# PERSPECTIVES ON ECONOMY AND EFFICIENCY IN TRIBUNAL DECISION-MAKING

***Bernard McCabe****

Tribunals can be more efficient than courts in the sense that it is possible to obtain more output from a given level of inputs in a tribunal. That outcome can be achieved without compromising on quality. No wonder governments like the tribunal alternative, and no wonder governments in most jurisdictions have embraced the promise of super-tribunals. But getting greater *value* from tribunals — as opposed to merely achieving cost savings — is a tricky business.

Innovation and reform is essential for tribunals. The need for economy is a fact of life. Developments in information technology that assist information management hold great promise. Professional managers also make a contribution. Yet not every innovation is to be welcomed, and not everything done in the name of economy actually promotes efficiency or even saves cost. Innovations justified with reference to economy in particular need to be scrutinised very carefully to ensure they do not lead to false economies in tribunal operations or compromise, at great cost to the community, the quality of what tribunals do.

Governments set policy, appoint members and allocate money, but individual tribunals enjoy a measure of independence in the discharge of their mission. Operational responsibility falls to tribunal leaders, assisted by professional managers. Many tribunal members have been missing in action in the debates over how these organisations are to be run. That is a pity. Tribunal members should have a deep understanding of the review and dispute resolution process, but that is not the limit of their knowledge. It is time for them to re-engage with what is happening. That is not to say members need to roll up their sleeves and take over the minutiae of management: that way madness (and inefficiency) lies. Rather, the challenge for members is to articulate clearly the philosophical basis for what each tribunal does and how economy and efficiency fit in.[1] The challenge — their challenge — is not only to do more with less but also to do it better.

**Tribunals generally deliver outcomes at lower cost to users**

The objects clauses in most of the statutes establishing our larger tribunals refer to a range of objectives, including accessibility, fairness, flexibility, justice and speed. Most of the statutes also address the desirability of minimising costs *to users*.[2] Tribunals typically provide a lower-cost experience for users through lower filing fees, simpler forms and flexible processes that are generally designed to be understood by litigants in person. They favour less formal hearing processes that focus or limit the scope of hearings, and they may dispense with 'in-person' hearings altogether in appropriate cases. Australian tribunals have also pioneered the development of alternative dispute resolution processes as part of their mission to provide cheaper mechanisms for dispute resolution and review. A number of tribunals are now considering opportunities for online dispute resolution and other

* *Bernard McCabe is Deputy President and Head of the Taxation and Commercial Division of the Administrative Appeals Tribunal. This is an edited version of a paper presented to the Australian Institute of Administrative Law National Conference, Brisbane, 22 July 2016.*

techniques for helping to defuse conflict and clarify misunderstandings before the formal tribunal processes are engaged.

All of the statutory objectives are important, but they can be difficult to reconcile. Being fair can be costly. Justice can be slow. A balancing process is always required, and it is difficult to make general statements about what a tribunal should do in particular cases. That balancing process is tricky because prosaic objectives like cost and delay are readily measurable, while 'fairness' and 'justice' are hard to define, let alone quantify. There is a danger of a kind of measurement bias that overemphasises the achievement of some objectives simply because they are easy to visualise on a spreadsheet. The courts can exercise some high-level control over the weighting and interaction of the variables in the exercise of the supervisory jurisdiction, but the practice of each member is more likely to be shaped by the culture in the particular tribunal. I will return to questions of culture in due course.

Individual and business users clearly benefit when tribunals achieve their statutory objectives. Yet the benefits of good tribunal processes do not stop at the hearing room door. It *almost* goes without saying that tribunal review and dispute resolution processes that are 'fair, just, economical, informal and quick'[3] also promote social harmony. Community disputes are less likely to spiral to the point where houses are firebombed or neighbours hire goon squads, and disputes between citizens and government can be resolved without riot police and arrests in the middle of the night. That is no small achievement, and it is only possible because our institutions — especially our tribunals, which do most of the review and dispute resolution which matters to ordinary people — generally satisfy expectations. When processes work well, everyone can be confident their liberty and property will be protected. People know their contracts will be enforced. Individuals can structure their own behaviour and interactions on the basis of a shared expectation that the law will be obeyed by other citizens, businesses and officials. It follows that tribunals do not just provide effective review and dispute resolution; they also help shape norms of conduct that enable citizens to avoid disputes in the first place.[4] Those norms permit a drastic reduction in transaction costs in the economy because citizens can safely make assumptions about the conduct of others. Good processes that reinforce shared norms reduce the need for complex negotiation and contingency planning.

The savings are real, but they defy easy calculation. As Richard Posner points out, 'It is even harder to estimate the benefits of our legal system than its costs'.[5] We may take some of the more abstract benefits and savings for granted as a result. We tend to focus on the direct costs to the community of establishing and running the institutions that underpin the success of our civil society.

There is no question that the cost of providing court and tribunal services is a concern for governments that must manage tight budgets.[6] That is as it should be. Courts and tribunals consume public monies. Australian governments are not alone in their concern about cost. In the United Kingdom, for example, a recent inquiry recommended the establishment of Her Majesty's Online Court as an alternative to traditional court processes. While the report plainly anticipated cost savings from more effective pre-hearing (and even pre-application) processes that would resolve disputes at an early stage, the report emphasised the potential savings that could be made in relation to real estate. Large courthouses in central locations are expensive, and many of the buildings are old, grand and require significant maintenance.[7] Anything that can reasonably be done to reduce the cost of court infrastructure is likely to commend itself to government, and so it should.

