Administrative Appeals Tribunal
30th Anniversary

The Hon Wayne Martin
Chief Justice of Western Australia

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Canberra, Western Australia

I would like to commence by acknowledging the traditional owners of these lands - the Ngunnawal people, and to pay my respects to their Elders.

This evening's glittering affair is in substance a birthday party, because, of course, we meet to celebrate the birth of the Administrative Appeals Tribunal a little over 30 years ago on 1 July 1976. Often birthday parties will be attended by proud and doting parents, and tonight we are fortunate to have with us a number of distinguished guests who might legitimately claim, or perhaps be accused of, a genetic link to the mature and confident institution, the birth of which we celebrate tonight. Many whose roles preceded gestation and birth cannot be with us tonight. AS has been mentioned, they include all but one of the members of the Kerr Committee, namely, Sir John Kerr, Sir Anthony Mason and Professor Harry Whitmore, although it is a great pleasure that Bob Ellicott QC and Mrs Ellicott can be with us tonight.

I digress to observe that although, torturing the metaphor I have commenced with, the Tribunal has a genetic link to the Bland Committee and Sir Henry Bland, its first 30 years of life have been anything but bland. Mention should also be made of the Attorney-General of the day, Peter Durack QC, not least because of his vital role at the time of delivery of the newborn and its neo-natal years, but also because he is, of course, a fellow Western Australian, and has been able to join us tonight with his wife.

Perhaps some measure of the volume of water that has flowed into Lake Burley Griffin since the birth of the Tribunal in 1976 is provided by a consideration of some of the other major events of that year. The Concorde supersonic jet commenced commercial flights, heralding a new age in international air travel. However, today it is a museum piece, and supersonic air travel a memory.

In 1976, the VHS format for videotape was introduced by JVC. A period of market dominance was followed by its eclipse by newer technologies including DVD, to the point where the video player now sits alongside the stereo in most Australian lounges, gathering dust and unused.

Internationally, East Timor became the 27th province of Indonesia in 1976. Fortunately, freedom and democracy ultimately prevailed, and that country now struggles to meet the challenges of independent nationhood with a bit of help from its friendly neighbours.

Unlike the Concorde and the VHS, and despite a relatively recent threat to its existence, the Tribunal has gone from strength to strength over the same period and is now an established and vital element of the structure of government in this country, the value of which has been recognised and emulated both domestically and internationally. Its reported decisions now occupy 90 or so volumes of the Administrative Law Decisions series of reports, and it enjoys jurisdiction under more than 400 separate statutory instruments.

Many of you may be wondering what on earth would possess the President of the Tribunal to ask a State Judge to speak after a dinner

celebrating 30 years of the existence of a Commonwealth Administrative Tribunal. The answer lies in part in the fact that I am a very new Judge - those of you who stood behind me earlier in the evening will have noticed the moisture behind my ears, and those who can see the lower part of my legs will notice the trainer wheels. The first 3 years of my practice as a lawyer were spent in Canberra, initially with the Administrative Review Council, and then as a very young and naïve Director of the Review Section of the Immigration Department - in which capacity I appeared in more than 50 deportation appeals before the AAT in the late 1970s. In that capacity, I had the enormous benefit of learning forensic skills at the feet of great jurists like Sir Gerard Brennan, Sir John Nimmo, Sir Reg Smithers, Justice "Wee Dougie" McGregor, Justice Fisher of the South Australian Registry and a little later, Justice Daryl Davies who is happily with us tonight with Mrs Davies. In addition, although then deprived of immigration jurisdiction, I had quite a lot to do with Robert Todd and Alan Hall, who have both been able to join us tonight.

The immigration jurisdiction then, as now, excited great passions, and its exercise was often influenced by somewhat idiosyncratic attitudes. Although I am sure it is pure coincidence, Sir John Nimmo refused every appeal he heard, whereas Sir Reg Smithers upheld virtually every one. Sir Reg wore his humanity and his compassion on his sleeve. I remember one case, Seljankowski, I think it was, in which Sir Reg asked the appellant under oath if he thought he would re-offend if permitted to stay in Australia. In a surprising burst of candour, the prospective deportee answered in the affirmative - to the disappointment of Sir Reg. Not to be outdone by this unexpected veracity, in his reasons for decision, Sir Reg

determined that he did not believe the appellant when he said that he was likely to re-offend because he, Sir Reg, was confident that he wouldn't.

