From sewers to 'super' adjudicators: What next for tribunals?

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The secret of change is to use all of your energy not on fighting the old,
but on building the new. – Socrates[1]

A postscript for tribunals to this principle from that ancient and wise philosopher is that 'rebuilding must follow an assessment of why an institution was created and what it was intended to achieve'.

Tribunals have a long history. Some of the earliest models emerged in England during the 13th century.[2] They were set up to deal with specific issues, like disputes involving railways and coal, drainage and flood defences: *commissions de wallis et fossatis* — the commissions of walls and ditches.

Single issue tribunals also emerged early in Australia. Our earliest tribunals dealt with dust diseases — we only have to remember black lung disease and asbestosis in this land of quarries to understand their genesis. Other early tribunals were taxation boards of review, a national body and in the states and territories the ubiquitous racing tribunals.

The subsequent centuries have seen a variety of models of tribunals and exponential growth of their number. Industrial relations bodies, tribunals that deal with town planning or disputes about tax or mining leases, professional disciplinary boards, and bodies which deal with refusals of licence applications, social welfare benefits and rental and superannuation issues, to name only some. Innovative practices have been spawned and spread. Examples are triaging, case management, concurrent processes for expert witnesses colloquially known as 'hot-tubbing' and wide use of alternative or facilitated methods of dispute resolution (ADR/FDR).

Above all, Australia pioneered tribunals which combined a variety of jurisdictions into a single mega-tribunal — the amalgamation movement. This has produced the Commonwealth's Administrative Appeals Tribunal (AAT), an administrative decisions only review body, and the combined civil and administrative tribunals (CATs) in the states and territories. The CATs review a wide selection of disputes in relation to consumer and commercial decisions, alongside matters between the public and their governments.

The importance of tribunals as a source of redress for individuals is now entrenched in this country. As an indication, the combined jurisdiction tribunals in Australia hear matters authorised by more than 1,300 pieces of legislation. Their combined case load for 2021–2022

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1 The quote is attributed to Socrates but may be a modern summary of his words.

2 'Commissions of Sewers', Wikipedia <https://en.wikipedia.org/wiki/commissions_of_sewers>.

is in excess of 227,000 per annum.[3] The value of this model of adjudication was recognised by the Productivity Commission when it categorised tribunals as one of the 'three major dispute resolution mechanisms' in the civil justice system in Australia.[4]

At the same time, some of the key advantages of tribunals — their objectives to operate in a manner which is informal, speedy, and accessible — are under pressure. There are constitutional shadows over the tribunal landscape, a need to critically examine the architecture of the combined jurisdiction tribunals, developments in technology which have impacted on tribunal operations, and the continuing vexed issue of tribunal appointments.

An exemplar of these developments is the AAT. No apology is needed for any reliance on this tribunal since:

> [t]he basic model [for all of the general jurisdictional tribunals in Australia] has been the Commonwealth model. That is because of its obvious success, its accumulated experience over a quarter of a century and the broad span of its activities.[5]

As a consequence, the objectives of the state and territory tribunals remain close to those of the AAT model.

Constitutional shadows over the tribunal landscape

Burns v Corbett

A weakness in the institutional framework for adjudication in Australia is the failure to define with sufficient precision the distinction between a tribunal and a court. This has opened the way for unwelcome constitutional intrusion. Unless a tribunal can be characterised in constitutional terms as a 'court of a state', the tribunal cannot exercise federal judicial power. The consequence continues to evolve.

That constitutional issue came to the fore in *Burns v Corbett*.[6] In that decision the High Court found that neither of the New South Wales combined tribunals involved — the former Administrative Decisions Tribunal and the later New South Wales Civil and Administrative Tribunal (NCAT) — was 'a court of a state'. Consequently, they could not hear an application between residents of different states, or between a state and a resident of another state. To do so contravened s 75(iv) — the diversity jurisdiction — of the *Constitution*. The practical implication was to prevent any state CAT from hearing reviews in jurisdictions such as discrimination, guardianship and residential tenancy matters in circumstances where the parties were residents of different states. The Queensland Civil and Administrative Tribunal (QCAT) is exempted from this prohibition, as it was created as a 'court of a state'.[7]

3 AAT and the Civil and Administrative Tribunals, *Annual Reports 2020–2021*. This number has reduced over the COVID-19 years.
4 Productivity Commission, *Access to Justice Arrangements* (Report No 74, 2014), Overview, 5.
5 NT Law Reform Committee, *Report on Appeals from Administrative* Decisions (1991, Report No 14) (Horton Review) 22.
6 *Burns v Corbett; Burns v Gaynor* (2018) 265 CLR 304.
7 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 164.

The decision affected both the civil and the administrative jurisdictions of the CATs. The number of cases potentially affected is not known but typically residential tenancy and guardianship are high-volume areas and given the nature of these jurisdictions a significant proportion of such cases would involve interstate parties.

To state that the decision caused consternation among the CATs is an understatement. The solution generally adopted has been to provide that any such matters must be redirected to a court.[8] That consequence of the decisions means the parties cannot enjoy the benefits of a tribunal adjudication.

Citta Hobart Pty Ltd v Cawthorn

The High Court made an even more concerning decision in its decision in *Citta Hobart Pty Ltd v Cawthorn*[9] (*Citta*). Mr Cawthorn, who needs a wheelchair for mobility, claimed that the Citta company developing Parliament Square in Hobart had discriminated against him under the Tasmanian *Anti-Discrimination Act 1998*. One of the entrances to the square was by stairs only. Citta's relevant defence was that the provisions in the State Act were inconsistent with the Commonwealth's *Disability Discrimination Act 1982* and a standard made under that Act. This was argued to raise a s 109 inconsistency issue and to be inappropriate for decision by the State's Anti-Discrimination Tribunal. The High Court agreed that the Tribunal could not decide the matter.