Tribunals do not require expensive purpose-built buildings, and they are anything but grand. Tribunals can usually be accommodated in modified commercial office space.[8] There is also

the potential to save money on personnel costs in tribunals. Judges are paid more than most tribunal members, and courts principally comprise relatively expensive full-time appointees. Judges cost significantly more than part-time or sessional tribunal members in particular. Judges also have higher on-costs and carefully prescribed working conditions. The casualisation of tribunal membership offers enormous flexibility to tribunal leaders and managers. It also enables tribunals to reduce their real estate footprint, as sessional members may be encouraged to work from home.

Governments have attempted to economise on other costs in courts and tribunals by merging 'back-office' functions like finance, human resources and payroll. There have also been attempts to economise on information technology expenses. That makes sense, as information and case management systems now account for a significant part of the budget (as well as a potential source of cost savings) in these bodies. In some cases, governments have implemented a 'shared services' model to achieve economies of scale. In others, governments have chosen to amalgamate entities.

The desire to economise on back-office functions is one explanation for the embrace of super-tribunals. The potential for rationalising and consolidating accommodation needs has also been a significant attraction of the super-tribunal model. Super-tribunals are large tenants, and they should be able to negotiate better deals in softening markets for commercial office space.

The move to establish super-tribunals has not been wholly uncontroversial. Members of some specialist tribunals might argue they have developed a level of expertise in relation to particular subject-matter that might be lost in a larger, more diverse body. Members and managers of the smaller bodies can also point to processes that have been tailored to deal with the needs of users in the particular jurisdiction.[9] Those arguments have found favour on occasion. Some specialist tribunals continue to operate outside the super-tribunal framework.

There are real advantages to be had from specialist expertise. The Kerr Committee[10] recognised that the ability to include members with specialist expertise on tribunal panels would lead to better, more informed decision-making. Of course, there is no reason why specialists cannot be appointed to a super-tribunal and provide the benefit of their particular experience in that context. A super-tribunal that is committed to informality should be able to establish (or preserve) a range of processes that are tailored for dealing with the challenges of particular cases or the needs of a particular jurisdiction.

The advent of super-tribunals has also seen the emergence of the specialist *generalist* decision-maker who is experienced in applying law and policy in a range of different jurisdictions. These expert generalists can develop a system-wide perspective that might elude a member with experience in only one jurisdiction. A super-tribunal can comprise a mix of experts and generalists who can be listed to hear cases individually or in combination in ways that best meet the needs of a particular case or jurisdiction. Super-tribunals also have the resources and economies of scale to invest in professional development for all members with a view to improving the quality of hearings and decisions.

It is not just members who can benefit from scale. Super-tribunals are relatively large and sophisticated organisations. They need managers equal to the task. The super-tribunal environment provides an opportunity for the development of professional managers. (Managers with expertise in information management processes are especially prized.) This new breed of manager holds out the promise of greater efficiency in tribunal operations. Their expertise in navigating the reporting and accountability mechanisms that now apply to all government bodies is also important.

The emergence of a class of professional managers creates challenges alongside the obvious benefits. The challenges were recognised by Sir Gerard Brennan, the first president of the Administrative Appeals Tribunal (AAT), when he delivered an address at a conference marking the AAT's 20th anniversary in 1996. Towards the end of his remarks, Sir Gerard observed:

> The growth of large volume jurisdiction has necessarily produced a bureaucracy of the AAT itself. I notice from the AAT Annual Report 1994–1995 a diagram of the large bureaucracy under the control of the Registrar. No doubt, having regard to the heavy caseload which the AAT now bears (as the statistics for that year demonstrate), a large bureaucracy spread throughout Australia is required. I hope that the need for this core of personnel and the inevitable closeness of their working relationship with the members, especially the permanent members, is not conducive to a cast of mind that subjects the independence of the members to the corporate memory or knowledge or advice of the AAT bureaucracy.[11]

The potential for tension between managers and members that Sir Gerard described is not unique to tribunals, of course. The same challenge is present in any professional organisation. Managers and professional staff often coexist uneasily. Professionals are jealous guardians of their autonomy and independence. They brood about managers misunderstanding and potentially usurping the professionals' role. Professionals understand their core value lies in their independent exercise of judgment and they are alive to (real and imagined) threats to their prerogatives. Accommodating that need for independence is a delicate task in a larger organisation like a super-tribunal that deals with high volumes of work. At best, there will be a creative tension in the relationship between members in a tribunal and managers who possess expertise in coordination. At worst, the relationships may become dysfunctional as a result of mutual incomprehension and disrespect.[12]

That brings us back to questions of culture. The establishment of a super-tribunal inevitably precipitates cultural tensions as members and officers of former bodies settle into the new structure or cling to elements of the old one. A fresh culture must emerge. That process takes time. It must also be handled with care. Not all of the cultural traits of the former organisations will make the transition, and some of them must be actively avoided in the new body. Tribunal leaders have an obvious role to play in shaping what emerges. But individual members must also play their part.

Members need to be better advocates for their own role. That role extends beyond passively sitting in hearings and making decisions that resolve disputes between parties. Members must also be concerned with the other aspects of the integrated review and dispute resolution process that lies at the heart of every tribunal and that (for administrative review tribunals, at least) makes an important contribution to good government. Members must be better at articulating the philosophical basis for *all* of their work so as to avoid misunderstandings about what needs to endure in tribunals and what can change or be improved.