Of course, idiosyncrasy is not the exclusive province of the judiciary. I am indebted to Justice Kirby for the following quote from a paper by Lord Woolf:

> "At the end of the first Anglo-French exchange between the administrators of the Conseil d'Etat and the English judiciary, Lord Scarman tried to explain the difference between our systems. He suggested that the success of the Conseil d'Etat was rooted in the fact that the French had greater trust in their administrators than their Judges. Whereas in England it was the Judges and not the administrators who were trusted. This suggestion as you would expect, went down well with an audience of English Judges and French administrators. However, its validity was clouded in doubt when I tried it out on an audience of Italian academics. I was assured by them that in Italy the public trusted neither the Judges nor the administrators. Surprisingly, they thought in Italy it was the *academics* who were trusted."

There might even be people in the audience tonight under the impression that the community trusts lawyers and politicians!

My stint in Canberra as a young and impressionable lawyer provided me with the great privilege of working for Sir Gerard Brennan at the ARC, where I also had a lot to do with Justice Michael Kirby and some great government lawyers, including Sir Clarrie Harders, Geoff Kolts and

Lindsay Curtis. One would have had to have been particularly obtuse not to have learnt a lot from such an outstanding group. Significant colour was provided by Professor Jack Richardson, who was then the Ombudsman and who represented himself in at least one case before the AAT. Breadth of experience was provided by the likes of Fred Deere and Sir William Keays, and input from the private profession from Roger Gyles QC, who was then a relatively young but eminent barrister, and who I am very pleased to see here tonight with Mrs Gyles.

This experience imbued in me a lifelong love of administrative law, although insufficient passion to get me through the Canberra winters. I was, however, reintroduced to those winters and to Commonwealth administration courtesy of a member of the Perth legal mafia in Daryl Williams, who asked me to serve on the ARC and later to chair it. In that capacity, it was a great pleasure to be reintroduced to the AAT and its personnel 25 years on. Quite a lot had changed - I'll come back to that a bit later.

Some of you may also have wondered why we are celebrating 30 years of the AAT when there were no equivalent festivities to mark the quarter century. At the risk of being blunt, the reason the 25-year anniversary was not appropriately celebrated was that at that time it looked very much as if a wake was more likely to be appropriate, because the same Daryl Williams was sharpening the executioner's axe, the fall of which was only precluded by a rebellious Senate. Notwithstanding the greater docility of the upper house, fortunately the executioner's axe has been stowed.

Apart from being a great experience, it was great fun being part of the early days of the Tribunal. Ron Mills, the first Registrar, who I'm very pleased to see here tonight with his wife, ran a tight ship, but its crew were united behind him and the first skipper. Its maiden voyage was, of course, the case of *Adams v Tax Agents Board* in which a constitutional issue was raised. This was to prove characteristic of the range and diversity of issues that were to surface regularly in the most unlikely contexts.

I quickly concluded that an academic review of the jurisprudential milestones passed by the Tribunal in the course of its 30-year journey would carry the grave risk that many of you would have to be awakened for your dessert and coffee, so I will leave that important analytical task to others who are in any case much better qualified than I to undertake it.

Rather, in view of the hour and social nature of the occasion, I will take the soft option, and try to keep you awake by addressing what I think are some of the broad themes that have evolved over 30 years of extremely successful merits review by the Tribunal. As imitation is the sincerest form of flattery, some measure of that success can be drawn from the replication of the umbrella structure for merits review in three States and one Territory, including the great State of Western Australia, in which my colleagues sit on the SAT on which the sun never sets and, of course, a unified umbrella merits review Tribunal has been set up in the United Kingdom, modelled on the AAT.

