ALTERNATIVES TO JUDICIAL REVIEW OF ADMINISTRATIVE ACTION -THE COMMONWEALTH OF AUSTRALIA'S ADMINISTRATIVE APPEALS TRIBUNAL

(Unfootnoted Draft)

I. THE REMEDIAL REFORM PHENOMENON

Beginning in the early 1960's there came to be a heightened concern throughout the British Commonwealth with perceived inadequacies in the existing remedies of administrative law and judicial review through the prerogative writs in particular. Professor K.C. Davis' 1961 review of the first edition of de Smith and his American perception that the prerogative writs should be thrown "into the Thames River, heavily weighted with sinkers to prevent them from rising again" apparently struck a cord with some Commonwealth jurisdictions.

Nevertheless, the first manifestation of this concern with the adequacy of the existing modes of relief was not an attack on the remedies of judicial review but, starting in 1962 in New Zealand, involved the creation of an alternative method of securing redress for wrongful administrative action in the shape of the Scandanavian-inspired office of the Ombudsman. The Ombudsman idea fairly rapidly took hold throughout the Commonwealth and illustrative of this is the fact that twenty years later only Prince Edward Island, the Territories and the federal jurisdiction are without one in Canada.

The next initiatives were in fact largely Canadian. In 1965, Quebec adopted a modest reform of the prerogative writs with its combination of the two remedies of certiorari and prohibition into a new mode of relief, that of evocation. Shortly thereafter, the McRuer Commission reported in Ontario and the outcome of this was a significant reform of the whole fabric of judicial review of administrative action, the key features of which were the adoption of a comprehensive judicial review remedy in the Judicial Review Procedure Act, the creation of a Divisional Court to handle, inter alia, administrative law matters, and an attempted codification of the principles of natural justice in the Statutory Powers Procedure Act. Of the Canadian provinces, only British Columbia followed Ontario in any of these steps. It, as New Zealand had done earlier, enacted a Judicial Review Procedure Act in 1975. However, in other provinces such as Alberta and Nova Scotia, reforms to the common law system of judicial review were achieved as part of general revisions of the civil procedure rules and this method of attack on the procedural difficulties of traditional judicial review was also followed in other Commonwealth jurisdictons, notably New South Wales and, more recently, and somewhat more dramatically, the United Kingdom.

Canada also led the way in another respect. As a result of increasing, though questionably justifiable concern with the role of the provincial superior courts in relation to federal statutory authorities, the Federal Court Act of 1970 contained provisions which essentially transferred that

jurisdiction from the provincial superior courts to the newly-created replacement for the Exchequer Court of Canada. Moreover, whatever one's view of the language of that statute or of the adequacy of provincial superior court review of federal authorities before 1970, the fact of the matter remains that the existence of the Federal Court Act has clearly contributed significantly to the development of an immense body of federal judicial review law in this country. The expansion of the extent to which it is sought to hold federal authorities accountable through judicial review has, without prejudging whether it is a good thing or not, been truly remarkable.

II. THE COMMONWEALTH OF AUSTRALIA'S AWAKENING

This whole remedial reform movement was somewhat slower in coming to the federal level in the Commonwealth of Australia, perhaps partly because, as in Canada, there was no federal court exercising general judicial review jurisdiction: that task was performed by the state and territorial courts and also by the High Court of Australia as part of its significant original jurisdiction, some of which, such as the authority to issue mandamus, was constitutionally-protected.

However, starting in late 1968, a Committee headed by the now notorious or heroic (depending on one's political and constitutional persuasions) Sir John Kerr, then a judge of the Commonwealth Industrial Court, engaged in a consideration of the way in which the remedies of administrative law could be improved

at the Commonwealth level in Australia. The background to this Committee was the acceptance in principle of the desirability of an Australian Federal Court and the consequent necessity to consider the role of that Court in judicial review matters. Nevertheless, the Committee's terms of reference clearly encompassed the possibility of other mechanisms for securing redress for perceived wrongs caused by statutory authorities and this Committee, as well as one particularly of the two that followed it, were clearly of mind to consider the issue in a far broader context than traditional judicial review.

