ethnic Affairs*. The Federal Court, exercising judicial review, cannot substitute its view of what is "right or preferable" for that of the decision-maker. That is the function of the AAT when it is reviewing a decision on the merits. A court exercising judicial review can do no more than require the decision-maker to make his determination in accordance with law and the requirements of natural justice. Because the function of the courts is limited in this way it has been suggested that decision-makers required to re-exercise their statutory discretions infrequently arrive at a different result the second time around. How accurate this suggestion is we do not know. It is a matter that would repay investigation.

The long title to the ADJR Act describes it as "An Act relating to the Review on Questions of Law of certain Administrative Decisions". Deane J. has stated that the Federal Court must be vigilant to ensure that it does not, under the guise of reviewing administrative decisions on questions of law, trespass into the merits of a case in which it possesses neither a mandate nor special
qualifications. So the traditional distinction is maintained in the legislative scheme.

Under s.5(2)(g) and s.6(2)(g) of the ADJR Act the Federal Court has jurisdiction to review the exercise of a power where the exercise of the power is so unreasonable that no reasonable man could have so exercised the power. The ground of review is a reflection of the comments of Lord Greene M.R. in Associated Picture Houses Ltd. v. Wednesbury Corporation. Lord Greene suggested that for the ground to be made out something overwhelming is required. But the House of Lords has questioned the correctness of this qualification. More recently Wilcox J. has followed the formula expounded by Lord Diplock in Bromley London Borough City Council v. Greater London Council:

"[D]ecisions that, looked at objectively, are so devoid of any plausible justification that no reasonable body of persons could have reached them".

His Honour considered that the reasonableness of the decision was to be assessed against the material actually or constructively before the decision-maker and such additional
facts as the decision-maker would have learned but for any unreasonable conduct by him.

This ground of review continues to be the subject of lively debate here and overseas. In *Minister for Aboriginal Affairs v. Peko Wallsend Ltd.* I noted that the courts have shown great diversity in their readiness to find that the ground had been made out and counselled judicial caution lest the courts "exceed [their] supervisory role by reviewing the decision on its merits". Judicial review on the merits of administrative decisions would be difficult to reconcile with the separation of powers.

The AAT

Of all the elements introduced in the 1970s the AAT was the most innovative and, accordingly, the most controversial. This is principally because of the width of the Tribunal's review jurisdiction, the fact that it extends in some circumstances to the decisions of Ministers and because it has power to review policy. However, it is impossible to evaluate the AAT in isolation; the AAT forms part of a large and complex mosaic in which each piece is interrelated.
The AAT is, to borrow an adjective or an epithet from a different universe of discourse, an "autochthonous" expedient. It is an independent general tribunal. It was established with a general jurisdiction because it was thought the exercise of jurisdiction by such a tribunal, instead of a miscellany of specialist tribunals, would standardize principles and procedure, thereby enhancing the administrative process and the knowledge and understanding of professionals and laymen alike. That object has been largely achieved. Unfortunately, as the AAT is not a court, it has not always followed its own decisions. Likewise, its decisions have not always been treated as precedents to be followed by decision-makers at lower levels. Inconsistency is a legitimate ground of criticism of any system of justice.27

The AAT exercises review on the merits of questions of fact and law. The AAT Act does not exclude review of Government and administrative policy, though the Administrative Review Committee was not in favour of the Tribunal reviewing such policy.28 The Tribunal does not possess a jurisdiction to review all federal administrative decisions. Various categories of decision have been excluded from AAT review. But it exercises its review
functions under nearly 300 statutes. In general, the AAT reviews decisions of officials rather than decisions of other tribunals. The AAT has taken over the work of other specialist review tribunals, notably that of the Taxation Boards of Review.

