



Administrative Appeals Tribunal

1976 – 2006

*30th
Anniversary*

Speeches

Old Parliament House, Canberra



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A collection of speeches delivered at the Administrative Appeals Tribunal Thirtieth Anniversary celebration held on Wednesday, 2 August 2006 at The Old Parliament House in Canberra.

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Contents

30th

| | |
|--|----|
| President’s Forward: 30th Anniversary of the Administrative Appeals Tribunal | 1 |
| <i>The Honourable Justice Garry Downes AM</i> | |
| Introduction to Chief Justice Gleeson | 3 |
| <i>The Honourable Justice Garry Downes AM</i> | |
| Outcome, Process and the Rule of Law | 5 |
| <i>The Honourable Chief Justice Murray Gleeson AC</i> | |
| Thank You Remarks | 14 |
| <i>The Honourable Justice Garry Downes AM</i> | |
| AAT – 30th Anniversary Speech | 15 |
| <i>The Honourable Sir Gerard Brennan AC KBE</i> | |
| Remarks by the Attorney-General | 17 |
| <i>The Honourable Philip Ruddock MP</i> | |
| Administrative Appeals Tribunal 30th Anniversary | 19 |
| <i>The Honourable Chief Justice of Western Australia Wayne Martin</i> | |



30th

President's Forward: 30th Anniversary of the Administrative Appeals Tribunal

The Honourable Justice Garry Downes AM

The 30th Anniversary of the establishment of the Administrative Appeals Tribunal had more significance than merely marking the achievement of three decades of independent merits review of Commonwealth Government decisions. The Anniversary coincided with the settling by the Parliament of the form that merits review would take in the Tribunal for the foreseeable future. It did this by passing extensive amendments to the Tribunal's Act. During the passage of the bill a number of amendments were incorporated which took account of the views of the Senate Legal and Constitutional Affairs Committee.

The result is a tribunal which is slightly less formal than when it began and one which maximises flexibility in the ways it deals with its case load. These welcome reforms reflect the experience and learning of the Tribunal's thirty years of operation.

It was accordingly appropriate to recognise the 30th Anniversary of the Tribunal with a function in Canberra. Chief Justice Gleeson delivered an oration in the House of Representatives Chamber in the Old Parliament House, where the Act was passed. This was followed by a dinner at which Chief Justice Martin, of the Supreme Court of Western Australia, was the main speaker, but at which there were also contributions by the first President of the Tribunal, Sir Gerard Brennan and the Attorney-General, Philip Ruddock MP.

This booklet collects the speeches. I hope it will serve as a permanent reminder of the importance of the work of the Administrative Appeals Tribunal, its record over the first 30 years and its promise for the next 30 years and beyond.



Introduction to Chief Justice Gleeson

The Honourable Justice Garry Downes AM

30th

Chief Justice Gleeson, Attorney-General Ruddock, Sir Gerard Brennan, Justices Gummow, Kirby, Hayne and Crennan, Chief Justice Black, Chief Justice Martin, Chief Justice Bryant, Chief Justice Higgins, Shadow Attorney-General Roxon, other Justices and Judges, Solicitor General Bennett, Mr Cornell, other distinguished guests, members and staff of the Administrative Appeals Tribunal, ladies and gentlemen.

It is a pleasure for me to welcome you here today. You do the Administrative Appeals Tribunal a great honour by being here. I might perhaps have shortened the conventional opening address to guests, but I wanted to recognise publicly the number of distinguished persons who have honoured the Tribunal today.

A little more than 30 years ago, in this very Chamber, the Attorney-General, Keppel Enderby, introduced the *Administrative Appeals Tribunal Bill*. He said:

‘The establishment of the Administrative Appeals Tribunal will be a significant milestone in the development in the administrative law of this country. It will provide an opportunity to build up a significant body of administrative law and practice of general application, as well as providing the machinery to ensure that persons are dealt with fairly and properly in their relationships with government.’

The opposition spokesman was its Shadow Minister for Consumer Affairs, one John Howard. Our present Prime Minister said this:

‘This legislation and the companion legislation to establish the office of an Australian ombudsman are both extremely significant phases in the development within Australia not only of our administration law: they are also momentous events in the evolution of our system of government.’

The Parliament knew that it was passing important and far reaching legislation. The intervening 30 years have confirmed that understanding.

It accordingly seems appropriate for the 30th anniversary of the Tribunal to be marked by an occasion such as this. The Tribunal was unique when it was established. However, its model has now been followed in a number of states and the Australian Capital Territory. A Unified Tribunals’ Service has been established in the United Kingdom. New Zealand is looking at proposals for a general tribunal.