The primary philosophy of the Kerr Committee and its successors is well-expressed in paragraph 11 of its August 1971 Report:-

> 11. Further, we have taken the view that at a time when there is vested in the administration a vast range of powers and discretions the exercise of which may detrimentally affect the citizen in his person, rights or property, justice to the individual may require that he should have more adequate opportunities of challenging the decision which has been made against him, not only by obtaining an authoritiative judgment on whether the decision has been made according to law but also in appropriate cases by obtaining a review of that decision.

and this was scarcely challenged, either politically or academically, in the whole of the process that followed, notwithstanding the fact that that process encompassed the most controversial and turbulent period in the history of Australian politics and two changes of government in a system where the two major parties are far more philosophically distinct than they are in this country.

III. The Australian Package

The ultimate product of the process (indeed the last may still not have been seen) was a series of Acts, starting in 1975 that effected far greater and more dramatic changes than any of the other reform exercises in the British Commonwealth. While the Commonwealth of Australia may have been slow climbing on the reform bandwagon, once it got rolling the rest of the field was rapidly overtaken.

The most novel and potentially interesting development came first. This was the Administrative Appeals Tribunal Act of 1975. This Act created two bodies: an Administrative Appeals Tribunal to act as an appeal authority from the merits of decisions made by disignated statutory authorities and also an Administrative Review Council whose function in broad terms was to monitor the operation of what became known as "the new Administrative Law" and to make reform recommendations to the Minister responsible.

Next followed the Federal Court Act of 1976 and linked to this was the Administrative Decisions (Judicial Review) Act of 1977, though the latter was not proclaimed into force until October 1, 1980. In terms of administrative law jurisdiction, the Federal Court not only was given largely exclusive general judicial review jurisdiction with respect to federal statutory authorities by the 1977 statute but was also created as a body to hear appeals on questions of law from and entertain cases stated by the Administrative Appeals Tribunal. What was most striking about this legislation was that, in the Administrative Decisions

(Judicial Review) Act, an attempt was made to codify the existing grounds of judicial review and the expansive way in which this was done seemed clearly expressive of a philosophy that the scope for judicial review of administrative action should be as broad as is possible without going as far as explicitly giving the courts authority for a de novo consideration of the merits of the matter before it. The following list of grounds in section 5 of the Act provides cogent evidence of this:-

> 5.(1) A person who is aggrieved by a decision to which this Act applies that is made after the commencement of this Act may apply to the Court for an order of review in respect of the decision on any one or more of the following grounds;
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> (a) that a breach of the rules of natural justice occurred in connexion with the making of the decision;
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> (b) that procedures that were required by law to be observed in connexion with the making of the decision were not observed;
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> (c) that the person who purported to make the decision did not have jurisdiction to make the decision;
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> (d) that the decision was not authorized by the enactment in pursuance of which it was purported to be made;
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> (e) that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made;
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> (f) that the decision involved an error of law, whether or not the error appears on the record of the decision;
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> (g) that the decision was induced or affected by fraud;
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> (h) that there was no evidence or other material to justify the making of the decision;
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> (j) that the decision was otherwise contrary to law.
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> (2) The reference in paragraph (1)(e) to an improper exercise of a power shall be construed as including a reference to
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> (a) taking an irrelevant consideration into account in the exercise of a power;
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> (b) failing to take a relevant consideration into account in the exercise of a power;

(c) an exercise of a power for a purpose other than a purpose for which the power is conferred;
(d) an exercise of a discretionary power in bad faith;
(e) an exercise of a personal discretionary power at the direction or behest of another person;
(f) an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case;
(g) an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power;
(h) an exercise of a power in such a way that the result of the exercise of the power is uncertain; and
(i) any other exercise of power in a way that constitutes abuse of the power.

(3) The ground specified in paragraph (1)(h) shall not be taken to be made out unless
(a) the person who proposes to make the decision is required by law to reach that decision only if a particular matter is established, and there is no evidence or other material (including facts of which he is entitled to take notice) from which he can reasonably be satisfied that the matter is established; or
(b) the person proposes to make the decision on the basis of the existence of a particular fact, and that fact does not exist.