It seems to me that at least one of the major achievements of the last 30 years has been the entrenchment of a community assumption or

expectation that at least in the area of Commonwealth administration, a person aggrieved by an administrative decision is likely to have the opportunity to pursue a fair, fast, informal and effective avenue for the review of that decision on both the merits and the law. As Chief Justice Gleeson observed earlier this evening, this is part of the process which he described as "justification". This legitimate expectation is the antithesis of the helpless frustration felt prior to 1976, when the Courts had a well-established reticence to intervene in the administrative process, and there was virtually no other avenue of redress available to an aggrieved citizen.

This is no small achievement. The judicial structure long ago developed processes for the review of decisions made by Courts lower in the hierarchy, but decisions of administrators must outnumber decisions of Courts by a factor in the hundreds or perhaps thousands, and many of them are profoundly important to the individual - such as the decision as to the country in which he or she will be permitted to live, perhaps at the risk of being separated from immediate family forever.

Discussing the meaning of justice in an august gathering such as this is an exercise which Sir Humphrey would describe as courageous, but if one regards justice as the delivery of fair, equitable and even-handed outcomes based on the ascertainment of the truth and the correct application of the law, then there is, I think, a cogent argument to the effect that a process for the just, fair and impartial review on the merits of a vast array of administrative decisions, is, at least in some respects as significant an instrument for the advancement of justice as the judicial system, although of course both ultimately depend upon, and implement, the Rule of Law. Fining errant drivers is, of course, important, but so is

deciding whether or not a person should be permitted citizenship or residence, or whether an insurance company should be permitted to continue to write business - which was the issue in one of the early major cases to come before the Tribunal. We all know how profound the impact upon the community of the collapse of a large general insurer can be - in one example dear to my own heart, which in fact involved the same insurer as that earlier case before the Tribunal, builders' work stopped all around the country, payments to injured workers and their dependent families terminated and so on. Very few Court cases would have repercussions as significant as that.

Which is why it was so important that the Tribunal succeeded in securing the confidence of both the Government and the community. And despite the abortive assassination attempt 5 years ago, the Tribunal has manifestly and indisputably secured that confidence. Even the Sir Humphreyist departmental secretary will readily acknowledge the benefits which the Tribunal has brought to the efficiency and justice of the administrative process. He or she will smart and mutter from time to time about the reversal of decisions considered to have been sound, but there is, in my view, almost universal acceptance of the desirability of independent merits review at the highest level of Commonwealth and, increasingly, State administrations. And the steady flow of applicants for review speaks eloquently of the confidence which the community has in the capacity of the Tribunal to deliver administrative justice.

Another major achievement of the last 30 years has been the Tribunal's impact upon the improvement of the quality of decision-making generally - irrespective of whether review is sought in a particular case or not. A

number of writers support that proposition, including such eminent and experienced authors as Stephen Skehill and Dennis Pearce. And my good friends Professors Robyn Creyke and John McMillan, in their empirical study conducted in 1999 and 2000, published in 2002, found that 80% of those administrators surveyed, considered that a beneficial outcome of external review was that it encourages decision-makers to pay more attention to the impact of a decision on the individual than they might otherwise do.

This important proposition is supported by my own anecdotal experience at the Department of Immigration, in which I served for approximately 2 years. The deportations reviewed by the Tribunal were those ordered because of the commission of serious criminal offences by non-citizens, many of whom had long been residents of Australia. The section in the Department making recommendations to the Minister in such cases was headed by a great servant of the public called Bert Treloar, who had been working in that area for about 20 years, and who had an encyclopaedic knowledge of the issues which arose from time to time and an almost instinctive way of resolving those issues. When decisions made on his recommendations came to be reviewed, and in some cases overturned by the Tribunal, there was understandably a degree of initial hostility and resentment. Bert was sometimes heard to mutter, "What would Judges know about immigration anyway".

Fairly early in the life of this area of jurisdiction, the Tribunal asked the Department to tell it how those decisions were made in practice. This made Bert enunciate, for the first time in 20 years, the factors and policies which guided his recommendations. This, of course, led in turn to one of

the early landmark decisions in the Tribunal as to the role of Government policy in *Drake's* case.