All of these developments can be sourced to the far sighted decisions of successive Australian Governments to establish and sustain the Administrative Appeals Tribunal. Because of the continued support it has received over the last 30 years the Tribunal is now an integral part of the process of administrative decision-making in government. Government is to be congratulated for introducing and supporting, in the interests of the people, a review process which surrenders executive power to an independent body.

We are greatly honoured by the presence here today of the leader of the judicial arm of Government, the Chief Justice of Australia, the Honourable Murray Gleeson AC. His agreeing to deliver a major speech

is itself recognition of the importance of the occasion. He was Australia's outstanding advocate and he is now Australia's outstanding jurist.

It is a double pleasure for me, because I count the Chief Justice as a colleague and friend. For many years we had rooms opposite one another on the Seventh Floor of Wentworth Chambers in Sydney. We were assiduous attendees at a Floor lunch every Friday. I appeared with him and against him. I appeared before him. Now, I am below him. I hesitate to add that at the moment, along with other guests here, he is carefully scrutinising a decision of mine for error.

It gives me great pleasure to ask you to join me in welcoming the Chief Justice of Australia, Murray Gleeson.



Outcome, Process and the Rule of Law

*The Honourable Chief Justice Murray Gleeson AC
Chief Justice of Australia*

30th

The establishment of the Administrative Appeals Tribunal in 1976 was described by Sir Anthony Mason, a member of the Commonwealth Administrative Review Committee which recommended that it be set up, as the most innovative and controversial element of a group of proposals designed to promote the rule of law and good governance by enabling citizens to call in question administrative decisions¹.

It was controversial because the tribunal was to review decisions ‘on the merits of questions of fact and law’², because such review could extend to questions of policy, and because the judicial method was adopted as a model for the Tribunal’s decision-making. It was innovative because it was to have a wide-ranging jurisdiction extending beyond specific areas within the purview, and control, of separate departments. I would say also that it was innovative because it conferred a function of merits review upon a body that was expected to have expertise in the process of review itself, as distinct from expertise in one particular subject of decision-making.

The AAT was never intended to stand alone. The *Ombudsman Act 1976* (Cth), the *Administrative Decisions (Judicial Review) Act 1977* (Cth), and the *Freedom of Information Act 1982* (Cth) are also part of a legislative scheme that reflects a certain set of values concerning public administration. The details of the scheme have been modified from time to time, but the values on which it is based have taken deep root. How many Commonwealth Ministers or officers are there today whose experience of public administration goes back beyond 1975?

The Tribunal, its President, and its present and past members, are to be congratulated on its success and widespread acceptance. The Australian judiciary can be proud of its role in the work of the Tribunal. The first President, Sir Gerard Brennan, and the subsequent Presidents through to and including Justice Downes, all judges, have all made their distinctive contributions to the Tribunal.

Sir Gerard Brennan’s judgments, written in the Tribunal’s formative years, still guide many of its decisions. For example, his approach to the perennial question of how the Tribunal is to undertake merits review of decisions governed or influenced by policy³ remains powerfully influential.

The concept of policy is protean. It is invoked in the exercise of judicial power, as well as in administrative decision-making. The word is sometimes used without further explanation. When judges say they base some decisions on policy, what kind of policy are they talking about?

Sometimes the word is used to mean general principle reflecting values in the law. For example, it is the policy of the law that no one should be convicted of a crime without a fair hearing. Such general principles, if challenged, may be justified by reference to the Constitution, to Acts of Parliament and to judicial decisions. What is important is that they are external to the decision-maker, and that assertions about their content are verifiable or falsifiable by the techniques of legal reasoning, and in accordance with the ordinary procedures of adversarial litigation.

The content of the proposition is amenable to legal analysis, may be tested in accordance with the requirements of procedural fairness, and is submitted to the judgment of a person or persons whose expertise is in the law, and usually not elsewhere. Sometimes the word is used to refer to a plan of

action, or an agenda, thought to be in the public interest. But courts do not have agendas, and plans of action of individual judges, if they were to exist, would normally lack democratic legitimacy.

In a liberal democracy, people who are expected to have private agendas, or personal plans of public action, are usually elected, not appointed, to office. Sometimes the word is used to describe a choice between alternative means of responding to public needs. Sometimes such choices are influenced by priorities in the allocation of resources. Sometimes those choices have been directly or indirectly the subject of electoral contest and resolution.

The wisdom of the Tribunal's initial caution in relation to merits review on questions of policy is clear. The same caution informs the wise and legitimate exercise of judicial power. There is a certain kind of policy, sometimes described as the policy of the law, which may necessarily affect judicial decision-making, when judges seek to develop the common law or interpret statutes.

There are other kinds of policy that are formulated through the political process. This is most obviously so when they involve setting priorities in the application of public funds, but it applies to many kinds of policy.

Generalizations about the role of policy in the exercise of judicial power may be unhelpful unless they are accompanied by an explanation of the kind of policy in contemplation. Only when the kind of policy issue is identified is it possible to form a view about whether the judicial process is properly adapted to its resolution.