Between the Federal Court Act and the Administrative Decisions (Judicial Review) Act came the Ombudsman Act of 1976. This established a Commonwealth Ombudsman along the basic lines adopted elsewhere with the authority of the Ombudsman restricted essentially to making recommendations and the decisions of Ministers and Cabinet (though not advice to those bodies) excluded. On the other hand, his jurisdiction encompassed the ability to rule that an administrative decision was just plain "wrong". Finally to complete the picture to this point, there has recently been the enactment Freedom of Information legislation.

In fact, the only omission from this complex network of review mechanisms is an equivalent of Ontario's Statutory Powers Procedure Act. However, it seems as though the Government still intends to move in this direction and, even now, procedural fairness has not been entirely neglected; not only is a failure to observe procedural fairness obligations made a specific ground of judicial review but, as with its roughly equivalent Ontario counterpart (the Statutory Powers Procedure Rules Committee), the Administrative Review Council is specifically charged to

> ... inquire into the adequacy of the procedures in use by tribunals or other bodies engaged in a review of administrative decisions and to make recommendations to the Minister as to any improvements that might be made in those procedures.

Administrative Decisions (Judicial Review)

The Act also provides that certain statutory authorities are subject to an obligation to provide reasons for their decisions.

Thus, from a situation where a scant eight years ago the only official recourse against most exercises of federal statutory authority was to invoke the traditional judicial review jurisdiction of the state courts and High Court of Australia, the Commonwealth of Australia has moved far beyond other recent innovations in this area to a position of theoretically intense and multi-faceted scrutiny of the administrative process.

It is not, in fact, easy to answer why this has been the case. A superficially attractive explanation for this phenomenon may, however, be found in the nature of grass

roots administrative law at the federal level in Australia. As opposed to the situation in Canada, the expert, independent regulatory agency or tribunal is not all that common in Australia. Administrative law still tends to be largely what civil servants or Ministers do by virtue of powers conferred on them by statute and it is more individually-oriented and less a process of broad regulatory thrusts affecting various segments of the population in different ways. Given this and some readily recognizable suspicion of government generally and civil servants as a class, there was probably a far greater chance of such extensive procedures being established federally in Australia than in Canada, particularly when this was combined with a large dose at the theoretical level of what is at times regarded as liberal philosophy - the courts are the citizen's essential bulwark against the abuse of power by statutory authorities.

What is significant, however, is that for a while now it has become apparent that the degree of commitment to the philosophy itself as well as the particular legislative package has been on the wane and, in the course of concentrating on one particular facet of that package (the Administrative Appeals Tribunal), I will attempt to identify the reasons for this disenchantment on the part of some. I also want to suggest that, while some of these reasons have to do with some peculiarly Australian conditions or particular events, there comes a point where to provide a multitude of avenues for the challenging of administrative action may be counterproductive not only in terms

of the administrative process itself but also in terms of those whom the reforms are primarily intended to aid: individuals and groups affected by that process.

IV. THE ADMINISTRATIVE APPEALS TRIBUNAL

During the 1980-81 academic year, I spent a sabbatical leave in Australia financed by my University and the Social Sciences and Humanities Research Council of Canada, one of the major purposes of which was to examine the functioning of the Administrative Appeals Tribunal with a view to assessing the possible application of such an approach to review either federally or provincially within Canada. Suffice it to say at the outset that my admittedly limited exposure to the Tribunal's functioning left me very sceptical about the appropriateness at least of that particular model for any Canadian jurisdiction. Now, some eighteen months later,I am somewhat hesitant to be quite so dogmatic, partly because one is always careful about making essentially present judgments on the basis of what may be out of date information and, related to this, a somewhat greater willingness on my part to believe that at least some of the problems of the Tribunal were either a passing phase or were the result of some rather peculiar events. Nevertheless, there are certain characteristics of the model that trouble me.

