and 88A). This cannot be done with cash. Also, there exists in the background a contractual relationship between the issuing bank and a third party, namely the customer who purchased it from the issuing bank in the first place. Again, this is not characteristic of cash. In other words, when the words "equivalent of cash" are used in the various judgments, I suggest that the Courts mean no more than that the community accepts that the issuing bank has adequate funds to pay the cheque on presentation. Moffitt P. may have used the word "cheque" somewhat loosely in his comments referred to on page 189 of Dr Weerasooria's article. Otherwise there would seem to be nothing in his comments inconsistent with the true legal characteristics of the bank cheque.

After all, a bank cheque cannot be filled in on the spot; it is normally used in a transaction where there has been some prior negotiation and in many cases (such as conveyancing transactions) where the payee knows with whom he is dealing. As an instrument of fraud its use is virtually restricted to circumstances where, as in the *Capri Jewellers*' case, the villain can pocket the fruits of his fraud and disappear. This is hardly likely to happen in the case of a block of land, a Rolls Royce car, or a parcel of B.H.P. shares.

I have no biblical quotation on which to close. However, with all due apologies to whomsoever may be entitled to them (I think it was "Rabbie" Burns), I condense my understanding of the problem into a few words, namely "a promissory note is a promissory note for a' that".

ROBERT MAKIM*

ADMINISTRATIVE APPEALS TRIBUNAL ACT 1975 (CTH)

This is the first, and so far only piece of legislation to have emerged from the long succession of Committees appointed by the Federal Government to consider the structure of Federal administrative law. The Administrative Review Committee (the "Kerr Committee") was established on 29th October 1968 and tabled its Report[1] almost exactly three years later. It was felt necessary to secure supplementary reports from a Committee on Administrative Discretions (the "Bland Committee"[2]) and a Prerogative Writ Procedures Review Committee (the "Ellicott Committee"[3]). Both Committees presented clear proposals for legislation, but only those of the Bland Committee concerning an ombudsman and an administrative appeals tribunal have been proceeded with further. An *Ombudsman Bill* was before Parliament when it was dissolved in 1975 and the present Government has now reintroduced it. The *Administrative Appeals Tribunal Act* 1975 (Cth)

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1 Parliamentary Paper No. 144 of 1971.
2 Parliamentary Paper No. 316 of 1973.
3 Parliamentary Paper No. 56 of 1973.

had been assented to prior to the dissolution but was only proclaimed in May 1976. It establishes an appeals tribunal (the subject of this comment) and an Administrative Review Committee in the nature of the British Council on Tribunals. Mr F. G. Brennan, Q.C., was appointed in June 1976 as President of the Tribunal and a Judge of the Industrial Court.

The Administrative Appeals Tribunal is unique in the British Commonwealth. It represents a substantially different concept of curial review from that found either in the Administrative Appeals Court proposed by the Victorian Statute Law Revision Committee in 1968 or the Public Administration Tribunal advocated by the New South Wales Law Reform Commission in 1973.[4] Both of those proposals envisaged a body much closer to an ordinary court than is the federal Tribunal. It goes without saying that the New Zealand Administrative Division of the Supreme Court, established by the *Judicature Amendment Act* 1968 (N.Z.), has nothing in common with the Tribunal. Again, it may be possible to compare the Tribunal with the *Conseil d'Etat* of France but that would be misleading. The Tribunal is intended to be "a single independent tribunal with the purpose of dealing with appeals against administrative decisions on as wide a basis as possible".[5] It is to be seen as "machinery . . . for adjudication rather than as part of the machinery of departmental administration".[6] Both those statements are valid, but the former will not be achieved if the latter is seen too strictly. The Tribunal's powers mean that it is closely related to the administration; it cannot fulfil its role if it sees itself as obliged to act as if it were part of the court system.