When questions of policy arise, a decision-maker using the judicial method, whether in the exercise of judicial power or, as in the case of the AAT, in the exercise of an administrative function may be confronted with an information problem. How is the decision-maker, consistently with the requirements of procedural fairness, to be informed about the matters relevant to a policy judgment? Let me give three examples of how the problem may bear on the work of the High Court.

First, in *Woods v Multi-Sport Holdings Pty Ltd*⁴ there was a spirited debate between two members of the Court about the appropriateness of taking account of certain information not the subject of evidence in the resolution of an issue of tort law. Questions of reliability and procedural fairness were raised.

Secondly, so-called constitutional facts, relevant to the decision of constitutional cases but not proved in evidence, are sometimes a source of difficulty. For an example of the practical dimensions of the problem, compare *Clark King & Co Pty Ltd v Australian Wheat Board* in 1978⁵ with *Uebergang v Australian Wheat Board* in 1980⁶, and see how the Court set about deciding whether a certain scheme for the marketing of primary products was the only practical and reasonable method of regulating an area of trade and commerce. That is, to say the least, an interesting kind of question for a court to have to decide, especially in the absence of comprehensive evidence.

Thirdly, consider the question whether the rule in *Rylands v Fletcher*⁷, concerning the basis of a landowner's liability for the escape of a dangerous substance, continues to have a useful role in modern conditions. Is the law of negligence nowadays a sufficient response to the problems that may arise? Those questions were considered, and answered in one way, by the High Court in 1994⁸. The same questions of legal policy were considered, and answered in the opposite way, by the House of Lords in 2004⁹. Which was the correct or preferable answer? That is for readers of the reasons for judgment to decide.

What interests me is the informational base of both decisions. It might be thought, for example, that information about modern practices relating to the transportation and storage of dangerous substances, such as toxic waste, or radioactive materials, or the transmission of energy, would be a

factor. If the same questions were put before a Law Reform Commission there would probably be a wide-ranging investigation of the facts relating to present circumstances and conditions.

How do courts of final appeal, in the absence of evidence, inform themselves about such matters? How do they know their information is comprehensive and reliable? Because a court at first instance, or an intermediate court of appeal, will be bound by the existing rule, they will not have received evidence bearing on the appropriateness of the rule.

The High Court does not receive new evidence when an appeal comes to it. By hypothesis, then, the issue is one that will be considered without evidence. Unless there are no relevant primary facts, or any relevant primary facts are uncontroversial, how does the Court proceed? This is an abiding problem in the exercise of judicial power. No doubt there are also challenges that face the AAT in reviewing administrative decisions affected by policy of one kind or another.

The work of the Tribunal over 30 years has prospered because of the contribution of the general body of its members, many of whom have brought specialised knowledge and experience to their task, and all of whom have understood the importance of the acceptability of its decisions to all affected by them. It is sound principle of the exercise of judicial power that the most important person in any courtroom is the party who is going to lose.

Similarly, administrative review, in both process and outcome, should appear rational and fair, not least to the person whose decision is being reviewed. The President of the Tribunal, Justice Downes, has on a number of occasions referred to the importance to the work of the Tribunal of the fact that it ‘has many members with expertise in areas outside the law such as accounting, aviation, defence, medicine and science’¹⁰.

In the same context he has referred to the importance of expert evidence¹¹. The effective and fair use of expert evidence is an issue currently facing the court system. It is a large topic, and beyond the scope of this paper.

In an address made in October 2005, Justice Downes said that he was about to hear an appeal from a decision of the Commonwealth Minister for the Environment authorising the importation of some elephants for the Sydney and Melbourne Zoos¹². This is interesting, because Sir Gerard Brennan, in an address on the occasion of the 20th anniversary of the AAT, disclosed a concern, back in July 1976, that he might be called upon to deal with issues about elephants and quarantine¹³.

I have no reason to believe that Presidents of the AAT have a preoccupation with elephants, but I am confident that they are very knowledgeable about tax and social security. I assume that when they have to decide the fate of elephants they have ways of seeing to it that their judgments are well-informed.

It would be both trite and unsatisfactory to say that the AAT is now part of the governmental landscape. The metaphor is unsatisfactory because it implies that the context in which the Tribunal operates, and the Tribunal itself, are static. There have been major developments, since 1976, in the principles and practice of public administration.

Methods of performance review and accountability within the public sector have changed, and continue to change. Privatisation, and outsourcing of functions, have placed many activities affecting the interests of citizens outside the scope of the legislative scheme conceived in the 1970s¹⁴. Furthermore, the application of the judicial model to merits review is affected by changes in the judicial model itself.

