"Theirs is Not to Reason Why": Problems of Subordinate Administrative and Judicial Tribunals Which Do Not Record Reasons For Decisions

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It would seem that there is no general rule in Anglo-Australian law which requires either judicial or administrative tribunals to give reasons for their decisions.[1] If a duty to record reasons is imposed upon a tribunal, whether it be a judicial or an administrative tribunal, by virtue of a statute, then, of course, there is no real problem: the tribunal must accompany any decision it gives with its reasons therefore, and if the tribunal neglects or refuses to comply with its statutory duty in this respect, then its duty may be enforced by appropriate means, e.g. by way of the writ of *Mandamus*.[2] Indeed, this expedient of imposing a statutory duty to record reasons upon tribunals of widely-varying descriptions sometimes finds expression in statutes which have, as their main purpose, the imposition of such a duty upon whole classes of tribunals of many administrative and quasi-judicial kinds: one of the best-known examples of such a statute is the United Kingdom *Tribunals and Inquiries Act 1971*, which stemmed from an English Act of the same name passed as far back as 1958.[3] However, it should be noted that, in the case of the English Act, the duty to give reasons is not automatically imposed; it does not come into operation unless and until the tribunal is requested to give its reasons by the party concerned.[4] On a more limited scale, the statute or regulations constituting a particular tribunal may impose a duty to give reasons upon that particular body.

The availability or non-availability of reasons for a tribunal's decisions is of great importance when one turns to the power of the ordinary courts of justice to correct and remedy errors made by inferior tribunals, whether those tribunals be administrative, quasi-judicial, or judicial tribunals proper, such as inferior courts of summary, or restricted, jurisdiction. The traditional role of the common-law courts in relation to courts of lower jurisdiction and inferior tribunals, particularly those tribunals which can be described as "quasi-judicial", has not been that of a true "appellate" nature; i.e. the common-law courts did not have jurisdiction, normally, to "re-hear" cases determined before inferior tribunals

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1. De Smith, S.A. *Judicial Review of Administrative Action*, 3rd ed., (London, Stevens, 1973) p. 128. Also see: *R.* v. *Gaming Board of Great Britain, ex p. Benaim and Khaida*, [1970] 2 Q.B. 417. However, it would be misleading to apply this statement, without some serious reservations, to judicial tribunals *stricto sensu*. In Australia at least, there seems to be a clear common-law obligation to give reasons placed upon magistrates and judges, where their decision in a matter involves the resolution of real issues of fact or substantial issues of law. This obligation is founded upon the idea that a disappoionted litigant's right of appeal to a higher tribunal (in those situations where such a right exists) would be gravely impaired if a first instance tribunal declined to give reasons: this would render the task of the appellate tribunal difficult if not impossible. This obligation applies particularly to first instance judicial tribunals, but would also seem to extend to the members of judicial tribunals intermediate in the appellate hierachy. For some Australian examples of this obligation, see: *Donges v. Ratcliffe*, [1975] 1 N.S.W.L.R. 502; *Pettit v. Dunkley*, [1971] 1 N.S.W.L.R. 376; and *Ex parte Reid*, (1943) 43 S.R.(N.S.W.) 207. That a similar position obtains in the United Kingdom, would seem to appear from *Starkie v. Starkie*, [1953] 2 All E. R. 1255, and *Sullivan v. Sullivan*, [1947] P. 50.
2. De Smith, *op. cit.*, at 129.
3. See S. 12 of both the 1958 and 1971 Acts.
4. See S. 12(I) of the 1971 Act.

and substitute their own opinion or decision for that of the lower tribunal; historically, the jurisdiction of the common-law courts over inferior courts and tribunals was "supervisory" by nature: exercised primarily at first by way of the Prerogative writs of Prohibition, *Mandamus*, and *Certiorari*, the courts' jurisdiction was limited to, in general, correcting errors of jurisdiction made by such tribunals, as well as correcting any errors of law made by a tribunal, so long as such errors of law patently appeared "on the face of the record".[5] If the tribunal gave reasons for its decision, and if those reasons appeared in the "record" of the tribunal's decision, then there was obviously a much greater chance of detecting any errors of law committed by the particular tribunal. If the tribunal, not being under any duty to give reasons, refrained from giving any, or, if having given reasons, those reasons were not incorporated in the "record" of the tribunal's adjudication, then, equally obviously, the task of the supervising court in discovering errors of law on the face of the tribunal's record was rendered correspondingly more difficult. Thus, given that, in general, the task of the Anglo-Australian common-law courts in relation to inferior administrative and quasi-judicial tribunals is, even today, basically "supervisory" in nature, rather than appellate in the true sense, it is still quite accurate to state that, the more the order or decision of an administrative tribunal is a "speaking" order or decision,[6] in the sense that such order or decision is accompanied by reasons as part of the official "record" of that tribunal's decision, then the easier it is for the courts to control and correct erroneous decisions of lower tribunals: the more the order of a tribunal is a "non-speaking" one in the sense that the order is not accompanied by reasons which are part of the official record, then the harder it is for supervising courts to detect and remedy errors of law committed by particular tribunals—if the order of the tribunal records a mere decision, and nothing else, then it is "the inscrutable face of a sphinx",[7] and is proof against most (though not all) judicial attack.

In examining this problem of the presence or absence of reasons in the decisions of subordinate administrative, judicial, and quasi-judicial tribunals (hereafter referred to simply as "tribunals"), it is proposed to deal with three broad questions:—

(1) In spite of the absence of any general rule requiring tribunals to furnish reasons for their decisions,[8] are there any circumstances in which a tribunal is obliged to give reasons?

(2) If a tribunal does furnish reasons for a particular decision, either voluntarily or pursuant to a statutory duty to do so, in what circumstances will those reasons be deemed to be part of the official record, so that a supervising court may have regard to those reasons when looking for "errors of law on the face of the record"? And finally,

(3) If a tribunal, not being under any duty, statutory or otherwise, to give reasons, chooses to refrain from giving any reasons, what inferences, if any, may a supervising court draw from this silence when scrutinising the tribunal's decision?

5. For a brief outline of the evolution of the common-law courts' "supervisory" jurisdiction over inferior judicial tribunals, see the judgement of Denning L.J. (as he then was) in *R.* v. *Northumberland Compensation Appeal Tribunal, ex p. Shaw*, [1952] I K.B. 338, at 346-348.
6. The terminology of "speaking" and "non-speaking" orders derives from the speech of Lord Cairns in *Walsall Overseers* v. *London & North Western Rly. Co.*, (1878) 4 App. Cas. 30, at 39.
7. This picturesque description of non-speaking orders was given by Lord Sumner in *R.* v. *Nat Bell Liquors Ltd.*, [1922] 2 A.C. 128, at 159.
8. See n. I.

