

TRIBUNAL AMALGAMATION 2015: AN OPPORTUNITY LOST?*

Robin Creyke

The *Tribunals Amalgamation Act 2015* (Cth) was passed on 14 May 2015. So ends a 20-year saga which began with the publication in 1995 of the Administrative Review Council (ARC) Report No 39, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, which had recommended the combination of the major merits review bodies in the Commonwealth.

The history of that saga includes the rare defeat in 2001 in the Senate chamber of the Australian Parliament of a package of Administrative Review Tribunal Bills (the 2000 Bills), notable for containing the most pages on a single topic introduced until then into the Australian Parliament. The 2000 Bills were to amalgamate the key national tribunals — the Administrative Appeals Tribunal (AAT), the migration tribunals (Migration Review Tribunal (MRT) and Refugee Review Tribunal (RRT)), the Social Security Appeals Tribunal (SSAT) and the Veterans' Review Board (VRB). The defeat followed a sustained national media campaign waged against the amalgamation by every major metropolitan newspaper in Australia,¹ principally on the ground that the Bills unacceptably diminished the independence of the tribunal system. There was also significant opposition from within the veterans' community — opposition which led ultimately to the removal of the VRB from the Bill. The coup-de-grace to the legislation came with the defection of the migration tribunals.

It is striking that, 15 years later, there was a brief mention but no analysis in the coverage of the proposal in the 2014 Budget to again seek to amalgamate the AAT with the SSAT, the MRT and the RRT, together with the Australian Classification Review Board. No major newspaper mentioned the topic. Such media interest as was evident came from online sources. The independent *IT News* queried the initial inclusion of the Australian Classification Review Board. Otherwise, there was a reference to the proposal on the website of one university centre, the Department of Immigration website and the website of one law firm. The Senate Standing Committee for the Scrutiny of Bills noted in its inquiry report that there had been submissions of 'major interest groups' but referred only to the Bar Association of Queensland, the Law Institute of Victoria and the Chief Justice of the Family Court.² For a Bill — the Tribunal Amalgamation Bill 2014, described by Senator Penny Wright in the second reading debate as legislation for tribunals, which are 'the coalface of the legal system' and, according to the Productivity Commission, one of the three pillars of the civil justice system in Australia³ — that is both surprising and disappointing.⁴

Australian amalgamation developments

That surprise and disappointment may have reflected a widespread acceptance of the amalgamation concept. Between 1975, when the legislation for the first general jurisdiction tribunal, the AAT, was passed, and by 2015, the Australian states and territories had embraced the amalgamation movement. Every mainland state and the two territories had

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established amalgamated civil and administrative tribunals, often referred to as 'super-tribunals',⁵ and in 2015 Tasmania published a discussion paper advocating it follow suit.⁶ Key federal publications between 2000 and 2015 also referred with approval to the earlier proposal to amalgamate the national merits review tribunals⁷ and, to a large extent, there was bipartisan political support for the legislation.⁸

Other possible reasons for the lack of media attention were that the hard lessons from 15 years ago had been learned or that, since 2000, the wider interest in the status of the federal tribunal has waned significantly. This paper examines whether either of these conclusions is accurate and concludes that, although there is much less to criticise in the 2015 amendments and this may have accounted for some absence of comment, the Commonwealth missed an opportunity to take further steps to modernise the tribunal merits review system and thus cement its reputation as a leader in the tribunal field.

Comparison of amalgamation legislation and policies in 2000 and 2015

Fifteen years ago, the debate on the 2000 Bills⁹ was intense. Although the debate was principally about whether the 2000 model detracted from the independence of the Tribunal,¹⁰ there were multiple concerns expressed in that debate. These were summed up in a statement by Ms Anne Trimmer, then President of the Law Council of Australia, who said:

Our main concerns in relation to the ART Bill are: first, reduced opportunity for merits review; secondly, compromised independence of the ART; thirdly issues associated with the appointment and qualifications of members; fourthly, denial of a right to legal representation; and lastly, the constitution of the panels themselves. A theme of the bill is a whittling away of the independence of the external merits review tribunal and its absorption into the bureaucracy. This is reflected in lack of tenure of members, the funding of divisions by departments, the concept of ministerial directions and the code of conduct and performance agreement requirements. Any reform which attacks the independence of the external merits tribunal must be regarded with caution.¹¹

Others' criticisms of the 2000 Bills were that they:

- took a 'one-size-fits-all' approach to the amalgamation in their core provisions;¹²
- provided no minimum qualifications for the President, including not having to be a Federal Court judge;¹³
- increased the imposition of rules on the Tribunal, referred to as 'trip-wires', not 'directions';¹⁴
- did not provide an open and transparent appointments system;¹⁵
- funded the six divisions of the Tribunal by the respective portfolio agencies;¹⁶
- introduced a presumption against legal representation in providing that portfolio legislation could restrict or remove access to representation and would be by leave;¹⁷
- required approval by all six affected ministers to cross-appointments to divisions;¹⁸
- emphasised the administrative and investigative character of the Tribunal's processes at the expense of its independent dispute-handling role. As the Hon Daryl Williams, the then Commonwealth Attorney-General, remarked: 'The new tribunal will provide for independent review within the framework and culture of an executive body' and 'Commonwealth review tribunals constitute part of the executive arm of government and provide administrative, not judicial, decision making in dispute resolution processes';¹⁹
- required that, if an applicant produced new evidence, the matter would be remitted to the agency for reconsideration;²⁰
- proposed that portfolio ministers could issue directions that would prevail over those of the President in reviewing decision relating to that minister's legislation;²¹
- provided that members could be removed for breaches of performance agreements and the proposed code of conduct for the Tribunal;²²

- raised the concerns of the veterans' community about reduction in the quality of decisions, which was due, among other reasons, to quotas on the total numbers of members and for each division, potentially diminishing available expertise;²³
- provided for second-tier review within the ART but only for cases heard initially by a single member, where there was a manifest error or where the case raised matters of general significance;²⁴
- established a system comprising a 'separate group of tribunals, broken up into divisions but with different rules relating to how they go about their procedures and with different processes for appointment and different funding'.²⁵

In combination, these concerns about loss of independence and other aspects of the 2000 Bills spelled their undoing.