I have earlier referred to issues about the role of expert witnesses and the way in which courts may properly obtain their assistance. Courts now routinely adopt procedures of case management, and encourage or accommodate procedures of alternative dispute resolution that were unknown in 1976.

Consider, for example, the problem of delay, which has always been a concern of the judicial process. This is a topic on which I speak with some personal experience.

I became Chief Justice of the Supreme Court of New South Wales in November 1988. After my appointment was announced, but before it took effect, I was invited to attend a meeting to discuss a delay reduction programme in the Court. The meeting was open to the public, but it was attended mainly by legal practitioners, officers of the Attorney-General's Department, and judges.

The Chief Executive Officer and Principal Registrar of the Court, Mr Soden¹⁵ presented a paper which projected that by the end of 1990, that is, two years into my term of office, in the absence of radical change, the average time from commencement to finalisation of cases in the Common Law Division of the Court would be 10 years. Such news, received in such circumstances, concentrates the mind.

The Supreme Court, and other Australian courts, took a variety of measures aimed at reducing delays. Many of the Woolf Reforms in the United Kingdom had been anticipated in New South Wales and elsewhere in Australia. Another change in the judicial method, which operates throughout the court system, although it manifests itself in different ways at different levels, is the decreasing orality of the process, and increased reliance on written evidence and argument.

The Tribunal's Act of 1975, in section 33, stressed informality of procedure, but in section 35 mandated, as a general rule, public hearings. The practical content of some aspects of the concept of a 'hearing' in court proceedings has changed in the past 30 years.

For example, the High Court now deals with many of its special leave applications on the papers. A trial in the Federal Court, or the Commercial Division of a Supreme Court, is likely to involve a substantial amount of written evidence and argument. Both the process of executive government and the judicial process have altered since the Tribunal was established, and continue to change.

A reading of recent reports of the Tribunal shows that it sees the need to keep up with changes in the judicial model. The Tribunal is not bound to the judicial model as it existed in 1975.

I should mention in this connection a development in court process that I hope will not be reflected in the procedures of the Tribunal. I refer to the importance of adhering to procedures of summary disposition where they are suitably adapted to the business of a court. By 'summary', I do not mean 'without a hearing'; I mean without the full array of procedures that are used by higher courts, in relation to complex cases.

The reason for having a multi-level court system is that cases do not all require the same procedures for their just resolution. I am puzzled by an assumption sometimes made that procedural uniformity between courts is self-evidently a virtue. In some instances, it is self-evidently a vice.

It would be remarkable if the civil justice system adopted the same procedures for resolving a claim for property damage resulting from a minor collision between two motor vehicles as it adopts for resolving a claim arising out of a collision at sea between two oil tankers; or if the criminal justice system dealt with minor offences in the same way as it deals with serious matters.

Courts of summary and of intermediate civil jurisdiction exist because there is a need to make justice reasonably accessible and affordable, and because not all litigation requires, for its just resolution, the time-consuming and expensive procedures of higher courts. Many cases, perhaps most cases, do not require formal pleadings, or interlocutory procedures such as discovery and interrogatories for their fair determination.

No doubt there are some differences between court rules and practices that are irrational and should be eliminated. There are also some differences that are deliberate and beneficial. Inappropriate

uniformity is just as bad as inappropriate difference. The unnecessary elaboration of the dispute resolution process is a weakness of some parts of the civil justice system, which in that respect is not an example to be followed by the Tribunal.

One major, and relatively recent change in the judicial model concerns professional formation and development of judicial officers (judges and magistrates). Programmes of orientation and ongoing education have been institutionalised in most Australian courts, and there is now a National Judicial College, supported by the Commonwealth Government and some State Governments.

The Judicial Commission of New South Wales, established in 1986, is recognised internationally for its work in judicial education. This is the most important change within the judicial branch of government during my time on the bench, and it has been embraced by the Tribunal.

If there is one thing I want to achieve during my remaining two years in office, it is to promote wider awareness of the importance of an adequately funded and managed Australia-wide programme of judicial education. In that, I include participation in international, and especially regional, activities of both basic and advanced judicial studies. These activities are now expanding rapidly, and Australia should be involved in them, both for its own benefit and as part of its contribution as a member of the international community.

The concept of using the judicial model of decision-making, suitably adapted, as part of the process of executive government was not completely novel in 1975. Royal Commissions have always done that. Constitutionally, there is no bright line that separates matters for judicial decision from matters for administrative decision.

The determination of criminal guilt, or actions in contract or tort, have been given as examples of ‘what, at least by reference to history and tradition, are basic rights and interests necessarily protected and enforced by the judicial branch of government’¹⁶. But many matters may be resolved either by the exercise of judicial or executive or for that matter, legislative, power. Dissolution of marriage used to be by Act of Parliament. Town planning and environmental issues may be, and are, resolved by legislation, or by administrative decision, or by courts.