Let us turn then to the first question posed above:

Something analogous to, although not identical with, a duty to furnish reasons for a decision is imposed upon a tribunal if that tribunal has reposed in it a power of decision which can be exercised only upon a finite number of *alternative* grounds fixed by law. If such a power is conferred, and a tribunal hands down a decision pursuant to that power, there is authority for the proposition that the tribunal must state *which* of those alternative grounds it has chosen to base its decision upon. It should be emphasized that this rule is only analogous to a duty to give reasons: although in the above circumstance, the tribunal must state in its decision which ground was relied upon, the rule does *not* go so far as to say that the tribunal is obliged to assign *reasons* to explain its choice of a particular ground of decision.[9] A case illustrating the nature and operation of this rule to state the grounds of a decision is *R.* v. *Sykes*.[10] In this case, a statute provided that "no application for ... a licence to sell ... beer ... shall be refused except upon one or more of the following grounds ...". Four grounds were then listed by the statute. The licensing justices rejected an application, refusing to state upon which ground they had done so. An English Divisional Court issued *Mandamus* to compel the justices to hear and determine the application according to law. Mellor J. said:

> "The justices may not be obliged to state the reasons which have induced them to refuse the licence on one of the four grounds ... but ... they ought to state on which of the four grounds ... they refused the licence, in order to justify their decision, and show that they were acting within their jurisdiction."[11]

Akehurst also suggests that this principle probably applies to the dismissal of those public office-holders, who, pursuant to the terms of their employment, cannot be dismissed at pleasure, but only for cause.[12]

It may also be that if a tribunal (or even a particular administrative officer) has vested in it (or him) a discretionary power which may be exercised in favour of, or against the interests of, any person, and if the tribunal is required to exercise that power "having regard to" certain matters specified in the statute or regulation which confers the power upon the tribunal, and if that discretionary power is exercised against the interests of the party concerned, then there is some modern Australian authority to suggest that if the aggrieved party asks *why* the power was exercised against him, he is entitled to a statement of the tribunal's reasons—and this, even though the aggrieved party may not be able to point to any statutory provision entitling him to such a statement of reasons. Authority to this effect may be found in the statements of two justices of the High Court of Australia in *Giris Pty. Ltd.* v. *Commissioner of Taxation (C'th.)*.[13] In this case, the appellant was disputing a liability to pay income tax imposed pursuant to S. 99A of the *Income Tax Assessment "Act." (C'th.) 1936-65*, upon the income of certain trust estates. By S. 99A(2), such estates would not attract tax if the Commissioner of Taxation was of opinion that it would be "unreasonable" to impose a tax upon particular trust estates. S. 99A(3) provided that, in forming his opinion as to what would be reasonable, the Commissioner was to have regard to certain specified matters, and "such other matters, if any, as he thinks fit". The appellant was assessed by the Commissioner to be liable to tax under S. 99A,

9. For a further discussion of this distinction between "grounds" and "reasons", see Akehurst, M., *Statements of reasons for Judicial and Administrative Decisions*, (1970) 33 M.L.R. 154, at 155-156.
10. (1875) I Q.B.D. 52. For a discussion of this and other similar cases, see Akehurst, *op. cit.*, 155-157.
11. (1875) I Q.B.D. 52, at 53-54.
12. Akehurst, *op. cit.*, at 157.
13. (1969) 43 A.L.J.R. 99.

and the Commissioner refused to exercise his discretion in the Appellant's favour. It would appear that there was no statutory provision giving the appellant any right to know why the Commissioner exercised his discretion against him. The appellant sought to have the assessment set aside on the grounds that S. 99A, under which the assessment was made, was an unconstitutional exercise of Commonwealth legislative power. This contention was turned down by all the judges, but two of Their Honours commented on the wide discretionary power reposed in the Commissioner. Barwick C.J. said as follows:

> "... in my opinion, the Commissioner is under a duty ... to form an opinion and the taxpayer is entitled to be informed of it, and upon the taxpayer's request, the Commissioner should inform the taxpayer of the facts he has taken into account in reaching his conclusion."[14]

Similarly, Windeyer J. stated:

> "...I have come to agree with the Chief Justice in thinking that the Commissioner's decision is not removed entirely from examination by the Court, because I think that he could be asked by a taxpayer to state the grounds of his opinion; and if asked, that he should do so."[15]

It is submitted that this is a welcome step in the right direction. There may well be reasons supportable on grounds of convenience and efficiency as to why the common-law has steered clear of developing a rule that tribunals (and persons acting in a similar capacity) are not obliged to give reasons for their decisions; but when the exercise of a power, whether it be administrative or judicial, can result in the interests of persons being placed at considerable hazard, be it financial or physical hazard, there is much to be said for the view, that at the very least, a person should be entitled at common-law to ask and be told the reasons why a particular discretionary power has been exercised against him. It is to be hoped that, in the absence of general Australian statutes of the type exemplified by the English *Tribunals & Inquiries Act*,[16] Australian courts will seize upon and exploit the strand of authority outlined by Barwick C.J. and Windeyer J. in the *Giris case*.

So far, this discussion has been concerned with the one or two loopholes which the common-law courts have, rather hesitantly, made in the rule which generally fortifies the position of tribunals against their decisions being impeached for error of law, viz. that such tribunals are not required to give reasons. Loopholes such as the suggested *Giris* principle are weapons which help the courts to gather the kind of information which is indispensable to the courts' effective discharge of their responsibilities of judicial review of inferior tribunals. However, it is probably true to say that, to a very large extent, the general law still insists that the information on the processes of administrative decision-making—without which the supervising courts are gravely handicapped in their efforts of review—must, as a general rule, be provided by way of the record, kept by the tribunal itself, of its own proceedings. It has already been explained why it is in the best interests of a tribunal to make sure that, insofar as it is not constrained to do otherwise by statute, its own record is as vague and brief as possible.[17]

It is because the common-law has ascribed such paramount importance to the "record" of the tribunal's adjudication as the primary source for the detection of error in the tribunal's processes, that attention must now be turned to the second

14. *Ibid.*, at 101. His Honour has reiterated this dictum in *Kolotex Hosiery (Aust.) Pty. Ltd.* v. *Commissioner of Taxation (C'th.)*, (1975) 49 A.L.J.R. 35 at 38.
15. *Ibid.*, at 106.
16. See nn. 3 and 4, and accompanying text.
17. See nn. 5, 6, and 7, and accompanying text.

broad question stated at the outset: If a tribunal has furnished reasons for a particular adjudication, to what extent do those reasons constitute a portion of the "record", for purposes of judicial review?

The statute constituting a particular tribunal or inferior court may, of course, solve the problem by simply requiring that the reasons for the tribunal's decision shall be put into writing and that those reasons will accordingly be incorporated into the record. This is the expedient adopted by the English *Tribunals & Inquiries Act*,[18] and is undoubtedly the most effective way of making sure that an inferior tribunal provides reasons which, if necessary, are available for scrutiny by a higher supervising court.

However, statutory instructions to tribunals in relation to the recording of the evidence and reasons upon which a decision is based, may fall short of a direct, unambiguous, incorporation of reasons and evidentiary findings into the official record: What is the position if the statute constituting a tribunal and its jurisdiction, directs that the tribunal's findings of fact, and the evidence therefore, be recorded in writing, but then goes on to provide a statutory "short form" of order or decision, which merely records the tribunal's decision, without including any reasons or evidence upon which the order is based? For instance, in the United Kingdom, the *Summary Jurisdiction Act 1848* greatly simplified the record, more or less removed the need for inferior courts to include recitations of reasons or evidence in their record of decision, and introduced simple, brief forms of convictions, which left a court of review with very little left, in the way of a detailed record, upon which to base any review. Similar types of "short form" convictions were introduced into Queensland by the *Justices Acts* in 1886. So, if a statute provides for evidence and reasons to be recorded, but omits these items from the official record of decision, are the former to be nevertheless regarded as part of the "record" for review purposes?

The answer would seem to be No—*if* the statute has expressly laid down a form of decision or order which omits reasons and evidence. The leading authority for this proposition is the Privy Council decision in *R.* v. *Nat Bell Liquors Ltd.*, in 1922.[19] In this case, the Board were concerned with an order of *Certiorari* to quash a conviction by a lower court of the defendant for an offence against a Canadian liquor statute, for alleged error of law on the face of the lower court's record. The alleged error concerned certain evidence which had been received and admitted by the lower court. By statute, the lower court was obliged to record the evidence in writing, but the statutory form of conviction omitted all reference to the evidence. Were the written depositions part of the "record" for purposes of review by *Certiorari*? The Privy Council held that the depositions, recorded pursuant to a statutory duty to do so, were nonetheless not part of the lower court's record—the latter was laid down in specific statutory form, and that form omitted to include the depositions.