By contrast, as Senator Jacinta Collins remarked during debate on the 2015 Bill, 'This bill is much less controversial. For the most part, its provisions affect a simple consolidation of existing tribunal architecture',²⁶ and it tidied up the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act), largely in non-controversial areas. Evidence supports Senator Collins's conclusion and indicates the contrast between the 2000 and 2015 legislation. That evidence is apparent in the provisions dealing with the following matters criticised in 2000:

- **Uniformity:** The 'one-size-fits-all' model has not been embraced despite an initial stated purpose which was 'to harmonise and streamline procedural matters for the amalgamated tribunal'.²⁷ That purpose was quietly dropped. Instead, the Explanatory Memorandum to the Bill stated the amalgamation would retain the successful features of each of the tribunals as currently constituted while preserving 'the distinctive aspects of each of the tribunals that are important in their specific jurisdictions'.²⁸ This is an approach which will adopt best practice but not at the expense of procedures and practices designed for the users of the former specialist tribunals.
- **President of the AAT:** The President of the AAT in 2015 remains a Federal Court judge.²⁹
- **Members subject to directions:** Moves by the government in 2000 for the Administrative Review Tribunal (ART) to become an executive-focused tribunal have been resisted and there is no provision in the AAT Act that members must comply with government policy. Directions may be issued but only by the President and, if the direction affects the division, following consultation with the division head. That means the Minister cannot trump decisions of the President and the directions are only to relate to operational and procedural, not substantive, matters.³⁰ Moreover, a failure to comply with a direction does not result in the invalidity of the decision.³¹
- **Funding:** Although not reflected in the *Tribunals Amalgamation Act 2015* (Cth), funding for the new AAT is a one-line appropriation to the Attorney-General's Department.³²
- **Representation:** Parties may generally appear in person or by a representative, and a party summonsed may also be represented.³³ In the Social Services and Child Support Division, however, representation of the non-agency party may only appear with leave of the Tribunal, and leave must take account of the objectives of the Tribunal. These include, for example, that Tribunal functions are to be 'proportionate to the importance and complexity of the matter'³⁴ and the wishes of both parties.³⁵ To that extent there is a limit on representation.
- **Appointments and cross-appointments:** These are subject to the approval of only two ministers — the Attorney-General and, if to a particular division, the portfolio minister — not six as in 2000, thus hopefully minimising delays.³⁶
- **Performance agreements for members:** There is no suggestion in 2015 that there be performance agreements and performance pay for members.

- **Removal of members:** There was a provision in the Tribunal Amalgamation Bill 2014 that membership could be terminated by the Governor-General for breach of certain criteria, but that was removed following the Senate debate and the recommendations of the Senate Legal and Constitutional Affairs Committee.³⁷ The status quo — namely, that members can only be removed by the Governor-General after an address by Parliament for proved misbehaviour or incapacity — has been preserved,³⁸ although the Governor-General may also terminate an appointment if a member, other than a judge, becomes bankrupt, is in financial difficulties, is absent without approval for 14 consecutive days or 28 days in any 12-month period and for certain other reasons.³⁹
- **Terms of appointment:** There was an attempt in 2015 to reduce the maximum term of appointment of members from seven to five years, but this was dropped by the Attorney-General following Senate objection. The position now is that a member may be appointed for up to seven years and be reappointed.⁴⁰
- **Appeal tier:** There is no general right to second-tier review within the AAT. The right is restricted to certain cases from the Social Services and Child Support Division in which a second review is available from the General Division of the Tribunal.⁴¹ In effect, this preserves the status quo prior to 1 July 2015, except that second-tier review is provided within the same institution.
- **Hearings:** Hearings on the papers are provided for, but only if the matter is appropriate and both parties agree.⁴² Hearings in the Social Services and Child Support Division at first review are generally, as was the case for the SSAT, to be in private.⁴³ However, the AAT may direct who may be present and the direction must take account of the 'wishes of the parties and the need to protect their privacy'.⁴⁴
- **New evidence:** The fundamental principle that merits review by the AAT was 'de novo', and could take account of new evidence without demanding that the matter be remitted to the original decision maker, has been retained.

The 2015 legislation has eschewed those key aspects of the 2000 Bills relating to the diminution of the AAT's independence, its structure and its processes. To that extent, the restructured AAT can ensure public confidence in its independence, integrity and impartiality.

There have, however, been lost opportunities. The loss of expertise, as feared in 2000 by the veterans' community, did arise in 2015; there has been no attempt to provide in the legislation for an open and transparent appointments system; and the VRB was not included.

Loss of expertise

There was a considerable changeover of members in 2015, notably due to the failure to reappoint a significant number of the migration tribunal members⁴⁵ and a lesser number of AAT and SSAT members. The extent to which this can be attributed to the impending amalgamation is not known but would have been a consideration. Overall, when the merger took place, according to the AAT President, Justice Duncan Kerr, the AAT 'came in about 15 [tribunal members] short'.⁴⁶ Kerr J said the expectation was 'that the ministers responsible for the previous tribunals would have completed all appointments so we would get a full complement of people coming across'.⁴⁷ That did not happen. Even if that full complement had been appointed, there would still have been a loss of expertise. The migration tribunals, for example, lost 31 experienced members since only seven of those whose terms expired on 30 June 2015 were reappointed.