Such examples, including Royal Commissions, illustrate the fact that the best way of deciding a question depends upon the nature of the question. There is an ongoing debate within the judiciary as to the appropriateness of using judges as Royal Commissioners. There is also a wider debate about the appropriateness of submitting certain kinds of question to a Royal Commission.

Generally speaking, the greater the political content of a question, the less the desirability of having it resolved by the judicial method, and by a judge, although, paradoxically, sometimes it is the political content of a question that prompts demands for a judicial inquiry. Plainly, in such cases, it is the perceived independence and fairness of the judicial process that leads to such demands.

I would not assent to a general statement that public opinion regards the judicial method of decision-making as inherently superior to the administrative method. I doubt that there is any identifiable public opinion on that topic. For one thing, the issue is stated too broadly to permit a simple answer. For another thing, public opinion on such a matter probably is neither general nor uniform.

The judicial method is appropriate for some questions and not for others. I regard it as the best available method of determining criminal guilt, and, provided the question is of sufficient particular or general importance, as one of the best available methods of deciding claims in contract or tort between citizens, or between a citizen and the government. It is unlikely to be the best available method of deciding whether drought relief should be provided to farmers, or how Australian troops should be deployed.

A system of effective and efficient decision-making seeks to match the issue for decision with the capacity of the decision-maker. By capacity I refer not only to personal calibre but also to the process by which the decision-maker acts. Within the judicial branch, the legitimacy and rationality of judicial decisions depends upon the existence of a reasonable relationship between the matters that arise for decision and the techniques and procedures that are brought to bear in their resolution.

In the formulation of legal principle, ultimate courts of appeal seek, or ought to seek, to identify issues that are justiciable, that is to say, issues which are of such a nature that they can be resolved by the court process with fairness and credibility. One of the merits of the High Court's more recent jurisprudence on section 92 of the Constitution is that it does not leave the Court in position of having to resolve, on the basis of unsatisfactory information, economic issues.

The Tribunal appears to cope very well with the problem of high-volume business. The civil justice system only manages to function because the great majority of cases are resolved without the need for a judicial decision. People sometimes forget how few judges there are. There are only about 1,000 judicial officers (judges and magistrates) in all Australian jurisdictions combined. They do not have the capacity to decide, by their professional techniques, more than a small fraction of the civil disputes brought to their courts.

In the criminal area, the administration of justice would collapse if all, or even most, people accused of offences decided to plead not guilty. In a civil trial court, especially one seeking to shift a backlog of cases, the most productive judge is not the one who makes the most decisions; it is the one who conducts his or her list so as to facilitate the most settlements.

This is a matter I have discussed with the President of the Tribunal. He has told me that the settlement rate of matters in the Tribunal is high (using 'settlement' in a broad sense), and that conferencing and other techniques are employed to minimise the need for ultimate decision-making. He also made the important point that, while the Tribunal attracts a lot of tax cases, partly because of its capacity to vary penalties, cases may bank up while decisions on issues of law from the Federal Court or the High Court are pending. This shows the danger of using performance indicators without sufficient knowledge of factors that might be relevant to performance evaluation.

References to the judicial method are usually intended to embrace the requirements of procedural fairness, the openness of the procedure, and the giving of reasons for decision. In that respect it is important to note that the word is 'judicial', not 'curial', because such references do not cover trial by jury.

Jurors give no reasons for their decisions. The acceptability of their decisions is based, not on their professional competence or the cogency of their reasons, but upon the assumption that they bring together the collective wisdom and common sense of a group of representatives of the community, chosen at random¹⁷. Some descriptions of court process appear to leave trial by jury out of account. What is taken as the judicial paradigm is not the only method, and historically was not even the typical method, of deciding cases by common law courts.

Subject to that qualification, it is clear that fairness and openness of procedure, and the giving of a reasoned decision, represent the great strengths of the judicial method. To those I would add the appearance of independence and impartiality that attends the decision-maker. These strengths relate both to process and to outcome.

In the kind of matter that is amenable to judicial process, a decision made by an independent tribunal which is obliged to hear both sides of an argument, to sit in public, and to give a reasoned decision is probably more likely to be right, and is almost certainly more likely to be acceptable to somebody adversely affected, than a decision made without those constraints.

The distinction between outcome and process is not rigid. This is illustrated by the budgetary description of the desired outcome of the Tribunal's own operations. It is 'to provide aggrieved persons and agencies with timely, fair and independent merits review of administrative decisions over which the Tribunal has jurisdiction'¹⁸. The process is part of the outcome. It is Parliament that decides the extent of the Tribunal's review jurisdiction. The bulk of its work covers Commonwealth workers' compensation, social security, veterans' affairs and taxation¹⁹.