Because the AAT's function extends beyond judicial review to review on the merits, there was the question whether the AAT was required to consider any policy that had been applied or ought to be applied in the making of the decision as well as the facts of the case. In Re Becker and Minister for Immigration and Ethnic Affairs\(^{29}\) Brennan J. held that "[j]urisdiction is ... conferred upon the Tribunal to review policy considerations which govern or affect certain discretionary powers." Without seeking to define exhaustively the circumstances in which the Tribunal would review, or refuse to review, a decision on policy grounds, his Honour drew a distinction between a policy made or settled at the political level and one made or settled at the departmental level. His Honour, though considering that substantial reasons must be shown why basic policies forged at the political level should be reviewed, stated that there might be exceptional cases where the demands of justice required a review of "basic or even political policies".\(^{30}\)
Subsequently the Federal Court decided that the Tribunal was not bound to follow a Ministerial policy and could not abdicate its function of determining whether, on the material before it, the decision was the correct or preferable decision.\textsuperscript{31}

A Summary of the Features of the New System

The features of the new system were summarized by Justice Brennan, the first President of the AAT, in his Foreword to the first Annual Report in 1977 of the Administrative Review Council:

"[T]he judicial method, designed for the application of settled principles, is modified in the Tribunal to cope with the dynamics of administrative decision making; the lines of bureaucratic authority are intersected by the Tribunal or by the Ombudsman; the traditional reticence of the administrative decision-maker is replaced by his written expression of reasons; access to the Court is simplified and facilitated. The citizen is thus enabled to challenge, and to challenge effectively, administrative action which affects his interests. If that result is achieved in wide areas of governmental action, the administration will be answerable not only to government, but to individual citizens. ..."

... The changes ... confer upon the citizen whose interests are affected, a right effectively to question the methods and legality of the relevant exercise of power and, in cases falling within the Tribunal's jurisdiction, a right to participate in the making of the final decision."
Criticisms of the New System

As was to be expected, the new system has generated criticism. The most fundamental criticism is the claim that it is undemocratic. Other objections are that the system is too favourable to the individual and too insensitive to policy or government interests, that it is too expensive and inefficient and that it has made administrative decision-making inefficient and more complex.

The Anti-Democratic Objection

In its widest form the anti-democratic objection questions the legitimacy of any form of review of administrative action. But in its strongest form the attack on legitimacy is directed to review by the AAT, particularly of Ministerial decisions. The objection is important and requires an answer.

Administrative review owes its place in a modern democracy to the vast expansion of the administrative decision-making process. The traditional legal theory of parliamentary democracy, shaped at a much earlier time when Parliament established its supremacy over the Crown (which
was to all intents and purposes the Executive), did not allow for the unprecedented growth in the role of the Executive. The doctrine of parliamentary supremacy, expounded so influentially by Professor Dicey, with its associated doctrine of ministerial responsibility, provided an adequate legal and political framework at the end of the nineteenth century for a Westminster-type democracy. Then legislative regulation took the form of prescriptive rules prohibiting undesirable conduct which were enforced by the courts in criminal proceedings.

In the intervening years the increasing complexity of social and economic life has called for more sophisticated and flexible regulatory control. This has led to regulation through the grant of licences, charters, franchises and subsidies subject to conditions in which administrative discretions have played an ever-increasing part. In turn, these techniques of regulatory control have been supplemented by legislative programmes administered by government departments or statutory authorities. Social welfare benefits are largely administered in this way. So the material welfare of the individual has come to depend even more on his rights against the Executive and its agencies than his rights against his fellow citizen.
The new techniques in regulatory control and participation constitute a marked departure from the nineteenth century model which looked to government enforcement of legislative policy through court adjudication. Administrative action began to replace legislative enactment and judicial adjudication in creating legal rules and also in resolving legal disputes.

The standard response to this problem is that the electorate, through its elected representatives, controls the Executive and the actions of administrators. This is a gross overstatement. Although Parliament has the capacity to control the Executive and administrative action, that capacity is exercised to a limited extent only. Indeed, there are those who assert that the Executive controls Parliament. There is a very large measure of truth in that claim, as is implicit in the practice of legislation by Ministerial pronouncement - the legislation when enacted being backdated to the Ministerial pronouncement - and explicit in the growing tendency in legislation to leave matters to be prescribed by regulation or by Ministerial guidelines. Although the federal government cannot always count on majority support in the Senate, the Executive can generally rely on Parliamentary support and approval and
this no doubt encourages politicians and administrators to believe that their decisions have electoral backing and authority.