In the short term, having new members means existing members carry an extra case load and need to spend time mentoring the newcomers during their learning period. Typically it takes two years for new members to become competent in an unfamiliar jurisdiction. So this consequence of the appointments process imposed additional pressures on experienced

members and will have had a considerable impact on migration and refugee decision-making. That pressure, in the circumstances of the AAT merger, has been compounded by the considerable delays in the appointment processes.

An optimistic view of the loss of expertise issue was taken by Justice John Chaney, President of the Western Australian State Administrative Tribunal (SAT), who noted in 2013:

The establishment of a super-tribunal inevitably creates concerns about a loss of specialist expertise, an increased level of formality or legality, and the application of a 'one size fits all' approach to procedures which is unsuited to the wide range of jurisdiction that super-tribunals exercise. Those concerns have not been borne out in practice. Rather, the benefits which have been identified in the way of accessibility, efficiency, flexibility, accountability, consistency and quality have all come to pass.

All super-tribunals have retained specialist expertise through full time members drawn from a variety of fields, and large numbers of sessional members from varied disciplines. That has preserved the availability of expertise.⁴⁸

That view may represent observations from a longer-term perspective. The SAT had been in existence for nearly a decade when Justice Chaney presented that paper. In the short to medium term, for the AAT, there has undoubtedly been a loss of expertise through the non-appointment of experienced members and the slowness to appoint new members. That is not to suggest there can be legislative criteria mandating fixed types and numbers of expert members. Tribunals' need for expertise changes over time. As the discussion of appointments suggests, however, there can be statutory objectives which reflect the need for maintenance of a spread of expertise.

Having members competent to review decisions across a range of activities is a key feature of the tribunal system and can be jeopardised during an amalgamation. A failure to appreciate this poses a danger to that system. Unless careful attention is paid to the mix of expertise in members post-amalgamation, this prized feature of tribunals as compared with courts can be weakened or lost. In the material available prior to the amalgamation there was no indication that this was a consideration, as it should have been, of those managing the process.

Open and transparent appointments processes

The legislation exhibits a significant gap on the appointments front. The situation can be contrasted with that pertaining to tribunals in Canada's largest province, Ontario. An amendment to its *Adjudicative Tribunals Accountability Governance and Appointments Act, 2009* provided, under 'Appointment to Adjudicative Tribunals', that: 'The selection process for the appointment of members to an adjudicative tribunal shall be a competitive, merit-based process' (s 14(1)), there was to be publication of the statutory criteria for positions which were to include 'Experience, knowledge or training in the subject matter and legal issues dealt with by the tribunal' (s 14(1) at 1) and 'If a member ... is required by or under any other Act to possess specific qualification, a person shall not be appointed to the tribunal unless he or she possesses those qualifications' (s 14(2)).

In addition, the responsible minister was required to publish the steps in the recruitment process and the criteria for appointment (s 14(3)) and the minister was not to appoint or reappoint a member without consultation with the chair of the tribunal (s 14(4)).⁴⁹ Legislation along these lines balances the ministers' ultimate responsibility for appointments with a more open and transparent system and takes account of the performance of existing members when reappointment is contemplated.

In relation to the AAT, although there are some specified qualifications for members in the 2015 AAT Act⁵⁰ and the President, in practice, does have the opportunity to make recommendations about appointments, this is not supported by legislation; nor are there legislative requirements for the process to be a public, merit-based, competitive process. Provisions like these are capable of mitigating the loss of expertise and alleviating some of the concerns being expressed by the current President of the AAT.

The present position, as the AAT notes in its corporate plan, is that:

The AAT ... has limited control over the size, makeup or location of its membership. This can affect the Tribunal's ability to plan for and undertake the review workload, including meeting targets for the number of reviews finalised and timeliness standards.⁵¹

This echoes warnings by the President that the failure to reappoint members and the delays in appointments mean that there will be 'personnel shortages' and these 'will inevitably lead to delays and backlogs'.⁵² These are pointers to issues which are likely to lead to the public's dissatisfaction with the Tribunal and could be avoided with a more open and transparent process for appointments. There are also other adverse managerial consequences from the delay.

Exclusion of the Veterans' Review Board

From the time of the Budget in 2014, when the proposal to merge the tribunals was announced, there was no mention of the VRB, despite it also being a high-volume merits review tribunal. The government explained that this was because it is 'within the Defence portfolio' — an explanation that did nothing to enhance the public's perception of the VRB as an independent review agency.⁵³ If convinced of the advantages of amalgamation for its larger merit review tribunals, there was no reason in principle for the VRB not to be included. The truth is the attempt to include the veterans' jurisdiction in 2000 was so bruising that for political reasons it was excluded from consideration. The government balked at facing the powerful veterans' lobby should it object to the revived proposal.

Although for the veterans' community the review process has not changed — that is, there is review by the VRB followed by further review by the AAT — the result is untidy, requires special legislative attention in the AAT Regulations and was not warranted by the government's reluctance to confront the powerful veterans' lobby. The omission is to be regretted.

In summary, some lessons from the ART experience were learned. There were, however, gaps in fundamentally important areas such as the need for the retention of expertise and an improved appointments process, and failure to include the VRB. Overall, there is no room for complacency, as the following discussion indicates.

Alternative models

The 2015 amalgamation offered opportunities to evaluate and reshape the AAT in the light of alternative models. That opportunity, to a large extent, was missed. In effect, the outcome bears the hallmarks of the ARC's *Better Decisions* report — a report developed in 1995 at a time before some of these alternatives had been trialled or introduced. It is to be regretted that there appears to have been no or little attempt to update thinking about the architecture of the administrative justice system and this is to the detriment of the federal tribunal system.

