MERGING TRIBUNALS: SOME REFLECTIONS

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I am happy to share with you today some of my experiences and thoughts on the subject of appropriate tribunal structures and measures designed to increase efficiency and cost-effectiveness, the issues being examined in the review being undertaken by the ACT Department of Justice & Community Services. I have read with interest the speech given by your Chief Minister on this subject in 2004.[1]

I have had two exposures to this subject, as head of the Fair Trading Tribunal of New South Wales (FTT) between 1999 and 2001 and as head of the Administrative Decisions Tribunal of New South Wales (ADT) from 1998 to the present.

In contrast to the position that now prevails in Victoria and Western Australia, there remain several separate major tribunals in NSW – in order of volume, the Consumer Trader and Tenancy Tribunal (the CTTT, 60,000 filings a year, of which 45,000 are residential tenancies filings), the Mental Health Review Tribunal (9,000 matters a year), the Guardianship Tribunal (7,000 matters a year) and the ADT (1,100 filings a year). The Land and Environment Court, which has Supreme Court status, deals with planning matters – a jurisdiction typically located in tribunals in other jurisdictions (2,600 filings).

For comparison, the Victorian Civil and Administrative Tribunal (VCAT) (which covers all the jurisdictions mentioned except for mental health) had 89,000 applications for the year ending 30 June 2006 (66,000 being residential tenancies filings). One interesting difference in the case of the new WA State Administrative Tribunal is the fact that residential tenancies was kept separate and left with the Local Courts, having regard to the scale of the State and for reasons of accessibility.

Disadvantages of merger

The main criticism that is made of amalgamation of tribunals has to do with the risk of loss of a specialised, fine-tuned response to the community need that the tribunal was created to address. This view was rejected by a NSW Parliamentary Committee which examined the jurisdiction and operation of the ADT and looked more generally at merger issues. It reported in 2002.[2]

The criticism has some other strands to it. One goes to a common feature of tribunals as they have been created in the past – the multi-member bench combining legally-trained and community members. Some critics see the multi-member bench as the defining characteristic of a tribunal and the one that marks it out as different from a court. The lay members often, as you know, have specialist expertise.

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I am not as wedded to the need for universal or near-universal multi-member benches. In my view there are categories of work in tribunals that can safely be left, at least most of the time, to a single member.

There is one major exception – professional discipline. Here the bench at final hearing should be multi-member and comprise a legally trained head, a member of high standing and integrity from the relevant profession and a community member, ideally with a consumer protection background. There should be provision for the addition of a second professional member if the complexity of the competence issues raised by the case warrants it.

My attitude that single member benches will often be sufficient is conditioned significantly by my experience as an occasional hearing commissioner with the federal Human Rights and Equal Opportunity Commission in the period 1989-1996 (when I was a member of the Commission as Privacy Commissioner). In my view, HREOC dealt with cases arising under the federal anti-discrimination legislation in an exemplary way, using well-qualified hearing commissioners who sat alone. There was a listing discretion allowing for multi-member panels, and this was exercised for some cases that were of a landmark kind (especially in the disability discrimination area). The reasons of the late 1970s that led governments to prescribe multi-member benches in equal opportunity matters are not, in my view, as relevant today. Similar arguments can be mounted, it seems to me, in relation to other jurisdictions including the protective jurisdictions.

Statutes can, it seems to me, give guidance as to the kinds of cases where it might be appropriate to have multi-member panels without prescribing them across the board. This approach, obviously, will produce savings and efficiencies as compared to an approach which mandates multi-member panels.

There is a risk in an amalgamated tribunal environment that there will be a loss of identity and status for the pre-existing separate tribunal. In the case of the ADT, I witnessed this sense of loss especially on the part of some of the members and staff that had been responsible for the work of the Legal Services Tribunal. There were also sentiments of this kind, not so widely shared, among members and staff of the former Equal Opportunity Tribunal. There is, no doubt, I think, that some loss of profile affects tribunals of the kind I have mentioned in the event of amalgamation.

Attention has to be given by the amalgamated tribunal to dealing with this change. Publicity materials, internet sites and the like have to seek to maintain clarity as to what matters can be brought to the Tribunal. Internal arrangements must ensure that appropriate separation of identity, culture and practice is maintained.

Advantages of merger

The major positive for the community in an amalgamated tribunals service is the common point-of-entry. The United Kingdom development is very interesting in that the creation of the common point-of-entry has been the first initiative. The amalgamation of the hearing tribunals themselves is being left to a later stage of the process. So we see a Tribunals Service being created, separate from the Courts Service, with over 3,000 staff and offices all over the country.

