

TRIBUNALS – 'CARVING OUT THE PHILOSOPHY OF THEIR EXISTENCE': THE CHALLENGE FOR THE 21ST CENTURY

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In Australian law ... merits review by tribunals is considered to be categorically different from judicial review by courts, at least in procedural and remedial terms. Whereas the characteristic merits review remedy is to vary a decision or make a substitute decision, the characteristic judicial review remedy is to set the decision aside and remit it for reconsideration.¹

The theme of this paper is that tribunals need to take up the invitation posed by the High Court in 2011 in *SGUR v Minister for Immigration and Citizenship*², to identify and to publicise their distinctive nature. As the High Court put it tribunals' inquisitorial mode of operation was meant 'to distinguish them from adversarial proceedings' and to characterise their statutory functions.³

That task requires consideration of the vision of the policy makers when they set up our tribunals' system; how that vision has been realised; and how might tribunals respond to the High Court's invitation to devise a model for themselves which takes the next step in their development.

First the vision

The birth certificate of Australian tribunals is found in the 1971 report known as the *Kerr Committee* report.⁴ From that report emerged the major institutions which populate the administrative review arm of government. At the federal level, these comprise in particular the Administrative Appeals Tribunal (AAT) and the federal specialist tribunals; at the state and territory levels, the tribunal systems include the so-called 'super' or multi-purpose tribunals with combined civil and administrative jurisdictions (the CATS).

As the AAT provided the model for tribunal development generally in Australia, it is used in this paper as an exemplar of what was envisaged as the role for tribunals in the justice system in Australia. Since the AAT model, with variations, is progressively being adopted by most States and Territories, its development and potential for change illustrates the tribunal practices more generally. However, the paper also refers to examples drawn from other broad jurisdiction and specialist tribunals. Their mode of operation exemplifies the unique contribution of Australian tribunals to the collective experience of tribunals in the common law world.

AAT model

The most far-reaching and innovative recommendation of the *Kerr Committee* was that the government establish a general jurisdiction tribunal to which people could bring appeals

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against decisions by government. Justification for this recommendation was, as the report noted:

...[t]he objective fact, in the modern world, ... that administrators have great power to affect the rights and liberties of citizens and, as well, important duties to perform in the public interest.⁵

As the report went on:

... when there is vested in the administration a vast range of powers and discretions the exercise of which may detrimentally affect the citizen in his person, rights or property, justice to the individual may require that he should have more adequate opportunities of challenging the decision against him.⁶

The major deficiency identified by the *Kerr Committee* in the administrative review system was that, outside the limited remedies available from the courts, there was no independent body, which could reverse decisions by government adverse to a person or corporation. In challenging government decisions affecting them, what the person or company wanted was not to be told by the courts that government had made a technical legal error. What they wanted was their licence to work, to import, to operate equipment, recognition of their qualification so they could seek employment commensurate with their skills and/or training, income support, or the start-up grant for their business. Those needs have, if anything, intensified in the intervening years with the growing reach of government. In other words, then and now, 'the more adequate opportunity' to challenge a decision against them was to be an umpire capable of adjudicating on all aspects of the merits of a government's decisions in relation to its citizens.⁷

The Commonwealth's response to that wish with the recommendation to set up a tribunal with a general and broad merits review jurisdiction was ground-breaking. Nowhere in the common law world in the 1970s was there a tribunal the function of which was to review all aspects of decisions by officials, across the whole of government, not just specialist pockets here and there. Indeed, so far-sighted was the suggestion that it is only in this century that other countries which have inherited the same English legal system have begun to replicate the move.

Features of the AAT template

The tribunal recommended by the *Kerr Committee* report was to be an impartial, external, statutory decision-making body. However, the principal feature of the new body was that it could review all aspects of a decision made by government - the merits function - and if appropriate, remake the original decision. To achieve this aim, the body was to have a number of specialist features apart from its ability to review the merits of a decision.

Specialist members

Unlike the courts, the membership of which is confined to judges or registrars, all of whom are lawyers drawn mostly from the bar, the tribunal's members were to have much broader expertise, knowledge and skills, both in the law and in other areas of activity.

Professor Whitmore, a member of the *Kerr Committee*, said 'the objections raised by administrators [to the existing system of judicial review by the courts] is that their decisions should not be reviewed by judges who have had absolutely no experience in the field of public administration'.⁸ As Professor Whitmore was the principal author of the *Kerr Committee* report, his insights into the proposed system have particular weight. In the face

of this criticism the AAT was also to have members with equivalent expertise to the public sector agency the decision of which was under review.

At the same time, it was recognised that the body needed those with high level legal skills and that its independence should be assured. Accordingly the recommendation was that the new tribunal was to have a President who would be a judge, and two other members, one of whom would be 'an officer of the Commonwealth department or authority responsible for administering the decision under review', another a member of the agency the decision of which was being reviewed, and a third, lay person 'drawn preferably from a panel of persons chosen for their character and experience in practical affairs'. In other words, one member was to have public sector experience, to ensure as the report said that, 'departmental policies and points of view were known and understood',⁹ and the majority were to be drawn from outside the legal fraternity.

