

CIVIL AND ADMINISTRATIVE TRIBUNALS – CAN THEIR PERFORMANCE BE IMPROVED?

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The topic upon which I was asked to address you tonight was whether the performance of tribunals, be they administrative or civil, can be improved. The simple answer to that is yes, but the detail is more complicated.

Improvement in performance depends first upon Government providing an appropriate structure and appropriate resources. It depends on the way tribunals manage the structure and resources they have provided to them.

Tonight I want to deal with the three different approaches taken by Governments in New South Wales, Victoria and the Commonwealth to provide structures which they have considered will provide improvement in the performance of tribunals. I will discuss the question of what, if any, benefits have been derived in Victoria from the new approach taken there.

I propose then to discuss some of the ways tribunals can improve their performance within the structure provided to them.

Over the last 25 years there has been significant growth in the number and variety of tribunals serving the community both in Victoria and throughout Australia. Tribunals were established during this period as specialist bodies to deal with a variety of issues as particular needs arose. It has always been the intention of Parliaments that such Tribunals be relatively informal, cost effective, efficient and, in comparison with courts, be able to apply specialist knowledge to the issues before the tribunal.

However, at least in Victoria and New South Wales, a large number of tribunals developed in a piecemeal fashion in response to *ad hoc* issues seen by Parliament to be relevant at the time of the creation of such Tribunals. It was argued in both States that this undisciplined proliferation of tribunals led to a number of undesirable consequences, including duplication of administrative infrastructure, inconsistency of approach and unduly narrow specialization by some tribunals. In particular, it was argued that tribunal members were insufficiently independent of the Executive.

A discussion paper entitled "Tribunals in the Department of Justice: A Principled Approach" was distributed widely throughout Victoria in October 1996 and numerous submissions were made in response to it. The paper proposed an improvement to the tribunal system by the creation of a large, judicially-led amalgamation of tribunals. It was argued that small tribunals dealing with specialist areas were not sufficiently accessible, efficient or cost-effective, and that a large tribunal would:

- improve access to justice;
- facilitate the use of technology;

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- complement measures to increase the use of alternative dispute resolution programmes;
- streamline the administrative structures of tribunals;
- develop and maintain flexible cost-effective practices;
- introduce common procedures for all matters yet retain the flexibility to recognize the needs of parties in specialised jurisdictions;
- achieve administrative efficiencies through the centralization of registry functions; and
- achieve more efficient use of tribunal resources.

It should be noted that the recent proposed amalgamation of Commonwealth Tribunals was said in the explanatory memorandum to the Administrative Review Tribunal Bill 2000 to be for similar reasons.

It was argued, too, that tribunals had been insufficiently independent and inconsistent. I can only speak for Victoria in this regard but many of the criticisms of the proliferation of tribunals in Victoria were justified. This is not a criticism of the membership of those tribunals, but a criticism of the structure and a criticism of the way in which governments treated such tribunals. In the years leading up to the creation of VCAT it was not uncommon for there to be a perception of political interference with tribunals as the result of the appointment of members who were known by the government of the day to have a viewpoint of a particular type. Tribunals were perceived as an appropriate dumping ground for unwanted public servants or as places where some friend of the government of the day might be appointed. For example, it was not unknown in Victoria for a parliamentarian who had lost a seat in an election to be soon after appointed to a tribunal. It was not uncommon for the terms of members of tribunals not to be renewed for reasons which were not explained, but which were clearly not related to issues of merit.

Another matter of concern has been the insidious depreciation of the value of remuneration paid to tribunal members. In Victoria, only one increase in remuneration has occurred in the last nine years.

The discussion paper suggested that longer terms of appointment for tribunal members and senior judicial leadership would improve these areas of tribunal concern.

The Judicially Led Amalgam

It is interesting to note that arguably the two most significant reforms which have taken place in recent years, the tribunals systems of Victoria and New South Wales, are judicially led amalgams. This process commenced in Victoria with the creation of a judicially led administrative review tribunal, the former Victorian AAT, in 1984. In many ways the Victorian AAT at the time of its creation was a copy of the Commonwealth Administrative Appeals Tribunal. That model of the judicially-led administrative review tribunal has been taken a step further in both New South Wales and Victoria by the inclusion of jurisdictions other than administrative review.