The key to the statute lies in the powers conferred on the Tribunal. Individuals, faced with an adverse governmental decision, want it changed; they want an appeal on the merits. Accordingly, the Tribunal's decision is in substitution for that of the administrator.[7] Such a substitution in turn depends on the Tribunal's being able to do all that the administrator could and to have full flexibility in its decision-making. This is achieved by permitting the Tribunal to affirm or vary the decision appealed from, or to set aside the decision and make a new decision in substitution therefor, or refer the matter back to the administration with the Tribunal's directions or recommendations.[8] The Tribunal is also authorized to give advisory opinions.[9] The Act, therefore, has rejected the limitations strongly advocated by both the Kerr and Bland Committees that the Tribunal should be excluded from reviewing the policy underlying a decision.[10] But the Bland Committee went further and affirmed that the Tribunal could not appropriately substitute its opinion for that of the administrator[11]

4 New South Wales Law Reform Commission, 16.
5 The Attorney-General, Mr Enderby introducing the Bill—Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 6 March 1975, 1187.
6 Ibid.
7 Act s. 43(6).
8 Ibid. s. 43(1).
9 Ibid. s. 59.
10 Kerr paras. 297(ii) and 299; Bland paras. 172(e) and (g).
11 Bland para. 172(e).

> "A Tribunal to the extent that it is functioning as an extension of the administrative process must not exclude from its mind the totality of considerations that bore on the original decision maker. . . . [The administrator] has to take his decision not solely on premises acceptable to a court but in a context of a broad governmental response to its interpretation of socio-economic values acceptable to the community. He absorbs this in the culture of his total administrative activity."

It is submitted that both these views depend for their validity on the proposition that the Tribunal can and should be another administrator using a different procedure. This cannot be so. The choice of an adjudicative framework precludes it; a tribunal can come close to appreciating the decision to be made in its full administrative context, but its input remains adjudicative. The Administrative Appeals Tribunal could never have been simply an extension of the administration. The question was where on the continuum from administration to Supreme Court it was to fall. This Act tries to place the Tribunal near enough to the administration for it to make acceptable administrative decisions in substitution for the original decision maker while maintaining its integrity and independence as an adjudicative body.

If the Tribunal is to substitute its opinion for that of the administrator, its composition must reflect this role. The Act provides for a President and Deputy Presidents[12] all possessing the qualifications for Federal judicial appointment.[13] The Deputy Presidents may be appointed on a part-time basis.[14] Originally, there was intended to be a provision giving these members the status of a Judge of the "Superior Court of Australia"[15] but this clause disappeared with the general elimination by the Senate of any reference to a Superior Court. In addition a number of non-presidential members may be appointed (whether full-time or part-time) from persons who have a wide range of knowledge or expertise in relevant areas[16]

> "A person shall not be appointed as a non-presidential member unless he:
> (a) is enrolled as a legal practitioner of the High Court, of another federal court or of the Supreme Court of a State or Territory;
> (b) has had experience, for not less than 5 years, at a high level in industry, commerce, public administration, industrial relations, the practice of a profession or the service of a government or of an authority of a government;
> (c) has obtained a degree of a university, or an educational qualification of a similar standing, after studies in the field of law, economics or public administration or some other field considered by the Governor-General to have substantial relevance to the duties of a non-presidential member; or
> (d) has, in the opinion of the Governor-General, special knowledge or skill in relation to any class of matters in respect of which decisions

[12] Act s. 5.
[13] Ibid. s. 7(1).
[14] Ibid. s. 6.
[15] Bill cl. 9.
[16] Act s. 7(2).

> may be made in the exercise of powers conferred by an enactment, being decisions in respect of which applications may be made to the Tribunal for review."

The Kerr Committee recommended that on each panel of the Tribunal there should be an officer of the government instrumentality appealed from[17] but the Bland Committee saw difficulties in this both as to the position of the officer vis-à-vis his department and public confidence in the Tribunal.[18] The former point could well be overcome, but the latter may well have been seen to be crucial. Such a provision does not appear in the Act.