Flexible modes of operation

A third feature of the tribunal was to be its flexibility. This had several facets. The rules of evidence were not to apply.¹⁰ The formal rules of evidence were seen as time-consuming, expensive, a barrier for self-represented litigants, and inappropriate for the accessible, cheap and informal mode of operations envisaged for the Tribunal. As the *Kerr Committee* noted: 'Lawyers should be prepared to reconcile themselves to techniques of analysis and investigation which are different from those in the common law courts'.¹¹ The minimum requirement was that the Tribunal 'shall inform itself as to the issues involved in such manner as it thinks fit, but procedures should be adopted to ensure that all material facts and matters of expert opinion are brought to the attention of the parties before a final decision is reached'.¹²

In other words, there was an obligation on tribunals to develop procedures tailored to the matters they had to decide. As Graeme Taylor, first Director of Research of the Administrative Review Council, said, the Tribunal should adopt 'procedures adapted to be exercised by individuals acting for themselves and by an interventionist tribunal'.¹³

Accessibility

Tribunals were also to be more accessible than courts. As Taylor pointed out, accessibility would be enhanced by 'easy access to review in a geographical sense'.¹⁴ So it was envisaged that tribunal members would travel to regional areas to provide review, provided the circuit was cost-effective, and that in turn was dependent on the volume of matters arising in a particular country town or region.

Accessibility included simpler remedies.¹⁵ In the 1970s in Australia, the predominant method of complaint about administrative injustice was through the arcane and technically complicated prerogative writs or the petition of right.¹⁶ These were barriers to people seeking review. By contrast, the tribunal, in having a remarkably easy application-for-review process and in being able to order that a decision be remade, was to make it easier for people to apply to it, and its variable remedies were capable of giving the person or corporation what they wanted by way of redress.

The formality of hearings processes before the courts also inhibited access. Accordingly, the tribunal was to develop friendly, applicant-appropriate processes which would encourage people to take steps to challenge government decisions.

Efficiency

Unlike courts tribunals were intended to be cheaper means of accessing one's rights. At a broad level it was envisaged that there would be a cost benefit from having one tribunal with jurisdiction across government, rather than a number of tribunals each with its own infrastructure to support. In addition, the cost of applying to the tribunal was to be much less than for an application within the court process.

A recommendation which was not adopted was the minimisation of the costs of the proposed tribunal through having a registry in common with other institutions in the administrative law package. As the report noted, cost-saving could be achieved by appointing the Registrar of the proposed Administrative Court (now the Federal Court) to be the registrar for the Tribunal.¹⁷ In other words, there was to be one registry and one set of staff. This did not happen. In addition it was proposed that there be a small administrative and research staff for the Administrative Review Council, to be shared between the court, the tribunal, and the General Counsel on Grievances (now the Ombudsman).¹⁸ This too did not happen.

Normative impact

The *Kerr Committee* was cognisant of the need for a system to improve public administration. The Committee conceded, without doing empirical work to substantiate the facts, that errors within public administration do occur, and that this possibility 'demonstrates the need for review'.¹⁹ However, as the report said: 'The existence of institutions of the kind we have suggested should tend to minimise the amount of administrative error.'²⁰ And further: 'If as a result citizens look more critically at and have the right to challenge administrative decisions, this should stimulate administrative efficiency'.²¹ As Taylor noted too, 'Obtaining justice by the review of decisions finds its ultimate justification by improvement in primary decision-making'.²² So although there was limited focus on this issue in the initial *Kerr Committee* report, largely because examination of the extent of wrongdoing was outside its terms of reference,²³ some, but minimal, attention was given to this issue.

Summarising the vision

In summary, the *Kerr Committee* contemplated a new body, a tribunal with the same powers as the initial decision-maker, that was to have government-wide jurisdiction. The body was also to have expert, independent members, and was to work quickly, informally, efficiently and cheaply, with procedures attuned to the particular jurisdiction and free of the restrictions inherent in the adversary process. A notable feature was the emphasis on the hearing as the vehicle for resolving disputes. Ultimately, the intention was that its decisions were intended to improve primary decision-making.

Have those features been realised?

At a conference in 1981, five years after the establishment of the AAT, Whitmore gave the innovations a mixed report card. Overall he said the objectives had not been met. He did identify some positive features. These included use of preliminary conferences as effective dispute solving methods; there was evidence that the Tribunal was shaping its procedures so that unrepresented applicants could be heard in an informal way and were being assisted by the Tribunal; and there was some tailoring of procedures to fit particular problems.²⁴

However, his criticisms were that there was a tendency for the Tribunal to revert to adversarial techniques rather than take a more active inquisitorial role and that, in general, the Tribunal had failed to develop different processes from the judicial model. As he said the Tribunal had not developed procedures 'which are ... cheap, quick and more suitable than the adversary process'. He was also concerned about the regular use of counsel at tribunal hearings, a feature he believed imposed on the Tribunal 'formality in curial terms', and he

noted the absence of adequate administrative support to carry out the Tribunal's investigative functions.²⁵

Developments since the 1970s

In the intervening period, despite the intentions of the *Kerr Committee* report to minimise the expansion of specialist tribunals by rolling their functions into the AAT, other specialist tribunals have been set up at the Commonwealth level, their existence often being sanctioned by the need to filter the volume of applications intended for the AAT.