Typically there are four alternatives to achieve a more coherent, less fragmented civil and administrative tribunal system:

- complaints can be heard within a designated division or divisions of a court (the court-based model);⁵⁴
- tribunals can be combined along sectoral lines, the sectors being topic-based⁵⁵ or regional-based⁵⁶ (the cluster model);
- the administration of existing tribunals can be centralised with or without tribunal co-location (the shared services model); or
- there can be adoption of a 'super-tribunal' comprising most or key existing tribunals while retaining some standalone specialist tribunals (the civil and administrative tribunal model).⁵⁷ This is not a permissible option under the *Constitution* and will not be considered further.

Court-based model

The first approach may be particularly attractive in the case of bodies politic with relatively small populations and a limited number of tribunals.⁵⁸ It was for these reasons that Tasmania, which had a population of 473 252 in 2001,⁵⁹ opted to house its administrative review jurisdiction in its lower-tier Magistrates Court,⁶⁰ which already dealt with civil matters.⁶¹

Size, however, is only one factor. So, for example, in 2008 the Australian Capital Territory, which had a population of 342 670 in the first quarter of 2008,⁶² introduced legislation for its ACT Civil and Administrative Tribunal (ACAT); the Northern Territory, with a population of only 244 300 in December 2014,⁶³ has set up its Civil and Administrative Tribunal (NTCAT);⁶⁴ and in 2015 Tasmania, with a population of 516 111 in the March quarter of 2015,⁶⁵ has announced that it is to explore the civil and administrative amalgamation tribunal option.⁶⁶

The disadvantage of this model is that it blurs the distinctions between courts and tribunals. This inhibits tribunals from publicising their distinctive features.⁶⁷ These include a multiplicity of dispute resolution options, specialist expertise, flexible modes of operation, more timely decision-making and lower costs. A tribunal is not just another court and has significant advantages accordingly.

Cluster model

The sectoral approach has been adopted in Ontario, Canada, with its 'cluster' model based on topics. As Bryden describes it, the 'clustering initiative ... is seen as an alternative to consolidating a number of tribunals exercising specialized jurisdiction into one or more "super-tribunals"'.⁶⁸ Suitability for clustering is based on effectiveness and efficiency and is progressively being introduced in that Province.⁶⁹

This option has the advantage that there has been no loss of specialisation. Whether it is cost-effective and what tribunals should be included in each cluster are issues.

Shared services model

The centralisation of administrative functions for existing tribunals — the 'shared services model' — is attractive. The model aligns with moves generally within governments to achieve greater administrative efficiency and cost savings. Against these objectives there are start-up costs which require substantial upfront investments in premises and information technology, and this suggests that efficiencies are unlikely in the short to medium term.⁷⁰

Despite such concerns, Canada is trialling this option for 11 of its smaller federal tribunals. The *Tribunals Support Service of Canada Act 2014*⁷¹ provides for consolidation of back office functions in one agency while retaining the identity of the existing specialist tribunals. As Bryden noted, it is too soon to judge the success of this initiative, but it brings access to technology which might not be affordable for smaller tribunals as well as the cost and expertise advantage of shared services.⁷²

In summary, consideration of these alternatives may have resulted in the adoption of an alternative model or a variation of the model chosen for the amalgamation of the AAT, but there is no evidence that this consideration took place.

Government's objectives⁷³

In the lead-up to the introduction of the 2015 legislation, the government identified the objectives of the amalgamated tribunal as savings, to avoid confusion, better governance arrangements and to improve the quality and reputation of the national merits review system.⁷⁴ It is arguable that none of these objectives have been achieved in the short term and some may not be achievable in the longer term.

Savings

Governments favour a dispute resolution system that is efficient and cost-effective. There can be no criticism of these objectives applied, as they are, across the public and private sectors. But justifying major institutional changes of the kind involved in mergers of high-volume tribunals should not be pursued at the expense of other laudable objectives. There was no discussion in the publicly available material from government whether, for example, cost saving and more efficient operations could have been achieved by adoption of any of the alternative models for bringing disparate tribunals into a more cohesive structure.

The predicted savings over the forward estimates (three years) for the merged AAT is a modest \$7.2 million.⁷⁵ That is less than \$2.5 million a year. The savings are said to come from 'streamlining back office functions and reducing property expenses by consolidating accommodation arrangements'.⁷⁶ This may reflect the warning provided by the Skehill Review in 2012 concerning financial restraints and the need for adequate resourcing if amalgamation was to be pursued.⁷⁷

That warning is being borne out. Property consolidation has not been effected quickly. The AAT website indicated that seven months after amalgamation only the ACT and Tasmania were co-located and in the ACT the co-location predated the amalgamation. In Queensland (which services the Northern Territory), in South Australia and in Western Australia, the former migration tribunals and the former AAT, but not the SSAT, are in the same building. In Western Australia, social services and child support operate from the adjacent but not the same building. For the largest registries — in Melbourne and Sydney — the former tribunals remained in separate buildings, although this changed for Sydney in May 2016.

At its most optimistic, full co-location is not scheduled to occur until 2017.⁷⁸ In addition, there are costs associated with co-location. Changes of venue are expensive, with new signage, security systems, websites, telephone numbers, stationary, directions, guidelines and manuals. The current indications are that in the short to medium term savings from the co-location are likely to be non-existent or minimal.

It is notable that the federal government did not refer to savings from having a single IT system. That may have been deliberate. The IT systems of the former migration and social security tribunals are tied to and supported by their related departments. Separating these

legacy systems would be costly and disruptive. Integrating IT systems is fraught with problems and inevitably takes time. Ten years after the Victorian Civil and Administrative Tribunal (VCAT) was created, its President noted: 'On amalgamation there were four computer systems in use. That has been reduced to two. That ... is a significant achievement'.⁷⁹ Understandably, the merged AAT has been cautious about its promises in this area. The most it has been prepared to state publicly is that it 'will review the range of legacy IT systems used by the AAT, MRT, RRT and SSAT'.⁸⁰

That leaves any financial benefits to come from bringing back office functions together. There is a single finance and human resources (HR) system.⁸¹ However, consolidation of other back office functions is likely to be protracted while the tribunals are housed in different buildings which must be equipped with libraries, telephones, video equipment and administrative staff. This suggests even modest savings are unlikely.