But the blunt fact is that the scale and complexity of administrative decision-making is such that Parliament simply cannot maintain a comprehensive overview of particular administrative decisions. Parliament's concentration on broad issues and political point-scoring leaves little scope for oversight of the vast field of administrative action. And in Australia the doctrine of individual ministerial responsibility, which was once a valuable sanction compelling sound administrative action, is in decline. Inefficient, even incompetent, action or inaction by a government department or statutory authority is no longer regarded as a matter for ministerial resignation. The decay of the doctrine of ministerial responsibility appears to be the consequence of a perception that it is beyond the capacity of ministers to oversee all that is done by their departments or the statutory authorities for which they are responsible. What is beyond the capacity of the minister is certainly beyond the capacity of Parliament.
Some commentators say that the policies implemented by administrators are those identified by the elected representatives of the people, so that the legitimacy of administrative decisions is established by determining whether they in fact conform to legislative prescriptions. This is a simplistic and misleading version of what in fact occurs. In fact, the pressure of Parliamentary business is such that Parliament is not only unable to review administrative decisions, it is also compelled to delegate to the Executive the formulation of legislative policy.

Some statutes identify a relevant policy or policies to be applied by an official or an agency in exercising a statutory discretion. On the other hand, there are many statutes which do not identify such a policy and describe the ambit of the discretion in general terms, leaving it to the official or agency to develop and formulate the particular policies which will best serve the public interest. That is becoming a more familiar facet of the federal legislative scene. Other statutes authorize the Executive by regulation to prescribe policy and the criteria according to which statutory powers are to be exercised. Very often the statutory prescription of a general policy leaves the decision-maker without guidance as to how he
should handle other issues of public importance which are bound to arise from time to time. In arriving at decisions within the limits of their statutory discretion, administrators to a large extent make their own policy judgments as well as their own value judgments on a range of important issues. Administrators do very much more than implement legislative declarations of policy.

For the most part then, the legislative and democratic basis for the administrative decision is that the legislature, having selected the administrator as the decision-maker, has left the making of the relevant policy choices and value judgments to the administrator. There may be a variety of reasons for choosing the particular decision-maker. Generally speaking, the legislature makes its choice because it believes that the particular decision-maker, be it an official or a tribunal, can bring to bear special qualities of skill and expertise.

From the legal perspective what is significant is that the legislature has chosen to vest the decision-making process not in the orthodox courts, but in administrators, whether independent of the Executive are not. The reasons for selecting administrators rather than judges are likewise
varied and very often they are a compound of different ideas. Often there is a need for technical or other expertise in a particular industry or activity, as well as a belief that this expertise will develop on a case by case basis. The perceived need for expertise is all the stronger when the decision-maker is to formulate policy or set policy guidelines. A court of general jurisdiction does not possess that special expertise. The desire for flexibility and expedition are other reasons for favouring administrative decision-making.

But the fact that Parliament has vested the decision-making process in an administrator does not mean that review of his decision is anti-democratic. After all, Parliament has provided for review by the various means available under federal law. Moreover, Parliament can, as it sometimes does, incorporate a statement of policy or criteria in the statute; it can provide for the giving of a Ministerial direction binding on the decision-maker and on the AAT; and it can exclude review by the AAT. Quite apart from these arguments, which rest on legislative power and exercise of that power, there is the paramount consideration that review is essential to ensure that the individual obtains administrative justice. Administrative justice is
now as important to the citizen as traditional justice at the hands of the orthodox court system.

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 have to give reasons for his decision. Fourthly, 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. The
insistent demand for a Royal Commission or a judicial inquiry in preference to a departmental inquiry on a matter of critical importance is telling testimony of the public perception of the intrinsic worth of the judicial and legal process. That perception can best be expressed in the form of this question: does anyone believe that a departmental or public service inquiry would have achieved what the Fitzgerald Inquiry has achieved? Mr Fitzgerald was once a Federal Court judge. Viewed in this way, judicial and Tribunal review of administrative decisions is simply one of the checks and balances indispensable to our democratic constitutional structure. It is no less significant than the principle that the Crown is capable of being sued in its own courts.