There has until relatively recently also been a proliferation of tribunals in the states and territories. Nonetheless, as the *Gotjamanos and Merton* report²⁶ noted in 1996, despite the ad hoc manner in which tribunal development occurred, 'there is a surprising degree of similarity' between the diverse bodies. The report attributed this to the fact that legal practitioners generally headed these bodies and they 'adopt essentially similar practices in their approach to preliminary hearings and procedures in substantive hearings'.²⁷ In addition, the legislation establishing them 'exhibit(s) a degree of consistency in describing the manner in which the respective tribunals are to operate'.²⁸

Those consistent features were:

- a more flexible approach to the receipt of evidence than would be permitted in a court;
- a merits based approach;²⁹
- an informal method of operation - although this varies considerably, often depending on the degree to which the hearing room resembles a court;³⁰
- administrative support systems - meaning physical premises, information technology, records management, financial systems, organisational structure and administrative and clerical staff;³¹ and
- an increasing use of ADR.³²

A common deficiency in the tribunals noted by the report was that there were:

- poor levels of information and public education available regarding tribunals and their operations, which makes it particularly difficult for self-represented applicants.³³

Since then further developments have occurred, three of which have been significant. The first is the setting up of the civil and administrative tribunals as the general purpose model of tribunal in the states and territories; the second has been 'creeping legalism'; and the third is the switch from a hearing model for resolving disputes to a pre-hearing model of dispute settlement.

Proliferation and flexibility of the general jurisdiction model

The success of the general-jurisdiction tribunal model is demonstrated by its replication elsewhere in Australia and beyond our shores.³⁴ In particular, the flexibility of the model is indicated by its adaptation to create the multi-purpose CATS model in the states and territories.³⁵

All but the Northern Territory, Tasmania, and South Australia have followed this path. In NSW there is a current inquiry about the possibility of further consolidation of its tribunals along these lines,³⁶ and South Australia is actively progressing the introduction of a

combined civil and administrative tribunal.³⁷ So despite the predominance of the CATS model, there is not yet a nationwide system of CATS in Australia, but this could emerge in time.

The flexibility of the multi-purpose model is demonstrated by its widespread adoption within Australia and more tentatively elsewhere.³⁸ That flexibility is necessary because the combined civil and administrative jurisdiction of these tribunals is considerably more complex than the jurisdiction of the federal tribunals and requires more detailed and sensitive rules for their operation. Nonetheless, the statutory framework, even of these tribunals, permits them to operate in a reasonably flexible manner.

Creeping legalism

There has long been explicit criticism of the formality of the processes adopted by tribunals. This was first observed in 1981 by Whitmore, who blamed lawyers' familiarity with judicial procedures. As he said, 'counsel prefer to play adversarial tactics. This means that the basic objectives of the Tribunal are ... being subverted to some degree by the legal profession'. As he explained: 'It is so difficult to persuade lawyers to get out of ingrown habits. The result is inevitable - extended hearings, delays and much higher costs, and of course these are the very things that the tribunal was set up to avoid'.³⁹

Although Whitmore attributed the problem to lawyers, equal blame could be attributed to the procedural models which are found in the legislation. Perhaps understandably given the time of the innovation, the *Kerr Committee* proposals for tribunal procedure were overly influenced by the judicial model. The evidentiary elements of the legislation for the AAT included provisions for:

- notice;
- exchange of documents;
- representation;
- evidence given on oath or affirmation;
- receipt of oral and documentary evidence; and
- references to examination and cross-examination of 'parties'.⁴⁰

These court-like processes pointed towards a level of formality and court-like process which undermined the stated objectives for the Tribunal. So although the statutory objectives shared by most of the major tribunals in Australia, are that the Tribunal, when carrying out its functions, 'must pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick',⁴¹ these have not been sufficient on their own to counteract the adherence by lawyers to models of process with which they are familiar.

Concerns about the judicialised model of tribunal which had eventuated at the Commonwealth level was echoed by NSW in developing its model for the Administrative Decisions Tribunal (ADT) in NSW in 1997, and by Victoria when it established the Victorian Civil and Administrative Tribunal (VCAT) in 1998. Despite this concern and the intention to avoid going down that path, the formality-of-process problem within tribunals has continued.⁴²

The ten year review of VCAT in 2009 described the problem as 'creeping legalism'.⁴³ As the report noted in its summary:

Within the community sector, there was a sense that the tribunal needed to get back to its roots. It was intended to provide quick, cheap and efficient justice for the general public. Yet many people think it had become too formal, with lawyers, expert witnesses and advocates dominating proceedings. It was often said the tribunal had allowed 'creeping legalism' to occur.⁴⁴

A recommendation to combat this problem by some who made submissions to the review was to introduce 'much stronger rules against legal representation in the tribunal'.⁴⁵ The newest of the 'CATS' the Queensland Civil and Administrative Tribunal (QCAT), has done that and has provided that, with limited exceptions, a person may only be represented by a legal practitioner with leave.⁴⁶ Significantly, this has been the most litigated procedural provision in the Act since it was introduced,⁴⁷ illustrating that the support of the legal profession for the millenia long rules of evidence is hard to displace.

Whether these moves have been or will be effective to combat legalism is hard to assess. Experience of tribunals such as the Social Security Appeals Tribunal, in which lawyers appear in only a minority of cases, would suggest that it should be. What the moves do signify, however, is the recognition that legal representation is one of the factors that has tended to 'judicialise' tribunal proceedings.

Pre-hearing dispute resolution

The next most significant development has been the growing interest in avoiding the formal hearing as the principal process within a tribunal for resolving disputes. There has been a growing tendency to favour instead reliance on pre-hearing settlement processes, described compendiously as ADR process models.

Tribunals have generally been quicker than courts to embrace ADR processes. However, this is a relatively recent development. There was little attention in the *Kerr Committee* report to pre-hearing disputes. Nonetheless, Professor Whitmore noted that the Committee envisaged that there would be 'some research work coupled with a [proposed procedure whereby parties to a dispute would be encouraged to exchange written statements and to confer with a view to settlement] prior to a hearing'.⁴⁸ This was the genesis of the preliminary conference, which has become a mainstay of the AAT's process model. It is used to encourage parties to exchange written statements, to identify and narrow the issues, and to confer with a view to settlement prior to a hearing.