The benefits that can be achieved through common infrastructure, common electronic platforms, co-ordinating training and the like are obvious.

Most of the affected members, especially the lawyer members, in my experience, have welcomed integration of tribunals, with the prospect that they might be given the opportunity to work across a variety of jurisdictions. In the case of the ADT, we have members who

previously only did legal profession discipline work also sitting in retail leases cases and revenue cases. They enjoy the diversity of work. We have members in the General Division who sit on freedom of information matters, privacy matters, occupational licensing matters and guardianship matters (we have a review jurisdiction in relation to decisions of the Public Guardian and the Protective Commissioner). Some of them also sit in the Equal Opportunity Division.

Portfolio location

In my view it is highly desirable that large, amalgamated tribunals be housed in the Attorney General's (AG) or Justice portfolio.

Historically, the Attorney General's portfolio has had as its primary responsibility within government the administration and management of courts. There is, in my view, a much stronger tradition of understanding and practice in the Attorney General's portfolio in relation to such matters as the need to respect and uphold the judicial and decision-making independence of judicial bodies, including tribunals.

As you know, the process choices of courts and tribunals must also answer to the law as it has been developed in the higher courts in relation to procedural fairness. Sometimes procedural fairness requirements are at odds with the views of public service administrators as to the appropriate process. These matters have to be addressed in the setting of budgets and the provision of appropriate registry and member support facilities. In my view, this set of dilemmas is well understood in the Attorney General's portfolios within which I have had substantial experience (Victoria, the Commonwealth and NSW).

The AG's portfolios usually have well-developed protocols in place around such matters as representations by disappointed parties to the Minister and the Department over the handling and outcome of cases. In my view, these conventions are not as well understood in the non-AG's portfolios of government.

It is no surprise to me to see that the major reforms now taking place in the UK provide for the housing of the integrated tribunals structure in the Justice portfolio – the Department of Constitutional Affairs. This is the choice that has been made in Victoria and WA.

Another danger that can be avoided by having tribunals, whether amalgamated or not, housed in the one portfolio is disparity of treatment of tribunal functionaries in relation to remuneration and other conditions, whether they are members or registry staff. In New South Wales, there are variations across portfolios in members' fees and in the remuneration paid to senior registry personnel. Disparities should be avoided in relation to Tribunal members and registry staff that cannot be explained in differences in complexity or gravity of the work.

Judge head of merged tribunals

This has been the pattern in Victoria, WA, the UK and, in the instance of the Commonwealth, the AAT. In NSW there are judge heads at the ADT and for the Medical Tribunal (both District Court). The Land and Environment Court (LEC) has Supreme Court status and a judge head. The LEC has a number of other full-time judge members.

Having a judge head assists, I think, in conveying to the public that a significant level of practical independence from Government is present in the organisation. In the case of the ADT, I have as full-time Deputy, another judicial officer who is a magistrate. In addition a number of the Divisions have judge heads – the magistrate is head of the Equal Opportunity Division, and acting judges head the Legal Services Division and the Retail Leases Division.

The Revenue Division is headed by a Senior Counsel and I head the General Division. So it can be seen, I think, in these arrangements, that the key members of the Tribunal are likely to be seen as people possessing real independence.

Appointment and renewal of members

Perhaps the most contentious issues in the operation today of tribunals in Australia surrounds the appointment and renewal of members of tribunals.

Non-renewal is the most critical issue. Rumours abound in the world of tribunals that certain non-renewals of highly regarded, full-time members in recent years were for no better reason than that the particular minister found their decisions on matters affecting the particular government to be unwelcome.

As it happens, at the ADT non-renewal is not such a prominent issue, for the practical reason that the only full-time members are both judicial officers with tenure - myself, a judge, and my deputy, a magistrate. With two exceptions, our part-time judicial members and non-judicial members are used on an occasional basis. So they are not very concerned, in terms of financial impact and their career, over whether they are renewed or not. Nor have there been any non-renewals of a controversial kind.

On the other hand, when I was at the FTT there were 8 full-time members and, as well, several part-time members whose principal occupation was working for the FTT. (The successor CTTT, bringing together the FTT and the Residential Tenancies Tribunal has many more full-time members.) The full-time and key part-time members of the FTT were often lawyers who had given up other careers to become tribunal members. Age-wise they were commonly in their 40s or early 50s, with 15 or more years post-admission experience and at a point in their career where if they were not renewed they might have considerable difficulty in finding other equivalent rewarding and satisfying work. They dealt with cases which sometimes involved the portfolio Department as a party, and there was a risk that they might be intimidated in how they dealt with cases involving the Department by the prospect of non-renewal.