The Court's decision was that legislation infected by similar issues prevents the five affected state combined tribunals hearing any claim or defence which 'colourably' raises an issue:

- arising under the *Constitution* or involving its interpretation (s 76(i)), or
- arising under any law of the Commonwealth Parliament (s 76(ii)).

Collectively these provisions cover nine types of disputes.[10]

The disturbing possibility for tribunals is the elastic reach of *Citta*. It has two bases: 'colourably' is a low bar; and the reach of this decision extends widely to any claim or defence which touches a constitutional provision or a Commonwealth law. The implications are that, if a party wants to elongate the process or eliminate the possibility of an appeal, there is now an argument that there is a colourable conflict in relation to disputes involving these laws.

The extent of the removal of tribunal jurisdiction will be tested further but is potentially broad as it is not confined to discrete topics.[11] The High Court, alive to the implications for state tribunals, has suggested that the potential reach of the decision could be limited by construing the state law 'so as not to exceed the legislative power of Parliament'. This solution, based on generic provisions in interpretation legislation, is yet to be tested. The concerns remain.

8 For example, *Civil and Administrative Tribunal Act 2013* (NSW) pt 3A; *South Australian Civil and Administrative Tribunal Act 2013* (SA) pt 3A.
9 *Citta Hobart Pty Ltd v Cawthorn* (2022) 400 ALR 1.
10 *Searle v McGregor* [2022] NSWCA 213 (Kirk JA) (*Searle*).
11 *Thurin v Krongold Constructions (Aust) Pty Ltd* [2022] VSCA 226; *Searle*.

The combination of these two decisions has effectively curtailed elements of the jurisdictional reach of most CATs and has resulted in frustrating expectations of some would-be applicants. Other potential dangers from the decision are that governments may be inhibited from bestowing further jurisdictions on tribunals and parties may become reluctant to rely on tribunals for dispute resolution. In other words, these constitutional roadblocks may undermine the important role tribunals play as an accessible and people-friendly dispute resolution option.

Tribunal architecture

The current tribunal streetscape in this country is one sizeable, amalgamated tribunal in each jurisdiction supplemented by a number of free-standing smaller tribunals. The architecture issue has been prompted by two significant reports. The first by Justice Pritchard in 2020 detailed research showing that the civil jurisdiction of the CATs comprises over 90 per cent of their workload;[12] the second was the Senate Committee Inquiry into administrative justice in Australia,[13] the Final Report of which was announced on 30 June 2022, which recommended the 'disassembly' of the AAT.[14] The reports raise some future development issues for Australian tribunals. Specifically, what guides governments when deciding whether to add to a jurisdiction of an amalgamated tribunal? And is the current composition of the amalgamated tribunals appropriate for the model?

Composition: what benchmarks are used by governments when deciding whether to add a tribunal to an amalgamated body or to retain an existing jurisdiction?

The 1971 Kerr Committee report[15] recommended that the Commonwealth establish a single tribunal to decide administrative law disputes on the merits. Building on that report, Bland, in his Final Report in 1973,[16] urged the government to consider why such a tribunal should be created, what members would be required, and what procedures and functioning were intended.[17] These were largely practical questions and by today's standards are relatively unsophisticated. The Kerr Committee report did note that, if government policy had an 'oppressive, discriminatory or otherwise unjust' impact on an individual, the President could be empowered to advise the relevant Minister accordingly. This was recognition that the tribunal could be involved in improvements to government decision-making.[18] Generally, however, the issues raised in these reports are insufficient to answer the questions faced by governments today. They do not address the fundamental questions raised by this topic.

12 Hon Justice J Pritchard 'Australian Civil and Administrative Tribunals: Challenges and Opportunities' (2020) 100 *AIAL Forum* 148 (Pritchard Research).
13 Senate Legal and Constitutional Affairs References Committee, *Performance and Integrity of Australia's Administrative Review System* (Final Report, 30 June 2022) (Senate Committee Inquiry).
14 Ibid.
15 Administrative Review Committee, *Report of the Commonwealth Administrative Review Committee* (Parliamentary Paper No 144, 1971) (Kerr Committee report).
16 Committee on Administrative Discretions, *Final Report* (Parliamentary Paper No 316, 1973) (Bland Committee Final Report).
17 Ibid [187]–[188].
18 Kerr Committee Report (n 15) [299].

Nor initially did the states do better. Indeed, a discussion paper produced by Victoria in the late 1990s, prior to the establishment of the Victorian Civil and Administrative Tribunal (VCAT), noted 'there are no formal criteria by which to assess the appropriateness of conferring a particular type of jurisdiction on a tribunal'.[19] For that reason, the discussion paper did identify some threshold measures. The bodies to be amalgamated should have low monetary limits, high application rates and less need for formality, and there was a requirement for specialist expertise.[20]

There was, however, no single and accepted set of standards, nor were there attempts to grapple with the issue of what kind of institution tribunals should be and how to differentiate them from courts, a key principle identified in the Kerr Committee report. The absence may have been the reason the President's Review of VCAT by Kevin Bell in 2008 did proffer a more principled approach, at least in relation to whether existing specialist tribunals should be amalgamated into a single body. The Review recommended that to decide whether a proposed new jurisdiction was appropriate government needed to consider the optimal size of an amalgamated body, the attributes of the dispute resolution process and the administrative arrangements.[21]

Subsequent reports preceding tribunal amalgamations in other states added to that list but largely from a pragmatic, not principled, perspective.[22] The advantages of combining tribunals into one institution were said to be cost savings through shared services and fewer members, greater consistency in decisions and standards, faster and simpler hearings, and the increased visibility and accessibility of the amalgamated body.[23] There is almost no discussion about the fundamental characteristics which justify the existence of tribunals including one which is amalgamated.