Many more procedures for pre-hearing dispute settlement have been devised and introduced since then. Such procedures are often standard in tribunals. Conciliation, mediation, case appraisal, and neutral evaluations have entered the lexicon. Their use has been encouraged at the Commonwealth level by successive recent Attorneys-General and is enjoined by the Model Litigant Principles under the *Legal Services Directions 2005* (Cth), backed up by costs orders, as well as by injunction in the legislation of some tribunals. For example, it is the default position in the compensation jurisdiction of the AAT,⁴⁹ and 'where appropriate' in applications to QCAT.⁵⁰

The AAT introduced mediation in 1991 initially as a pilot program but from 1993 it was underpinned by legislation and has been available in all matters before the Tribunal. Conciliation conferences in its compensation jurisdiction were introduced on 1 July 1998 and are the norm unless they are unlikely to be useful.⁵¹ The remaining ADR processes – neutral evaluation, case appraisal and conciliation for all jurisdictions – were introduced in amendments to the *AAT Act* in 2005.⁵²

The significance of this move has not been publicised sufficiently. Of over 10,000 dispute resolution processes conducted by the AAT in 2010-2011 – only 20 per cent of these were hearings. Between 53 and 60 per cent of these matters which did not go to a hearing were settled using ADR.⁵³ The AAT is not alone. In QCAT 53 per cent of civil matters were

finalised through mediation in 2010-2011.⁵⁴ In VCAT no figures are available for 2010-2011 as the Tribunal is currently revising its data collection and developing a new framework.⁵⁵ However, 57 per cent of all matters were finalised through mediation in 2009-2010.⁵⁶ WA's State Administrative Tribunal in 2010-2011 resolved 57 per cent of contested matters using 'facilitative measures', of which 78 per cent of mediations had a successful outcome.⁵⁷

So rather than hearings being the locus for dispute settlement, the preponderance of applications to tribunals are finalised following consensual settlement processes. These figures indicate that it is the pre-hearing, not the hearing processes of tribunals that are the engine rooms of their processes for settling disputes. In an era when the virtues of cheaper, personalised, and more accessible and speedy justice are being exhorted by governments, that is a notable change.

Back to the future: how should tribunals be presenting themselves? What is it that makes them distinctive?

Merits

The most precious of its attributes and the one tribunals should not underestimate is their central merits review function. Tribunals can be an independent arbiter of all aspects of a person's claim. That is a signal advantage over the courts. Being outside government also means that tribunals, although respectful of, are not bound by the policies affecting officials and are able as a consequence to look more closely at the merits of the individual case.⁵⁸

Importantly, any tribunal which is at the apex of the hierarchy, such as the CATS and the AAT, can say to an applicant that this tribunal is the final tier of the merit review dispute resolution system. In addition the tribunal is able, if relevant, to consider evidence up to the date of the hearing, a role which courts, on appeal or review, are generally not able to perform.⁵⁹ That means that the person or corporation does not need to return to the agency with their information about a worsened medical condition or financial exigency, with consequential savings in time and avoidance of litigation fatigue. As Mr Lindsay Curtis, then President of the AAT (ACT), said in 1996, contrasting the role of tribunals with courts exercising judicial review:

The tribunal[s] role ... is the more comprehensive one of deciding what ought to have been the correct or preferable decision. ... In this respect at least, review by the tribunal can be a more potent force in support of good administration than the exercise of judicial review by the courts.⁶⁰

Diverse membership

A distinct advantage of tribunals is that their members have diverse backgrounds. Tribunals often have available to them members with a spectrum of knowledge, skills and experience. As a consequence, tribunals are better able to understand the niceties of the context in which the decisions under review are made.

Expert members give decisions of tribunals authority both within government and among those applicants affected by their decisions. Specialist, usually non-legally trained, members provide greater legitimacy to the tribunals' decision-making in areas which are technical, often complex or which have policy or other features which make particular understanding of the context important.

Justice Garry Downes, as President of the AAT, was assiduous in adding specialist members commensurate with new and active areas of the tribunal's jurisdiction. The AAT currently has actuaries, environmental scientists, aviation experts, psychiatrists, doctors, pharmacologists, as well as those with experience in the Tribunal's principal areas of

jurisdiction, such as compensation, tax, social security, veterans' affairs and freedom of information. Members with public sector experience, are also commonly found in the tribunal. These features of the AAT are replicated in other Australian tribunals with variation of specialities according to their jurisdiction.

Vindication of this feature of tribunals is evident from the *Moorhead* study in the UK. That study undertook a review of the literature on drivers of satisfaction about courts and tribunals for the public and participants for the period 2000-2008. One of the key results of the study, based on literature from the United Kingdom and internationally, was that there was a lower rate of satisfaction with courts than with tribunals.⁶¹ One of the reasons, as found in a Scottish study included in the survey, was that 'a significant majority of respondents (about 70 per cent) felt judges were out of touch with ordinary people's lives'.⁶² That claim cannot be made against tribunals, membership of which is designed to replicate the expertise of the original decision-makers in the particular areas of activity under review.