It is provided that the Tribunal will sit in three Divisions (General, Medical and Valuation) with the possibility of others being created.[19] The Bland Committee suggested three different Tribunals with the General Tribunal sitting in further Divisions.[20] When the Tribunal sits, it is to consist of a presidential member presiding and two other members.[21] All questions of law fall to be decided by the presidential member; other questions will be decided by majority.[22]

The Tribunal is open to application by "any person or persons . . . whose interests are affected by the decision".[23] This extends to any organization one of whose "objects or purposes" is affected by the decision.[24] Both provisions could be radical departures from past rules of standing. The former departs from the old formula of "persons aggrieved" which has been interpreted so narrowly by Australian courts in the past. However, use of the word "interests" permits the Tribunal (or the Industrial Court on appeal) to read down standing to its former limits. What is an "interest"? Is it a legal interest or a legitimate concern? In the context of an unincorporated association, a limitation to legal interests would not make sense. Does, then, the section grant standing to a person who habitually fishes a river which is being polluted by some activity of or permitted by government, or to an organization for the prevention of river pollution? If this is so we are seeing a major break-through in standing bringing the law at least to the stage in the United States represented by *Scenic Hudson Preservation Conference* v. *Federal Power Commission*[25] if not to the startling and more recent decisions of the U.S. Supreme Court.[26] Because of the narrow jurisdiction granted the Tribunal in the Act, issues of standing are unlikely to arise in the near future. When they do, it will be open to the Tribunal to follow the direction indicated by the change in formulation of

[17] Kerr para. 292.
[18] Bland paras. 148-152.
[19] Act s. 19(2).
[20] Bland para. 130.
[21] Act s. 21.
[22] Ibid. s. 42.
[23] Ibid. s. 27(1).
[24] Ibid. s. 27(2).
[25] 354 F. 2d 608 (1965).
[26] See G. D. S. Taylor, "Rights of Standing in Environmental Matters" in *Environmental Law: the Australian Government's Role* (A.G.P.S. 1975) pp. 50-52.

standing in the Act or to construe the words narrowly and fall back on the existing tripartite basis of standing.[27]

One of the most restricting elements in judicial review of administrative action is the rules of evidence. Generally, an individual is given no substantial reasons for an adverse decision and evidence of those reasons is not available to him. Section 28 entitles a person who has standing to "a statement in writing setting out the findings on material questions of fact and the reasons for the decision". This overcomes the common law rule that reasons need not be given, and, like the voluntary giving of reasons at common law, fixes those reasons and makes them binding on the decision-maker. At one step this gives the potential applicant two weapons. He may use the reasons to found an appeal or he may secure a *certiorari* to quash from the High Court or a State or Territory Supreme Court based on error of law appearing in those reasons. This is a substantial and desirable reform. There has been an almost universal duty to give reasons in the United Kingdom since section 12 of the *Tribunals and Inquiries Act* 1958 (U.K.) and the quality of administrative decision-making does not appear to have declined as a result.

The giving of reasons still leaves out much relevant material. If the Tribunal is to make an adequate attempt to substitute its opinion for that of the administrator, it must have before it all the material available to him and more. Hence, the Act prescribes that the government instrumentality is to make available to the Tribunal all relevant documents in its possession.[28] This is a crucial and far-reaching provision; only in this way can the merits properly be plumbed. In addition, the Tribunal may require a fuller statement of reasons[29] or obtain evidence in the usual judicial manner.[30] The doctrine of Crown privilege is maintained expressly, both as to statements of reasons[31] and the disclosure of documents.[32] This area excited much debate in the Parliament. As originally presented, the Bill gave to any Minister the power to object to the disclosure of documents or the giving of reasons on three grounds: (a) security, defence, and international relations, (b) disclosure of Cabinet material, and (c) "for any other reason specified in the certificate". While the Bill left final decision on the privilege to the Tribunal,[33] the Liberal and Country Parties representatives felt very strongly that the grounds were too wide, that they narrowed the common law, and that only the Attorney-General should be authorized to claim privilege. In the Senate it was therefore agreed that ground (c) should be expressed to be the same as the common law and that only the Attorney-General should claim privilege.[34] Another interesting debate concerned the power of the Tribunal to subpoena witnesses. The Opposition

