

ADMINISTRATIVE APPEALS TRIBUNAL 30th ANNIVERSARY;

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OUTCOME, PROCESS AND THE RULE OF LAW

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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, and 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 1970's¹⁴. 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 s 33, stressed informality of procedure, but in s 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 last 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 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 s 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 1000 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 1970's. 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 it²⁶:

"[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.

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- 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, p2..
- 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 p22.
- 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 OJCLJ Pt
1, p5.

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- 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.