

AAT – 30th Anniversary Speech
Old Parliament House, Canberra
2 August 2006

It is a joy to be present this evening when we are celebrating the 30th Anniversary of the establishment of the Administrative Appeals Tribunal. It is great to meet again so many who have contributed to the work of the AAT, especially those who were involved in earlier days. I mention with particular appreciation the Hon. Justice Daryl Davies, the first Deputy President and second President, Messrs Allan Hall and Robert Todd, the first Senior Members and later Presidential Members and Mr Ron Mills, the founding Registrar. It is fitting that tonight's proceedings should be opened by the Chief Justice's keynote address, marked by His Honour's customary erudition. It is significant that the keynote speaker is the Chief Justice of Australia, as the AAT is part of the judicial system of the Commonwealth. Although it does not exercise the judicial power of the Commonwealth within the meaning of that term in Chapter III of the Constitution, it is designed to do justice in individual cases, according to law and independently of the executive power. Those are the features which mark the AAT as an element in the judicial system. When Lord Denning made his maiden speech to the House of Lords, he commented on the United Kingdom Franks Committee Report on Tribunals. He said:

“[I]t contains and reaffirms a constitutional principle of first importance – namely, that these tribunals are not part of the administrative machinery of government under the control of departments; they are part of the judicial system of the land under the rule of law.”

I am pleased to see that under the *AAT Act*, as it now stands, the President of the AAT must be a Judge of the Federal Court.

An essential characteristic of the AAT is that it is independent of the Executive branch of government. It must be independent in its thinking, independent in its procedure, independent in its interpretation of the law. Not only does independence give authority to the AAT and its decisions; independence is essential to the AAT's very survival. If it were not, and were not seen to be, independent of sponsoring departments, its existence would be a costly charade. Unless the resources that are expended in maintaining the AAT produce a better quality of administrative justice than primary decision-making, those resources would be much better devoted to decision-making at the primary level. The independence, competence and expertise of the members of the AAT, its powers and processes are designed to produce better administrative justice for individuals and corporations. So it is to be hoped that the level of competence and expertise will be maintained, and that the independence of the members is assured. Those are the essentials if the AAT is to perform the function for which it was designed.

The primary benefit of AAT review is, of course, the doing of individual justice. It is to secure administrative justice for those affected by the exercise of power and for those for whose benefit power is conferred on a repository. Administrative justice is, of course, justice according to law but it is also justice according to lawful and reasonable policy.

The secondary benefit which the AAT confers is the exposing of policy to critical review. The AAT ensures that policy conforms with the law and that it is reasonable in its application to concrete situations. The requirement to state reasons for decisions, both at the primary and at the review level, ensures openness and legitimacy in the exercise of executive power. These are tremendous benefits in a modern complex

democracy – benefits that would not be available but for an institution vested with power to review decisions on their merits.

What does the future hold? There is now a manifest movement towards the outsourcing of governmental functions. Powers which were once vested in officers of government administering statutes are now increasingly exercised by employees of corporations who perform governmental functions under contract. Has this removed areas of decision making from AAT review? It would be regrettable if important public functions affecting the interests of individuals are kept outside the field of decisions reviewable by the AAT. In the first place, the aspiration for individual administrative justice would be frustrated. Secondly, there would be an imbalance between judicial review and merits review. The Courts have moved towards reviewing decisions in the public law area even though those decisions are made by private individuals in performance of government contracts. It was Lord Justice Rose who said in *R v Insurance Ombudsman; Ex Parte Aegon Life Insurance* [1994] COD 426, 427:

“... a body whose birth and constitution owed nothing to any exercise of governmental power may be subject to judicial review if it had been woven into the fabric of public regulation or into a system of governmental control or was integrated into a system of statutory regulation or was a surrogate organ of government or but for its existence a government body would assume control.”

If the Courts must supervise the lawfulness of the exercise of public powers exercised by non-government officials then the AAT should have jurisdiction to ensure that those powers are exercised on the merits of individual cases. That calls for the vesting of new powers in the AAT. If that were done, the jurisdiction of the Courts would be confined to the review of decisions based on errors of law while administrative justice

according to law and reasonable and legitimate policy would be done by AAT review. To the Attorney-General, who is here this evening, I would commend any proposal for the extension of the AAT's jurisdiction to ensure that it covers decisions made in the area of public law.

Needless to say, we wish the AAT well in the decades to come. We look forward to the development of its jurisdiction and trust that it will maintain the judicial ethos and safeguard the individual and corporate interests which arise under and pursuant to the laws of the Commonwealth.

The Hon Gerard Brennan, AC KBE