One report did, however, contain some warnings. They were the need to avoid swamping the smaller tribunals by high-volume tribunals incorporated into the amalgamated body, that the tribunals for inclusion not be disparate in nature, that too large an amalgamated tribunal would lead to the diseconomies of big bureaucracies and prevent cost savings, and that

19 Hon J Wade MP, Attorney-General's Department Vic, *Tribunals in the Department of Justice: A Principled Approach* (Discussion Paper, 1996) (Wade report) 3.

20 Ibid.

21 K Bell 'The Role of VCAT in a Changing World: The President's Review of VCAT' (Speech, Law Institute of Victoria, 4 September 2008) 12.

22 For example, Hon M Barker, *Western Australian Civil and Administrative Review Tribunal Taskforce Report on the Establishment of the State Administrative Tribunal* (2002) (Barker Review) chs 4 and 5; NSW Legislative Council Standing Committee on Law and Justice, *Opportunities to Consolidate Tribunals in NSW* (Report, 2012) 49 (NSW Standing Committee report); Qld: *Independent Expert Panel to Advise on the Implementation of an Amalgamated Civil and Administrative Tribunal in Queensland* (Report, 2008) Attachment 6 (based on standards developed by the Department of Premier and Cabinet in 2000). See also Tasmanian Department of Justice Discussion, *A Single Tribunal for Tasmania* (2015) (*A Single Tribunal for Tasmania).* Annexure 6: Assessment Criteria, 171–2; New Zealand Ministry of Justice, *Tribunal Guidelines: Choosing the Right Decision-Making Body; Equipping Tribunals to Operate Effectively'* (2019) (NZ Tribunal Guidelines).

23 ACT: ACT Law Reform Advisory Council, *Guardianship Report* (2016); NSW: Report of Department of Communities and Justice, *Statutory Review: Report of the Statutory Review of the Civil and Administrative Tribunal Act 2013* (November, 2021) (NSW Government Statutory Review); Qld: Queensland Government, *Review of the Queensland Civil and Administrative Tribunal Act 2009* (Report, 2018); SA: *Statutory Review: South Australian Civil and Administrative Tribunal [SACAT]* (2017) (Bleby review).

there would always be a need to take account of special circumstances.[24] These warnings referred back to the optimal size of an amalgamated body raised by the Bell review and raised some deeper issues for consideration.

Despite these suggestions, reviews following a period of operation of the combined jurisdiction tribunals focus at most on the statutory objects for the tribunal and whether the amalgamation has cut costs and made tribunal processes more efficient.[25] The reports do not identify minimum benchmarks justifying the creation of the amalgamated body. Nor do they contain data against any such benchmarks of the extent to which any perceived benefits have been achieved. The result is disappointing. Governments appear not to have turned their minds to the potential for the advantages of tribunals to be undermined if care is not taken to avoid identified pitfalls. As de Villiers noted of the amalgamation movement in the Australian states, 'there is no reference to a grand design or a comprehensive explanation as to why the civil and commercial jurisdiction of the courts is being diminished by the transfer of these functions' to tribunals.[26]

Governments need to develop benchmarks — the principled approach advocated by Kevin Bell — based on the experience of the operation of these bodies. Without such guidelines, there is a danger that incorporation of new jurisdictions may substantially impair the justifications for the amalgamation. Amalgamation was designed to achieve timely decisions; encourage alternative forms of decision-making, including mediation; and enhance consistent and high-quality decision-making. These objectives need to be remembered when the structure of tribunals is under consideration. This remains a task for urgent attention.

Are the jurisdictions included in the CATS or the AAT a good fit?

The two reports by Justice Pritchard[27] and the Senate Committee do raise the issue of whether having all the jurisdictions under the combined tribunal umbrellas is a good fit. The concerns expressed mirror the call for criteria. As one commentator put it, in relation to state and territory combined tribunals:

> As a result of the absence of a general philosophical plan or guiding principle as to what jurisdictions should be transferred to super-tribunals, the super-tribunals of the respective States resemble a smorgasbord of jurisdictions with little intra-state consistency.[28]

24 NSW Standing Committee report (n 22) [3.45]–[3.47], [3.53], [4.55]–[4.59].

25 Cth: Hon IDF Callinan AC, *Report on the Statutory Review of the Tribunals Amalgamation Act 2015* (Final Report, 2015) (Callinan Review); NSW: NSW Government Statutory Review (n 23) 13; Qld: Queensland Government, *Review of Queensland Civil and Administrative Tribunal Act 2009* (Report, July 2018); SA: Bleby Review (n 23) 90–91; Vic: President's Review of VCAT (n 21); WA: Hon K Baston, WA Parliament Standing Committee on Legislation, *Inquiry into the Jurisdiction and Operation of the State Administrative Tribunal* (Report 14, 2009) (Baston review).

26 B de Villiers 'Accessibility to the Law — the Contribution of Super-tribunals to Fairness and Simplicity in the Australian Legal Landscape' (2015) 39 *University of Western Australia Law Review* 239, 242.

27 Pritchard Research (n 12); Senate Committee Inquiry (n 13).

28 de Villiers (n 26) 247.

CATs

The structural issues for the CATs have not achieved the same level of public notoriety as occurred in relation to the AAT. Nonetheless, since the warnings about amalgamation were made prior to the establishment of four of the state and territory combined tribunals, it is important to consider whether the information has influenced amalgamations since that time or had an impact on the reviews of the older CATS. That question is raised squarely by the imbalance between the volume of matters in their civil and administrative jurisdictions. Has this created the structural, resourcing, or swamping issues which were foreshadowed?