Members *should* know what they are doing. As professionals, they should have knowledge and experience which enables them to recognise what is valuable in their tribunal's work. They should also have insight into what measures will genuinely promote efficiency and economy in that organisation. A concern for efficiency must form a central part of their philosophical discussion. Efficiency is a core value in government, and tribunals concerned to promote good government must ensure their own operations are conducted with the need for efficiency in mind. But the language of management and efficiency must be watched. Members are not mere inputs into a process or resources to be deployed. That language only serves to diminish them. In any event, the members' perspective needs to be carefully explained and justified, not just asserted.

**Getting the philosophy right**

Any discussion of the philosophical basis of tribunals must begin with an acknowledgement that tribunals come in many forms and play many roles. No two tribunals need operate or be structured in the same way. Indeed, in a super-tribunal, the same tribunal might operate in quite different ways in different cases depending on the jurisdiction it exercises and other variables. It is therefore difficult to identify an overarching theory of tribunals. Indeed, that is part of their point: the dispute resolution and review functions which lie at the heart of the tribunal concept have few essential features apart from a measure of independence and an obligation to act judicially. These entities can be adapted to fit many needs. As a student of design might explain, their form should correspond to their function. If they have several different functions, they may require a number of different forms. The form(s) should also be efficient because tribunals cannot pretend to the role of promoting good government unless their own operations are well run and because they should be conscientious in their expenditure of public monies in any event.

Tribunals are often defined with reference to courts. That is not altogether surprising given the bodies often perform essentially the same function. Yet the comparisons are often greeted with an emphatic warning in response. Tribunals are *not* courts, we are regularly reminded. That is frustrating because, even if the statement is true, it is ultimately unhelpful. Tribunals have been a long-term feature of the Australian legal system. The AAT has been conducting merits review at the Commonwealth level for over 40 years. Surely, after all that time, we should be able to explain who we are and what we do without having to define ourselves with reference to what we are not.

The statement is not universally true in any event. While the larger state super-tribunals undertake administrative review, they also perform other functions. Most of these bodies decide small debt cases and resolve disputes between parties in their original jurisdiction.[13] Those claims may involve significant amounts of money. Tribunals effectively act as courts in those cases — or at least as 'anomalous tribunals' which operate within the hierarchy of courts. In Queensland, for example, s 164(1) of the *Queensland Civil and Administrative Tribunal Act 2009* expressly provides that the Queensland Civil and Administrative Tribunal (QCAT) is a court of record, and the Queensland Court of Appeal acknowledged in *Owen v Menzies* that QCAT was a 'court of a state' for the purposes of s 77(iii) of the *Constitution*.[14] That does not mean tribunals undertaking judicial work must be modelled slavishly on the courts. But the court model should not be militantly dismissed as irrelevant or objectionable either.[15]

It is true that Commonwealth administrative tribunals are not courts exercising judicial power under ch III of the *Constitution*. The High Court has said so repeatedly. But the separation of powers doctrine should not be used to overstate the differences between courts and (at least some) administrative tribunals. Consider the AAT in comparison with the Federal Court. Many disputes dealt with in the pre-amalgamation AAT were binary in nature in the sense there was a single lawful answer available. There is no role for preference or policy in deciding whether a deduction is allowable under income tax legislation, for example. The reasoning process the AAT adopted in such a case was really no different from that followed by the Federal Court, which might otherwise deal with the same dispute under the *Administrative Decisions (Judicial Review) Act 1978* (Cth) or pursuant to a constitutional writ.

The comparison becomes more complicated when the exercise of discretion is required. Tribunals like the AAT have a broader role in those cases. They must examine the merits of the case and potentially have regard to government policy, community expectations, public policy and the need to promote good government in the course of making the correct or preferable decision. That may require the AAT to undertake a more inquisitorial role and

co-opt government decision-makers who are under a statutory obligation to assist the tribunal.[16] But that does not mean the experience of the courts is irrelevant.

Indeed, the AAT was consciously established on a judicial model. The report of the Kerr Committee, which recommended the establishment of a new general merits review tribunal, included a detailed outline of how the new organisation should operate. The structures and procedures the committee envisaged were plainly modelled on the courts.[17] That was no accident, as Sir Anthony Mason (a member of the Kerr Committee) subsequently explained. Writing in 1989, Sir Anthony identified the common shortcomings in administrative decision-making that the AAT was designed to address using a more judicial approach:

> Experience indicates that administrative decision-making falls short of the judicial model — on which the AAT is based — in five significant respects. First, it lacks the independence of the judicial process. The administrative decision-maker is, and is thought to be, more susceptible to political, ministerial and bureaucratic influence than is a judge. Secondly, some administrative decisions are made out in the open; most are not. Thirdly, apart from statute, the administrator does not always observe the standards of natural justice or procedural fairness. That is not surprising: he is not trained to do so. Finally, he is inclined to subordinate the claims of justice of the individual to the more general demands of public policy and sometimes to adventitious political and bureaucratic pressures.[18]

Sir Anthony did not use the expressions 'efficiency' or 'good government' in that passage, but he surely could have done so given the shortcomings he identified contribute to unsound decision-making, waste, costly appeals and conflict.