Warnings emerged from the amalgamation experiences in the states and territories about the potential for a blowout in costs from amalgamation. A witness to the New South Wales Legislative Council Standing Committee on Law and Justice review in 2012, preceding the amalgamation of tribunals in New South Wales, pointed out that '[t]here are ... diseconomies of large scale that occur in all big bureaucracies, and I submit to you that a change ... will cost more'.⁸² The evidence of the General President of ACAT to the committee was that the ACAT 'was not cheaper than the existing tribunal system in the Australian Capital Territory'.⁸³ The President of the SAT, while noting that there are difficulties in comparing pre-amalgamation and post-amalgamation costs,⁸⁴ said, although it was more efficient, that SAT was 'unlikely to be cheaper'.⁸⁵ So this evidence too indicates that achieving even modest savings in the short term is doubtful.

The evidence suggests that it is unlikely that amalgamation of tribunals will lead to a reduction in calls on the revenue, at least in the short to medium term. Those seeking to identify the financial benefits of the amalgamation need to take a long-term view, and focusing exclusively on financial benefits is misplaced. Achievement of this goal should be replaced with others such as greater efficiency or better public satisfaction and even these will take time to materialise. It is also a pity that alternative models were not canvassed to assess whether more savings could have been achieved.

Avoid confusion and provide better access for litigants

Consolidation is based on the assumption that there will be one set of premises; one logo; one telephone number or email address; one front counter; uniform application forms; a consistent fee structure; more uniform practices and procedures; and a common set of manuals, directions and guidelines.

The Productivity Commission report *Access to Justice Arrangements* identified the potential benefits from full co-location as 'improved accessibility and ... the single tribunal avoids the confusion that can arise from the existence of multiple tribunals, furthers the "no wrong door" principle, and provides a better opportunity for those with complaints to find and use the justice system'. The 'one-stop-shop' facility saves people 'time, money and stress'.⁸⁶

These objectives can be bundled under a single ambition: to improve user experience. At present, these objectives cannot be met by the merged AAT. Enhanced user satisfaction is not furthered by housing different key divisions of the Tribunal in different locations in those cities where full co-location has not yet occurred. In those cities, the Tribunal will have the same label — the AAT — in their lobbies, which is a recipe for confusion. It can be expected that applicants, practitioners, representatives, witnesses, taxi drivers and GPS sources cannot decide which is the appropriate building to attend.

Confusion is ameliorated to an extent by the AAT website provided those searching understand that the information they need about location of a particular division may not be found immediately on the home page. The searcher must scroll down to find references to the Migration and Refugee Division and the Social Services and Child Support Division, and they must follow another link or two to find their location in a particular state or territory. Considerable persistence may be required and that is not a universal quality among applicants, witnesses, and legal or other advisers.

Although the failure for the AAT to be fully co-located is a short to medium term situation, confusion and access problems are likely to continue. There is an understandable irritation by the public at problems in finding their way to the correct building to hear matters. These issues do not augur well for the reputation of the Tribunal. The AAT plans to survey stakeholders and applicants for their 'views about the AAT's services ... in the first half of 2016'.⁸⁷ If it does so, the findings may not be to its liking.

Better governance

There are multiple facets to achievement of improved governance. This paper includes only managing institutional structures; leadership; and better utilisation of members and staff.

The impact of a fragmented institutional structure impacts negatively on the whole Tribunal. This is illustrated by a comment of the General President of ACAT, who noted in a public forum in 2015 that it is essential for the development of organisational culture that staff should be in one location. There needs to be a coherent and integrated structure within the combined Tribunal if it is to be successful. As the Hon Justice Kevin Bell, a former President of VCAT, commented:

With such a[n amalgamated] structure, the natural tendency is towards separation. Therefore, not working towards unity leads to disunity. To date, there has not been sufficient institutional drive [in VCAT] towards the centre. As much as possible, [divisions of an amalgamated tribunal] should be working as part of a unified organisation ...⁸⁸

[T]here needs to be much greater emphasis on functional integration and operational unity, not just on institutional amalgamation.⁸⁹

His words apply not only to physical location but also to the internal structures of the combined Tribunal and to the management of its personnel. Slowness in achieving integration and a unified institutional structure for the AAT has the potential to stall progress and inhibit those developments needed to create a cohesive, effectively functioning institution.

The amalgamated Tribunal is a large dispute resolution body by Australian standards. The AAT will have over 700 full-time equivalent members and staff,⁹⁰ about 300 of whom are members;⁹¹ receive some 40 000 applications per annum;⁹² and operate nationally in all capital cities. The Tribunal now comprises eight divisions — Freedom of Information Division (FOI Division), General Division, Migration and Refugee Division (including the [Immigration Assessment Authority](#)), National Disability Insurance Scheme Division (NDIS Division), Security Division, Social Services and Child Support Division, Taxation and Commercial Division, and the Veterans' Appeals Division.

There are only two additional divisions to those that existed under the former AAT. However, those divisions comprise the former migration tribunals and the SSAT. It is these divisions that receive by far the greatest proportion of the Tribunal's case load. The combined case load of these divisions exceeds that of the former AAT by a factor of six to one, with the migration case load being roughly three times and the social security and child support case

load being roughly twice that of the pre-existing six divisions of the former AAT.⁹³ The consequences of this significant increase are the need to avoid institutional imbalance, for a more extensive leadership team and for development of a more productive team of members and staff.

(a) Institutional imbalance

From a management perspective these figures signify an unbalanced structure. The concern is that the two divisions representing the former migration and income support tribunals will dominate the former six divisions of the AAT, have an undue influence on the processes and administration of the amalgamated body, receive the lion's share of resources and inhibit the retention of appropriate features of the former tribunal.