Basically, the Tribunal's jurisdiction consists of matters originally assigned to it in the Schedule to the Administrative Appeals Tribunal Act and subsequently added to by

legislative action. While, however, it was not set up as a body possessing general appellate jurisdiction over the affairs of all federal statutory authorities, the philosophy behind the tribunal's creation was clearly that it should be as near to general in coverage as was administratively feasible. To quote from the First Annual Report of the Administrative Review Council's survey of the legislative history:-

> 25. One essential concept of a general appeal tribunal is that it should provide for appeals from as many types of decisions as possible.

Indeed, since its inception, one of the principal concerns of the Council has been the degree of commitment of the government to that philosophy with the Council endeavouring with a reasonable amount of success to push the government to follow through on that fundamental assumption on which the Tribunal was founded.

Thus the Tribunal has become an agency for the determination of appeals on the merits in such diverse matters as deportation orders, broadcasting licence transfers, claims for compensation against the Post Office for loss of mail, refusal of recreational pilots' licences, Australian Capital Territory rating assessments, customs and tariff levies, and various forms of social security benefit decisions. Some of these jurisdictions involve a very high volume of initial determinations potentially subject to appeal (e.g. social security benefit denials), some depend upon very complex factual inquiries, others raise difficult and highly specialised areas of law (customs and tariffs), certain types of decisions have a high

public and political visibility (Broadcasting licence matters, certain deportation cases) while many involve nice short, sharp questions of law and fact.

Because of this incredible variety, there seems a clear need for such a Tribunal to possess the potential for both procedural flexibility and innovation in the way that certain matters are handled, e.g. high volume jurisdictions and, indeed, section 33 of the Act seemingly goes a considerable way in that direction by providing that the procedure to be followed is in the discretion of the tribunal, mandating that there be as little formality and technicality and as much expedition as possible and doing away with any requirement to follow the strict rules of evidence. In addition, the Act provides a relatively simple mechanism for invoking the jurisdiction of the Tribunal and this has apparently worked out in practice in proceedings commenced in Canberra, the principle registry of the Tribunal.

Nevertheless, my impression gained from fairly regular attendance at the Tribunal's frequent Sydney sittings during 1980-81 was that there was little difference between the way in which this Tribunal operated and what one would expect of a regular court on whom a similar appellate jurisdiction had been conferred. The way in which the proceedings were conducted seemed to make representation by counsel a decided advantage, if not quite an essential, and, with the proceedings often presided over by a Federal Court judge who spent the rest of his days dealing with federal bankruptcy matters in the same courtroom, the chances for a real transformation taking place

were not all that good despite the absence of the normal wigs and gowns of both counsel and adjudicators. Moreover, in New South Wales with its divided Bar, it was not unusual to witness the spectacle of a three person tribunal confronted by a Queen's Counsel, his junior and a solicitor on both sides plus two or three departmental monitors and this irrespective of the matters at stake. Not unnaturally, this judicial panoply also had an effect on the way proceedings were conducted with the presentation of evidence, argument and submissions very closely approximating the traditional judicial model in all cases.

There were, however, some signs that the administrators of the Court, the judges, and the Administrative Review Council were beginning to recognize the problems with this method of proceeding and, indeed, the hesitation of the government in conferring certain types of high volume jurisdiction on the Tribunal was also probably in part at least related to this. Thus, while I was there, more attention was beginning to be paid in some cases to informal methods of gathering evidence, and, also the use of preliminary conferences to clarify issues and narrow the scope of the formal hearing was increasing. Subsequently, the legislation has also been amended to enable greater use to be made of adjudicators other than Federal Court judges. Aside from the contribution that the mere presence of such judges obviously made to the whole courtroom atmosphere, this particular feature also gave rise from time to time to embarrassing problems of judicial comity when a Federal Court

judge of equal status had to determine appeals on issues of law from a Federal Court judge sitting in or as the Administrative Appeals Tribunal. Such a situation posed clear credibility problems for both the new Court and the new Tribunal.

How far, however, all these palliatives will go in forcing the Tribunal to be more flexible and less judicial in at least certain contexts is, however, questionable. Of course, at the end of the day, the major influence in this direction may be the practical one that, as a body with limited resources, the Tribunal may have been forced to adapt now that the government has moved and conferred on it more high volume jurisdiction work.