The renewal process needs, in my view, to be much more transparent than it has been in the past. Permanence and continuity should be fostered in the case of legal members and other members who are appointed because of their professional expertise. It seems to me similar considerations apply to fractional full-time members, or part-time members who give a high proportion of their time to the work of the tribunal. The issues are not so pressing in the case of sessional members who are called up only on an occasional basis.

In my view, if a member has been appointed to a full-time post and performs satisfactorily (by reference to measures that are known to the member and ultimately interpreted by someone of credible independence, perhaps a retired tribunal head) the government should be obliged to reappoint.

If there is a downturn in the business of the tribunal, or a restructure, as occurs in the case of a merger, there should be clear protocols over dealing with existing members, especially the full-time members and the significantly-involved part-time members. They should be continued at the same level unless there are proven performance grounds for non-continuation. If for budgetary reasons, it is decided to continue with a lesser number of members, those that are not reappointed should receive some compensation by way of exit package, honouring the principle that such appointments are ordinarily intended to be renewed. In the instance of the changeover from the FTT to the CTTT there were no exit packages for non-renewed full-time members. Their terms were simply allowed to expire.

It seems to me there can be a greater margin of flexibility allowed in relation to the appointment process than is allowed in the renewal process – but basic practices such as public calls for expressions of interest for members should be followed in connection with high-volume areas of work, followed by selection interviews leading to a recommendation. On the other hand, it remains desirable, I think, to allow to continue the traditional system of confidential invitations being extended in order to obtain individuals of particular distinction (say, a retired judge) or to meet a need in a highly specialist or complex area.

Administration of tribunal

The administrative arrangements, as I discern it, in the case of the Commonwealth AAT and the WA and Victorian super-tribunals, involve conferral of ultimate administrative and management responsibility on the judge head. Below the judge head, there is a CEO who has overall responsibility for the running of the registry functions. These organisations run separately from the portfolio Department, though obviously, they must continue to deal with it in relation to budget allocations and some infrastructure issues.

The NSW AG's model is a different one with the Registry functions of courts and tribunals being administered directly by the Department. That means that the Registrar of the Tribunal has a dual reporting line to the Department and the head of jurisdiction, the required one being to the senior officers of the Department.

The head of jurisdiction, under this model, must therefore liaise with the head of the Department over issues that might involve a difference of view, and at times the Registrar or CEO may find themselves in a difficult situation. These are merely, of course, introductory comments to a difficult and contentious discussion.

As for my own situation, the ADT is a small tribunal. It has 12 registry staff. It does not have the scale, as I see it, to warrant separation of the management function from the AG's Department. I suspect any amalgamation in the ACT, given the population differences between NSW and the ACT, is likely to produce a tribunal with a relatively small number of registry staff. In my view, it is desirable in dealing with small units of staffing to have the staff connected to a broader institutional structure so that they have ready access to promotion and other work opportunities.

Registry structure

The ADT does its business through a single registry. We rotate the staff through different aspects of operation every few months – counter and public enquiries work, initial registration of matters, listing and co-ordination of members for hearing, issuance and registration of orders, publication of decisions (including uploading to the internet). We do not have sub-registries matching the Divisions. We have not seen that as appropriate given the smallness of the number of staff, and the ease with which the staff can share knowledge with each other as to the differences in procedure and practice that we do have for different classes of business.

In bigger more high volume tribunals, it seems to me to be inevitable that one would have sub-registries. For example, if there was a mega-tribunal in NSW, there would at the least I think be sub-registries for residential tenancies, home building claims, retail lease claims, consumer claims, professional discipline, merits review and protective matters.

Appeal panel within the merged tribunal

A unique feature, I think, of the ADT as compared to other merged tribunals in Australia and the Commonwealth AAT is that it has an appellate tier. Most Divisional decisions are

appealable to the Appeal Panel. In addition the Appeal Panel has an external appeals jurisdiction, and has been given jurisdiction to hear appeals in relation to guardianship and estate management orders (orders usually made by the Guardianship Tribunal, and sometimes by the Mental Health Review Tribunal and Magistrates). For the year ending 30 June 2006, we had filed 82 internal appeals and 17 external appeals.

Initially, I was not convinced of the desirability of an internal appeal tier. I tended to the view that tribunals should, essentially, be trial-type bodies, with appeals going out to the courts. I was also concerned that the introduction of an appeal tier created another way station on the way to finality. In the instance of merits review matters, it is usual for the agency to have dealt with the matter twice (original decision, internal review decision). We have had cases that have gone to the primary level of the Tribunal, the Appeal Panel level and then to both tiers of the Supreme Court. This is excessive on any view.