Nat Bell may be regarded as a decision on particular statutory provisions, and thus limited, but it does seem to indicate a restrictive approach by the courts to the definition of "record", especially where the record has received a measure of statutory definition, in the case of a particular tribunal. That this restrictive view is probably the correct one in Queensland also, seems to be borne out by the decision of the Full Court of the Queensland Supreme Court in *R.* v. *Southern Division Railway Appeal Board, ex p. Noonan*, in 1930[20] (hereafter called *Noonan's case*). Noonan sought an order quashing a monetary penalty imposed upon him by the Railway Appeal Board ("the Board"), on the grounds of error

18. See S. 12(5) of the 1971 Act.
19. [1922] 2 A. C. 128.
20. [1930] St.R.Qld. 10.

of law disclosed by the reasons which the Board had seen fit to prepare in writing. There was no statutory duty incumbent on the Board to put their reasons in writing, and the form of order which the Queensland *Railway Acts* obliged the Board to prepare did not include the reasons for decision.[20a] The Board had volunatrily prepared its reasons and then attached them to its formal order. The Full Court held unanimously that the attached reasons did not form part of the Board's record, and thus the court could not inquire into the reasons. The judgements of Henchman and E.A. Douglas JJ. (Macrossan S.P.J. agreeing with the latter) show that the statutorily-prescribed "short form" of order, excluding any requirement to state reasons, was the factor which weighed equally heavily with E.A. Douglas J.'s view that, in any event, any error disclosed by the Board's reasons was not of a type which afforded Noonan grounds for relief.

Noonan's case is not as "hard line" a decision as the *Nat Bell case*, because in the latter case there was a statutory duty to record the evidence in writing, and yet the Privy Council held that that was still insufficient to constitute the record of evidence part of the official "record". On the other hand, in *Noonan's case*, there does not appear to have been any statutory requirement that the Board put its reasons in writing, so perhaps, there was a greater rationale for the court's decision not to treat the reasons as part of the record. Nevertheless, the fact remains that the members of the Full Court do appear to have concentrated, not upon the presence or absence of any duty to put reasons in writing, but upon the statutorily-prescribed "short form" of order. In this latter respect, *Noonan's case* is right in line with the Privy Council's narrow approach in *Nat Bell.*

The restrictive view adopted by the Privy Council in *Nat Bell* towards the definition of "record", which, it has been submitted, is also the correct view of the decision in *Noonan's case*, has received a measure of substantial support in the judgements of two members of the High Court of Australia in the case of *R.* v *District Court of Northern District of Queensland, ex p. Thompson*[21] (hereafter called *Thompson's case*).

In *Thompson's case*, the applicant had been "called up" for military service under the *National Service Act (C'th.) 1951-65*, and had applied to a Queensland District Court for an order exempting him from military service on the ground of conscientious objection, as provided for by the *National Service Act*. The District Court turned down his application, and Thompson asked the High Court for an order quashing the District Court's decision on the grounds of error of law on the face of the District Court record. The alleged error was in the District Court judge's reasons for judgement which he had prepared in writing. The main ground of the High Court's decision was that there was no error of law which afforded the applicant grounds for relief, but, in the course of the decision, two judges—McTiernan and Menzies JJ.—expressly considered the question of whether the District Court judge's reasons formed part of the official court record, so as to be examinable for error of law by a supervising court; indeed, Menzies J. expressly rested his decision upon his answer to this question.[22]

Both justices held that the reasons for judgement were not part of the District Court record, and thus not amenable to scrutiny by a supervising court for error of law. Both justices approached the problem by analysing the *National Service Act* and the Queensland *District Courts Act,* and the Rules made thereunder, in order to discover what form of order was comprised in the record of the District Court's decision, as authorised by the above statutes. The similarity of this ap-

20a. The statutory provisions relating to the form of the tribunal's order are discussed in *ibid.*, at 15, 22, and 26.

21. [1968] Argus L.R. 509.

22. *Ibid.*, at 519.

proach to that adopted by the Privy Council on the similar point in the *Nat Bell case* is obvious. The reasoning of McTiernan and Menzies JJ. on this issue is well exemplified by the following passage from the judgement of Menzies J.:

> "The National Service Regulations made under the Act provide forms for orders granting or refusing exemptions which are to be made in a court of summary jurisdiction. These provisions are hardly consistent with treating any reasons given ... as part of the record ..."[23]

And a little later on, His Honour says:

> "I have found nothing in the Act or the Rules—even if rr. 231 and 232 of the District Courts Rules apply—to require a judge of the court to put his reasons for judgement in writing or which constitute reasons put into writing as part of the court record."[24]

The reasoning of McTiernan J. on this point is almost identical with that of Menzies J.[25]

It will be noticed that both justices asked not one, but two, questions: (1) Did the statute require reasons to be included in the record of the tribunal's order? and (2) Did the statute require the reasons to be put into writing? The first question is the more important one of the two—in the *Nat Bell case*, the statute *did* require the reasons to be put in writing, but nevertheless, the Privy Council still held that the written reasons were *not* part of the record. Why? Because the *first* question posed above was answered in the negative, in the *Nat Bell case*. In *Thompson's case*, the second question, *as well as the first*, was answered in the negative; but, if the relevant statute in *Thompson's case had* required reasons to be put in writing, but with no mention of such reasons being included in the record of decision, would Menzies and McTiernan JJ. *still* have decided that the District Court judge's reasons were *not* part of the District Court record? If it be that the High Court require a negative answer to *both* the questions posed above, before written reasons are excluded from the record—whereas the Privy Council would seem to require a negative answer to only the first question posed above in order to effect this exclusion—then it would appear that the High Court may adopt a somewhat more lenient test in determining whether a tribunal's written reasons are a part of that tribunal's record. The question must remain a moot point, for the time being.

Up to this point, the cases considered—*Nat Bell*, *Noonan's case*, and the *Thompson case*—have all been concerned with the approach by the courts to a definition of the "record" of an inferior tribunal, where there has been some statutory provision relating to the format and content of the record of a tribunal's order or decision. It has been shown that, in general, the courts pay a fairly strict regard to any statutory provisions on the subject of tribunals' records, orders, and decisions. Some attention should now be given to another situation, which is merely a variation on the main theme. It is this: If a supervising court is faced with determining what is the "record" of a tribunal, *and there are no specific statutory provisions particularly relating to the format of the tribunal's record of decision*, then what criteria will guide the court in determining what constitutes the tribunal's record, for purposes of judicial review?

It will be necessary to look at the position in both England and Australia, but so far as the latter country is concerned, there is some authority which tends to indicate that, hopefully, the courts will adopt a somewhat more liberal stance, than is apparently the case where tribunals' records are the subject of statutory provision.

23. *Ibid.*, at 518.
24. *Ibid.*, at 519.
25. See McTiernan J. in *ibid.*, at 514-515.

Once again, attention must be turned to a decision of the Full Court of Queensland; in this instance, a case dating from 1962—*R.* v. *Tennant, ex p. Woods*.[26] The decision sought to be impugned for error of law in this case, was a land valuation handed down by the Queensland Land Court, and, again, the error of law allegedly appeared in the written reasons which the Land Court prepared, accompanying its determination of value. Again, the Full Court unanimously decided that the alleged error of law was not of a type appropriate to afford relief to the applicant, but the Full Court did, somewhat in passing, consider whether the error of law appeared on the face of the Land Court's record. The Land Court's decision took the format of one document (although consisting of several pages), headed with the word "Decision", followed by the court's reasons, and concluding with the court's determination of value. As noted before, the alleged error of law occurred in the reasons.[27] On this fact situation, the Full Court briefly considered what was the "record" of the Land Court. There appear to have been no relevant statutory provisions relating to the form of the Land Court's record of decision: if there were, they appear not to have engaged the attention of the Full Court—on this point anyway—and the remarks of Their Honours on the subject of what constituted the Land Court's "record" seem to have been framed on the assumption that there were no relevant statutory directions on this matter.