These are areas of decision-making, or are similar to areas of decision-making, that directly affect the rights and interests of individual citizens (often rights against or liabilities to the government), that lend themselves to the judicial process and that, in State jurisdictions, traditionally have been dealt with by the judicial process. They are examples of administrative decision-making where citizens look for attention to individual rights and interests, and value a review process that emphasises procedural fairness and independence.

What people regard as due process in the determination of their tax obligations or their social security rights is likely to be very different from what they regard as an appropriate method of allocating water resources, or deploying troops. Decisions affecting human rights and, above all, personal liberty, are quintessential examples of cases where fairness of process is itself part of the outcome to be expected from good government. If government does not deliver the appearance of justice, manifested in due process, in such cases, then it fails to deliver what is an essential aspect of a liberal democracy under the rule of law.

Similarly, just as disputes about property, and personal rights and obligations, between citizens are most acceptably resolved governmentally (if resolution by government be necessary) by the judicial process, when such issues arise between a citizen and the government itself, the government's process of resolving such issues is an integral part of what government delivers by way of outcome.

One of the characteristic features of the context in which modern administrative law functions is a change in emphasis from the duties of public officials to the rights of citizens. That change in emphasis means that the case for having the AAT, and for independent merits review of administrative decisions that are properly amenable to such review, is probably stronger now than it was in the early 1970s. That form of climate change powerfully affects the environment in which modern managers of the business of government operate. It is impossible to accept that it could be ignored by effective management.

As the portfolio outcome statement earlier quoted shows, the community's right to, and expectation of, due process is not limited to the administration of criminal and civil justice by the courts. I put that, not as a legal proposition, but as a statement of social reality. To ignore that reality involves a political risk. Acknowledgement of that reality explains the scope of the AAT's jurisdiction, which is an expression of political will. It is not constitutionally mandated; it is an outcome of the political process.

Proper concern with management should not distract attention from the consideration that good governance, in a rights-conscious community, requires that executive decisions be made with due attention to public acceptance of the process of decision-making. Theoretically, and leaving aside constitutional considerations, it may be possible to devise a tax system that was administered entirely by government officers applying their unreviewable judgment of fact and law, or personal discretion, but such a system would never command public confidence in a liberal democracy of the 21st century.

Certainly in relation to tax matters, it may be said that, if the AAT did not exist, it would be necessary to invent it, or something very like it. In fact, it replaced something that, in its practical operation, had many similarities. In some other areas of jurisdiction, the AAT reviews the decisions of specialised internal review bodies, bringing to such decision-making its own expertise and its structural

independence. In all areas of its jurisdiction, its review function reflects Parliament's appreciation of a public demand for a level of independent merits review external to the department that made the original decision.

The Administrative Review Council plays an important role in this area. It has recently published an important report on 'The Scope of Judicial Review'. In that report the Council referred to the public law values that underlie judicial review²⁰. Those were said to be 'the rule of law, the safeguarding of individual rights, accountability, and consistency and certainty in the administration of legislation'. Similar public law values underlie administrative merits review.

The Tribunal does not exist only to increase the prospects that decisions made by the executive branch of government will be 'better', in the sense that they will be based upon a correct appreciation of the facts, or an accurate understanding of the consequences of the application of policy to an individual case, although that is a part of its role. It does not exist merely to add another layer of decision-making and so improve the prospects of producing correct or preferable outcomes in that sense. There might be other ways of achieving the same object.

The Tribunal also has a function of ensuring that decisions within the areas of its jurisdiction conform to law; and in that respect, together with the judiciary exercising judicial power under the Constitution, or statute, including the ADJR Act, it reinforces public confidence that the government respects the rule of law. Diminishing such confidence involves a political, as well as a social, cost.

It would be dangerous for any modern government to disregard what some commentators, notably in Canada, have come to describe as the ethos or culture of justification which pervades modern liberal democracies. This has been identified as an aspect of the rule of law²¹. The present Chief Justice of Canada, Chief Justice McLachlin, writing extra-judicially in 1998 on the role of administrative tribunals in that country said²²:

'Where a society is marked by a culture of justification, an exercise of public power is only appropriate where it can be justified to citizens in terms of *rationality and fairness*. Arbitrary decisions and rules are seen as illegitimate. Rule by fiat is unaccepted. But these standards do not just stand as abstract rules. Indeed, most importantly, the ability to call for such a justification as a precondition to the legitimate exercise of public power is regarded by citizens as their *right*, a right which only illegitimate institutions and laws venture to infringe. The prevalence of such a cultural expectation is, in my view, the definitive marker of a mature Rule of Law'. (Emphasis in original)

The development in the Australian community of a cultural expectation that those in authority are able and willing to justify the exercise of power is one of the most important aspects of modern public life. There are, of course, different techniques of justification, appropriate to different conditions and circumstances. Justification does not merely mean explanation.