Administrative Decisions Tribunal of New South Wales

In October 1998 the Administrative Decisions Tribunal commenced operation in New South Wales. That Tribunal incorporates the functions of the former Legal Services Tribunal, the

former Equal Opportunity Tribunal, the former Community Services Appeals Tribunal and, in addition, it has a substantial administrative review jurisdiction including the hearing and determination of *Freedom of Information Act 1989* appeals. Formerly these appeals were heard in the District Court. The ADT continues to accrue jurisdiction, with its Community Services Division and Retail Leases Division both commencing in 1999.

The amalgamation of tribunals by the New South Wales Government aimed to promote a more efficient and effective tribunal justice system. In the course of introducing the legislation, the Attorney-General for the State of New South Wales, the Honourable J.W. Shaw said:

The growth of tribunals has fragmented responsibility for determining legal rights, leading to a lack of consistency and in some cases arbitrary decision making. It may also lead to poor resource allocation in relation to decision making.

These were the same arguments as those which led to the evolution of VCAT in Victoria. The ADT and VCAT have developed a close working relationship. Only last month two deputy presidents from VCAT went to Sydney to spend a week each working with the ADT. Closer communication between Australian tribunals is most important. Soon the Australian Institute of Judicial Administration will set up a Tribunals Committee to further such communication.

Victorian Civil and Administrative Tribunal

I turn now to the establishment of the Victorian Civil and Administrative Tribunal, now known by the acronym VCAT, the evolution of which I, not surprisingly, have greater knowledge.

The establishment of VCAT was the most far reaching change to the operation of the tribunal system ever undertaken in Victoria, if not in Australia.

There has always been broad bipartisan, political support for what has taken place in Victoria. It was a Labour government which established the Victorian AAT in 1984. A Liberal Party government created VCAT in 1998. The Labour opposition at the time generally supported the legislation which created VCAT.

Having had a change of government in Victoria since the establishment of VCAT it is gratifying that the present Attorney-General wholeheartedly supports the work of VCAT and its commitment to providing high quality and affordable access to justice for all Victorians.

Last financial year, the VCAT operated within a budget of approximately \$20 million. It determined in the order of 90,000 applications. It now does more civil business than the Magistrates' Court in Victoria. There are 42 full-time members of whom 18 are women. There are 145 part-time or sessional members. In addition 9 magistrates, 6 of whom are based in rural Victoria, are sessional members of the Tribunal.

VCAT performs the quasi-judicial functions of 14 Tribunals, Boards and Authorities which operated previously within the Department of Justice. In addition it performs the disciplinary functions of a number of previously separate organisations which operated outside the Department.

More specifically, VCAT encompasses the jurisdictions of the old Victorian Administrative Appeals Tribunal, the Anti-Discrimination Tribunal, the Credit Tribunal, the Domestic Building Tribunal, the Estate Agents Disciplinary and Licensing Appeals Tribunal, the Guardianship and Administration Board, the Residential Tenancies Tribunal and the Small Claims Tribunal. VCAT assumed the licensing appeals functions and the inquiry and

disciplinary functions of the Motor Car Traders Licensing Authority, the Prostitution Control Board and the Travel Agents Licensing Authority and the licensing appeals and disciplinary functions of the former Liquor Control Commission. It should be noted that for the most part these jurisdictions are exclusive to VCAT and not concurrent with court jurisdictions.

In addition, the Tribunal has a number of new jurisdictions such as jurisdiction to hear and determine disputes under the *Retail Tenancies Reform Act 1998* and under the *Fair Trading Act 1999* and to review decisions of the Psychotherapists Registration Board, the Dental Practice Board and most recently the Chinese Medicine Registration Board.