[27] Ibid. 47-48.
[28] Act s. 37.
[29] Ibid. s. 38.
[30] Ibid. s. 40.
[31] Ibid. s. 28(2).
[32] Ibid. s. 36(1).
[33] Ibid. ss. 28(3) and 36(3)-(6).
[34] Commonwealth of Australia, *Parliamentary Debates*, Senate, 4 June 1975, 2206 and 2226.

sought an unconditional right to counsel by such witnesses. This they regarded as "self-evident".[35] The Government did not agree at all—witnesses before courts do not have such a right and, said the Attorney-General, Mr Enderby, "We know of no reason why the position should be taken to this unheard of stage unless someone is seeking to abuse the legal process".[36] But there was a reason, and it lay in the distrust of tribunals by some members of the Opposition, based on the Diceyan view of the rule of law. Senator Greenwood explained it thus in the Senate[37]

> "Where there is a Tribunal which on its own initiative has the power to summon witnesses to appear before it, those persons ought to be granted certain rights. One of the fundamental rights they should have is the right to representation."

Later the Senator emphasized that the Tribunal was not a court. "No one", he said[38]

> ". . . is safely protected where there is simply a tribunal which is not a judicial body and which is not amenable, as judicial bodies are, to the supervision of the superior courts."

In the present context this is an astounding legal statement for a former Attorney-General to make. Upon it being established that a discretion was inherent to allow representation in special situations in the ordinary courts, a subsection was inserted making the allowance of representation discretionary.[39]

The Tribunal's procedure emphasizes its informality and the need for the Tribunal to substitute its decision for that of the administrator. The Act provides few mandatory procedural requirements but seeks to indicate a climate.[40] Thus, section 33 provides for procedural rules and goes on to direct that "the proceeding shall be conducted with as little formality and technicality, and with as much expedition" as appropriate. There is provision for taking evidence on oath while section 33(1)(c) excludes the rules of evidence and permits the Tribunal to "inform itself on any matter in such manner as it thinks fit". Hearings are in general to be public, but provision is made for closed sessions.[41] Finally, the Tribunal is granted express power to hold a preliminary conference of the parties where this is thought desirable on application by the parties. The object of the conference is to reach a negotiated solution promoted actively by the Tribunal. These procedural directions form a very limited structure. Everything will depend on the rules of procedure eventually adopted and the attitude of the Tribunal's members themselves. After all, the *Income Tax*

[35] Mr Howard, Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 22 May 1975, 2737.
[36] Ibid. 2738.
[37] Commonwealth of Australia, *Parliamentary Debates*, Senate, 4 June 1975, 2207.
[38] Ibid. 2210.
[39] Act s. 40(4).
[40] Ibid. s. 40.
[41] Ibid. s. 35.

Assessment Act 1936-1975 (Cth) Part V contained no procedural directions at all as to the Board of Review. If the ultimate question for the Tribunal is what decision is best in the circumstances, too close an adherence to legal forms and procedures will not promote that aim.