Flexibility of process

The intention that tribunals be flexible was designed to distinguish tribunals from courts. This is illustrated by the statutory objectives to offer processes which are 'fair, just, informal, economical and quick';⁶³ to conduct their proceedings 'with as little formality and technicality, and with as much expedition', as the statutes and the matters before them permit; and that the tribunal 'is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate'.⁶⁴

These injunctions are not mere verbiage. The Victorian Court of Appeal in *Weinstein v Medical Practitioners Board of Victoria* confirmed that the words 'may inform itself' have work to do.⁶⁵ As Maxwell P (with whom Neave and Weinberg JJA agreed) said:

The words 'may inform itself ...' were plainly intended to have work to do. They have a meaning and a purpose quite distinct from the meaning and purpose of the words 'not bound by rules of evidence'. Far from the phrase 'may inform itself' being negated or neutralised by other provisions, these words play a necessary part in defining the character of the formal hearing which the panel conducts. For the purposes of 'determining the matter before it', the panel is authorised to 'inform itself in any way it thinks fit' subject always to the overriding obligation to accord procedural fairness.

These objectives provide considerable scope for offering procedures tailored to the applicant and the type of matter. If a matter is urgent, preliminary steps can be curtailed or bypassed; if the matter raises limited issues of fact or law, the applicant can be encouraged to rely on pre-hearing processes such as case appraisal or a neutral evaluation. At the hearing, proceedings can be formal or less formal depending on the nature of the matter; a highly contested security or compensation matter with political or financial implications is aided by having competent counsel or legal practitioners and operating with a degree of solemnity commensurate with the matters at stake. By contrast, where the Tribunal has before it an unrepresented applicant seeking a percentage of shared care in relation to the children of a former relationship, or a denial of Newstart allowance for a failure to seek work, the procedures may need to be less formal. That is designed to encourage witnesses, who may be intimidated by having to appear in the tribunal setting, to relax sufficiently to provide appropriate evidence for the tribunal to reach the 'correct or preferable' decision. Attentiveness to the interests of applicants contributes to users' and the public's perception of the fairness and appropriateness of tribunal processes.

The importance of taking advantage of this opportunity for flexible processes is supported by the *Moorhead* study which found that parties are satisfied if they feel they have had a fair hearing, even if they did not achieve the outcome they wished.

Judgments about the fairness of courts' or tribunals' process are, the evidence suggests, central to satisfaction with those courts and tribunals. Where rigorous comparison is made it is suggested that the influence of respondent views on process is stronger than the influence of their views on outcomes.⁶⁶

As the earlier discussion indicates, procedural flexibility encompasses use of a range of dispute resolution tools with an increasing emphasis on process models other than the formal hearing. Use of such processes produces savings in financial and human terms, and reduction in the time taken.⁶⁷ At the same time, not all matters are suitable for resolution by non-adjudicative means. Where a significant objective of an applicant is to establish formal recognition of maladministration or wrongdoing by an employer, employees have less satisfaction with a mediated outcome.⁶⁸ Equally when an employer is keen to obtain a non-determinative outcome to enable it to continue a practice or sustain an interpretation of legislation which is of questionable legality, the motivation to avoid the publication of a precedent detracts from the overall value of an outcome obtained by non-adjudicative means. In other words the use of such forms of dispute resolution is a complex issue. Nonetheless, the success of these forms of resolving people's disputes is illustrated by the increasing use being made of them throughout tribunals in Australia.

Accessibility

A common rationale for the establishment of tribunals is that they should be accessible. The notion refers to a number of facets of tribunals processes: the visibility and availability of tribunal premises or location of hearings; prosaic customer service elements of the processes such as the physical environment, general service, information provided by staff, waiting times, catering and other facilities;⁶⁹ and the ability of the tribunal to accommodate a range of applicants.

The diversity of jurisdictions has required tailored processes. In practice this has meant that procedures can be set up so that a self-represented litigant in a recovery of a debt matter is treated differently to a pharmaceutical company seeking review of a decision denying it a patent which had the potential to earn millions of dollars for the company. Accessibility incorporates the ease of finding and using tribunal processes for the self-represented person.

Geographical accessibility has meant that tribunal members go on circuits from metropolitan headquarters; VCAT has begun to set up regional hubs which are staffed to serve populations outside capital cities;⁷⁰ and hearings can and do take place in locations of convenience for witnesses, particularly busy professionals, and for applicants such as those in nursing homes and hospitals. I ran a hearing, complete with barristers, recording equipment, and support staff in an Intensive Care Unit of a local hospital. VCAT has raised the possibility of use of large mobile vehicles, akin to library or Red Cross services, or co-locating with community organisations as other ways to heighten the access of people to their administrative justice bodies.⁷¹

Accessibility has also been enhanced by increased co-location of tribunals, where sharing of services and facilities can occur. The emergence of civil justice/dispute resolution centres in major centres to rival court-houses as the locus for all the dispute resolution services for users is occurring. This enhances users' perception of tribunals' impartiality, objectivity and independence from government. The establishment of recognisable facilities in which tribunals are located facilitates recognition of the importance of tribunals. Their greater visibility is also an effective means of encouraging people to take advantage of tribunals' services. Evidence supporting these features of tribunal developments was provided by QCAT's 2011 *Annual Report* which recorded that the tribunal had received 37 per cent more applications in that financial year than the combined tribunals it had absorbed.⁷²

IT developments are also facilitating access. Increasingly tribunals are offering secure online portals for lodgement, uploading, exchange and sharing of documents, with consequential saving of applicants' and practitioners' time and money. Tribunals have adapted to use of SMS and other information technology communication tools, and use social media. Flexible processes also lead to increased accessibility. For example tribunals can offer hearings, formal and informal, on the papers, by telephone, video, at all times of day and night. These features of the adaptability and innovative procedures within tribunals are leading to increasing satisfaction of users.