On the above facts, the members of the Full Court had no hesitation in deciding that the written reasons of the Land Court did form part of the official record of the Land Court's decision.[28] It would seem that the fact that the reasons and the determination were issued as more or less one physically united document, allied with the fact that reasons and determination were apparently contemporaneous in point of time, were the deciding factors in the view of the Full Court. Fairly obviously, these suggested tests of physical unity and contemporaneity are going to lead to a much-expanded notion of "official record", than is the case with the *Nat Bell*-type approach. It would also appear to be a rather obvious deduction that this more liberal approach towards constructing a "speaking"—and hence more easily-reviewable—order for a tribunal will probably only be utilised by supervising courts where there is an absence of clear statutory direction as to the form of a tribunal's record of decision.

So much for the Australian position in this matter of defining what is meant by a tribunal's "record"—what stance, if any, have the English courts adopted on the question? To this, attention must now be given.

With the post-Second World War advent of the closely-organised "welfare state" in the United Kingdom, and the consequent proliferation of multifarious welfare agencies, compensation tribunals, boards of review, and a whole host of administrative tribunals exercising quasi-judicial powers in one form or another, it is perhaps surprising that a more cohesive and authoritative definition of what constitutes the "record" of these tribunals, for purposes of review by the English High Court of Justice, has not yet emerged. Yet, such is the case. Since the passing of the first *Tribunals & Inquiries Act* in 1958, the need for a clear judicial definition of what is a "record" has undoubtedly declined to a large extent, as the Act clearly defines the "record" of those tribunals to which it applies so as to include in the record of a tribunal any written reasons it is asked to give.[29] Still, there are a number of English decisions decided prior to the *Tribunals & In-*

26. [1962] Qd.R. 241.
27. See counsel's description of this document in *ibid.*, at 244.
28. See Stanley J. in *ibid.*, at 247-248; and Wanstall J. in *ibid.*, at 257. (Mansfield C.J. agreed with Wanstall J.)
29. See n. 18, and accompanying text.

quiries Act coming into force, which relate to the pre-Act, or common-law, concept of what is a tribunal's "record", and these throw some valuable light upon the sorts of problems which have been discussed in previous pages.

The English courts, in the 1950's,—at least, those courts below the level of the House of Lords—developed a wide-ranging and flexible approach to the definition of "record"—at least in the absence of any statutory provision dealing with the composition of the "record" of particular tribunals. It will come as no surprise to learn that Lord Denning played a leading role in the modern development by English courts of a liberal doctrine defining the concept of "record".

The approach of the English Court of Appeal to this question is well summarised in the following *dictum* by Denning L.J. (as he then was) in the leading case of *R.* v. *Northumberland Compensation Appeal Tribunal, ex p. Shaw*[30] (hereafter called *Shaw's case*):

> "What, then, is the record? ... It has been said to consist of all those documents which are kept by the tribunal for a permanent memorial and testimony of their proceedings ... I think the record must contain at least the document which initiates the proceedings; the pleadings, if any, and the adjudication; but not the evidence, nor the reasons, unless the tribunal chooses to incorporate them. If the tribunal does state its reasons, and those reasons are wrong in law, certiorari lies to quash the decision."[31]

Although this style of approach was a marked improvement over the Privy Council's approach in the *Nat Bell* decision, Lord Denning did seem to be suggesting in the above passage that, even if a tribunal chose to give its reasons, those reasons would not become part of the record unless "... the tribunal chooses to incorporate them ...", into the record, presumably. By 1959, this un-Denning-like piece of coyness had disappeared, and it had been replaced by the following unambiguous statement of the position, taken from Lord Denning's speech in the House of Lords decision of *Baldwin & Francis Ltd.* v. *Patents Appeal Tribunal*[32]:

> "The court would not compel a tribunal to give its reasons if it did not wish to do so: but if it did so, it became part of the record then ..."[33]

This statement of the position with respect to a tribunal's voluntarily-conceived statement of reasons is diametrically opposed to the approach inherent in the judgements of Menzies and McTiernan JJ. in *Thompson's case*.[34]

Apart from what might be termed the more obvious documents, such as the adjudication, written reasons, documents initiating the appeal to the particular tribunal, and any orders made by the tribunal, Lord Denning was also of opinion that "the record" of a tribunal's decision comprised any document or other form of written material which was referred to, or mentioned, in the tribunal's formal adjudication: this view was applied by the Court of Appeal in *R.* v. *Medical Appeal Tribunal, ex p. Gilmore*[35] (hereafter called *Gilmore's case*).

A glance at some of the fact situations of the above cases will show the practical effect of this liberal English approach to the definition of "record":

Shaw's case[36] concerned a claim by a dismissed Hospital Board employee for compensation for the length of service he had provided. He alleged that the amount of compensation awarded him was too low because the compensating

30. [1952] I K.B. 338
31. *Ibid.*, at 352.
32. [1959] A.C. 663.
33. *Ibid.*, at 688.
34. See nn. 21-25, and accompanying text.
35. [1957] I Q.B. 574; see Denning L.J.'s statement of the rule at 582.
36. *Supra*, n. 30.

tribunal had mis-interpreted the word "service" in the appropriate Regulations. He appealed to an Appeal tribunal which confirmed the decision of the first instance tribunal. The decision of the Appeal tribunal did not refer to Shaw's contention about the definition of "service"; however, if the Appeal tribunal's decision was read in conjunction with the decision of the first instance tribunal, then the question about the definition of "service" became readily apparent. Shaw appealed ultimately to the Court of Appeal seeking an order of *Certiorari* quashing the order of the Appeal tribunal for error of law on the face of the record—the mis-interpretation of "service." The Court of Appeal held that, inter alia, the order of the first instance tribunal was an appropriate part of the Appeal tribunal's record to be looked at by a court of review.[37]

In *Gilmore's case*,[38] the order sought to be quashed was that of a medical appeal tribunal which had awarded the applicant a sum by way of compensation for the loss of one eye. As the applicant was already blind in the other eye, he argued that his compensation should be based on the value of *two* eyes, not one, as the tribunal had done. The scheme of compensation laid down in the appropriate Regulations supported the applicant's submission. When the medical tribunal refused to heed the applicant's argument, he appealed to the Court of Appeal to have the tribunal's order quashed for error of law on the face of the tribunal's record. The difficulty was that the tribunal's written adjudication contained no reference specifically to the right eye or the left eye; however the adjudication referred to a medical specialist's report which did refer to the two eyes separately, so that, if the tribunal's adjudication *and* the specialist's report were read in conjunction, the error of law was clearly evident. The Court of Appeal unanimously held that any document referred to by a tribunal's record became part of that tribunal's record.[39]

The House of Lords appears to have considered the expanded, liberal definition of what is a tribunal's record on only one occasion: *Baldwin & Francis Ltd.* v. *Patents Appeal Tribunal*.[40] Lord Denning sat on this appeal as a Lord of Appeal in Ordinary, so it is not surprising that he repeated substantially the same views that he had previously adumbrated in cases such as *Shaw* and *Gilmore*.[41] *Baldwin & Francis* was very similar to *Gilmore's case* in that an attempt was made to incorporate into the record of a Patents Appeal Tribunal the report and decision of the patents examiner, as well as the specifications of the applicant's invention. It was argued that if all these documents were looked at together, it would be apparent that the Patents Appeal Tribunal had proceeded upon the basis of an error of law, which was alleged to be evident upon the face of the tribunal's record augmented in the above fashion.