The Tribunal has judicial leadership. Its President is a Supreme Court Judge and it has two Vice-Presidents, each County Court Judges. The judicial members are responsible for the administration of the Tribunal. It is divided into two Divisions, a Civil Division and an Administrative Division, each headed by one of the County Court Judges. Each of the Judges and each Member of the Tribunal has a fixed 5 year term of tenure at the Tribunal. The members, many of whom are sessional, are from a wide range of disciplines. Legal members are the most numerous but there are doctors, accountants, engineers, planners, academics and the like amongst the members. The Civil Division has a number of lists which are each headed by a Deputy President and which might be said to hear inter-parties matters, such as anti-discrimination, credit, domestic building, residential tenancies, retail tenancies and the like. Similarly the Administrative Division has a number of lists, each of which is headed by a Deputy President. There are senior members and ordinary members attached to one or more lists. The Administrative Division is basically an administrative review jurisdiction. It deals with reviews of Freedom of Information decisions, planning decisions, State tax decisions, land valuation and in addition reviews the decisions of a number of licensing and disciplinary bodies such as the Medical Board, Nurses Board and various other professional and business organisations.

It is interesting to observe that the distinction between civil and administrative tribunals which existed previously in Victoria has been blurred, if not removed, by the creation of VCAT. The administrative review functions are now seen as a quasi-judicial rather than an administrative function in Victoria.

Has there been an improvement in performance because of amalgamation?

Many members of previously separate tribunals viewed the introduction of VCAT with real trepidation. Some concerns which had a real basis were that the collegiality of the small tribunal would be reduced by the creation of a very large tribunal. Other concerns were that the degree of expert specialization would decrease with a large amalgamated tribunal. A further concern was that the tribunal would become increasingly legalistic and that the appointment of judicial leadership would not lend itself to informality and user-friendliness or accessibility.

It is, of course, for others to judge whether or not these concerns now have any justification. However we have endeavoured to meet each of these concerns. First, each individual list, of which there are 13, is managed by a deputy president. In a number of cases that deputy president was the former head of the tribunal whose jurisdiction is now managed by a list. Substantial managerial discretion is delegated to such heads of lists. Furthermore, we have endeavoured to make the Tribunal more, rather than less, informal, particularly by the introduction of mediation and compulsory conference procedures. In addition, substantial time has been spent on professional development and training in relation to such matters as the proper conduct of a hearing, writing of reasons for decisions and issues of potential conflict and bias.

However, although the Tribunal is only two years old, it is apparent that there has been a significant improvement in other ways. First, there can be no doubt that the Tribunal is more independent than many of the individual tribunals were in the past. Each member has a five-year term. Although appointments are made by the Governor-in-Council, a protocol has been reached between the Attorney-General and the President of the Tribunal as to an appropriate process of appointment. That process is based upon merit. Since the commencement of the Tribunal no political interference has been experienced in the appointment of, or the termination of employment of, members, and we do not anticipate that it will in the future. The political price to be paid by such interference is now a high one in that each judge has the entitlement to return to his court. Indeed each sits in his or her respective Court as well as in the Tribunal.

The fact that the Tribunal has a substantial budget and the fact that it is led by a Supreme Court judge means that the Tribunal has instant accessibility to the Attorney-General of the day. This is a significant issue in terms of budget and other issues of principle which affect the Tribunal. I understand that many of the constituent parts of VCAT when they were individual tribunals had real difficulty in communicating with the government of the day. One example of the increased status of the Tribunal is that the President of VCAT sits on a Courts Consultative Council with the Chief Justice, the President of the Court of Appeal, the Chief Judge of the County Court, the Chief Magistrate and the Attorney-General and the Head of the Department of Justice. Access to such consultative bodies was not available to the smaller tribunals. Indeed, a recent consequence has been that the Attorney-General has accepted that Tribunal members' salaries should be independently reviewed by the JRT which reviews judges' salaries annually.

The President of the Tribunal is required to report annually to the Parliament. I believe that an annual report of this nature is a powerful tool in educating both the public and Parliament about the operations and needs of the Tribunal. Concerns expressed in such a document from the President of a tribunal of the nature of VCAT are more likely to receive attention than they did in the past.