Cost-effectiveness

Tribunals have long out-performed courts as the locus of adjudicated settlements of legal disputes. Volume alone, however, is insufficient as a noteworthy feature of the tribunal model. Are tribunals cost-effective? The answer is it depends. Some clearly are; others are more costly. All are cheaper than courts. Many factors impact on the cost of tribunal operations. The higher the volume the less expensive are individual cases; the smaller the volume, the higher the cost. But matters such as the nature of the dispute and whether it involves extensive evidence, multiple witnesses, and requires senior legal practitioners, can significantly increase the cost of the procedures. The length of the matter is also a factor and whether it goes to hearing or settles during a pre-hearing process can dramatically affect costs. No straight line comparison per cost of hearing is feasible.

Nonetheless, it is worth noting that the report on VCAT by the Hon Justice Kevin Bell⁷³ recorded that in its ten years of operation VCAT had finalised about 872,000 civil and administrative disputes, that is, roughly 87,200 per year, at an average cost of \$274 per case.⁷⁴ Figures from 2010-2011 annual reports indicate: a VCAT hearing averaged \$440 per matter;⁷⁵ the QCAT cost per finalised hearing was \$685,⁷⁶ and the SAT's cost per case was \$3,244.⁷⁷

For the financial year ending 2011, a VRB cost per finalised hearing was \$1,544;⁷⁸ for SSAT the cost was \$2239.⁷⁹ The AAT average cost of a hearing was \$15,754 but only \$3,362 without a hearing.⁸⁰ Since the cost of a hearing at the Federal Court was \$19,074 per case in 2007-2008,⁸¹ and undoubtedly more than that in the following financial year, it is clear that most tribunals are significantly cheaper, and all cost less, than a court hearing.

As the information provided earlier indicates tribunals provide a generally cost effective dispute resolution process. Tribunals can further minimise transaction costs for parties by reducing the number of times parties need to attend the tribunal, and by setting out these requirements in standard directions.⁸² Continued or increased use of pre-hearing dispute resolution mechanisms also reduces costs. A UK study - the *Annual Pledge Report for 2008/09* which records the results of the policy of UK Government Departments of using ADR where appropriate, reported that ADR had been used in 314 cases with 259 being settled (a success rate of 82 per cent) and the cost savings was estimated to be £90,200,000.⁸³

So tribunals are largely fulfilling their intended cost-minimisation objective and they do so in ways the courts either cannot, like merits review, or can only do so to a modest extent such as through use of ADR.

Where next?

In summary, there is room for improvement by tribunals on fronts such as improved communication strategies, including publicising their advantages. Challenges are present on both cost and technical grounds but use of the latest communication facilities will increasingly combat this problem. For example, online portals have been introduced in some

tribunals and will become more generally available over time. Achieving consistent outcomes is another area of criticism of tribunals given that strict doctrines of precedent do not apply in tribunals. For the CATS, the challenges are also due to the disparate nature of their combined jurisdictions; and for federal tribunals, from the geographical spread and disparities in size of registries. Again improvements are possible through, for example, introduction and use of tribunal appeal panels. There is limited circuit involvement of staff in non-hearing processes but this will emerge with a recognition of the centrality of these forms of dispute resolution services within tribunal. Such innovations could see tribunals become even more accessible to the public they serve.

Steps to improve primary decision-making are also occurring. Tribunals have a strategic role in ensuring that information arising from their decisions is effectively disseminated to government and a strategic advantage in the information they glean about deficiencies in government. They can then advise agencies of serious systemic problems which can be addressed by the primary decision-maker.⁸⁴ This can be done through the Annual Report, which can include recommendations that the Attorney-General seek rectification from the relevant public body as appropriate,⁸⁵ or by other structured means. Both VCAT and QCAT have provisions imposing duties on their Presidents to inform relevant Ministers of issues they perceive, as well as improvements to the tribunal service which could be made.⁸⁶

Less formal processes such as ad hoc liaison meetings with government have been adopted by other tribunals, including the AAT, to achieve the same ends. A missing link in the package of administrative law reforms introduced by the *Kerr Committee* was a body to monitor the implementation within government of decisions or recommendations by the accountability agencies. With the increasing development of interest in integrity issues and implementation of monitoring processes to ensure lawful, ethical and effective outcomes, that may come. These strategies also have the potential to contribute to the general improvement of public administration, to the benefit of the public at large.

Conclusion

A leading Canadian commentator and judge once said whimsically of tribunals:

Although [tribunals] have become entrenched and assert competence – no one seriously questions our right to exist – we have become, with our strength, increasingly confused over what our role is and how to play it. Picture the stage. Hovering around it are complementary players. We have the roaming courts, exercising parental supervision over their adolescent offspring and hesitating very little to curb perceived excesses. We have, too, the peripatetic bureaucrats, entering and exiting as the impulse moves them, regardless of what the script says. In the wings are the elected politicians, waiting for their cue to jump in and admonish, but not quite sure what their cue is. In the audience sits a restless public who had thought we had the starring role but sees us forcefully and regularly upstaged by what was supposed to be a supporting cast. And there we stand on centre stage, scratching our heads, with an incomplete script, too many directors, and endless rehearsals. No one wants to close us down, but we are very nervous about the reviews.⁸⁷

I do not suggest that this is the collective and current position of Australian tribunals. Nonetheless, in my view, her words do echo the challenge of the High Court in *SZGUR*. It is time for tribunals 'to carve out a philosophy of their own existence'.⁸⁸ It is time as a leading UK academic said recently of their investigative role: 'Tribunals have yet to articulate a fuller vision of what type of active approach they aspire to undertake'.⁸⁹

Other warnings have been given. The UK Judicial College said recently that it is of paramount importance that the distinctive features of tribunals are understood and protected.⁹⁰ The Hon Michael Black said in a speech to the AAT in March this year, that it was critical to remember the principles on which the AAT, the body which provided the blueprint for tribunals in Australia, was founded, to renew the commitment to its foundation

principles, and to 'maintain the rage' with respect to innovation. It was too easy, he said, to slip back into old ways. These are the challenges that lie ahead.