With the exception of the professional discipline area, I think the Appeal Panel has proved to be useful. The Appeal Panel operates in a low cost and informal way, as compared to the situation that might apply if an appeal had to be taken to the Supreme Court. Many matters have been resolved at the Appeal Panel level and the rate of further appeal to the Supreme Court is low.

The right of appeal to the Appeal Panel has now been removed in the case of legal profession discipline matters. I have asked that it be removed in respect of the other discipline jurisdictions we have. To avoid double-handling by the Supreme Court of legal profession discipline matters, I try to list a judge member (by which I mean a judge of District Court status not a magistrate) to sit at trial level in serious cases, so that any appeal will, by virtue of provisions in the Supreme Court Act, go to the Court of Appeal. I try to do the same wherever possible with the Appeal Panel.

Costs awards

One of the usual characteristics of tribunal legislation is that the courts' costs-follow the-event rule is not applied. In the ADT the rule basically is that each party bears their own costs unless there are 'special circumstances' that warrant an order. Merely losing has not been seen by the ADT as sufficient to provide a 'special circumstance'.

I have, for some time, been an advocate of tribunal statutes taking a more fine-tuned approach to the costs issue. While I agree with the 'special circumstances' philosophy, I think the statute should give reasonably detailed guidance as to the kind of conduct that might attract a costs order and deal with issues such as offers of compromise that were better than the final orders made against the offeror. We have a commercial civil disputes jurisdiction – retail leases disputes – and the pressure has been consistent there from successful parties for there to be an automatic order for costs. Some of the Retail Leases Division decisions have tended to give weight to the contention that because of the 'commercial' character of this litigation there should perhaps be a greater preparedness to award costs. But we have remained firm that a costs-follow-the-event philosophy is not to be embraced. While either party to a lease can initiate proceedings, the usual pattern is retail shop lessee-in-difficulty bringing proceedings (to retain possession, or alleging some form of misconduct that has damaged their business) against a lessor, who usually is a major shopping centre owner.

I have seen the VCAT provisions as dealing well with the costs issue, though I probably would not be as fixed as those provisions are in relation to the procedures to be followed around offers of compromise.

Legal representation and agents

Limitations on legal representation are sometimes found in tribunal statutes. In my view legal representation should be allowed, perhaps with a 'reverse leave' provision – a right in the Tribunal to remove the legal representative. I am not convinced of the need to bar lawyers in, for example, small consumer claims. The respondent, especially if it is a corporation, will appear through an experienced officer, who sometimes will have legal qualifications. In my view, the bars on lawyers tend to disadvantage one-time applicants to a greater extent than respondents, who often are repeat participants with the advantage of experience in dealing with the tribunal.

Where a party seeks to appear through a lay representative, there should be a requirement to apply for leave to appear. There should also be some power in relation to managing persons who are introduced into the proceedings as McKenzie friends. In large, merged tribunals there may need to be provision for special classes of lay representatives to be allowed to appear as of right – such as building experts and planning experts, for those jurisdictions where typically professionals of this kind have appeared.

Litigants in person

In the ADT the typical paradigm is unrepresented applicant versus representative respondent. Some unrepresented persons have dysfunctions of various kinds. Some create great difficulties for the management of proceedings. Some are pursuing so many applications against a particular respondent that relations between the two sides are near or at breakdown. These experiences are, of course, common in many tribunals and the courts.

I think thought needs to be given to the kind of support or assistance structures that are available to registries and members, as well as the unrepresented party, to ameliorate these difficulties. There needs, I think, to be some form of duty solicitor or other type of assistance arrangements built into the structure. This kind of facility can, of course, be deployed in a relatively effective way in a larger tribunal environment.

Conclusion

I have sketched some of the issues that arise when considering the merger of tribunals. Tribunals have been seen by governments for the last hundred years as the preferred means for dealing with many types of disputes. Tribunals are seen as offering more practical and more flexible case-handling and decision-making procedures than the courts. They are often seen as the place to locate the primary determination of new legal rights (for example, the equal opportunity laws and appeals against administrative decisions). They have grown up ad hoc. In my view thoughtful merger can lead to significant gains in the professionalism, accessibility and independence of tribunals.

Endnotes

1 AIAL *Forum* No 43, 34

2 Parliament of New South Wales, Committee on the Office of The Ombudsman and the Police Integrity Commission, Report on the Jurisdiction of the Administrative Decisions Tribunal (November 2002), see esp. 42-44