The capacity for improvement in processes and efficiency within VCAT has been substantial. For example, it was not uncommon in the past for three of the constituent tribunals to be conducting hearings in one major provincial centre at the same time. In certain circumstances, three members in three cars incurring three costs of accommodation could take place. With the amalgamation of the Tribunal, a number of members now sit across jurisdictions. Now one member can go to a provincial city and deal with a number of matters which previously were the province of separate tribunals. This is obviously efficient. However, more than this, it provides significant career satisfaction for members who are now able to have a variation in the types of case which they hear.

The VCAT Act requires, uniquely in such legislation as far as I am aware, that the judicial members have a statutory obligation for the training, education and professional development of members of the Tribunal. Immediately upon the commencement of VCAT, a Professional Development and Training Committee was established. This enables each list to conduct seminars on matters of specific relevance to its list but also is an opportunity for all members to be involved in areas of common interest such as ethics, or decision-writing. In addition, further list-specific training is conducted throughout the year. Funding is provided for the purposes of cross-cultural training of members. A considerable amount of work has been done by the mediation committee in relation to mediation training for members.

Last year the issue of the need for assistance on the judicial learning curve came to prominence in the media and throughout legal circles. As you will be aware, the AIJA has

been deeply involved in discussions which it is hoped will lead to the creation of a National Judicial College. The Victorian Attorney-General has appointed a Judicial Education Working Party chaired by the Chief Justice, with a view to the creation of a Judicial Studies Council. He intends that it will have responsibility for continuing professional education for VCAT members as well as the judiciary. I believe professional training and education is an area which VCAT is equipped to handle particularly well. At VCAT, a New Members' Handbook has been developed, which provides newly appointed members with a convenient guide to practical aspects of membership. We have a mentoring programme for new members. There is also a New Members Committee which provides practical support and assistance to newly appointed members.

However, notwithstanding the work done internally by any tribunal, there must be a recognition by Government that access to justice includes access to competent and well-trained members. This year for the first time we have an actual budget figure allowed for training. We are hopeful that that figure will be increased in years to come. From these funds, eight members will undertake a Monash University diploma course in Tribunal Procedures this year, as well as conducting the many other list specific seminars. The issue of professional training and development is a significant one. The development and maintenance of community respect for Tribunal decisions is closely related to that issue. I believe that resources for adequate professional development are more likely to be provided in the context of VCAT, than was likely in the context of the numerous smaller tribunals which existed previously.

Many of the members of VCAT are qualified to sit in a number of jurisdictions that were previously managed by separate boards and tribunals. The flexibility to use the expertise of members across a broad range of lists increases VCAT's effectiveness. For example most reviews of decisions of the Medical Board justify the inclusion of a member with medical qualifications. This was not possible under the old AAT. A number of doctors, nurses and other professional persons are now members of VCAT. More than that however, it enables a cross fertilisation of management and hearing culture between lists, broader experience for members, and enables members to accumulate new perspectives and knowledge. VCAT has found that this results in greater career flexibility and satisfaction for members. Rotation of Deputy Presidents occurs. This gives new focus to senior members, breaks down further cultural differences between old tribunal jurisdictions and contributes to Deputy Presidents and Senior Members having the significant leadership and responsibility in the Tribunal. It also gives them greater career satisfaction, and a broader experience with the attendant possibilities of other judicial appointments becoming open. Already, one Deputy President has been appointed to the County Court since the commencement of VCAT.

Members are not the only people at VCAT benefiting from the amalgamation. The reorganisation of seven former registries into a single registry with three sections has produced staff efficiencies and enhanced career opportunities for registry staff.