As originally introduced, the Bill designated the Superior Court of Australia as that to which appeals from the Tribunal were to be taken. The Opposition sought to substitute the State Supreme Courts because they are the "ordinary courts of the land"—again the rule of law. In the event, it was agreed that the Australian Industrial Court should hear appeals. The Industrial Court hears appeals on questions of law either as a basis for the setting aside or referring back to the Tribunal of the substantive decision made[42] or as separate references analogous to the case stated procedure of summary courts.[43] There is, however, a further appeal which is rather curious. Section 31 states that the Tribunal's decision that a party has standing is "conclusive". This would normally mean "conclusive on the facts" but open to appeal or review for error of law. However, section 44(2) states that where the Tribunal's decision is that the party has no standing, then "the person may . . . appeal . . . from the decision of the Tribunal". This statement is against the background that every other appeal is on a question of law, yet both the wording of the subsection and the fact that it is provided for separately imply that the appeal is a general one. Further, section 31 must be fitted into the pattern. Section 44(1) allows appeals only from the decision and if one party wishes to challenge the presence of another at a hearing his challenge should be made prior to the hearing, for, if he is right, the entire hearing will be vitiated. By using the word "conclusive" in section 31, has the decision that a person has standing been taken out of the general appeal provisions of section 44? Is the only remedy of a challenging party to seek a *certiorari* against the decision to admit a party? It is submitted that the enacting of both sections 31 and 44(2) means that there is no appeal from a decision to admit a person as a party. Full scope for judicial review is, however, retained since the privative clause which was originally subclause (4) of what is now section 44 was deleted in the Senate. The objector in this situation will be restricted to showing that an error of law has been made; his rights are, therefore, more restricted than those of a person refused standing.

The Administrative Appeals Tribunal has the structure of a major new instrument of administrative justice but it has the jurisdiction of a window dresser. When introduced, the Bill contained no schedule of jurisdiction and the Opposition saw this as a grave defect. It sought in both Houses to introduce a schedule conferring all the jurisdiction recommended by the Bland Committee in its Report. The Government countered this with promises of a schedule of their own to be introduced in the Senate. When the Government came to introduce its schedule, Hansard[44] records it as

[42] Ibid. s. 44(1).
[43] Ibid. s. 45.
[44] Commonwealth of Australia, *Parliamentary Debates*, Senate, 4 June 1975, 2220-2222.

being exactly the same as the Opposition's. According to Hansard this schedule was approved by the Senate without discussion. Yet, when the Bill was reported back to the House of Representatives with the Senate's amendments, Hansard[45] records a different schedule as being that passed by the Senate. The House approved this new version with a number of additions[46] and the Senate did so too.[47] No one appears to have noticed the discrepancy and it is interesting to speculate whether Hansard was wrong (an unthinkable thought) or some sleight-of-hand (an equally unthinkable thought) took place. The Official Schedule of Amendments prepared by the Clerk of the Senate records the schedule in the same form as was reported back to the House of Representatives, but that schedule appears nowhere in Hansard's record of the Senate's deliberations.

The Acts and Regulations over which the Tribunal is given jurisdiction number twenty-six but, while some are significant in importance or number of likely appeals, they barely intrude upon the mass of decision-making by federal Government. This is disappointing. However, the then Opposition (now Government) affirmed time and again in debate that the Tribunal should have a wide jurisdiction. In the House of Representatives, Mr Viner affirmed "that this legislation should give to citizens affected by administrative decisions, a general right to have those decisions reviewed".[48] In the Senate, Senator Greenwood affirmed that[49]

> "On any return to government, the Opposition itself certainly would examine this particular Bill to ensure that the purposes which I think the Opposition clearly has demonstrated it desires to have implemented are implemented as fully as can be in order to provide the most comprehensive review system possible."

One may look forward to the realization of this affirmation, but when?

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"THE CLEARANCE PROCEDURE AND THE CONCEPT OF 'COMPETITION' UNDER THE TRADE PRACTICES ACT 1974"

The *Trade Practices Act* 1974 (Cth) opens up a challenging field of economic law. It introduces new concepts and new administrative machinery. This paper examines the concept of "competition" under the clearance provisions of the Act. It is argued that the Act aims to promote a process of "workable competition" in industry and that the Commission ought to consider all clearance applications in the light of this policy. A survey of

[45] Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 19 August 1975, 43-45.
[46] Ibid. 48.
[47] Commonwealth of Australia, *Parliamentary Debates*, Senate, 21 July 1975, 149.
[48] Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 21 May 1975, 2631.
[49] Commonwealth of Australia, *Parliamentary Debates*, Senate, 4 June 1975, 2192.

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