An empirical study undertaken in 2019 produced mixed responses to the question concerning the suitability of tribunals for inclusion. There was a discernible trend to identify guardianship as an outlier.[29] It was noticeable too that remuneration tribunals, industrial relations and most workers' compensation bodies, some mental health tribunals and, in two States, criminal injuries bodies have been excluded. Tenancies, atypically, are excluded from Western Australia's State Administrative Tribunal (SAT). Although there is some consistency in the exclusions, the justification for not bringing these bodies under the combined tribunal umbrella is limited.

Despite the marked imbalance between the civil and the administrative aspects of their jurisdictions, responses from some of the larger combined tribunals were that 'swamping' had not occurred. This was said to be due to the professionalism of members[30] or that the issues could be managed.[31] There are reasons to be cautious about these responses. It is not just the imbalance in size which is of concern but also the different culture and practices between the two arms. Civil matters were formerly undertaken by courts; initial administrative decisions were made by the executive. These factors import parameters for decisions by the judicial and executive arms of government which are significantly distinct. To an extent, these differences have been retained for most combined tribunals in their legislation. There has been little analysis to date of the impact of this feature of their statutory frameworks.

Common sense and an understanding of human nature suggest there would be a tendency for the tribunal members, staff and those who appear in the civil jurisdiction to adopt a judicial, not an administrative, model of practice. Legal representatives familiar with court processes are likely to operate, even if subconsciously, in court-like mode. The adversarial process employed in party/party disputes compared to the more inquisitorial processes in the administrative jurisdictions add force to the supposition.

There is some support for this view. Research by Justice Pritchard concluded:

> [The addition of the civil jurisdiction had created a] challenge for those CATS with a large civil jurisdiction, and especially one which includes more complex or high-value cases. That challenge lies in combating the resistance of some lawyers to dealing with cases quickly, using streamlined processes. Attempts to impose short time frames at each stage of a proceeding may be met with consent orders by the parties to extend time. Statements of issues, facts and contentions, or summaries of cases, can start to look like pleadings.

29 R Creyke, 'Australian Tribunals: Impact of Amalgamation' (2020) 26(4) *Australian Journal of Administrative Law* 206–232.
30 Ibid.
31 Ibid 206.

That finding also concurs with tribunal members' knowledge of the prevalence of judicial culture. It is significant that the QCAT has a 'by leave' requirement for legal representation before it.[32] There are also statutory limits on legal representation in some jurisdictions within NCAT. The 2021 review of NCAT accepted that legal representation should continue to be limited in the Consumer and Commercial Division since legal representation as of right could 'create a legalistic, formal or adversarial culture'.[33] No such limitation applies in the South Australian Civil and Administrative Tribunal (SACAT), Western Australia's SAT and the ACT's Civil and Administrative Tribunal (ACAT).[34]

The result is an inherent conflict in the combination of the civil with administrative matters, particularly, as Justice Pritchard observed, in high value or precedentially significant matters. As she observed:

> In such cases it is particularly important for CATS to keep steadily in mind their philosophical foundation, and to continue to press the parties to narrow the dispute to what is really in issue, to endeavour to resolve the case by compromise through ADR or FDR and, failing that, to proceed to a hearing as quickly as possible.[35]

That conflict has the potential to threaten foundational features of tribunals in Australia that they provide informal, economical and speedy decisions. This threat needs to be kept under surveillance and carefully managed to avoid such an outcome.

AAT

The issue is raised by the recommendation in the report of the Senate Committee Inquiry that the AAT be disassembled.[36] The justification for the recommendation was not clearly spelled out. 'Disassembly' is a structural term — to take apart. At first sight the term suggested that recommendation meant that some parts of the AAT should be hived off or reconstituted. That assumption was misplaced. The government has now settled the meaning with its announcement that the AAT is to be abolished and the tribunal replaced 'with an administrative review body that serves the interests of the Australian community'.[37]

Justification for this dramatic move is that previous appointments processes had 'fatally compromised the AAT, undermined its independence and eroded the quality and efficiency of its decision-making'.[38] Funding deficits had also hobbled the tribunal. The government has established a comprehensive process of consultation with interested and knowledgeable members of the community to establish 'an accessible, sustainable and trusted federal administrative review system'.[39]

32 *Queensland Civil and Administrative Appeals Tribunal Act 2009* (Qld) s 43.
33 NSW Government Statutory Review (n 23) 17.
34 ACT: *ACT Civil and Administrative Tribunal Act 2008* s 30; SA: *SA Civil and Administrative Tribunal Act 2013* s 56; WA: *State Administrative Tribunal Act 2004* s 39.
35 Pritchard Research (n 12) 158.
36 Senate Committee Inquiry (n 13) rec 3.
37 Hon M Dreyfus KC MP Attorney-General 'Albanese Government to Abolish Administrative Appeals Tribunal' (Media Release, 16 December 2022) 1.
38 Ibid.
39 Ibid 2.

An issue which may receive attention in that consultation process is the imbalance in size as between the Migration and Refugee Division of the AAT and its remaining divisions. The issue of swamping may be a real one. Any one division which is more demanding of resources than another must be analysed carefully to ensure that the more demanding elements of the tribunal's operations do not outweigh legitimate needs of others.