Sir Gerard Brennan noted in 1996 that members of the Kerr Committee had considered whether a less 'judicial' (some would say less costly) structure should be adopted. Sir Gerard pointed out that Professor Harry Whitmore initially 'did not envisage a high-powered institution engaged in statutory construction and the time-consuming enunciation of reasons for decision'.[19] Professor Whitmore reportedly favoured a more administrative model in which 'shopfront' reviewers would provide quick and informal action in relation to decisions.[20] Sir Gerard pointed out there were enormous practical impediments to that sort of approach. It would require an army of well-trained staff and reviewers and lots of shopfronts, and there would be issues with the consistency and quality of review decisions. That model would have been much more costly over time.[21] The Kerr Committee preferred the more judicial model in its final report, and its recommendations were largely reflected in the *Administrative Appeals Tribunal Act 1975* (Cth).

Sir Gerard pointed out that adopting a qualified judicial model lent the AAT the authority (and, one might interpolate, the infrastructure and resources) to carry out its role. His comments on that role are worth quoting at some length, because the AAT was not just intended to resolve narrow disputes and correct injustice to individuals; it was also intended to promote good government by playing a normative role. Sir Gerard explained:

> External review is only effective if it infuses the corporate culture and transforms it. The AAT's function of inducing improvement in primary administration would not be performed merely by the creation of external review. Bureaucratic intransigence would not be moved unless errors were clearly demonstrated and a method of reaching the correct or preferable decision was clearly expounded. AAT decisions would have a normative effect on administration only if the quality of those decisions was such as to demonstrate to the repositories of primary administrative power the validity of the reasoning by which they, no less than the AAT, were bound. Any effect that the AAT might produce in primary administration would depend on the reasoning expressed in the reasons for AAT decisions.[22]

The first president of the AAT was a strong believer in the benefits of what he described as 'decision-making in a judicial manner' because it ensured legal rules would be clearly stated and applied. That was essential to the authority of the AAT. Sir Gerard added that other features of the judicial approach, like a habit of independence and impartiality, were also essential for members. Members who went about reviews with a 'judicial' mindset were

better able to 'strike a balance between the interests of the public and individual interests' because they were professionally trained to consider the impact of decisions on citizens, whereas administrative decision-makers may be more inclined to think of the interests of the community and be sensitive to the concerns of their political masters.[23]

Interestingly, Sir Gerard made much of the desirability of appointing presiding officers with legal *training*, not just legal qualifications. He pointed out that professional lawyers were trained to develop the desired mindset, but they also needed legal skills of a high order so the AAT could provide more authoritative guidance on law and procedure to all decision-makers. That was important because decision-makers might otherwise be inclined passively to follow departmental guidance that effectively trumped the law.[24]

Presiding members were expected to be *experts* in the law on the judicial model. They were the equivalent of judges. (Many of the earlier members were, in fact, serving or former judges.) To assist those members in their high-profile role, the AAT provided access to support services like associates, legal research officers, libraries and other infrastructure designed to improve the quality of the reasons given to the bureaucracy and the wider community. Presiding members did not take legal *advice* from anyone and there was no suggestion of a presiding member claiming legal professional privilege over material received from an associate or researcher employed by the tribunal. The reasoning process was intended to be, as far as possible, transparent and it usually culminated in the publication of a set of reasons. Publication was seen as essential to give effect to the AAT's normative function.

Sir Gerard acknowledged the 'judicial' approach to decision-making in the AAT was modified by less formal hearing and pre-hearing processes, but the essential elements of a public judicial-style hearing were retained for most cases.[25] AAT members had the flexibility to adopt a more inquisitorial role than was common in court proceedings, but even then there were limits. Those limits were recognised and reinforced recently in the Federal Court's decision in *Charara v Commissioner of Taxation*[26] (*Charara*). In *Charara*, the Court considered whether a presiding member overstepped his role when he adopted an active role in questioning a self-represented applicant. Justice Wigney pointed out that members of the AAT might not have the same freedom to question a witness as the decision-maker who was represented as the presiding member could have in a more inquisitorial proceeding conducted in the absence of a contradictor. His Honour acknowledged it was difficult to make general observations about what was appropriate, but the behaviour and role of a presiding member must be evaluated in context. The context included the extent to which proceedings were inquisitorial.[27]

There are other practical limits to achieving a mechanism of review that is completely informal. Experienced presiding officers know that formality — most obviously, the emphasis on atmospherics in the hearing room, including modes of address and the deportment of the parties — has a role to play in the effective management of hearings. Too much formality can overawe or frustrate the parties, especially if one is self-represented. That is obviously undesirable. But *choosing* to adopt a more formal approach in particular cases should not be dismissed as an exercise in self-aggrandisement. Used appropriately, the more formal aspects of the hearing process can assist a member to maintain control and retain a clear focus on the intellectual task at hand. A recent study of diagnostic errors by medical practitioners highlights the risks of professionals being distracted by challenging or unruly behaviour. The study confirmed that doctors dealing with unruly patients made 42 per cent more diagnostic errors when dealing with complex cases.[28] The higher error rate was attributed to the fact that the doctor was forced to devote more of his or her mental resources to dealing with the patient's bad behaviour.[29]

There is no reason why this pattern observed in doctors' surgeries would not be evident in tribunal hearings. Imposing a higher degree of formality on an applicant who is inclined to be unruly can help a member to remain focused because the features that make a hearing more formal are easy to apply and cost little. Perhaps unsurprisingly, the study reported a lower error rate associated with bad behaviour observed in routine, less complex cases.[30] For present purposes, that conclusion might help to explain why it is appropriate for a higher level of formality in AAT proceedings compared with other tribunals, where the issues in dispute may be less complex and the applicant is not faced with a contradictor. Dennis Pearce makes essentially the same point. He suggests that it is appropriate to expect a graduated increase in formality as an applicant progresses from primary decision to review. He suggests that a more formal environment becomes appropriate in circumstances where the less formal environment that preceded it did not yield a resolution. Where disputes linger, greater authority and formality may be required.[31]