That concern has been faced in the states and territories which have amalgamated their tribunals. The New South Wales Legislative Council Standing Committee on Law and Justice, in its inquiry in 2012 into the possible establishment of the New South Wales Civil and Administrative Tribunal (NCAT), heard evidence that the pre-existing Consumer, Trader and Tenancy Tribunal (CTTT), formerly the largest tribunal in New South Wales, had a total of 65 294 applications in 2012–2013.⁹⁴ By contrast, the Administrative Decisions Tribunal (ADT) — an amalgamated administrative-only tribunal to be included in the NCAT amalgamation — received only 841 applications in the 2013 financial year.⁹⁵ That meant that the CTTT case load was 77 times that of the ADT.

In the Standing Committee's final report, the New South Wales Legislative Council acknowledged that the CTTT could 'overwhelm any new tribunal in an administrative and fairness/justice sense and from a resources perspective'.⁹⁶ Nonetheless, it recommended the adoption of the NCAT proposal. As the report pointed out, other amalgamated tribunals had accommodated potential 'swamping' and this could be avoided with 'thorough planning and implementation and a staged process of consolidation'.⁹⁷

Although the imbalance in sizes of the federal tribunals merged in 2015 is less marked, the potential for swamping remains. It is too early to conclude that the 'swamping effect' has occurred, although anecdotally there are complaints, particularly that the practices of the former migration tribunals are being imposed at the expense of those of the former AAT. These complaints suggest at least teething problems due to the inequality of size and influence of these former specialist tribunals.

The only indication that government appreciated this issue is gleaned from the provisions in the AAT Act indicating the need for differentiating between the three, emphasising the objective of maintaining the distinctive aspects of each.⁹⁸ There was certainly no staged process of consolidation — the amalgamation of all the tribunals occurred on 1 July 2015.

These figures, along with the legislative and practice distinctions between the general former AAT divisions and the two large new divisions, coupled with the fact that there are different funding models for the three arms,⁹⁹ illustrate the potential for the AAT, post 1 July 2015, to be a federated, tri-partite body, not a unified structure. This creates a live issue for management of the combined tribunal if the 'diseconomies of scale' are to be avoided or counteracted. They also raise the issue of whether a preferred structure such as shared services model, or the cluster model might not have been a more apposite approach.¹⁰⁰

(b) Leadership

To compound the problem, the revised management structure of the AAT was slow to materialise. The AAT Act provides for there to be heads and deputy heads of divisions.¹⁰¹

The positions are to be assigned by the Attorney-General.¹⁰² The advertisements for the heads of the Migration and Refugee Division and of the Social Services and Child Support Division appeared in 2015.¹⁰³ At the beginning of 2016 the positions had not been filled, although this was rectified by appointments in February¹⁰⁴ and March¹⁰⁵ 2016.

In its first months of operation, when guidance and leadership is critical to manage the inevitable problems which accompany the creation of a new institution, these failures are worrying. The absence of those with responsibility for the leadership and management of the merged body at this time should have been avoided. That need is the greater to avoid the 'swamping effect' on the new body.

(c) Better utilisation of members and staff

Cross-fertilisation of experience for Tribunal members and staff is one of the advantages of amalgamation. This can be achieved for the AAT by cross-appointments to divisions, leading to a more flexible and experienced workforce, less chance of 'capture' by client groups, better-quality decisions, less downtime for members and a wider pool of expertise. These moves could also lead to cost savings if they lessen the need for underutilised part-time members.

Although there was a widespread practice of appointments of individuals to multiple divisions in the former AAT, since 1 July 2015 cross-appointments have been limited to Deputy Presidents. That may alleviate concerns about the initial absence of expertise of cross-appointed members and staff more generally but denies the wider benefits which flow from the practice.

A significant barrier to cross-appointments is the different categories of membership provided for in the AAT Act. There are to be two categories of senior members and three categories of members¹⁰⁶ as well as the President and presidential members — seven categories in all. Each category has a different salary scale,¹⁰⁷ reflecting in particular the previous differential salary scales of the three constituent tribunals involved in the merger. A similar position arises in relation to staff. Different rates of pay will inhibit cross-appointments unless there are moves to remove these impediments to uniformity.

Managerially, members and staff need uniform appointment practices and common general criteria for appointments, tenure and remuneration; for members, there should be standardised reappointment and removal from office provisions as well as common sessional sitting fees and other conditions of service such as employment status, room sizes, and entitlements and allowances for each principal category of member.

The continuation of the differential treatment of members and staff for the three key parts of the merged body is understandable in the short term but, since the differences are enshrined in the Act, it appears that they are intended to continue. That is inimical to the development of a unified tribunal. Consistency of salary scales for members and for staff in a combined tribunal is critical to avoid morale problems and to promote social cohesion.

Other issues

In addition to the objectives identified by government, there are other facets of the amalgamated body which raise potential issues.

Process and procedure

A risk from amalgamation is that there will be an 'inflexible application of generalist processes to specialist bodies that need the capacity to cater their procedures to suit their client base and legislative objectives'.¹⁰⁸ This risk appears to have been heeded.

An initial objective of the merger was said by government to be 'to harmonise and streamline procedural matters for the amalgamated tribunal'.¹⁰⁹ That purpose was quietly dropped. The Explanatory Memorandum to the Bill noted that the amalgamation would 'retain the successful features of each of the tribunals as currently constituted' and preserve 'the distinctive aspects of each of the tribunals that are important in their specific jurisdictions'.¹¹⁰

Nonetheless, the corporate plan of the Tribunal states that 'The AAT will work with government to increase consistency in procedures relating to the conduct of review across divisions where appropriate'.¹¹¹ The statutory objectives of the AAT apply to all its divisions,¹¹² as do aspects of the *General Practice Direction*.¹¹³ So some attempts have been made to harmonise procedures.