I have been at pains to reject any suggestion that I regard merits review of decision-making by the judicial method as the paradigm of public justification. It is appropriate in some circumstances, and not in others. My point is that unless both merits review, and judicial review, of administrative action are understood against the background of a culture of justification, they are not seen in their full context.

Australian administrative law, for reasons related to our Constitution, has not taken up the North American jurisprudence of judicial deference²³. Neither, on the other hand, has it embraced the wide English concept of abuse of power as a basis for judicial intervention in executive decisions²⁴. Considerations of jurisdiction and legality remain the focus of judicial review of administrative action. Subject to any relevant statutory qualification, failure to accord procedural fairness involves excess of jurisdiction²⁵.

However, issues of jurisdiction and legality are debated in a context in which the rights of citizens, sometimes fundamental human rights, are at stake. Within the executive function, provision for independent and expert merits review of decisions of a kind appropriate for such review makes an important contribution to a government's apparatus of justification. What will be involved in merits review, especially in the case of decisions with a policy content, may depend upon the nature of the decision and the kind of policy. It is an expression that is sometimes used to contrast limited concern with jurisdiction.

I should refer to another aspect of the existence of executive merits review by a Tribunal which functions independently of a Department whose decisions are reviewed. It appears to me that a system of administrative merits review that meets the expectations fostered by a culture of justification relieves the judicial branch of government of pressures to expand judicial review beyond its proper constitutional and legal limits.

Federal courts can mark out and respect the boundaries of judicial review the more easily where there is a satisfactory system of merits review. This has beneficial consequences for the relations between the three branches of government, and relations between the judicial branch and the public.

All forms of independent review of executive decisions have implications that are, in the widest sense, political. In that sense, acceptance of the legitimacy of the exercise of judicial power is a political matter which cannot be ignored. The acceptance of its legitimacy strengthens the role of judicial power in the maintenance of the rule of law. It does not weaken, but strengthens, the judicial arm when judicial power is seen to be exercised constitutionally.

Finally, I should mention a topic that is perhaps psychological or, in a sense, environmental. During the 19th century, when the Privy Council was the ultimate court of appeal in the British Empire, this was said of it ²⁶:

[T]he controlling power of the Highest Court of Appeal is not without influence and value, even when it is not directly resorted to. Its power, though dormant, is not unfelt by any Judge in the Empire, because [the judge] knows that [the] proceedings may be the subject of appeal to it'.

Within the Australian civil and criminal justice system, that applies to the High Court, even though we only hear about 70 appeals a year. It is a reason why we do not strictly confine special leave to appeal to cases which raise issues of general importance. No judge is completely free from the possibility of appellate oversight, including the oversight of a final court of appeal, even in what might seem like a routine and unimportant case.

The criteria for granting special leave include a reference to the interests of justice. Responding to the interests of justice is something that the court cannot abandon, however heavy the pressure of its workload. Such responses have an effect that percolates through the entire system. Similarly, within the executive branch, the capacity of citizens to invoke the Tribunal's jurisdiction must have an effect on the atmosphere in which decisions are made. The influence may be indirect, and in some cases even fairly remote. Yet, even then, it promotes good governance.

Notes

- 1 Mason, 'Administrative Review: The Experience of the First Twelve Years' (1989) 18 Fed L Rev 122 at 126-127.
- 2 Ibid at 126.
- 3 *Re Drake and Minister for Immigration & Ethnic Affairs (No 2)* (1979) 2 ALD 634.
- 4 (2002) 208 CLR 460.
- 5 (1978) 140 CLR 120.

- 6 (1980) 145 CLR 266.
- 7 (1868) LR 3HL 330.
- 8 *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520.
- 9 *Transco plc v Stockport Metropolitan Borough Council* [2004] 2 AC 1.
- 10 Justice Garry Downes AM 'Government Agencies as Respondents in the Administrative Appeals Tribunal', paper delivered to Australian Government Solicitor, Government Law Group, Canberra, 16 June 2005, p 6.
- 11 Justice Garry Downes AM 'The Use of Expert Witnesses in Court and International Arbitration Process', 16th Inter-Pacific Bar Association Conference, Sydney 3 May 2006, p 2.
- 12 Justice Garry Downes AM 'Why does Australia have a General Review Tribunal', Address to the New Zealand Chapter of the Council of Australasian Tribunals, Wellington, 7 October 2005.
- 13 Sir Gerard Brennan, 'Twentieth Anniversary of the AAT: Opening Address' in *The AAT – Twenty Years Forward* ed John McMillan at 8.
- 14 cf *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277.
- 15 New Chief Executive Officer and Principal Registrar of the Federal Court of Australia.
- 16 *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at 109 [40].
- 17 *Swain v Waverley Municipal Council* (2004) 220 CLR 517.
- 18 AAT Annual Report 2004-2005 – 'Reader's Guide'.
- 19 AAT Annual Report 2004-2005 p 22.
- 20 Administrative Review Council, *Scope of Judicial Review*, Report No 47, April 2006 at p 37.
- 21 See, for example, Dyzenhaus, Hunt & Taggart, 'The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation', (2001) 1 OUCJ Pt 1, p 5.
- 22 McLachlin, 'The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law' 12 C.J.A.L.P 171 at 174.
- 23 *Canada (Director of Investigation & Research) v Southam Inc* [1997] 1 S.C.R 748; cf *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135.
- 24 *R v North and East Devon Health Authority*; Ex parte Coughlan [2001] QB 213; cf *Re Minister for Immigration and Multicultural and Indigenous Affairs*; Ex parte Lam (2003) 214 CLR 1.
- 25 *Re Refugee Review Tribunal*; Ex parte Aala (2000) 204 CLR 82.
- 26 Letter from the Registrar of the Privy Council dated 20 July 1871 quoted in Quick & Garran, *The Annotated Constitution of the Australian Commonwealth*, 1901, p 736.