The earlier Callinan Review into the AAT suggested there were internal issues about the inclusion of the Migration and Refugee Division of the AAT (MRD).[40] The review noted there was a cultural misfit between the MRD and the remainder of the AAT's jurisdictions, because of its 'very different legislative regimes and practices', exacerbated by it legacy case load and 'deficiency of members'.[41] The recommendations of this report did not suggest the excision of the MRD but did recommend that the procedures code applying to that division should be removed.[42]

The Senate Committee Inquiry also focused on that division in its expression of concerns 'about [MRD's] administrative processes, transparency and productivity':[43]

> The figures are telling. For the period 1 July 2021 to 28 February 2022, the MRD had a total of 56 845 cases on hand, 84 per cent of the Tribunal's total backlog of cases. That had barely reduced from the 86 per cent at the end of the previous financial year. The cases on hand had increased from 16,764 at the end of FY 2016 to 65,374, a more than fourfold increase. As the AAT submission to the Committee observed:
>
> > The percentage of cases finalised within 12 months has declined steadily from 66% in 2016–17 to 29% in 2020–2021. Similarly, the median processing time from lodgement to decision for cases finalised in 2016–17 was 40 weeks; by 2020–2021 the median had more than doubled to 99 weeks. For protection visa cases, the median time for cases finalised in 2020–2021 was 104 weeks.

The statutory requirement for distinct procedures for the MRD[44] has inhibited the intended harmonisation of procedures within the combined tribunal.[45]

These and other differences have been inimical to the development of 'a new common culture' as was intended at amalgamation in 2015.[46] A similar, less extreme carve-out of statutory procedures applies to the Social Services and Child Support Division (SSCSD).[47] The Security Division, for understandable reasons, is also subject to special statutory procedures.[48] These exceptions too need critical examination.

A singular and prized feature of tribunals is their flexibility. But even elastic bands have their limitations. An issue for those tasked with reshaping the national amalgamated tribunal will be what is the level of elasticity which can be tolerated in the revised tribunal if it is to achieve the objectives outlined in the Attorney-General's media statement when disassembly was

40 Callinan Review (n 25).
41 Ibid 1.3.
42 Ibid Measure 22.
43 Senate Committee Inquiry (n 13) [7.13].
44 AAT Act s 24Z.
45 Hon Justice D Kerr *Chev LH*, 'Challenges and Changes' (Speech, South Australian Chapter of the Council of Australasian Tribunals, 26 October 2016) 9.
46 Ibid.
47 AAT Act ss 39(2)(b), 39AA.
48 For example, AAT Act ss 19E, 19F, 27AA, 35A, 38A, 39(2)(a), 39A, 39B, 43AA.

announced. In that context it is as well to remember that it is easy to abolish institutions and undo good work — much harder to fine-tune and tailor them.

Tribunals' internal architecture

A related structural issue is whether the new tribunal should offer expanded access to a form of internal appeal. The AAT's submissions to the Callinan Review advocated second-tier review more generally to alleviate 'the pressures on the court system'.[49] That submission was rejected by the review.[50] Currently, the SSCSD is the only AAT Division in which a second tier of appeal is permitted.[51] That special position was to compensate the jurisdiction for the potential loss on amalgamation of two external tiers of merits review: the first being review by the former Social Security Appeals Tribunal; the second being the AAT.

The majority of combined tribunals have an appeal tier or panel.[52] Their value is that a panel of more experienced and senior members produces decisions which are of higher quality. These decisions provide consistency and guidance to other members of the tribunal and, in turn, improve public administration. They also reduce the workload for courts. For an applicant, an internal appeal is also cheaper and quicker and usually provides full merits review, advantages not possible from court proceedings. Such decisions also reduce the workload of the courts. These features enhance the public's trust in the institution. As the NSW Parliament Standing Committee on Law and Justice put it:

> [L]imiting appeals to only the courts can create a barrier to the availability of appeals for some people due to the cost, delay and formality of court processes. Ensuring access to justice is also about ensuring an accessible appeal mechanism.[53]

These outcomes are consistent with the aspiration in the announcement of the intention to abolish the AAT that the revised body will 'serve the interests of the Australian community', improve the 'quality and efficiency' of the tribunal's decision-making,[54] and increase trust in the institution.[55] They respond to a growing concern with the absence of trust more generally in Australia's public institutions. As Peter Shergold, a wise former leading public servant, put it:

> I am concerned about the declining levels of trust in politicians, in governments to some extent, to a lesser extent in public servants, and declining trust in the authority of churches, business, unions, and the law …[F]or institutions that have traditionally been associated with democracy there is declining trust. … It is clear our institutions need to be revised and reinvigorated and rethought.[56]

49 AAT Submission to Callinan Review (n 25) [103]–[104].
50 Callinan Review (n 25) Measure 13.
51 AAT: *Social Security (Administration) Act 1999* (Cth) ss 179, 182, 183.
52 ACAT Act 2008 (ACT) s 79; NCAT Act 2013 (No 2) (NSW) s 80(2); QCAT Act 2009 (Qld) s 142; SACAT Act 2013 (SA) ss 70, 71.
53 NSW Parliament Standing Committee Report (n 22) xiii.
54 Hon M Dreyfus KC MP Attorney-General 'Albanese Government to Abolish Administrative Appeals Tribunal' (Media release, 16 December 2022) 1.
55 Hon TF Bathurst 'Trust in the Judiciary' (Speech, 2021 Opening of Law Term Address, 3 February 2021).
56 P Shergold 'Promise of "Frank" Look at Our Pandemic Response', *The Australian* (9–10 April 2022) 18.

Technological changes

No consideration of the future of tribunals would be replete without addressing the profound technological changes which have occurred in the last decade — changes accelerated by the pandemic. The digital transformation has been a 'road to Damascus' moment or what psychologists would call a 'reframe'.

The upside of these developments has been an acceleration of changes to the benefit of both applicants and tribunals. What has emerged is a more sophisticated analysis of the advantages provided by technological assistance, and how these possibilities can be used for particular tribunal processes and specific categories of applicants.

The consequence has seen certain kinds of proceedings, such as directions hearings, initiated by electronic means, except in special circumstances, and the discretionary use of electronic proceedings in other kinds of proceedings — for example, alternative dispute processes, if that is fair, resolves the matters quickly and efficiently and can be conducted using such methods. At the same time online processes must take account of the needs of the person, their ability to manage online communication and their strong preferences, particularly if the person is not legally represented.