There are distinct benefits for tribunals in better publicising of their advantages and greater self-promotion. The benefits and the challenges ahead for tribunals were aptly summed up in these words in the *Leggatt Report*:

Only so will tribunals acquire a collective standing to match that of the Court System and a collective power to fulfil the needs of users in the way that was originally intended'.⁹¹

As the Report went on, there needs to be a:

renewed sense amongst tribunals and their staff that they are there to do different things from the courts, and in different ways, but with equal independence. In many respects, it is a more difficult task'.⁹²

Endnotes

- 1 Peter Cane 'Judicial Review in the Age of Tribunals' [2009] *Public Law* 479 at 494-5.
- 2 *Minister for Immigration and Citizenship v SZGUR* [2011] HCA 1.
- 3 *Minister for Immigration and Citizenship v SZGUR* [2011] HCA 1 at '23].
- 4 Commonwealth Administrative Review Committee (Kerr Committee) Report 1971, *Parliamentary Paper No 144*.
- 5 *Id* at [361].
- 6 *Id* at [11].
- 7 *Id* at [58].
- 8 H Whitmore 'Administrative Law in the Commonwealth: Some Proposals for Reform' (1972) 5 *Federal Law Review* 7, 10.
- 9 *Id* at [293].
- 10 *Id* at [295(g)].
- 11 Kerr Committee report at [334].
- 12 *Id* at [[295(h)].
- 13 GDS Taylor 'Access to Administrative Justice' (Paper presented to the conference Australian Lawyers and Social Change II, Canberra, 18-20 May 1979, 1 at 7).
- 14 GDS Taylor 'Access to Administrative Justice' (Paper presented to the conference Australian Lawyers and Social Change II, Canberra, 18-20 May 1979, 1 at 7).
- 15 GDS Taylor 'Access to Administrative Justice' (Paper presented to the conference Australian Lawyers and Social Change II, Canberra, 18-20 May 1979, 1 at 7).
- 16 *Ibid*.
- 17 *Id* at [250].
- 18 *Id* at [292].
- 19 *Id* at [10].
- 20 *Id* at [364].
- 21 *Id* at [364].
- 22 GDS Taylor 'Access to Administrative Justice' (Paper presented to the conference *Australian Lawyers and Social Change II*, 18-20 May 1979, 1).
- 23 Kerr Committee report at [8].
- 24 H Whitmore 'Commentary' (1981) 12 *Federal Law Review* 117-118.
- 25 H Whitmore 'Commentary' (1981) 12 *Federal Law Review*, 117-119.
- 26 J Gotjamos and G Merton *Report of Tribunal Review to the Attorney-General* (1996).
- 27 *Id* at 95.
- 28 *Ibid*.
- 29 *Ibid*.
- 30 *Id* at 96.
- 31 *Id* at 97.
- 32 *Id* at 103-4.
- 33 *Id* at 98, 99.
- 34 For example, the Tribunals Service in England and Wales; the cluster model in Ontario, Canada and a general jurisdiction body in Quebec and British Columbia. Even the US has raised the possibility of a combined disability review body with a truly awesome caseload.
- 35 ACT: *ACT Civil and Administrative Tribunal Act 2009* (ACT); NSW: *Administrative Decisions Tribunals Act 1997* (NSW); Qld: *Queensland Civil and Administrative Tribunal Act 2009* (Qld); Victorian *Civil and Administrative Tribunal Act 1998* (Vic); *State Administrative Tribunal Act 2004* (WA).