Beyond these steps, the general procedures in pt IV of the AAT's *General Practice Direction* do not apply to the Migration and Refugee Division and the Social Services and Child Support Division.¹¹⁴ Since these procedures relate to lodgement of documents, stay of decisions, expedited review, processes for initial conferences, directions hearings, procedures at hearings and the consequences of non-compliance with legislative requirements and directions — core procedural matters for any tribunal — it is apparent that any consistency advantages of amalgamation in these areas is not to eventuate. This is evidenced further as each former tribunal has maintained its separate identity on the AAT website, including maintenance of individual statistics and performance data and their own annual reports.¹¹⁵

Other specific differences are sanctioned by the direction of the President. Hence, there are special privacy provisions which apply only in the Migration and Refugee Division.¹¹⁶ That division is not subject to the requirement that parties use their 'best endeavours' to assist the Tribunal,¹¹⁷ and there is a special regime for the provision of material to the AAT which applies only in that division.¹¹⁸

There is also a flexible approach to hearings in Social Services and Child Support Division claims, particularly at first review. Pre-hearing ADR processes are not employed,¹¹⁹ oral applications are permitted in some matters,¹²⁰ oral or no reasons may be the norm¹²¹ and only the applicant may attend a first review hearing.¹²²

These practices indicate the former migration tribunals and the SSAT will continue to operate under their pre-1 July 2015 procedural practices¹²³ — a feature of the merged body cemented by the legislation. This confirms that a high degree of flexibility in practices and procedures is to be tolerated and any realisation of consistency is not likely to materialise.

While continuation of differences can be divisive, uniformity too can be counterproductive to the needs of particular users, inhibiting rather than enhancing rights of access to review. A delicate balancing act is required to achieve the aim of consistency of procedures and practices within the combined Tribunal while maintaining different practices specific to, and appropriate for, individual jurisdictions.

The present position enshrined in the legislation is that the delicacy required to achieve the desired objective has not been achieved. That is because the different procedures of the chief divisions are enshrined in legislation and will be difficult to change. This is inimical to

the development of a more user-friendly, accessible tribunal which avoids confusion and enhances accessibility. More careful attention to this issue was needed and will be needed to avoid these consequences of the status quo.

‘Creeping legalism’

A controversial procedural issue is how to avoid aspects of adversarial legal practices infecting the practices and procedures of an amalgamated tribunal. In particular, the generally court-focused training and experience of most legal practitioners mean it is more likely that the tendency of legally trained members in hearings is towards an adversarial rather than an inquisitorial approach.

The amalgamation of tribunals is capable of providing a more flexible, less formal, more cost-effective and quicker form of dispute resolution. These features are reflected in the common statutory objectives of amalgamated tribunals that the Tribunal should operate in a manner which is ‘fair, just, economical, informal and quick’,¹²⁴ coupled with the requirement in one of the objectives in s 2A, added in 2015, that the Tribunal’s operations are to be ‘proportionate to the importance and complexity of the matter’.¹²⁵

Despite being obliged to follow the same ‘fair, just, economical, informal and quick’ objectives, the 10-year review of VCAT identified as a key theme the need to revisit the foundation principles on which the Tribunal was established — namely, to adopt procedures which were user-friendly and different from those in courts and, in particular, to avoid ‘creeping legalism’.¹²⁶ As the review reported:

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.¹²⁷

The tendency for tribunal processes to become judicialised is due to pressures from several quarters:

- the lower federal courts’ stringent application of judicial review standards;
- the courts’ willingness to find ‘errors of law’ in appeals against tribunal decisions; and
- the presence of legally trained representatives before the tribunal.

The responses to these tendencies have been varied. The Australian High Court has, since 1996, regularly warned the lower courts against being overly demanding when exercising judicial review, or hearing appeals, from tribunals.¹²⁸ The fact that the message has needed to be repeated on several occasions suggests that the warning is not always heeded.¹²⁹

Another response has been the legislative attempt to restrict the appearance of legal practitioners before tribunals.¹³⁰ Evidence about the effectiveness of these provisions is limited, but in its first year of operation researchers noted of the provision in the *Queensland Civil and Administrative Tribunal Act 2009* that legal representation could only be by leave¹³¹ that it had been the most litigated of any of the provisions in the new Act, indicating that attempts to exclude lawyers are strenuously opposed.¹³²

There are mixed views about the desirability of representation by legal practitioners at tribunal hearings. In its *Access to Justice Arrangements* report, the Productivity Commission recommended that, for simple legal and factual matters where there is equality between the parties, legal representation should generally only be permitted with leave, but, for more

complex matters or where there is a power imbalance, representation by legal practitioners should generally be allowed.¹³³

This is a sensible view. It is preferable in many matters for evidence to be presented by an applicant. That person is in the best position to chronicle the facts and can provide evidence without bearing the extra costs associated with legal representation. At the same time, for any matter depending on analysis of complex legislation or where the facts, including the credibility of witnesses or parties, are in dispute, the knowledge and skill of a legally trained representative can enhance the prospects of success for an applicant.¹³⁴ In general, representation leads to better outcomes in ADR and more efficient, focused hearings — benefits which accrue to claimants.

Whether that balance has been achieved in the AAT is not yet known. At present, the position preserves the pre-1 July 2015 approach. Previously, an applicant before the SSAT was rarely represented and required the permission of the principal member,¹³⁵ and in the migration tribunals persons other than an applicant were prohibited from giving evidence unless invited to speak.¹³⁶ That situation has been preserved.

In the former AAT, there were generally no limits on representation. Currently, the President's direction power in s 18B of the AAT Act may be used to limit the level of representation formerly experienced in the AAT, and this may be encouraged by the new objective for the Tribunal to provide review which is proportionate to the importance and complexity of the matter.¹³⁷ There has as yet been no direction by the President on this issue.