The following discussion of the changes reflects practices within the AAT but is also apparent in the guidelines, practices or legislative changes of combined tribunals throughout Australia.[57] The collection is a testament to that flexibility which is a hallmark of tribunals.

COVID-related changes

It was assumed at the commencement of 2020 that the pandemic would quickly be brought under control. That assumption proved to be misplaced. Consequently, tribunals introduced fundamental changes to their operation.[58] The most obvious response to the pandemic was the virtual cessation of hearings in person. Online hearings became the norm.[59] Pre-hearing processes were, almost without exception, to be conducted electronically, and documents were to be lodged online.[60] These moves were not without their humorous side. As one commentator observed of hearings by videoconference, these have been notable for the distraction of 'children and family pets apparently seeking "leave to appear"'.[61]

57 ACAT: Practice note 1 of 2022, *Communicating with ACAT;* Practice note 2 of 2022, *How Can I Take Part in ACAT Proceedings — Remotely or In Person;* NCAT: President's Message, 3 May 2022, *Changes to In-person Hearings*; NCAT, *COVID-19: Temporary Arrangements to Lodging Your Application and Documentation*; NCAT Procedural Direction 6 — *Filing of Documents*; NTCAT: Practice Direction No 3 — *Electronic Case Files*; *Modified NTCAT Process for Termination of Tenancy*; NTCAT & MHRT: *COVID-19 Measures*; QCAT: *QCAT COVID-19 Update*, 7 March 2022; SACAT: *All Applications are Lodged Online; Majority of Hearings by Telephone or Video*; SAT: Public Notices 10 June 2022 — *Hearings May Be in person, By Telephone, or Video Conference Depending on the Matter and the Interests of Justice*; TasCAT: *COVID-19 Important Update: Conduct of Hearings at TasCAT*, 15 March 2022; VCAT: *COVID Safety Measures for VCAT Hearings*.

58 AAT Act s 33.

59 For example, AAT General Practice Direction cl 2.4 and Practice Directions for specific divisions; ACAT: NCAT: NTCAT: QCAT: SACAT: SAT: VCAT.

60 For example, AAT General Practice Direction cl 2.2. and documents were to be lodged electronically: cl 2.3.

61 P Woulfe, Chair Federal Litigation and Dispute Resolution Section, Law Council of Australia, 'Welcome to the 2021—2022 (Summer) Edition of Chapter III'.

As a consequence, there was wholesale use of videoconference and teleconference hearings. This was a boon to some. Many applicants said they wanted their matters dealt with and had sufficient confidence in the technology to accept an online hearing.[62] For people with special needs, particularly of those with mobility or psycho-social issues, use of remote hearings improved their access to justice. The applicant can participate more comfortably from their own home or the house of their support person. The flipside of this advantage is that the applicant must have access to the technology and that the person's particular disability does not inhibit their participation.[63]

Members' competence in managing technology has also been enhanced.[64] Overall, this has meant a boost to more efficient operations. The efficiency of tribunal operations has also been improved, with requirements for earlier lodgment of documents and restriction on the size of documents able to be lodged online.[65] Another consequence is that parties are thinking more critically about what evidence they need to submit. As one tribunal observed approvingly:

> improved audio-visual technology has allowed fairer and safer access and enabled expert witnesses, parties and their counsel to appear remotely, reducing costs without compromising fairness or independence.[66]

At the same time, those who are likely to be digitally challenged, whether for geographical or other reasons, must not be left out.[67] For these cohorts, greater efforts must be made to facilitate access. One suggestion is that 'governments fund free digital literacy programs and access to free or low-cost internet or computers for citizens who are disadvantaged to facilitate their participation in virtual hearings'.[68]

There are mixed views about whether there are procedural fairness issues in online hearings. A survey of AustLII-reported cases in the AAT in the first quarter of 2020 revealed only a handful of some thousands of cases where concerns were raised on the ground of absence of fair process.[69] There are alternative views. In-person contact during tribunal processes can increase the possibility of understanding a point of view and can enhance trust and the exchange of sensitive information.[70] As one commentator observed: 'We humans are social animals.'[71] The use of online hearings detracts from these possibilities, particularly for hearings and other processes where sensitive matters such as family or migration issues are likely to be raised. In such matters, the parties are often reluctant to be heard online.

62 Minutes of LCA/AAT Liaison Committee meeting (LCA/AAT Minutes, 20 August 2020), 5.
63 LCA/AAT Minutes, 3.
64 For example, see AAT, *AAT Annual Report, 2020–2021*, p 102.
65 For example, the Tasmanian Workers Rehabilitation and Compensation Tribunal, *Annual Report 2020–2021,* ACAT's website notes, p 15: 'Documents can be lodged by email (so long as it is not more than 40 pages long).'
66 Tasmanian Resource Management and Planning Appeal Tribunal*, Annual Report 2020–2021*, 15.
67 B Howarth 'Govt Must Manage Demographic Divide as Services Go Online' *The Australian* (6 May 2022) 22; A Moses 'Digital Justice Must Not Leave Anyone Behind' *The Australian* (21 January 2022) 21. See also C Denver and A D Selvarajah 'Safeguarding Access to Justice in the Age of the Online Court' (2022) 85 *MLR* 25.
68 A Moses (n 67) 21.
69 The survey was conducted by the author of this article and has not been published.
70 T Fullerton 'West Opening, But Damage is ne' *The Australian* (19 February 2022) 13.
71 Hon Justice Logan 'The Efficient Disposal of Cases after COVID-19' (Speech, Virtual Conference of the Commonwealth Magistrates' and Judges' Association, Logan, 13 September 2021) 5.