The study may also have interesting implications for the conduct of hearings using technology. Experienced presiding members know there is an increased risk of unrepresented parties becoming unruly when they are not present in the hearing room. Individuals often become taller on the phone (although not as tall as many appear to feel when using Twitter or other social media where one may cat-call and heckle anonymously). Video-conferencing creates a greater sense of immediacy that assists the member to communicate the gravity of the process and maintain order, although challenges remain. It is possible that tribunals may encounter more difficulty than courts in handling parties that appear remotely precisely because tribunals are already less formal than courts. This is an issue that requires further study. But I digress.

The influence of the relatively elaborate judicial model on the development of the AAT was not the product of a lack of imagination. That model was consciously chosen because it was thought best adapted to the AAT's larger normative responsibility for promoting good government.[32] Given the AAT is a tool of good government, something more should be said on that topic.

I have already mentioned how the values of efficiency and economy lie at the heart of good government. Good government demands efficiency and abhors unnecessary bureaucracy. Good government also recognises the value of subsidiarity, especially in a federal system. Decision-making power is, as far as possible, delegated to appropriately qualified decision-makers who are close to the governed and who, as a result, may have best access to the knowledge required to make a superior decision. But a concern for good government also recognises the importance of independence and perspective (which may sometimes be compromised by proximity) and the need for accountability.

Accountability is an important concept which must also find its way to the heart of any philosophical explanation of the role of administrative tribunals like the AAT. The science of economics has much to say that is helpful and relevant on this topic. The theory of agency cost tells us that all human beings will face temptation when they expend resources belonging to other people. An agent or servant might slack, shirk, rort or steal (although, happily, the last of these phenomena in particular is much less common in the Australian Public Service than many people would have you believe). Agents might indulge their personal preferences — for power or leisure or pure self-aggrandisement. They might be careless, precisely because being careless is often easier than taking care. The costs of all of this bad behaviour are known collectively as 'residual costs'. Residual costs are obviously undesirable. They represent inefficiency in its purest form. But there are two other components of agency cost that need to be brought into the calculation. These are bonding costs and monitoring costs. I want to mention monitoring costs in particular. They are the costs associated with policing and containing residual costs. If we are to achieve the goal of

reducing agency costs — the loss in efficiency that occurs when an agent acts on behalf of a principal — we have to reduce residual costs without unduly increasing monitoring or bonding costs. Accountability mechanisms must not be so onerous and intrusive that their cost exceeds the losses they are intended to avoid. Agents should not be so busy being accountable that they end up without the focus or the resources they need to do their jobs.[33]

The AAT model described by Sir Gerard and envisaged by the Kerr Committee represents an inspired, if nascent, example of a measure designed to reduce *agency* costs across the whole of government, not just *residual* costs. The AAT was never intended to review every decision made by government. As Sir Gerard pointed out, the AAT was not designed to deal with a high volume of cases where it simply responded to isolated examples of administrative injustice. Sir Gerard said that would trap the AAT, with its relatively expensive infrastructure, in a forest of single instances where the cost of correcting the error was even greater than the error itself.[34] The AAT was designed to provide higher-level guidance that would yield benefits across the entire system of government administration. While the cost of dealing with individual cases was higher under a judicial model, the system-wide benefits that flowed from the AAT's intervention in particular cases were potentially very large indeed. That is why the investment was — and is — justified.

I have spoken at some length about the philosophy and model which informed the AAT at the time of its establishment and in its early years. I do not mean to suggest everything said or done during that period must be set in stone. That would be impossible in any event given the recent amalgamation with two different tribunals that were not established on the same judicial model. My point is to elucidate the philosophical underpinnings of the AAT which explain, for better or worse, why it was structured and conducted business in a particular way. In doing so, I hope I have demonstrated why, at least in relation to a significant part of the AAT, the oft-quoted observation that the 'tribunal is not a court' should be avoided. The expression is a conversation-stopper. It peremptorily dismisses a model which is still relevant because it formed part of the tribunal's DNA. In the case of the AAT, our challenge is to evaluate critically what follows against a coherent philosophy of *tribunal* decision-making that honestly acknowledges its judicial antecedents.

If we are to define ourselves by exclusion, however, we should be clear about what else we are definitely not: tribunals (and tribunal members) are not executive decision-makers operating within the hierarchical framework of a department in which members are supervised, scrutinised and directed by executive managers. Tribunal members must be independent. I have written elsewhere that federal administrative tribunals may be creatures of the executive branch in a constitutional sense, but their important role means they must remain separate from the executive and, in an important sense, above it.[35] The habits of mind and behaviour that may be appropriate in a department are not necessarily appropriate in a tribunal, as Sir Gerard Brennan observed.[36] Tribunal members need the assistance and support of public servants to make decisions, but it is not a straightforward collaborative process like that which occurs in other organisations. Tribunal members *are* the tribunal when they make a decision and must accept a measure of personal responsibility for what they do. Members should not be subject to direction in their role, but they must be appropriately supported. (If a decision is successfully appealed, the court does not typically criticise the public servants who may have assisted the tribunal member. The court will focus on the member and his or her reasons, and any shortcomings in the decision will be sheeted home to the member in a very public way. That is as it should be, but it rather underlines the point.)