*Insensitivity to Government and Policy Interests*

It is a natural reaction on the part of the administrator and the politician to think that the new system is too favourable to the individual. They are not attuned to review of their decisions by an impartial adjudicator. They are not independent and they view a case from the perspective of government. The attraction of judicial review and of Tribunal review on the merits is that
they offer justice to the individual by means of independent adjudication. The real thrust of the objection is a distaste for genuinely independent review and a preference for departmental decision-making because it is weighted in favour of the government viewpoint. As I have said, antagonism to independent review is often expressed in the false claim that it is anti-democratic. But independent determination of the citizen's rights against the Executive is the hallmark of a modern democracy and a feature of Ch.III of the Constitution. Politicians and administrators profess an enthusiasm for independent adjudication - but all too often their preference is for an outward form of independent adjudication which defers to government policies and attitudes. Sceptics regard government acceptance of independent adjudication as a concession to the esteem it enjoys in the public mind.

The extent to which particular tribunals act independently of government must vary considerably. One of the unresolved problems of administrative justice is that we have failed to evolve principles spelling out the circumstances in which a decision-maker must act independently of political direction or influence, as compared with those in which he is subject to such direction
or influence. The questions which were not finally answered in *Reg. v. Anderson: Ex parte Ipec-Air Pty. Ltd.*[^32] and *Ansett Transport Industries (Operations) Pty. Ltd. v. The Commonwealth*[^33] still remain unanswered.[^34]

But it is clear that the AAT is a Tribunal in the judicial mould; its independent character is reinforced by the absence of any statutory restriction on its capacity to review policy. Unquestionably there is a tension between the independent character of the Tribunal and an expectation or belief on the part of some administrators and politicians that the Tribunal should defer to government policies. This tension has been evident in deportation cases where the Tribunal and, on appeal, the Federal Court have set aside administrative decisions, including Ministerial decisions, based on government policy. As the Tribunal determines the rights of individuals, there are strong reasons for not compromising its independence. At the same time I recall that the Administrative Review Committee recommended that the composition of the AAT should include an officer of the department or agency responsible for the decision under review[^35] so that the Tribunal would have access to specialized knowledge of the relevant area of administration.
If there is a need to relax the tension between independence and Executive apprehension that its interests are insufficiently protected then perhaps further protection might come in the form of better selection of the categories of cases which should be subject to review on the merits or definition of government policies which should be respected either on a qualified or, perhaps, on an absolute basis. Whether there is such a need is not for me to say. Those who assert that there is may not have paid adequate attention to the remarks of Brennan J. in Re Drake and Minister for Immigration & Ethnic Affairs (No. 2) to the effect that the desirability of consistent decision-making was a strong reason for the Tribunal adopting a practice of applying lawful Ministerial policy, unless there were cogent reasons for not doing so. Then the standards and values in the Ministerial policy would operate as a constant reference point. As I understand it, the Tribunal has acted in accordance with Brennan J.'s comments.

But Executive policy is enunciated in various forms and at various levels of government. I have already mentioned Brennan J.'s discussion of the topic in Re Becker. It is one thing to say that the Tribunal should respect policies determined at Cabinet or Ministerial level that relate to
international affairs or the national economy. It is a very
different thing to say that the Tribunal should respect a
policy determined at departmental level which excludes, on
discretionary grounds, a certain category of persons from
the receipt of social welfare benefits when the excluded
category falls within the larger class of persons to whom
the benefits may be paid. 39 And it is yet another thing to
say that the Tribunal should defer to a decision which is
expressed to be based on a particular policy, when the
connection between the facts of the case and the stated
policy is tenuous or a decision in favour of the applicant
will have little or no impact on the policy or the
objectives it seeks to achieve. So it is difficult to
devise an immunity for decisions based on government policy
which would apply across the board, yet conform to an
acceptable standard of justice to the individual.