The majority of the House decided that, in any event, there was no error of law disclosed by the record, even if the record was augmented in the above way. However, none of the House, except for Lord Denning, was prepared to lend the authority of the House of Lords to the "Denning doctrine" as to the definition of "record". The opinion of all the Law Lords (with, of course, the exception of Lord Denning) is reflected in the following quotation from the speech of Lord Tucker:

37. Singleton L.J. in *ibid.*, at 345; and Denning L.J. at 354. Morris L.J. doubted whether the Appeal Tribunal's record "spoke" its error at all—at 355; but, like Singleton L.J. (at 344), he felt that the Appeal Tribunal's concession of the point in the court below precluded them from relying on the point in the Court of Appeal.
38. *Supra*, n. 35.
39. See n. 35, and accompanying text.
40. *Supra*, n. 32.
41. See in particular Lord Denning's speech in *ibid.*, at 688-691.

"... I therefore desire to emphasise that there is nothing in your Lordships' decision in the present case that can be quoted as any authority as to the meaning of the word 'record' ... or as to whether the court can or will look beyond the actual order or decision in the case of a 'speaking order' to discover whether error in law exists or not, or what documents constitute 'the record' ... These questions may require decision at some future date. When that time arrives it may be necessary to consider whether the word 'record' in relation to certiorari to quash for error on the face *means anything more than the order or decision as recorded*."[42] (writer's emphasis)

There the English position would seem to rest for the present. Lord Tucker's dictum has certainly raised doubts as to whether the liberal "Denning definition" of 'record' is well-founded; if the narrow approach to the question foreshadowed by Lord Tucker gains acceptance, then the position will have reverted full-circle to the method of approach so dramatically exemplified in the *Nat Bell case* in 1922. But then, so far as Australia is concerned, the Tucker line probably represents the dominant approach in this country anyway, if cases such as *Thompson's case*[43] and *Noonan's case*[44] are any guide.

Indeed, there is something to be said for the view that the so-called "Denning doctrine" of the definition of "record" can only operate when there are no statutory provisions governing the form of the tribunal's record.[45] For instance, in *Shaw's case*, there would seem to have been no statutory provisions regulating the form of the tribunal's order; while in *Gilmore's case*, it was very easy to incorporate explanatory material into the tribunal's record because there *were* regulations governing the tribunal in question which required the tribunal to include in its record of decision a written statement of their reasons.[46] As the presence of liberal statutory provisions will facilitate the expansion of what constitutes the reviewable record, so will the absence of statutory directions on the point allow the supervising court to exercise a much freer hand in deciding what material may be included to form a record reviewable for error of law. *R.* v. *Tennant, ex p. Woods*[47] is some authority for the proposition that, where there are no apparent statutory provisions controlling the content of the "record", Australian courts are not averse to adopting the *Shaw* style of approach to defining a tribunal's record.

Two final points deserve to be made upon the "Denning doctrine":

Firstly, His Lordship has expressed the opinion that, if the supervising court, upon examining the record of the particular tribunal whose decision is sought to be reviewed, thinks that the record before it is incomplete, then the supervising court can order the tribunal to complete its record, by sending up whatever material is necessary to fill the gaps in the record.[48] While a useful power, it still does beg the question, to some extent, of just *what* material is a court entitled to regard as part of an inferior tribunal's record, so that the supervising court can call up that material, if need be. Lord Denning himself has sought to answer this point by saying that the court's power to call up material extends not only to the tribunal's formal order, but to "all things touching the same".[49]

Secondly, His Lordship has stated that, even if particular material is not, strictly (or even liberally) speaking, part of a tribunal's record, nevertheless a

42. *Ibid.*, at 686-687.
43. *Supra*, n. 21.
44. *Supra*, n. 20.
45. This view has been suggested by at least one learned commentator comparing the decisions in *Shaw* and *Noonan*: see (1948) I Univ. of Qld.L.J. (No. 3) 50, esp. at 52.
46. See [1957] I Q.B. at 582.
47. *Supra*, n. 26. Also see text accompanying nn. 26 and 27.
48. See *Gilmore's case*, *supra* n. 35, at 582-583.
49. *Baldwin & Francis Ltd.* v. *Patents Appeal Tribunal*, [1959] A.C. 663, at 688.

supervising court may treat such material as part of the record IF the parties to the action consent to such material being placed before the court of review.[50] Whether this "consent" rule is well-founded in law is perhaps debatable: certainly some of the Privy Council's comments in the *Nat Bell* decision may lead the observer to doubt whether Lord Denning is correct on this point.[51] However, be that as it may, Lord Denning's view has received clear support in Australia: see the decision of the Full Supreme Court of New South Wales in *Ex p. Hopkins; Re Cronin*,[52] especially the judgement of Herron J.[53] Also, the Privy Council itself has given some support, albeit inferential support, to the so-called "consent" rule, in a decision dating from 1937, *Estate & Trust Agencies Ltd.* v. *Singapore Improvement Trust*.[54] In this case, a determination of the Singapore Improvement Trust was attacked on the ground that the Trust had taken into account irrelevant considerations, beyond its statutory charter, in arriving at its determination. The irrelevant considerations appeared partly from the Trust's formal order, but more particularly, from an affidavit sworn by one of the Trust's officers, and not part of the Trust's formal order, for the purpose of informing the Privy Council of the Trust's grounds of determination. Both parties clearly consented to the affidavit's being placed before the Privy Council, and the Privy Council had full regard to the affidavit in reaching its decision, without questioning in any way the parties' right to place additional material, by mutual consent, before the court. Admittedly, the point was not raised or argued in any way, but nevertheless, the Privy Council did not demur to this procedure. Thus, the better view on this aspect of the whole problem of converting "non-speaking" orders into "speaking" orders, is that Lord Denning is probably right.

This question of what, if any, material outside the tribunal's record (however the latter be defined) can be looked at by a court reviewing for error of law, is of some importance for this reason; the legal quality of an error of law will determine whether or not the supervising court can look to material *outside* the record of the tribunal in order to detect the error of law.

The situation is this: If the alleged error of law is one whose effect be to deprive the tribunal of its *jurisdiction* to hear and determine the matter, then and only then may the supervising court seek and have regard to material *other than* the tribunal's own official record.[55] If the alleged error of law is one which does *not* deprive the tribunal of its jurisdiction in a particular matter—i.e. if the tribunal's jurisdiction is one which would comprehend and allow the particular, alleged error of law—*then* the supervising court can only quash the tribunal's decision because of that error *if* the error is patent upon the face of the tribunal's record[56]—and then arise all the problems previously discussed of what constitutes "the record"

It is not the province of this Paper to discuss when does an error of law go to jurisdiction, and when does it not[57]—however, the point is mentioned merely to show that the common-law courts' power to investigate the orders of tribunals, and to convert "non-speaking" orders of such tribunals into "speaking orders" is far greater, when the courts are seeking to show that an inferior tribunal has not

50. *Shaw's case*, *supra* n. 30, at 353.
51. See the Board's comments in [1922] 2 A.C. at 155-156, and 160.
52. (1957) 57 S.R. (NSW) 554.
53. *Ibid.*, at 564.
54. [1937] A.C. 898.
55. This rule is well-established: see the *Nat Bell case*, [1922] 2 A.C. 128; *Shaw's case*, [1952] I K.B. 338; *Noonan's case*, [1930] St.R.Qld. 10; and *R.* v. *Tennant, ex p. Woods*, [1962] Qd.R. 241.
56. The *Nat Bell case*, supra n. 55; and *Shaw's case*, supra n. 55.
57. See, for a discussion of this point, Benjafield, D.G., and Whitmore, H., *Principles of Australian Administrative Law*, 4th ed., (Australia, Law Book Co., 1971), at 176-181.