Thank You Remarks

The Honourable Justice Garry Downes AM

30th

Thank you very much Chief Justice.

I was particularly struck by your core theme of the desirability for flexibility of procedures. It is an important issue for me. The Tribunal deals with a multi-million dollar tax case with senior counsel on both sides very differently to a social security case where the applicant is unrepresented. The cases are equally important. They both deserve full attention. But the process should be adapted to the nature of the issues and the circumstances of the parties.

One sometimes sees references to *adversarial* and *inquisitorial* procedures in discussions of process. I noticed that you did not use these rubrics. This may have been because, although they can convey an instant picture, the vice of their use is to suggest two conflicting, even mutually exclusive, methods. I prefer your emphasis on adaptability and flexibility. The management of each matter should reflect its own facts and circumstances.

Please now join us for cocktails in King's Hall and then for dinner in the Parliamentary Dining Room after we first thank the Chief Justice again for his thought provoking address.



AAT – 30th Anniversary Speech

30th

*The Honourable Sir Gerard Brennan AC KBE
First President of the Administrative Appeals Tribunal and
former Chief Justice High Court of Australia*

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.



Remarks by the Attorney-General

*The Honourable Philip Ruddock MP
Attorney-General of Australia*

30th

Acknowledgements

First, may I acknowledge the traditional owners of the land we meet on – the Ngunnawal People – and pay my respects to their elders, both past and present.

Other Acknowledgements

Chair – The Hon Justice Garry Downes

The Hon Murray Gleeson AC

The Hon Sir Gerard Brennan AC KBE

Distinguished guests

Ladies and gentlemen

Introduction

Let me start by thanking the President of the Administrative Appeals Tribunal, the Hon Justice Garry Downes, for inviting me to say a few words at tonight's 30th anniversary dinner.

I was in Parliament 30 years ago when the legislation establishing the AAT was passed.

So I am particularly pleased to have been given this opportunity to reflect on how the AAT has become an integral part of Australia's legal system.

The Importance of Administrative Law

As you know, administrative law is about the rule of law – about ensuring that government decision-makers are accountable, and that the decision-making processes are fair and transparent.

The Commonwealth tribunals that review the merits of such decisions play a crucial role in maintaining public confidence in the system as a whole, and upholding the principles of open and accountable government.

Australia's System of Administrative Law

Our system of administrative law is one of the fairest and most sophisticated of any common law country – and the AAT sits at its peak.

Since it opened on the 1st of July 1976, the AAT has grown from what some saw as a rather radical initiative, to become a highly successful and respected Australian institution.

A Senate Committee report released last year described the AAT as having an impeccable reputation¹.

This reputation has been well earned, and it brings credit to the entire Australian justice system.

International Interest in the AAT

In fact, the AAT's reputation has attracted attention from jurists and academics around the world.

For example, Australia's administrative law system, and the AAT, featured prominently in the major tribunal reform project that was recently undertaken in the United Kingdom.

The UK reforms drew on the experience of the AAT as Australia's top-tier administrative review tribunal.

The concept of 'merits review', and the extensive use of alternative dispute resolution in the AAT were also of particular interest to the UK.

This is a great endorsement.

Conclusion

The AAT – rightly – leads the world in administrative law innovation and best practice.

This is an achievement that we should be celebrating.

So let me finish by expressing my congratulations to the AAT on its first – very successful – 30 years, and by extending my best wishes for the next – even more successful – 30 years.

Notes

- 1 Senate Foreign Affairs, Defence and Trade References Committee: 'a reputation [that] is impeccable'.



Administrative Appeals Tribunal 30th Anniversary

30th

*The Honourable Chief Justice of
Western Australia Wayne Martin
Chief Justice of 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.

**Administrative
Appeals Tribunal**

1976 – 2006