The VCAT Act places a substantial emphasis upon mediation which is a significant factor in the conduct of proceedings before the Tribunal. In many cases now before the Tribunal, mediation is being used successfully where it was not used previously. In particular, since the commencement of VCAT, mediation has been used with considerable success in anti-discrimination matters. A Mediation Committee has been established to develop a Code of Conduct for VCAT mediators and is now conducting a study of the mediation work done in VCAT. Monash University conducted a research project upon mediation in planning cases. However, we are yet to maximise our capacity to use mediation as a tool for dispute resolution and I plan to take steps this year to achieve this by creating a central mediation unit led by a senior member to co-ordinate all mediations and to ensure that appropriate standards are maintained.

There is increasing recognition of the benefits afforded by mediation, not only within the Tribunal. Research indicates that mediation empowers people in a way that hearings do not and that people who have been through mediation feel better about the results, even if they 'lose', than if they go through hearings. With this in mind, several of the lists at VCAT are reviewing their approach to mediation, with the aim of increasing significantly the percentage of cases which proceed to mediation.

The benefits for members of the public of the amalgamated tribunal extend beyond the ease of accessibility afforded by a single Tribunal when making an application. In its first year of operation, list members conducted hearings at 52 venues throughout Victoria including Melbourne, suburban locations and rural centres. This year hearings were conducted at 114 venues. The ability of members to sit across various lists greatly increases the access of rural and regional Victorians, in particular, to the Tribunal. Last month, VCAT Online commenced, an internet based electronic application process which cost over \$1 million to develop. It is the first interactive electronic lodging process of its type in any Australian court or tribunal. Application can be made at any time from any place and the system will issue a receipted application form with the date of hearing over the internet. At the moment this is restricted to residential tenancies cases, but we are exploring ways of internet electronic lodging in other areas. Although this project commenced before the creation of VCAT there can be no doubt that it was given great impetus by the creation of the amalgam, as was an electronic order processing system which permits many parties to receive their certified order at the hearing.

As with all processes of change, the establishment of VCAT was more a starting than a finishing point. The evolution of VCAT is ongoing. There have been substantial logistical and cultural difficulties associated with the amalgamation of so many previously separate organizations. Many of these difficulties have been surmounted. With very few exceptions, the overwhelming majority of VCAT members and staff have had the strength of character to accommodate the many changes that have taken place, with enthusiasm and good grace.

However, much work remains to be completed in the evolution. For example, VCAT inherited from the various bodies that preceded it an ad hoc bundle of practice notes. Not only were practice notes in different form, but in some instances they applied different approaches to similar situations. Their language was inconsistent and, in some cases, convoluted and overly legalistic for the many people without legal representation who use VCAT. Following the introduction of several practice notes that cover the whole of VCAT, such as expert evidence, all of the practice notes are being rewritten. All will adopt the same format and style, and all will be written in plain English so as to be accessible to non-represented parties.

I am hopeful that the Tribunal will be provided with a permanent duty lawyer scheme to assist the numerous unrepresented users.

I expect that over a period of time the work undertaken by the Tribunal will expand. For instance, a number of Bills before Parliament now expand the jurisdiction of the Tribunal.

The Information Privacy Bill which is designed to establish a regime for the responsible collection and handling of personal information in the Victorian public sector, has had its second reading. If passed in its present form, VCAT will have jurisdiction to hear complaints after a conciliation by the Privacy Commission in much the same way as it does in Equal Opportunity matters.¹

¹ The *Information Privacy Act 2000* has now been enacted. It received assent on 12/12/2000.

The Autumn 2000 session of Parliament included the *Chinese Medicine Registration Act 2000*, *First Home Owner Grant Act 2000*, and the *Psychologists Registration Act 2000*, all of which expanded the jurisdiction of the tribunal.

Summary

It is interesting to note that the Commonwealth, in creating the Commonwealth AAT, led the way towards the judicially-led tribunal which resulted in the creation of the large amalgams in New South Wales and Victoria. It would appear that the Commonwealth is now heading away from that model. In Victoria there was bipartisan political support for the appointment of judicial leadership as a necessary step in ensuring the independence of the tribunals which were the subject of the amalgamation. I am confident that that leadership has been a significant aspect of the public perception of the independence of the Commonwealth AAT, the former Administrative Appeals Tribunal of Victoria and now the New South Wales Administrative Decisions Tribunal and VCAT. There are of course many issues relating to tenure of members of tribunals, but I think we would all agree that the longer the term, the greater the perception of independence. Accordingly the 5 year terms of VCAT members are a significant improvement on past arrangements in Victoria.