Submissions to an inquiry in the United Kingdom earlier this century also advocated oral hearings. The inquiry found that such hearings were arguably more user friendly, better suited to cases that turned on disputed facts or complex issues where it was necessary to test the evidence rigorously, they provided a better opportunity to uncover information not disclosed in written evidence, offered parties the equivalent of their 'day in court', and allowed justice to be seen to be done in a more transparent way.[72]

Post-pandemic

Notwithstanding these developments, the post-pandemic period has seen a return to in-person hearings at tribunals become the default position. As one combined tribunal said of its intention post-COVID:

> We are determined not to simply revert to the pre-COVID-19 way of performing our functions but to build on lessons learned to be more effective and efficient in the interests of the parties and in conformity with our statutory objectives.[73]

At the same time, valuable remnants of the COVID-induced innovations have been retained. Online hearings are more likely for remote locations where that is more efficient or to respond to the particular circumstances of a party. Pre-hearings or other processes conducted electronically are likely to continue. Directions hearing, conferences and some forms of alternative dispute resolution may be accomplished online without disadvantage, provided all parties have access to the technology and are comfortable with its use.

Nonetheless, although the lessons from this period are still being amassed, the preliminary assessments have alerted tribunals to how better to use technological changes while not jeopardising those fundamental tenets of the justice system — namely, that justice requires parties should be seen and heard. The accelerated reliance on use of electronic means of operation is likely to have a continuing impact on tribunal operations.[74] More targeted use is to be expected. However, implications remain for open justice and accessibility. These issues will need to be assessed carefully to ensure tribunal objectives can continue to be realised.

Tribunal appointments

Tribunal appointment is a contentious issue.[75] Australia has seen its share of political cronyism in the appointments process. It is ironical that the generous salary range for members of tribunals, designed to ensure their independence, is being subverted by the salaries making these appointments desirable positions in which to place people with political connections.[76]

72 Sir A Leggatt, *Tribunals for Users: One System, One Service* (London, TSO, 2001) (Leggatt report) [8.16].
73 ACAT, *Annual Review 2020–2021*, 25.
74 R Down 'Legal Body Wants Virtual Access Systems Extended' *The Weekend Australian* (18–19 June 2022) 8.
75 Senate Committee Inquiry (n 13) ch 4 'The selection of AAT members'.
76 For example, AAT members are currently paid between $193,990 to $496,560 pa.

In the 1990s concerns about appointments processes in tribunals led the Administrative Review Council to warn:[77]

> There is overwhelming support for a rational and transparent selection and appointment process, and for the proposition that more broadly-based consultation in that process is likely to assist in ensuring merit-based appointments. Some suggested that otherwise the conclusion would remain open that appointments were being made for reasons other than merit. … The existence of concerns about independence, whether or not correctly based in fact, can itself damage the credibility of individual tribunals and the tribunal system, thereby undermining the function that tribunals were established to perform.

What is dispiriting is that, more than a quarter of a century later, the same recommendations are being made.[78] What can be done? The question is apt given the evidence of public dissatisfaction with cronyism. Failure to follow accepted processes is involved, including political preferment in tribunal membership. The practice is not confined to Australia. It has been acknowledged to be endemic.

What is the position in other countries?

For England, Wales, Scotland and, in some circumstances, the United Kingdom as a whole, there are two protections. Most appointments to positions on major tribunals in England and Wales are made by the Judicial Appointments Commission and, for Scotland, by a Judicial Appointments Board. Appointees must meet statutory qualifications. There is no absolute prohibition on political appointments, but use of the independent commission serves to avoid unbridled practices. As the Leggatt report observed, these processes 'provide an independent filter for the appointments process which will make it harder for political appointments to occur'.[79]

In Canada, the situation is patchy and variable. In Ontario there is a legislative solution.[80] The Act requires as part of the 'member accountability framework' a publicly available description of the functions of members, and a requirement that an applicant has the 'skills, knowledge, experience, other attributes and specific qualifications required of a person to be appointed as a member of the tribunal'.[81] In addition, unless trumped by provisions in another Act, selection of tribunal members must be a competitive, merit-based process, based on publicly available statutory criteria relating to experience, knowledge or training in the subject matter and tribunal jurisdiction, as well as decision-making aptitude.[82] An appointment or reappointment to a tribunal must be based on the recommendations of the chair of the tribunal.[83] In other provinces, the matter is left to the legislation for individual tribunals. Canada has experienced similar issues relating to appointments as Australia.[84]

77 Callinan Review (n 25) citing ARC's *Better Decisions* report [4.25], [4.28]
78 Law Council of Australia, *Policy on the Process of Judicial Appointments* (Policy Statement, 2021) 8; Grattan Institute submission to the Senate Committee Inquiry, Submission 12, p 7.
79 Leggatt report (n 72).
80 The *Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009* SO 2009, Ch 33, Sch 5.
81 Ibid cll 7(2), 8.
82 Ibid cl 14(1)–(3), (5).
83 Ibid cl 14.4.
84 H M MacNaughton 'Future Directions for Administrative Tribunals: Canadian Administrative Justice — Where Do We Go From Here?' in R Creyke (ed), *Tribunals in the Common Law World* (Federation Press, 2008) 213, 214.