In its Eighth Annual Report, the Administrative Review
Council stated that "[t]he primary criterion for
reviewability on the merits ... is that rights or interests
of individuals must be specifically affected to a
significant extent by the decision in question" (my
emphasis). 40 The suggested criteria for reviewability are
not very different from those discussed in relation to
judicial review. Meantime, Parliament has chosen to adopt a different and less independent procedure for review in setting up the new Immigration Review Tribunal.

**Expense and Inefficiency**

The adversary system of justice, as we know it, is a high cost system. The impact of high costs was not so noticeable in an era when the system made no pretense of catering for the needs of those who could not afford it. But this changed as the system extended with the object of servicing the community generally. And the impact has become even more noticeable as the costs of litigation soar beyond the reach of the ordinary citizen and as governments become reluctant to pick up the rising bill for legal aid as well as the increasing costs of financing the network of administrative tribunals as well as the orthodox court system.

In the context of administrative review, this reluctance is sharpened by a feeling that the adversary system has resulted in excessive formality and undue emphasis on lengthy technical and legalistic arguments, as well as the delays and problems caused by inadequate preparation of cases. There is a view that lawyers appearing before the
Tribunal are not always equipped to handle the policy and administration issues which arise. If that criticism is well-founded - and my experience does not enable me to confirm or deny it - then it is a reflection on the education and training of lawyers and an indication that the Tribunal is not obtaining the assistance which it deserves.

These perceptions, critical of the present system, need to be overcome. Otherwise there is the risk that an extreme reaction may prejudice the cause of independent review. Unfortunately, in the prevailing climate of economic rationalism and managerial efficiency the intrinsic virtue of justice to the individual does not figure as the paramount goal. Complaint about high costs as a barrier to access to the courts and tribunals is entirely legitimate but the remedial measures often suggested are primarily designed to reduce the cost to government, not the cost to the citizen who seeks a remedy in respect of an alleged injustice.

Concluding Comment

I should make some final reference to the impact of the new system on the administrative process. Critics say that, as a result of the new system, the administrative process is
more time-consuming and more costly than it was before. But it can scarcely be a legitimate point of criticism that more attention is now given to the authority of the law, to the need to give the citizen an opportunity to put his side of the case and to the statement of reasons for a decision. If these innovations have a price in time and additional cost then, within proper limits, it is a price well worth paying, so long as we obtain a greater measure of administrative justice. Despite the criticism of inconsistency to which I have already referred, the new system has contributed to a greater measure of administrative justice in its insistence on compliance with the rules of natural justice, its careful scrutiny of the reasons for decision, its emphasis on the justice of the case and its success in making the principles and procedures of review more uniform. These are the enduring benefits of independent review. No other system has been suggested that could provide them in the same measure.
FOOTNOTES

1. **Public Service Board of N.S.W. v. Osmond** (1986) 159 C.L.R. 656.


6. Ibid., p.12.

7. Loc.cit.


11. **Minister for Arts Heritage and Environment v. Peko-Wallsend Ltd.** (1987) 75 A.L.R. 218; special leave to appeal refused by the High Court.

12. Toohey, at p.221; **Civil Service Unions Case**, at p.407.


14. Toohey, see note 9.


16. CREEDNZ Inc. v. Governor-General (1981) 1 N.Z.L.R. 172, at p.198 ("the larger the policy content and the more the decision-making is within the customary sphere of elected representatives the less well-equipped the Courts are to weigh the considerations involved and the less inclined they must be to intervene").

17. O'Shea, at pp.419-420.


23. Loc.cit.


30. Ibid., at p.701.

31. Drake, see note 20.

32. (1965) 113 C.L.R. 177.

33. (1977) 139 C.L.R. 54.


38. See notes 29 and 30.


41. See pp.7-8, supra.

42. See p.13, supra.

43. See, for example, Finch v. Goldstein (1981) 36 A.L.R. 287 (which resulted in long-needed reform of the procedures adopted by Public Service Promotions Appeal Committees so that they conformed to the requirements of natural justice).