That is not to say management structures and practices used elsewhere in the public sector have no role to play in a tribunal. Tribunals are still government agencies and they are staffed by public servants. Developments elsewhere in the public sector may offer valuable

insights into how the tribunal could work better and more efficiently. But managers do not have a monopoly on insight. The experience of specialist generalist members in particular should also be taken into account. They are appointed to make decisions which have an important effect on the lives of individuals and the community, and they may be called on to review the decisions of ministers and agencies. At their best, they have a deep understanding of government, process and human interaction. They know efficiency and economy when they see it. Their insights into their own workplace should not be lightly dismissed.

The important thing is that the experience of public service managers and the success of practices and structures developed in other contexts must be carefully assessed against a coherent philosophy of tribunal decision-making so that the tribunal's role is not compromised. It is for the leaders and members of each tribunal to work out what that philosophy should be. That process begins with the legislation which establishes the tribunal in question, but it cannot end there.

The responsibility for articulating and 'operationalising' (a dreadful, made-up word) a tribunal philosophy is more challenging in a super-tribunal because of the range of functions the body must perform. The dictates of efficiency — and, yes, of good government — require that hard questions be asked about whether there is a proper philosophical basis for persisting with different approaches to different functions in a super-tribunal. But there is no reason why different approaches cannot be pursued in an amalgamated body when it is appropriate to do so. Articulating a coherent philosophy for what changes and what stays is vital. The AAT, for its part, is approaching this task with care. We have made clear we understand that one size does not fit all (although it should be said there is potentially a worse outcome: one size fits nobody).

**Squaring the circle: evaluating change against an appropriate philosophical framework**

That brings me back to concepts of efficiency and economy and the way in which they are incorporated into the philosophy of tribunals and tribunal decision-making. That philosophy must be dynamic because, while it embodies enduring values, it must also respond to the environment. Innovations become possible as a result of technological or other progress (such as the potential inherent in video-conferencing, online dispute resolution and software that is used to manage and analyse information in law firms). Case loads fluctuate; budgets vary. New jurisdictions are added and old ones fall away. The composition of the membership evolves. Each tribunal must deal with all of this change and exploit new opportunities with a view to improving efficiency and economy without compromising the other important values which inform its operations.

Everything a tribunal does must be tested against a coherent philosophical framework that incorporates a commitment to efficiency and economy. A discussion of member support arrangements serves to illustrate the point.

I have already noted the influence of the judicial model on the establishment of the AAT. Early members of the AAT — mostly judges and senior lawyers — worked out of 'chambers' and had 'associates' and personal assistants. Associates attended hearings to assist the member in managing exhibits and dealing with the parties, as associates or tipstaffs in court do. Research officers and extensive libraries were made available. Most decisions were carefully edited by experienced staff before publication (through the law reports and, more recently, to the world at large on the internet). The extensive support arrangements were presumably thought necessary for the members to produce the sort of high-quality decisions that Sir Gerard Brennan described.

Those support arrangements evolved. Sessional or part-time members began to account for a growing share of the tribunal's membership. Some of their needs were different from those of the full-time members. Pools comprising full-time and casual support staffers were established to provide more flexible assistance to members. Technological change meant there was less call for typists and clerks, and remote access to tribunal files became possible. The number of personal assistants began to dwindle. But members were also provided with more sophisticated training — on decision-writing, for example. The ability to access information electronically helped them to do their jobs without as much direct assistance from support staff.

While the AAT has traditionally had a strong commitment to member support staff, some other tribunals have had a different experience.[37] In some high-volume jurisdictions, processes that were well adapted to a homogenous case load reduced the need for assistance to members. The review might focus on a limited range of evidence, and there were few opportunities for collecting new evidence that would have to be managed and exhibited. Hearings might be quick and informal, with only the member and the applicant present for a conversation; the hearings might routinely occur over the phone. In many of those tribunals, original decision-makers did not attend or play an active role in the proceedings; they were available to assist, but they were often disinterested in the tribunal's decision unless it went against them. Many tribunals did not regularly publish their decisions or they regularly delivered oral reasons, so editing assistance was less of an issue. In some cases, the only avenue of appeal was to another tier of the tribunal, or another tribunal, which proceeded to re-hear the matter de novo, which meant there was less scrutiny of the first body's reasons. In some cases, the tribunals acted as filters that dealt with straightforward disputes, leaving more complex disputes to be addressed in the more formal environment of the AAT or a court. Many of these bodies focused on dispute resolution and review *simpliciter*. They did not have the same normative role as the AAT.

These features of different tribunals might provide a principled explanation for why members could be provided with less elaborate support arrangements in some cases. But it seems likely that some tribunals have simply underinvested in member support. That may be a consequence of those bodies being inadequately resourced by governments. It may also be the product of conscious decisions by those who manage tribunal budgets to favour other priorities within the organisation.

Underinvestment in member support services compromises a tribunal's performance. If hearings are a shambles because files have not been adequately prepared or if written decisions are delayed, poorly researched or badly edited, there is an impact on quality and on the tribunal's prestige and authority. It might also lead to higher appeal rates. Appeals are enormously costly.