In New Zealand, guidelines recommend members be appointed on their merits, with the tribunal chair being involved in any interview panel. The guidelines indicate minimum qualifications for members should be in legislation and take into account the nature of the tribunal, the requisite practice in or experience with the tribunal's subject matter, whether legal or adjudicative experience or qualification is needed, and whether the person is fit and proper to be appointed.[85] The discretion of the relevant Minister to appoint or recommend appointment is unfettered. At the same time, the guidelines recommend public notification of job descriptions, advertisements for eliciting interest, and the interviews should be conducted by an independent panel.[86]

The French system is possibly the most sophisticated and the most transparent. Under the Code of Administrative Justice there are multiple categories of potential employees who may become members of *Le Tribunal Administratif*. A substantial proportion are recruited from *L'Ecole Nationale*, the National School of Public Administration. Defined proportions may also come from those with military, public or hospital service, academe, the judiciary or by competitive examination. The interesting aspect of the process, however, is that there is a prescribed and limited scope for political appointments. Ministers may appoint to certain positions they control but the terms of these appointees are limited to three years with one renewal. Equally the French President, the Presidents of the National Assembly, and the Senate may each appoint someone, but for one three-year term only. These details are statutory — that is, they are included in the Code.

Australia

In Australia there is a momentum for change. What is called for is a rational and transparent selection and appointment process and more broadly based consultation to assist in ensuring merit-based appointments. The Senate Committee Inquiry recommended that the Attorney-General retain the discretion to make appointments outside those of the independent panel but that the discretion should be limited. The report did not specify how the limits were to be achieved.[87]

The Law Council recommended that, if an appointment was not on the list recommended by an independent panel, the Attorney-General must at least publish an explanation. That solution may, as Leggatt put it, make it harder for political appointments to occur.[88]

The Grattan Institute recommended that, to strengthen the criteria listed by the Administrative Review Council, the Attorney-General should *only* be able to choose candidates assessed as suitable by the independent panel — a panel which would include the Secretary of the

85 NZ Tribunal Guidelines (n 22) 17, 18. See also P McConnell 'The Future of Tribunals in New Zealand' in Creyke (n 84) 194, 197–200.

86 Ibid 200.

87 Senate Committee Inquiry (n 13) rec 2.

88 Law Council of Australia (LCA), *Policy on the Process of Judicial Appointments* (2021) 8 which the Council 'considers should govern the appointment of members and/or presidents in the AAT' (LCA Submission in December 2021 to the Senate Committee Inquiry, *Performance and Integrity of Australia's Administrative Review System*, Recommendation, 9).

Attorney-General's Department and the Public Service Commission or their representatives.[89] An alternative safeguard recommended by the Institute was that, if there were appointments outside the panel's list, an annual report to Parliament on tribunal appointments must be made by a Public Appointments Commissioner, a position to be created.[90]

The Attorney-General heeded some of these suggestions as evidenced in *Guidelines for Appointments to the Administrative Appeals Tribunal (AAT)* (Guidelines) published in December 2022. Vacancies are to be advertised with listing criteria for positions and expressions of interest are to be called for every six months. Independent assessment panels are to be used, the panel comprising the Secretary of the Attorney-General's Department (or delegate), the President of the Tribunal, and another member nominated by the Attorney-General. The Attorney-General 'will use the panel report to recommend [members'] appointments'.[91]

The Guidelines do not prohibit political appointments, but the overall process is more transparent and an improvement. There is enhanced openness and fairness in the appointments' process assuming they continue to be followed.

It is unlikely that the statutory system in France would be adopted in Australia. Nonetheless, assuming a possibility that some political appointments will continue to be made in Australia, it would have been a distinct improvement if some limit on the number of such appointments, akin to those in the French Code, could have been essayed. Such an outcome is possible. The Grattan Institute noted that: 'In the 12 years before the amalgamations, just three per cent of new members had political connections … In the seven years since, 18 per cent of new members had political connections — … 31 per cent since 2017–18.'[92] These figures are contrasted with VCAT in which '0.5 per cent of current appointees have political connections, despite high salaries and a similar appointments process to the AAT'.[93] So even without a statutory inhibition it appears that conservative practices can provide for limitations on political appointments.

If, as the Attorney-General has indicated, and the Productivity Commission has confirmed, tribunals are an important element of the national justice system, the appointments processes deserve to be more transparent and non merit-based appointments should be limited, ideally to the three per cent or less, which was the position for the AAT about a decade ago.

Tribunals face a loss of trust when the issue of political appointments has become a matter of public notoriety. Political appointments are seen as a threat to the independence of members' decision-making, thus eroding confidence in the outcomes of their decisions. That notoriety and the issue of the independence of its members, has again become apparent, notably in relation to appointments to the AAT, although concerns have also been expressed

89 Grattan Institute submission to the Senate Committee Inquiry 'Towards a Better AAT Appointments Process' (2021) 11.
90 Grattan Institute, 'New Politics: A Better Process for Public Appointments' (2022) recs 6, 7.
91 Attorney-General's Department, *Guidelines for Appointments to the Administrative Appeals Tribunal (AAT*) (15 December 2022) 1, 2.
92 Grattan Institute (n 89) 19.
93 Ibid 20.

in relation to appointments to some CATS. It is to be hoped that the heightened attention to this issue will serve to significantly limit resort to political appointments in the future.

Conclusion

Tribunals are the face of justice for the Australian public. As such, tribunals deserve to be maintained and supported in order that they can continue to be accessible, efficient, and perceived to be independent. These features are essential to promote public trust and confidence in tribunal decision-making. There is much of which we can be proud in the history of tribunals in Australia. At the same time there remain challenges for this important segment of our public institutions.

A paper presented at the AIAL national conference in 1997 concluded with the following, as apt today as then:

> [G]overnments weaken the links in the accountability chain at their peril. People only have confidence in a system which is independent and impartial. Moves to reduce the important of … the tribunal system and to lessen the effectiveness of the bodies which investigate citizens' complaints should be resisted because they ae taking away important safeguards and because they a retrograde, short-sighted approach to administrative review. … We forget these lessons at our peril.[94]

94 R Creyke, 'Sunset for the Administrative Law Industry? Reflections on Developments Under a Coalition Government' (1998) 87 *Canberra Bulleting of Public Administration* 39, 53.