But for Bert, the cathartic effort of having to enunciate why he had been doing what he had done for the last 20 years, and then give reasons for the application of that policy to the particular case, revolutionised the way he and his section did things. And eventually he unabashedly declared it was for the better. He became convinced that the standard and consistency of the recommendations made by his section had improved significantly, and for my part I have no doubt that this example has been replicated across vast tracts of Commonwealth administration.

The third broad theme I have chosen to address tonight before I allow you to return to our feast, is the significant role which the Tribunal has played in the development of innovative procedures which have extended well beyond merits review and into the judicial system. One of my mildly indecent obsessions for the last 10 years or so has been procedural reform in the Courts, and I have therefore looked carefully at the significant developments that have occurred in the Tribunal in this regard and which have already found their way across into the Court system in many instances.

There has, of course, been much debate, particularly in the earlier years of the Tribunal, about the extent to which it was desirable for the Tribunal to follow the curial model set by its inaugural President. Hindsight tells us, I think, that the adoption of that model was successful in establishing the standing and reputation of the Tribunal in an uncertain environment, because there were, of course, no procedural precedents for an umbrella

merits review Tribunal to follow. The inevitable distrust and suspicion which accompanies uncertainty was, in my respectful opinion, substantially allayed by the adoption of a familiar procedure, being modelled on the procedure followed by the Courts.

However, once the reputational base of the Tribunal had been established, it was, in my opinion, entirely appropriate for successive Presidents to encourage the adoption of a flexible approach to procedure, in which the degree of formality and insistence upon due process, and the nature and extent of the pre-hearing procedures, varied with the subject matter under review and from case to case. This has, I think, provided a very successful model of flexible procedure which has been adopted not only in other Tribunals, but also in some, but perhaps not enough, Courts. As Chief Justice Gleeson has already mentioned, it is a process which the Courts must pursue increasingly through case management. One size of procedure does not fit all - the procedures must be tailored to fit the case and ensure a timely result.

Experience in the Tribunal has also demonstrated that it is perfectly possible to resolve complicated issues of fact and law quite satisfactorily without the need for the rigidity provided by formal rules of pleading. The use of a direction requiring the exchange of statements of facts, issues and contentions, and the success of that process, has encouraged its adoption in the Courts and will, I think, continue to have that effect.

In the area of expert evidence, the taking of evidence from expert witnesses concurrently - hot-tubbing as it is sometimes called - has been practised in the Tribunal for many years now, and it is, I think, fair to say

that the Tribunal has led the country in the development of experience in this area. This is another development which will increasingly be exported to the Courts.

Similarly in the field of mediation, the Tribunal has shown the extent to which ADR can result in successful outcomes arrived at other than by a disputed determination - outcomes achieved in approximately 78% of the cases brought before the Tribunal. It is also, in my view, significant that this high settlement rate is achieved even without the incentive for settlement created by the risk of an adverse costs order in the event of failure in most areas of jurisdiction.

I have no doubt that the Tribunal, under the Presidency of Justice Garry Downes, will continue to innovate and lead procedural reform, and show by practical experience and example how the Courts can benefit from such reforms.

But anniversaries are not only occasions for looking back - they are also occasions for looking forward. The challenge which the Tribunal set for itself as an adolescent 15-year-old approaching maturity in its 1991 Annual Report remains, in my respectful opinion, an appropriate guide for the future endeavours of the Tribunal. 15 years ago, the Tribunal expressed its mission in these terms:

> "The Tribunal must carve out its own place in the Australian system of Government. In short, it must become a first class Tribunal rather than a second class court. To do this, it must assume a role of intellectual leadership in the field of

> administrative law. … Having defined the environment within which it operates, and in keeping with its proper role and function, the Tribunal must develop its own ethos. The Tribunal is not simply an administrative institution, nor is it simply a legal institution. It is in fact both, and as such occupies a unique place in the Australian system of Government and law."

The Tribunal has, in my respectful opinion, been entirely successful in achieving these objectives in the first 30 years of its life. I, for one, have every confidence that it will continue to do so.