Limits on member support services are often justified with reference to the need for efficiency, but they might have the reverse effect. Underinvestment can waste (highly paid) time. Full-time members of tribunals are expensive, even if they are generally less expensive than judges. It makes no economic sense for a full-time member on a significant salary to be distracted from high-value tasks that only he or she can perform in order to undertake clerical functions that can be done competently by someone at a much lower pay grade. Better-quality support helps tribunals to get more out of their expensive members. But the way in which the support is provided is also important. Some tribunals provide support to members on an essentially transactional basis. Members 'task' support staff in a pool to undertake specific functions — this really means 'negotiate', although that might occur through the intermediation of a manager or some kind of electronic portal. That process tends to underestimate the scope of the beneficial interaction that is possible between a member and an associate. An associate should not just undertake tasks on a file; he or she

also acts as a sounding board on particular matters and assists the member in dealing with the stress and minutiae encountered when running a busy list. A transactional process might work for sessional members in particular; however, there may be significant transaction costs involved which are ignored because they are hidden or poorly understood.

The costs of wasting a relatively expensive full-time member's time may be poorly understood, but the cost of wasting the time of sessional members may be understood all too clearly. In some tribunals, sessional members are paid very low daily rates and their terms and conditions are relatively poor. They are so poorly remunerated that it may actually be more cost-effective for tribunal managers to off-load administrative tasks that should be undertaken by support staff onto members *because the members may effectively be cheaper than employing more staff*. Members may not do those tasks competently. It is hard to imagine them doing them willingly.

Members in those tribunals have allowed this to occur. In some cases, they have filled the gaps in member support arrangements out of a sense of professionalism. It is also possible that some members fear making a fuss over the quality of support they receive. In any event, it is unfortunate that there has not always been a principled response to these developments from members.

Tribunal work is challenging. While different tribunals have different needs, all members require formidable skills and excellent judgment. Many members have the alternative of working elsewhere for higher pay. More than a few accept an appointment out of a sense of civic duty. Tribunal jobs are unlikely to be attractive to any of those quality individuals if they perceive they are taken for granted and exploited. Tribunals and the communities they serve will suffer if well-qualified people are less motivated to accept appointment or be listed for hearings as a consequence of inadequate member support.

The advent of super-tribunals can lead to an accentuation of the unfortunate tendency to underinvest in member support. Super-tribunals undertake a range of different functions which might appropriately be supported in different ways. There is a danger that managers who do not appreciate the differences — most obviously because tribunal leaders and members have failed to explain them adequately — will try to standardise arrangements at the lowest level of support. Super-tribunals are also much larger than the tribunals they replaced. They may be more hierarchical and they have more internal stakeholders who are disconnected from (or have only a fragmented exposure to) the tribunal's core business of conducting reviews and resolving disputes. Member support arrangements might be a relatively easy target for budget cuts in those circumstances.

Decisions in relation to member support arrangements should be made in the context of a larger discussion over member productivity. But the entire discussion will make more sense and deliver superior outcomes if it proceeds against a clear philosophy of tribunal decision-making.

**Conclusion**

Economy and efficiency are important features of tribunals, and they are properly regarded as values that form part of a coherent philosophy of tribunal decision-making. But the people who should know best what that philosophy entails — the members — need to re-engage in the debates over the future shape of tribunals. That is particularly important in the case of super-tribunals, which need to balance different functions.

**Endnotes**

1 There is a rich vein of academic literature dealing with the challenge: see, for example, Robin Creyke, 'Tribunals — Carving Out the Philosophy of Their Existence: The Challenge for the 21st Century' (2012) 71 *AIAL Forum* 19–33; see also Robin Creyke and Matthew Groves, 'Administrative Law Evolution: An Academic Perspective' (2010) 59 *Admin Review* 27–41.

2 See, for example, s 10(e) of the *Northern Territory Civil and Administrative Tribunal Act 2014* (NT) (and s 8(1)(d) of the *South Australian Civil and Administrative Tribunal Act 2013* (SA), which is in similar terms), which refers to the need 'to keep costs to parties involved in a proceeding to a minimum insofar as is just and appropriate'; see also s 9(b) of the *State Administrative Tribunal Act 2004* (WA), which refers to the need to minimise cost to the parties. Section 6 of the *ACT Civil and Administrative Tribunal Act 2008* (ACT) casts its net more broadly and refers to the cost implications for all who are required to deal with the Tribunal, which presumably includes non-parties. Section 6(b) refers to the need 'to ensure that access to the tribunal is simple and inexpensive, for all people who need to deal with the tribunal'. The *Civil and Administrative Tribunal Act 2013* (NSW) says the object of the Act is to ensure the Tribunal can 'resolve the real issues in proceedings … cheaply', while s 2A(b) of the *Administrative Appeals Tribunal Act 1975* (Cth) refers to 'providing a mechanism of review that … is …economical'.

3 *Administrative Appeals Tribunals Act 1975* (Cth), s 2A(b).

4 For an especially thoughtful and erudite discussion of the role of the law and legal institutions in promoting civil order, see Martin Krygier, *Civil Passions* (Black Inc, 2005) 64–6.

5 Richard Posner, *How Judges Think* (Harvard University Press, 2008) 4.

6 See, for example, National Commission of Audit, *Towards Responsible Government: Report of the National Commission of Audit — Phase One* (14 February 2014) 211–12 <http://www.ncoa.gov.au/index.html>.

7 Online Dispute Resolution Advisory Group, Civil Justice Council, *Online Dispute Resolution for Low Value Civil Claims* (February 2015) 9 <https://www.judiciary.gov.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf>.

8 There are limits, of course: poorly configured space or inaccessible premises will make it harder for tribunals to discharge their role. Security concerns must also be addressed.

9 Robin Creyke, 'Tribunals and Access to Justice' [2002] *Queensland University of Technology Law and Justice Journal* 4.