Administrative Review Council

A notable omission from the amendments to the AAT Act was the retention in pt 5 of the provision for the ARC. As the government had announced prior to its Budget in May 2014 that the ARC was to be one of the bodies which was to be abolished, the failure to remove this section of the AAT Act is puzzling. To take an optimistic view, the retention may have been because it was seen that in the future there may again be a need to reactivate that body. If that was the rationale, it is laudable. If the reason was simply to avoid taking a step which was controversial, the motive is not praiseworthy. No public comment, beyond the initial announcement of its demise, has given any indication of government thinking on this issue.

Conclusions

The upshot of this discussion is that there were omissions from the amendments to the legislation, such as to provide for a more transparent appointments process, overtly to include the VRB in the merger, and to provide legislatively for an appointments process, which would prevent loss of expertise.

The failure to provide some incentives for a better appointments process has undoubtedly impacted negatively on membership and the need for more effective leadership at this critical time. The slowness to co-locate, although a matter not wholly within the control of the Tribunal, has undoubtedly contributed to some of the management and cost-saving difficulties. Whether these could have been avoided had action been taken earlier or had there been adequate funding to permit earlier co-location and better attention to IT issues is not known. Certainly the savings expected are unlikely to be reached, and the inevitable access issues arising from the incomplete co-location, although not long-term issues, do nothing to improve the quality and reputation of the national merits review system.

There are also major issues which may continue from the predominant influence of the Migration and Refugee Division on the operation of the Tribunal, the different funding models, and the differential salary scales within the Tribunal's membership. There are other simmering issues, such as the impact on the mode of operation of the Tribunal of the insidious effects of 'creeping legalism'. The report card overall is not particularly healthy in the short term, although it may improve if the President uses the directions power strategically and makes good on his promise to tackle other legacy issues.¹³⁸

Finally, the failure actively to consider whether another model might have avoided what appears to be a loose federation of tribunals, with a possibility of the largest element of that federation — the Migration and Refugee Division — having a predominant and not necessarily appropriate impact on the other elements, is a disappointment and does not augur well for the future of the amalgamated body.

Dr Cronin, in her assessment of the 2000 proposals, noted that 'Chief Justice Gleeson said ... that the only criterion for judging courts and tribunals is the measure of success they have in ensuring public confidence in their independence, integrity and impartiality'.¹³⁹

In similar vein, The Hon Justice O'Connor, then President of the AAT, said of the 2000 proposals that the policymakers should be asking the following questions:

- [H]ow can the amalgamated tribunal ... improve what the Australian public already has?
- How can it improve the quality of the decisions that are made?
- What improvements in service are going to result from amalgamation?
- How will the Australian public benefit from the amalgamation?¹⁴⁰

Until these questions can all be answered positively, the history of the AAT's amalgamation will not have fulfilled the promise of the undoubted benefits that can be gained from amalgamation. At present, the body resembles a cluster rather than an amalgamated institution and the story is of opportunities missed rather than taken, to the detriment of the institution.

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- 119 *Administrative Appeals Tribunal Act 1975* (Cth) s 34(b).
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- 121 *Administrative Appeals Tribunal Act 1975* (Cth) s 28(1AAA).
- 122 *Administrative Appeals Tribunal Act 1975* (Cth) ss 28(1AAA), 29(1)(a)(ii), 32(2), 34(b).
- 123 Administrative Appeals Tribunal, above n 51, 5.
- 124 *Administrative Appeals Tribunal Act 1975* (Cth) s 2A(b).
- 125 *Administrative Appeals Tribunal Act 1975* (Cth) s 2A(c).
- 126 Bell, above n 79, 20.
- 127 Ibid 21.
- 128 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259; *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559; *Minister for Immigration v Eshetu* (1999) 197 CLR 611; *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323; *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611.
- 129 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323.

- 130 *Administrative Appeals Tribunal Act 1975* (Cth): s 32(2), (3) — representation in the Social Services and Child Support Division is only by leave; s 30 — a person may be legally represented unless the representative is excluded. *Northern Territory Civil and Administrative Tribunal Act 2014* (NT): ss 103, 130 — normally a party is entitled to be represented, but, if a 'party' conducting a case is disadvantaging another party to a hearing, the person can be excluded; s 45 — leave is required for legal representation subject to specific provisions for particular divisions. *Queensland Civil and Administrative Tribunal Act 2009* (Qld): s 43 — parties are to represent themselves unless the interests of justice require otherwise. *South Australian Civil and Administrative Tribunal Act 2013* (SA): s 56 — legal representation is permitted. *State Administrative Tribunal Act 2004* (WA): s 39 — legal representation is permitted. *Victorian Civil and Administrative Tribunal Act 1998* (Vic): s 62 — limits the circumstances in which legal representation is permitted.
- 131 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 43.
- 132 Bill Lane and Eleanor Dickens 'Twelve Months On — Reflections on the Key Issues Considered by the Queensland Civil and Administrative Tribunal' (2010) 30 *Queensland Lawyer*, 152, 156.
- 133 Productivity Commission, above n 3, 'Overview', recommendations 10.1, 51.
- 134 Australian Law Reform Commission *Managing Justice: A Review of the Federal Civil Justice System*, Report 89 (1999) [9.99]–[9.105].
- 135 *Social Security (Administration) Act 1991* (Cth) s 161(2).
- 136 For example, *Migration Act 1958* (Cth) ss 359(2), 379A, 379B.
- 137 *Administrative Appeals Tribunal Act 1975* (Cth) s 2A(c).
- 138 Administrative Appeals Tribunal, *Annual Report 2014–15* (2015) ch 1, 3.
- 139 Cronin, above n 12, 10.
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