merely made a mistake in the law that that tribunal has applied, but that the tribunal should not have even assumed the right to hear a particular matter.[58] Needless to say, to any court which feels especially aggrieved at a decision by a tribunal, and which desires to quash a particular decision, there is always the temptation to say, in appropriate judicial language and form: "We do not like this decision of this tribunal; there is evidence of error upon which we can quash; unfortunately, that evidence does not appear on the face of the tribunal's record; however, if we characterise this error as one going to jurisdiction, we can call evidence *outside* the record which will disclose the error; therefore we characterise the error in *this* case as one going to jurisdiction; therefore we can now resort to that evidence *outside* the record." Whether the error *really* goes to jurisdiction will often be a very fine, hair-line decision: yet the very vagueness of the concept is its strength—thus does it provide a useful weapon for courts of review in deciding which decisions to quash, and which ones to let stand.[59]

So far, this Paper has been examining, inter alia, the examinability or otherwise by courts of review, of the reasons or other explanatory material furnished by tribunals, either voluntarily or pursuant to a statutory duty to do so, in support of their decisions. Attention must now be turned to the final one of the three broad questions stated at the outset of this Paper. This question is:

If an inferior tribunal is under NO duty to state reasons or provide material in explanation of its decisions, and if that tribunal does not provide any reasons or explanatory material, then what inferences, if any, may a court of review draw from the tribunal's failure to provide such material? If certain inferences are to be drawn, then what action, if any, can a supervising court take, in relation to that tribunal's particular decision?

It has already been noted that, in some circumstances, the Australian courts have shown some favourable disposition towards the proposition that if a tribunal or administrative officer has vested in it (or him) a power which is exercisable upon one of a number of stated grounds, then the tribunal will be obliged to furnish reasons for that power's exercise to affected parties who ask for those reasons.[60] No further discussion of this situation need be embarked upon; instead, attention will be directed to the position where there has been no formal demand for reasons, and, accordingly, none given.

The position is most acute where the authority—be it subordinate tribunal or administrative officer or Government Minister—is invested with a discretionary power, upon whose exercise the only limit placed may be some open-ended criterion such as "... when the Minister is of the opinion that the purposes of the Act will be served"; or "... when the Minister is of the opinion that reasonable grounds exist"; or some equally vague criterion whose content is fiendishly difficult to quantify in any objective way. What court, exercising the normal powers of judicial investigation and the reception and testing of objective evidence, can, upon a suit for judicial review of the exercise of some subjectively-phrased discretionary power vested in some administrative or ministerial agency, decide

58. Indeed, there is high authority in Queensland for saying that the courts can review decisions of inferior tribunals for errors of law *only* if those errors go to jurisdiction: *Noonan's case*, *supra* n. 55; or if the error results in an "invalid" decision by the tribunal: *R.* v. *Tennant, ex p. Woods*, *supra* n. 55. The latter decision is a particularly strong one, because *Shaw's case* (*supra* n. 55) (which had decided, inter alia, that review for error of law was *not* restricted to situations where the error went to the tribunal's jurisdiction) was cited to, and discussed by, the Queensland Full Court on this particular point in *R.* v. *Tennant*—nevertheless, the Full Court in the latter case took a narrow view of its power to review for error of law, and declined to accept the English Court of Appeal's view, in *Shaw's case*, that "non-jurisdictional" errors of law committed by tribunals were reviewable by the courts.

59. For a similar comment, see Benjafield and Whitmore, *op. cit.*, at 177.

60. See the *Giris case*, *supra* n. 13; and accompanying discussion.

whether "the purposes of the Act" have been properly served, or whether the Minister (or whatever the authority is) was *really* of opinion that "reasonable grounds" existed? What if a court of review feels that an administrative exercise of discretion is quite unreasonable, even though the authority concerned may have formally certified that, in its opinion, reasonable grounds did exist?

Generally, the common-law courts are manifestly ill-equipped to handle these types of situations. Historically, as has been pointed out much earlier in this Paper,[61] the common-law courts have never had an appellate jurisdiction over subordinate administrative and quasi-judicial authorities, in the sense of rehearing a case "de novo" as it were; their tools of review originally consisted solely of the Prerogative Writs—and these were mainly concerned to see that inferior tribunals stayed within the law: as long as they did so, they could come to whatever decisions they liked. This is why "error of law" bulked so large (and continues to bulk large) in the history and usage of *Certiorari* and Prohibition. Thus, the common-law courts, generally speaking, when faced with a decision made on discretionary grounds for which reasons are neither required (most of the time anyway) nor given (in the absence of any common-law duty to do so),[62] can only review such a decision on the grounds of its legal regularity, not on the grounds of its merits or lack of them.

But how does one check a decision when there are no recordable criteria for its basis?

Notwithstanding their fundamentally intractable nature, so far as reviewability is concerned, discretionary powers of decision-making have always been notionally subject to judicial scrutiny. In the eyes of the common-law, the holder of discretionary power must act

> "... according to the rules of reason and justice, not according to private opinion ... according to law, and not humour. It is to be, not arbitrary, vague and fanciful, but legal and regular."[63]

... Which rolls most impressively off the judicial tongue, but, with the greatest of respect, it does not furnish a substantial amount of tangible guidance in making sure that a discretion bounded only be "reasonableness", or something equally definable (!), is indeed "legal and regular".

In the atypical case where the courts are given a statutory power to exercise a real appellate jurisdiction over the exercisers of discretionary power, in the sense of being able to re-consider all the evidence which was available to the holder of the power, and hence decide whether the evidence justified the exercise of the power in the particular way it was exercised—where the courts have THAT sort of jurisdiction (it must be statutory; the common-law generally does not provide it), then may a "creative" court (or "adventurist court", perhaps) exercise a truly effective power of review. There is strong authority for the proposition that, when a court is given a statutory, appellate jurisdiction to rehear, not just review, the decisions of holders of discretionary power, then that jurisdiction cannot be defeated by the holders of such power refusing to give reasons:

> "Their Lordships find nothing in the language of the Act or in the general law which would compel the Minister to state his reasons for taking action under S. 6, sub-s. 2. But this does not necessarily mean that the Minister by keeping silence can defeat the taxpayer's appeal. To hold otherwise would mean that the Minister could in every case, or, at least, the great majority of cases, render the right of appeal given by the statute completely nugatory. The court is, in their Lordships' opinion, always entitled

61. See n. 5, and accompanying text.
62. See n. I.
63. Per Lord Halsbury in *Sharp* v. *Wakefield*, [1891] A.C. 173, at 179.

> to examine the facts which are shown by evidence to have been before the Minister when he made his determination. If those facts are in the opinion of the court insufficient in law to support it, the determination cannot stand."[64]

The Privy Council then went on to not merely quash the offending decision of the particular minister and order him to "hear and determine according to law", they quashed the decision and substituted their own determination in favour of the respondent taxpayer.[65]

Very robust and very commendable. But, in the absence of such statutory appellate jurisdiction, the common-law courts are normally hamstrung, when reviewing discretionary decisions unaccompanied by reasons, by the common-law rules which usually require that a court can only upset a discretionary decision *if* there is evidence to show that the decision was vitiated by one or more of the legal errors such as breach of the rules of Natural Justice or any one of that number of errors of law all subsumed under the catch-all description of "Ultra Vires"—e.g. taking account of irrelevant considerations, tying one's hands by pre-conceived policy notions, ignoring relevant considerations, and the like. BUT—the establishment of any one of these must depend upon the availability of evidence of what motivated the decision-maker: no evidence; then no effective avenue of common-law review.