During my stay in Australia, one of the other problems facing the Tribunal was quite clearly the politically controversial nature of some of its more high visibility jursidictions, a situation that was in certain instances, in my view, exacerbated by the tribunal's handling of those jurisdictions.

One dramatic example was provided by an appeal from the Australian Broadcasting Tribunal's failure to sustain a takeover of a Melbourne television station by the all pervasive Rupert Murdoch. While the appeal was pending before the A.A.T., the government was publicly issuing statements about the necessity to curb the powers of the Broadcasting Tribunal and there was never far from the surface the threat that a decision of the A.A.T. sustaining the Tribunal's decision might be reversed legislatively. At the same time, the A.A.T. was confronted by an

application by the opposition Australian Labour Party to be given standing on the appeal. Clearly, this was not the kind of situation in which a relatively new Tribunal anxious to establish its credibililty and independence would willingly become embroiled.

A more pervasive problem was, however, presented by the tribunal's jurisdiction under the Migration Act, 1958 to hear appeals by aliens subject to a Ministerial deportation order because of conviction of crimes carrying with them a possible sentence of death or a year or more in gaol. This jurisdiction is exercisable by a Presidential Member of the Tribunal sitting alone and is not a true appellate jurisdiction in the sense that the Tribunal only has the authority to either affirm the ministerial deportation decision or to remit the matter back to the Minister with a recommendation.

Aside from the fact that there are always potential threates to the integrity and public recognition of a body such as this when its decisions may or may not be respected by a political authority, the Tribunal also suffered from this jurisdiction by reason of the fact that, perhaps not unnaturally, these proceedings tended to be the most bitterly and adversarily contested of all matters coming before the Tribunal. They also, in terms of simply the percentage of the cases dealt with by the Tribunal, took up a grossly disproportionate amount of the time of Presidential members of the Court. The Tribunal also exercised this jurisdiction under the glare of newspaper

publicity in part because crime and criminals are major concerns of the popular press in Australia but, in particular, because some of the appellants had either been involved or suspected of involvement in organised crime and the cultivation and distribution of massive quantities of illicit drugs, a problem which the enforcement authorities were having a great deal of difficulty containing. To therefore recommend that an appeal be allowed in one of these cases, as the Tribunal sometimes did, was calculated to create popular as well as police and government resentment.

This resentment was not in any way decreased by aspects of the way in which the Tribunal handled this role. Thus, despite the fact that the Minister had laid down policy guidelines as to how he was going to exercise his discretion in these deportation matters, the Tribunal and, ultimately, the Federal Court intimated that this policy could not be sacrosanct when there was a statutory appeal on the merits. Moreover, some judges were clearly less inclined to accord a degree of deference to the wisdom of such a policy than others. Secondly, and this was certainly the single most important contribution to the length of these proceedings, the Tribunal's attitude towards the offence for which the deportee had been charged was that, while the conviction itself could not be challenged, the Tribunal could take into account all of the circumstances pertaining to the commission of that offence. In reality, this had the effect of converting many deportation appeals into a de facto retrial of the original charges. Finally, when all of this was coupled with

the Tribunal's general attitude on onus of proof that the decision at first instance was neither presumptively correct nor presumptively incorrect, it is not surprising that there came to be a sense that the tribunal simply did not appreciate the dimension of the problem that the police and immigration authorities had to handle.

Of course, none of the matters that I have raised in relation to the Broadcasting and Migration jurisdiction of the Administrative Appeals Tribunal are a necessary incident of the creation of a general administrative review body of this type. However, they do speak to a couple of dangers in such a system of appeals. In a constitutional framework where judges are "meant" to confine themselves to judicial matters and not resolve policy issues, and where policy is in fact much more of a covert rather than an overt part of regular judicial decision-making, the sudden judicialisation of a broad range of policy issues has the potential to produce desenchantment on the part of those now subject to such review and, in some instances, a tendency on the part of those with this "new" power to flex their muscles. Such a conincidence of attitudes can, of course, present at least teething problems for an agency such as this. Indeed, the problem has been exacerbated in Australia not only because traditional judicial attitudes and functioning have been somewhat more conservative than they have been in Canada but also because the administration has had to face up to not just the Administrative Appeals Tribunal but a veritable plethora of other review mechanisms as well. When these reforms have in part at

least been the result of suspicion of the civil service and the extent of civil service power and when the new system is perceived in some at least government quarters as involving the imposition of inappropriate, non-expert review of expert decision-making, the prognosis for an at all compatible relationship between reviewer and reviewed (at least initially) is not all that good.