We shall all await with interest, the developments in the Commonwealth tribunal sphere. Interesting developments were proposed by the Administrative Review Tribunal Bill. Although the proposed ART structure of divisions and a four-tiered hierarchy mirrored the VCAT model, there were significant differences. The Bill set out no qualifications required of the President or other members. The Bill provided for performance agreements to be entered into by all members other than the President, and for a code of conduct to be prepared. Tenure is not fixed, but cannot exceed 7 years although a member may be reappointed. Whether these arrangements would enhance or detract from the independence of the Commonwealth Tribunal is unclear.

However, whatever might be happening in the Federal arena, I think it is likely that the judicially-led amalgam is here to stay in the foreseeable future in Victoria, New South Wales and in a different way in South Australia.

I am, of course, not submitting that a tribunal of the type created in Victoria and New South Wales is appropriate everywhere. There are advantages in discreet tribunals dealing in specialized areas. The particular disadvantages of lack of independence and inconsistency of approach which applied in Victoria may well not apply elsewhere if tribunals are given appropriate resources and are guaranteed independence. However, the creation of VCAT in the Victorian context has significantly increased the independence of the Tribunal and has enabled the Tribunal to be efficient in using the resources which are made available to it. I think it is likely that over a period of time the Tribunal will be able to negotiate more substantial resources for the professional training and professional development of its members than would have been the case with the constituent small tribunals. The Tribunal is now very well known in Victoria. Hardly a day goes past that some issue relating to the Tribunal does not appear in a major metropolitan daily newspaper. On the one hand, there are difficulties with this in the sense that a criticism made of the Tribunal has much more public force than in the past because it is now so well known to the community. Nevertheless, on balance, it appears to me that a public institution which is well known to the community is, as long as it gains the respect of the community, more likely to be understood and appreciated by the community.

A final matter relating to whether the performance of tribunals can be improved is the issue of communication. All tribunals are grappling with better ways of communicating with the public and with the users of tribunals. The report "Courts and the Public", which was

produced by the Australian Institute of Judicial Administration in 1998, and was written by Professor Parker previously of Griffith University, deals with many ways in which the needs of the public might be met.

VCAT has expended considerable effort and money in producing annual reports. These reports ought to be as transparent as possible in relation to the activities, successes, failures and difficulties of the Tribunal. VCAT's Annual Reports are written as much to be read by the community and users of the Tribunal as they are to fulfil their statutory purpose.

However, there are other ways for tribunals to communicate with the public. An appropriate and useful web site has been set up by VCAT which is in itself an extensive legal resource because of its links. We have established user groups who meet regularly. We encourage constructive criticism of our processes and performance by such user groups. Publication of guidelines as to the operation of the Tribunal is another important way of meeting the needs of the public. We are working upon the production of some of our guidelines in a number of languages other than English. Having rules, practice notes and the like written in plain simple English is important. Tribunals should have available to their public a service charter indicating what services will be provided, what standard of services will be provided and advising users as to how they might make a complaint about the operation of the Tribunal. We have such a charter and we now have electronic monitoring of complaints.

A further improvement which is called for in tribunals across Australia is improved accessibility of decisions. This can be done several ways by the use of websites, perhaps Austlii, or by publications. However, another way of communicating to the public, and one method by which the Tribunal operates, is to produce short summaries of significant decisions. A more detailed consideration of these issues can be found in Professor Parker's report.

The tribunal system in Australia is in good hands. The tribunal system in this country is likely to expand notwithstanding whatever might be happening in the Commonwealth sphere. Tribunals provide access to a justice system which is not otherwise available to many members of our community, and continual improvement of our tribunals will enhance community confidence in the decisions which are made.