- 36 NSW: NSW Legislative Council, Standing Committee on Law and Justice *Opportunities to Consolidate Tribunals in NSW*, March 2012 - an options paper for discussion, Nicola Berkovic 'State Super-tribunal on the Cards' *The Australian Legal Affairs* section, 26 August 2011, 13. The author notes that the current government in NSW has not indicated whether it intends to pursue this initiative of its predecessor.
- 37 SA: Susannah Sage-Jorgensen, 'How the Absence of a General Merits Review Tribunal in South Australia Measures and Impedes Public Engagement and Participation in Administrative Decision-Making' (2012) 68 *AIAL Forum* 61, an intention reiterated by the SA Attorney-General, the Hon John Rau, in the keynote address to the AIAL National Conference, Adelaide, 19 July 2012.
- 38 See note 34.
- 39 H Whitmore 'Commentary' (1981) 12 *Federal Law Review*, 117-119.
- 40 Kerr Committee report at [328]-[333].
- 41 *Administrative Appeals Tribunal Act 1975* (Cth) s 2A.
- 42 NSW: *New South Wales Parliamentary Debates*, Legislative Assembly, 29 May 1997, p 9602 (Whelan).
- 43 Hon Justice Kevin Bell *One VCAT: President's Review of VCAT* (2009).
- 44 *Id* at 21.
- 45 *Ibid*.
- 46 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 43.
- 47 W Lane and E Dickens 'Twelve Months On - Reflections on the Key Issues Considered by the Queensland Civil and Administrative Tribunal' (2010) 30 *Qld Lawyer* 152 at 156.
- 48 Hon Justice Kevin Bell *One VCAT: President's Review of VCAT* (2009) 16.
- 49 *Safety, Rehabilitation and Compensation Act 1988* (Cth).
- 50 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 4(b), 69, 75; Justice Alan Wilson 'QCAT Hybrid Conferencing Processes: ADR and Case Management' (2011) 67 *AIAL Forum* 80.
- 51 *Administrative Appeals Tribunal Guide to the Workers' Compensation Jurisdiction* (2007). 9.
- 52 *Administrative Appeals Tribunal Act 1975* (Cth) s 3(1) and Part IV, Div 3.
- 53 *Administrative Appeals Tribunal Annual Report 2010-2011*, Chapter 3.
- 54 *Queensland Civil and Administrative Appeals Tribunal Annual Report 2010-2011*, 13. Although the statistics need refining, it is estimated that between 50% and 60% of Administrative Review cases are expected to settle prior to a hearing: Justice Alan Wilson 'QCAT Hybrid Conferencing Processes: ADR and Case Management' (2011) 67 *AIAL Forum* 80, 85 note 10.
- 55 *Victorian Civil and Administrative Appeals Tribunal Annual Report 2010-2011*, 22.
- 56 *Victorian Civil and Administrative Appeals Tribunal Annual Report 2009-2010*, 5.
- 57 *WA State Administrative Tribunal Annual Report 2011*, 11.
- 58 *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577.
- 59 *Tasty Chicks Pty Ltd v Chief Commissioner of State Revenue* [2011] HCA 41 (High Court of Australia); *Rana v Repatriation Commission* (2012) 126 ALD 1 (Full Court of the Federal Court).
- 60 *Re Russell and Conservator of Flora and Fauna* (1996) 42 ALD 441 at 446.
- 61 Richard Moorhead, Mark Sefton & Lesley Scanlan (Moorhead et al) 'Just Satisfaction? What Drives Public and Participant Satisfaction with Courts and Tribunals: a Review of Recent Evidence', *UK Ministry of Justice Research Series 5/08*, (2008) 9-10.
- 62 *Id* at 10; and see H Genn & A Paterson *Paths to Justice Scotland: What People in Scotland Do and Think About Going to Law* (Oxford, Hart, (2001)).
- 63 *Administrative Appeals Tribunal Act 1975* (Cth) s 2A.
- 64 eg *Administrative Appeals Tribunal Act 1975* (Cth) s 33.
- 65 *Weinstein v Medical Practitioners Board of Victoria* (2008) 21 VR 29.
- 66 *Moorhead et al*, 60.
- 67 Norton Rose Australia 'Disputing efficiency' (March 2012) *Public Law Report* 10.
- 68 *Moorhead et al*, 20.
- 69 *Moorhead et al*, 11.
- 70 Hon Justice Kevin Bell *One VCAT: President's Review of VCAT* (2009).
- 71 The Hon Justice Kevin Bell *One VCAT: President's Review of VCAT* (2009), 9.
- 72 *Queensland Civil and Administrative Tribunal Annual Report 2010-2011*, 6.
- 73 The Hon Justice Kevin Bell *One VCAT: President's Review of VCAT* (2009) .
- 74 The Hon Justice Kevin Bell *One VCAT: President's Review of VCAT* (2009) 3.
- 75 *Victorian Civil and Administrative Tribunal Annual Report 2010-2011*, 5.
- 76 *Queensland Civil and Administrative Tribunal Annual Report 2010-2011*, 12.
- 77 *Department of Attorney General (WA) Annual Report 2010-2011*, 90.
- 78 *Veterans' Review Board Annual Report 2010-2011*, 18.
- 79 *Social Security Appeals Tribunal Annual Report 2010-2011*, 10.
- 80 *Administrative Appeals Tribunal Annual Report 2010-2011*, 22.
- 81 Attorney-General's Department *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009) 37.
- 82 *Transforming VCAT: Promoting Excellence* (April 2011), 7.
- 83 Norton Rose Australia 'Disputing efficiency' *Public Law Report* (March 2012), 9 at 10.
- 84 Administrative Justice and Tribunal Council (England and Wales) *Right First Time* (June 2011) [87].
- 85 *'Right First Time* (2011), [87].

- 86 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 31; *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 172.
- 87 R Abella, 'Canadian Administrative Tribunals: Towards Judicialisation or Dejudicialisation?' (1988) 2 *Canadian Journal of Administrative Law and Practice* 1, 3.
- 88 John McMillan, 'Merit Review and the AAT: A Concept Develops' in J McMillan (ed) *The AAT-Twenty Years Forward* (AAT et al, Canberra, 1998), 33.
- 89 Robert Thomas 'From "Adversarial" v Inquisitorial" to "Active Enabling, and Investigative": Developments in UK Administrative Tribunals' (Paper presented at a conference The Nature of Inquisitorial Presses in Administrative Regimes: Global Perspectives, University of Windsor, Faculty of Law; Windsor, Ontario, Canada, 26-27 May 2011) to be published by Ashgate, UK in 2012-3.
- 90 Judicial College *Tribunals* Winter 2011, 80.
- 91 Sir Andrew Leggatt *Tribunals for Users - One System, One Service: Report of the Review of Tribunals* (Leggatt report) (2001) Overview, [8].
- 92 Leggatt report, n 120, [1.14].