Two recent decisions of the High Court of Australia on the scope of traditional judicial review of administrature may also not have improved matters. Expressly excluded from the ambit of the Administrative Decisions (Judicial Review) Act are decisions of the Governor General. However, this has not stopped the High Court from holding that the review of such decisions is available on a residual common law basis and then in another context, that the Royal Representative is at least sometimes subject to duties of procedural fairness. In isolation, these decisions are arguably legitimate but, in the context of the recent reforms, they obviously caused considerable consternation. Thus, in dissent in one of the cases, Murphy J., a Labour Party appointee to the Court, railed in support of political accountabililty only in such matters:-

> This does not mean that standards of good faith, fair dealing, natural justice and propriety are not applicable. They are, but they are political standards enforceable by the political process, sometimes very effectively and sometimes ineffectively.

Even the outgoing Governor General, former Law Professor, Sir Zelman Cowen was moved to comment:-

> For my part, let me say - even if I am to be torn apart for saying it - that I have serious doubt, especially in what I conceive as a democratic framework of society - whether this is a role for judges, or one to which judges ought to aspire. I think that what has been done in Australia in the way of administrative law reform is exciting, remarkable and impressive, but in some respects I wonder whether it has not gone too far.

Once again, I may be subject to the criticism that I have concentrated on the peculiarities of the Australian political and judicial scene and have not generalized sufficiently nor been able to see through or beyond those quirks. Nevertheless, I think the experience is instructive in terms of the desirability making wholesale changes to our administrative remedies fabric and, more particularly, the wisdom of proceeding in the direction of an A.A.T. or Conseil d'Etat model.

V. CONCLUSIONS

In concluding, however, let me be somewhat more concrete about my criticisms of the A.A.T. model:-

1. Total generalization has proved difficult not only politically but for some very real structural reasons. The more generalist such a tribunal is, the more diverse, varied and flexible have to be its procedures for handling appeals and that obviously presents a major design problem.

2. Moreover, even if one was satisfied that the procedural problems had been overcome and one had eliminated the possibilitly that the Tribunal would revert to judicial type, there are still serious doubts as to whether or not one could

staff such a Tribunal so as to ensure that generally the second look at the matter on the merits was as likely to be as good as if not better than the first look. The range of powers potentially subject to appeal would be so vast as to cause doubts as to the capacity of anyone to do other than check for obvious abuses and, if that is all that can be expected, why on appeal on the merits? Isn't that what judicial review does at the moment?

3. Even if one was convinced that an appeal on the merits was desirable and a plethora of specially set up adminitrative appeal tribunals undesirable, there have to be serious questions as to whether a body such as an Administrative Appeal Tribunal is a necessary third tier of review in those jurisdictions where there is both judicial review and an effective office of the Ombudsman. There is also reason to take issue with whether specialist administrative appeal tribunals are necessarily a bad or inefficient method of dealing with issues when an appeal on the merits or even a more limited appeal is thought desirable.

All this is not, however, meant to suggest that the current Canadian scene is perfect in my view. I, in fact, have some sympathy for the idea of a specialised administrative law court for judicial review purposes. A federal Ombudsman would be a valuable addition. Also, as I have argued previously, there is a need for a rationalisation of existing statutory appeal procedures in the sense of ironing out obvious and indefensible inconsistencies as between various types of appeal and the grouping under a single umbrella of various statutory appeals with issues in common, as Quebec tried with the late, and in some

places lamented, Professions Tribunal. However, I am not at all convinced, particularly in the light of my Australian observations,as to the need for or desirability of a general administrative appeal body with authority to rule on the merits of virtually all exercises of statutory power.

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