10 Commonwealth, *Report of the Commonwealth Administrative Review Committee*, Parliamentary Paper No 144 (14 October 1971) 86–8.

11 Sir Gerard Brennan, 'The AAT — Twenty Years Forward' (Speech delivered at the Administrative Appeals Tribunal Twentieth Anniversary Conference, Canberra, 1 July 1996 <http://www.hcourt.gov.au/assets/publications/speeches/former-justices/brennanj/brennanj_aat2.htm>.

12 Some tribunal managers seem to think members are prima donnas. Some members say they wish for managers who have no more contempt for members than is absolutely necessary.

13 Professor Robin Creyke suggested that the larger state tribunals have 'a truly polyglot jurisdiction': see Robin Creyke, 'Tribunals: Divergence and Loss' (2001) 29 *Public Law Review* 403, 406.

14 [2012] QCA 170, [55] (McMurdo P).

15 Creyke and Groves, above n 1, 31.

16 Section 33(1AA) of the *Administrative Appeals Tribunal Act 1975* (Cth) obliges the decision-maker to assist the Tribunal to make its decision. Section 33(1AB) obliges all parties to assist the Tribunal to achieve its statutory objectives. The obligation is qualified in some areas of the AAT's jurisdiction, however. In the Migration and Refugee Division and the Social Security and Child Support Division, the original decision-maker does not ordinarily appear at hearings. The absence of a contradictor makes a significant difference to the dynamics of the hearing, but it also changes the emphasis of the Tribunal's role.

17 Commonwealth, *Report of the Commonwealth Administrative Review Committee*, Parliamentary Paper No 144 (14 October 1971) 88–92.

18 Sir Anthony Mason, 'Administrative Review: The Experience of the First Twelve Years' (1989) 18 *Federal Law Review* 122, 130; see also 131.

19 Brennan, above n 11.

20 Ibid; see also Creyke, above n 1, 22.

21 Sir Gerard's arguments about the relative efficiency of the more adversarial approach in appropriate cases were discussed in a paper he delivered at the University of Otago in 1979: see Sir Gerard Brennan, 'The Future of Public Law — the Australian Administrative Appeals Tribunal' (1979) 4 *Otago Law Review* 286. Sir Gerard pointed out (at 292–3) that, in a majority of cases where the AAT set aside a decision under review, the facts as found by the AAT were significantly different from the findings of the original decision-maker. That rather points to the importance of rigorous investigative and fact-finding processes in those cases selected for review by the AAT: it was essential that the AAT had access to the best-quality information available rather than simply 'going over' the factual findings of the original decision-maker. Those rigorous processes were costly — perhaps too costly for the AAT to undertake on its own. The AAT was, after all, a newcomer to the dispute between the parties. Sir Gerard explained (at 292): 'the ability to find the facts of a case makes an important contribution to the quality of justice. Where an adversarial procedure is adopted, the parties do the fact-gathering for the tribunal; where the inquisitorial procedure is adopted, the tribunal must use its own resources.' Sir Gerard went on to explain (at 298) that the cost of this more rigorous

review may be prohibitive in some areas of high-volume review. A more attenuated form of review may be appropriate in those cases.

22 Brennan, above n 11.

23 Ibid.

24 Ibid.

25 Ibid. There were a number of exceptions to this general rule recognised in the law applying to the pre-amalgamation tribunal. The most obvious exceptions were in the Security Appeals Division and in relation to decisions under the *Freedom of Information Act 1982* (Cth).

26 [2016] FCA 451.

27 Ibid [116].

28 Henk Schmidt et al, 'Do Patients' Disruptive Behaviours Influence the Accuracy of a Doctor's Diagnosis? A Randomized Experiment' (2016) *BMJ Quality & Safety* 4.

29 Silvia Mamede et al, 'Why Patients' Disruptive Behaviours Impair Diagnostic Reasoning: A Randomized Experiment' (2016) *BMJ Quality & Safety* 4.

30 Schmidt et al, above n 28.

31 Dennis Pearce, *Administrative Appeals Tribunal* (LexisNexis Butterworths, 3rd ed, 2013) 341.

32 The Kerr Committee could have recommended a different course — like the approach embodied in the Administrative Review Tribunal Bill 2000. That Bill proposed re-establishing the AAT (which would be renamed in the process) on a model that was less judicial and adversarial and which more closely resembled the administrative review processes that were commonly carried on within the executive: see generally Creyke, above n 13, 410–11. But those reforms were never implemented.

33 There is a rich literature on agency cost theory. One of the classic expositions can be found in Michael Jensen and William Meckling, 'Theory of the Firm: Managerial Behavior, Ownership Structure and Agency Costs' (1976) 4 *Journal of Financial Economics* 360.

34 Brennan, above n 11.

35 Bernard McCabe, 'Community Values and Correct or Preferable Decisions in Administrative Tribunals' (2013) 32 *University of Queensland Law Journal* 103, 113.

36 Brennan, above n 11.

37 Member support arrangements in the AAT are set to continue their evolution now the AAT has amalgamated with two other tribunals with a history of different member support arrangements, different philosophies and different functions. That does not mean the judicial model which informed the design of member support arrangements in the pre-amalgamation AAT becomes irrelevant. The same approach to member support may continue to prevail in cases in the General and Other Divisions and the Taxation and Commercial Division of the AAT, which now deal with the case load of the pre-amalgamation body given the statutory framework that governs those reviews is essentially unchanged and the normative function remains.