However, some gleams of light shine through the murk of common-law difficulties in this area. The courts in England have begun to show in recent times that they are prepared to take a tougher line with discretionary decision-makers who try to fend off the arrows of judicial review with a shield of silent, reasonless orders. Particularly where a public officer is charged with exercising a discretionary power under an Act of Parliament, and the power in question relates to the effective workings of that Act with respect to members or classes of the public, for whose benefit the Act has been passed—in these situations, the courts have strongly hinted that if a discretionary power has been conferred upon a public officer, with the purpose of furthering the interests of a class of the general populace, then an exercise of that power contrary to the interests of that class will NOT be shielded from judicial attack by a failure to accompany the decisions with reasons. In *Padfield* v. *Minister of Agriculture, Fisheries and Food*,[66] in 1968, the House of Lords upset a decision of the minister who had discretionary power to refer complaints by milk producers to a committee of inquiry, under a compulsory milk-acquisition scheme. In this case, the minister refused to refer a series of genuine complaints to the relevant committee, but there was evidence to show that the minister's decision was motivated by considerations clearly irrelevant to the purposes of the Act. The interest of the case lies in the *dicta* from four members of the House, as to their attitude *if* there had been no reasons accompanying the minister's decision. The drift of their Lordships' thinking on this point is well illustrated by the following extract from the speech of Lord Pearce:

> "... it (was not) intended that he could silently thwart its (i.e. the Act's) intention by failing to carry out its purposes. I do not regard a Minister's failure or refusal to give any reasons as a sufficient exclusion of the court's surveillance. If all the prima facie reasons seem to point in favour of his taking a certain course to carry out the intentions of Parliament in respect of a power which it has given him in that regard, and he gives no reason whatever for taking a contrary course, the court may infer that he has

64. *Minister of National Revenue* v. *Wrights' Canadian Ropes Ltd.*, [1947] A.C. 109 (P.C.), at 123.
65. *Ibid.*, at 125-126.
66. [1968] A.C. 997.

no good reason and that he is not using the power given by Parliament to carry out its intentions."[67]

Statements of this nature, it is submitted, are coming suspiciously close to saying that, in certain circumstances, a failure to give reasons will be *prima facie* grounds for upsetting a decision for legal irregularity. However, the background of *Padfield's case*, coupled with the careful language in which their Lordships framed their remarks, give a fairly clear hint as to what those "certain circumstances" will be: a situation in which the power is so closely linked with the furtherance of a particular statutory plan or scheme which is intended to benefit classes of the public, that the power can almost be described as that traditional creature well-known to the common-law: the power coupled with a duty to act.[68]

To conclude:

From the foregoing survey, this writer feels that certain comments may be made, as indicating some of the key problems which occur in relation to "speaking" and "non-speaking" orders of inferior tribunals:

(a) The greatest fundamental difficulty arises from the failure—or refusal— of the common-law to develop a rule providing that, unless statute directs otherwise, inferior tribunals and other forms of subordinate authorities should *prima facie* be under a duty to give reasons, preferably written, for their decisions. Developments in the general law, such as the encouraging *dicta* in *Padfield's case*, and the statements by some of the High Court in the *Giris case*, are welcome, but are confined to a too narrow compass of possible situations.

(b) In relation to (a) above, legislative intervention is needed.[69] Merely providing for particular tribunals in particular pieces of legislation on an *ad hoc* basis, is doing no more than patching the quilt badly and infrequently. What is needed is a "catch-all" Act, like the English *Tribunals & Inquiries Act*—one in the Commonwealth sphere to cover those tribunals for which the Commonwealth has constitutional responsibility; and one in each of the several States, for State tribunals.

(c) So far as the general ability of the common-law courts to review tribunal decisions is concerned, the very limited nature of the courts' jurisdiction over inferior tribunals is another key bottleneck. Historically—and this still persists to an appreciable extent today—the courts have no power to rehear; merely a power to review for error of law. But even worse; only those errors which can be characterised as appearing "on the face of the tribunal's record" are reviewable: and this has come about largely because the courts' power to review did not develop as a single concept of principle, but grew up tied to the Prerogative Writs. The Writs revolved around the idea of the tribunal's "record" (*Certiorari* and Prohibition in particular); the courts' power of review grew up around the Writs; and thus the modern-day substantive law is littered with those technical and arid judicial debates, which have been examined in this Paper, as to what constitutes the "record" of the tribunal in question. As long as the substantive law governing the courts' power to review continues to regard "the record" as

67. *Ibid.*, at 1053-1054. Also see Lord Reid at 1032-1033; Lord Hodson at 1049; and Lord Upjohn at 1061-1062.
68. For a discussion of discretionary powers coupled with duties see de Smith, *op. cit.*, 251-252.
69. At the Federal level, the *Report of the Commonwealth Administrative Review Committee* (dated August 1971—C'th. Parlty. Paper No. 144 of 1971) has recommended that any person aggrieved by a decision of any Federal administrative tribunal should be entitled to apply for and receive reasons for such decision. The Committee also recommends that such furnished reasons shall form part of the tribunal's record, for purposes of detecting and correcting possible errors of law appearing therein. See the *Report*, para. 266.

being of such prime importance, the most useful "stop-gap" reform measure that the common-law could introduce, would be to lay down the rule that, unless statute has clearly intervened (as in the *Nat Bell case*) to define "record", then the liberal approach of cases such as *Shaw's case* should govern the matter, rather than the neo-*Nat Bell* approach of the High Court in *Thompson's case*.

(d) All of the foregoing discussion has been primarily concerned with ways of making sure that the courts, when called upon to review tribunal decisions, are faced with the examinable creature of a "speaking" order, rather than the unexaminable monster of a "non-speaking" order. This is not to say that this writer is suggesting that everything should be done to put the courts in a position where they exercise a virtual power of rehearing a case as on appeal; far from it—this would subvert the great practical value of having particular matters determined expeditiously by specialist tribunals, and impose a huge and unwelcome burden upon the ordinary courts. BUT—the function of the courts IS to see that any subordinate tribunal keeps to the law of the land: thus the courts should be able, if they wish, to have recourse to all and any material, whether part of the record or not, to ascertain whether the tribunal has kept within the bounds of the law. Within those bounds, specialist tribunals should be supreme masters of their own houses; but the courts should be supreme masters over whether those tribunals ARE within those bounds. The old historical idea that the function of the King's courts was to "supervise" lower tribunals is still essentially valid; however the courts should be given modern, streamlined tools with which to do the job properly.

(e) Finally, a point which stems directly from the prior paragraph: The mass of technicalities of medieval origin which surrounds the major weapons of judicial review—the Prerogative Writs—needs to be done away with, and replaced with a simple, unitary judicial process, applicable to all actions for review of administrative decisions, and governed by the one body of legal principle, as now, the Prerogative Writs are not. This suggestion, of course, is not new,[70] but the fact that virtually every commentator who hesitantly ventures forth upon the quick-sands of Anglo-Australian administrative law, comes up with this suggestion (or plea?), perhaps shows how vital is the need for this particular piece of reform.

POSTSCRIPT

Since the writing of the foregoing paper, some of the recommendations of the 1971 Commonwealth Administrative Review Committee have been implemented in the *Administrative Appeals Tribunal Act* (Cwlth.) 1975.[71] (hereinafter called the Act.)

The Act creates two bodies: Parts II-IV of the Act provide for the constitution, organization, and powers of a (Commonwealth) Administrative Appeals Tribunal; while Part V of the Act creates an Administrative Review Council. The latter body is basically a research and "watchdog" organization, with the responsibility of inquiring into, and making recommendations concerning, the general *corpus* of law and practice relating to the decision-making activities of Commonwealth administrative agencies (S.51 of the Act). The Council has no

70. This suggestion has been adopted by the *Commonwealth Administrative Review Committee* in its *Report* (*ibid.*), wherein it has been recommended that, for judicial review of the decisions of Commonwealth administrative tribunals, the form of procedure should be by way of a simple, originating summons: see *Report* (*ibid.*) at para. 251 *et. seq.*, esp. para. 254.
71. The Act received the Governor-General's Assent on 28th August, 1975.

adjudicatory, determinative, or enforcement functions—these are all reposed in the Tribunal, some of whose features relevant to this paper are now briefly examined.

The jurisdiction of the Tribunal is established by sections 25 and 26 of the Act. S.26 provides that the Tribunal may review the decisions of certain Commonwealth bodies and administrative agencies which are listed in a Schedule to the Act. S.25 provides that jurisdiction in matters other than those listed in the Schedule to the Act, may be conferred upon the Tribunal by other Acts of the Commonwealth.

Persons entitled to apply to the Tribunal for review of the decision of a Commonwealth administrative agency, are allowed, under S.28 (1) of the Act, to request that the administrative agency (of whose order review by the Tribunal is sought) furnish to the applicant person a statement in writing setting out the agency's findings on material questions of fact, as well as the reasons for the agency's decision. This, of course, is inspired by the similar provision in the U.K. *Tribunals and Inquiries Act*,[72] and implements one of the more important recommendations of the 1971 Commonwealth Administrative Review Committee.[73] However, s.28 (2) of the Act should be noted, which provides that, if the Commonwealth Attorney-General certifies accordingly, such a statement of reasons for decision may be refused if it would involve disclosing to the applicant information whose public release would, inter alia, prejudice the security of Australia, or involve the disclosure of Cabinet deliberations: see the grounds for refusal of reasons in s.28 (2) (a), (b) and (c).

In contrast to the corresponding U.K. legislation, the Commonwealth Act does not declare that a statement of reasons for decision furnished under s.28 (1) of the Act, shall form part of the official "record" of the agency's decision, for purposes of review by the Tribunal. Instead, sections 37 and 38 of the Act are apparently designed to make certain that the Tribunal has before it all relevant documents and information concerning the agency's decision as will aid the Tribunal in its process of review. S. 37 commands any Commonwealth administrator, whose decision is the subject of an application for review by the Tribunal, to lodge with the Tribunal a statement containing findings of fact and reasons for decision, as well as any other documents or parts thereof which the administrator may think relevant to the review of the particular decision by the Tribunal. S. 37 also gives the Tribunal power to declare that documents are deemed to be relevant, and that such documents must be lodged with the Tribunal. A person whose decision is being reviewed by the Tribunal cannot escape his obligation under s. 37 to deliver all relevant documents to the Tribunal, on the grounds that the documents in question might contain matter of the type dealt with in s. 28 (2) of the Act—he is still obliged to deliver them to the Tribunal: see sections 36 (1) and 36 (2) of the Act.

If the Tribunal is dissatisfied with the completeness and adequacy of a statement by an administrative agency as to the latter's fact findings and reasons for decision, and that statement has been lodged with the Tribunal pursuant to s. 37, then, s. 38 gives the Tribunal the power to order that the particular person or agency whose decision is being reviewed furnish the Tribunal with an additional statement or statements containing further and better particulars as to the fact findings and the reasons for decision.

Thus, it can be seen that, although the Act has not adopted the English expediency of deeming particular documents and material to be part of the official

72. Supra, fn. 3
73. Supra, fn. 69.

"record" of the tribunal or agency whose decision is being reviewed,[74] the Act has clearly, in the provisions of sections 28, 37, and 38 attempted to make abundantly certain that the Tribunal, in all its activities of review, will be in possession of all documents and information of any relevance, which might assist the Tribunal in its deliberations.

Another recommendation of the Commonwealth Administrative Review Committee which has been more or less implemented by the Act, is the simplification of the manner in which an aggrieved person may apply for an administrative decision to be reviewed. The Committee had advised that a simple, originating summons be the sole means of initiating an application for review:[75] S. 29 of the Act provides, even more simply, that an application for review by the Tribunal shall be in writing in accordance with the prescribed form, that the application specify the grounds on which review is sought, and that the application be lodged within whatever time-limits may be prescribed.

Section 43 (2) provides that the Tribunal's decisions must be accompanied by reasons in writing, and that those reasons must include the Tribunal's findings of material facts. Subsection 3 of the section commands that a copy of the Tribunal's decision be served on each party to the proceeding, while subsection 5 makes it clear that the command of subsection 3 includes the reasons for the Tribunal's decision.

Appeals from the Tribunal's decisions are governed by sections 44-46 of the Act. Appeals lie to the Australian (Commonwealth) Industrial Court, but only on a question of law (s. 44 (1)). Also, s. 44(2) allows an appeal to the Industrial Court in cases where the Tribunal has ruled that an intending applicant for review of a decision has no sufficient interests affected by the challenged decision and thus lacks *locus standi*. S. 45 permits the Tribunal, of its own motion, to refer a question of law to the Industrial Court, if that question of law has arisen in proceedings before the Tribunal.

When the Industrial Court is hearing an appeal, whether under s. 44 or under s. 45, s. 46 requires the Tribunal to send to the Court all documents that were before the Tribunal in connection with the particular proceeding in question. The mode of instituting an appeal to the Industrial Court is not specifically laid down in the Act; s. 44 (1) merely states that the appeal will be "in such manner and within such time as are prescribed". The Industrial Court may make such order, on appeal, as it thinks appropriate (s. 44 (4)), and such order may include, but is not limited to, affirming or setting aside the Tribunal's decision, or remitting the case to the Tribunal to be heard and decided again (s. 44 (5)).

It may be noted that the Tribunal's own power of review is, under s. 43 (1), virtually unlimited as to the type of decision that the Tribunal may hand down: it is, in relation to subordinate Commonwealth administrative agencies and decision-makers, exercising virtually an appellate function by way of re-hearing.

It should be stressed that the Tribunal is not a *court* of review, in the judicial sense of the word "court". Certainly, it is not constituted as a "federal court" is required to be constituted under s. 72 of the Commonwealth Constitution:[76] "presidential" members of the Tribunal hold office until they reach the age of 70 years (s. 8 (1) (a)), while "non-presidential" members hold office for terms not exceeding 7 years (s. 8 (1) (b)). Furthermore, it seems unlikely that the Tribunal can be described as exercising the judicial power of the Commonwealth, as that

74. Supra, fn. 18.
75. Supra, fn. 70.
76. S. 72, as currently interpreted, requires that all judges of federal courts (including the High Court) shall be appointed for life: see *Waterside Workers Federation of Australia v J.W. Alexander Ltd.*, (1918) 25 C.L.R. 434.

latter term is understood in Chapter III of the Commonwealth Constitution: the Tribunal's power is merely to review, acting within a very flexible procedural framework and apparently applying whatever discretionary power was vested in the original decision-maker (ss. 43 (1) and 43 (6)). A power of decision-making like this—founded in a quasi-legislative process of policy-making—does not partake of that application to a fact-situation of pre-existing rules of law and conduct, which is one of the hallmarks of a judicial, as distinct from an administrative, process.[77]

Even as an administrative agency, rather than as a "court" of review properly so-called, the Commonwealth Administrative Appeals Tribunal is a welcome step along the road towards some unification and rationalization of administrative procedures in the Commonwealth sphere—a step which also contains some elements of reform slightly more loaded in favour of the citizen seeking redress than is usual.

77. For a recent discussion and application of this distinction, in the context of Commonwealth administrative tribunals, see *R.* v. *Trade Practices Tribunal ex p. Tasmanian Breweries Pty. Ltd.*, (1970) 44 A.L.J.R. 126.