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President of the Administrative Appeals Tribunal

Ten Years as President

Introduction

As I guess everyone knows I will be retiring as President of the Tribunal and as a Federal Court judge on 15 May, exactly eight weeks from today. On Monday week I will have completed 10 years as President of the Tribunal.

I will not be resigning as President because my appointment comes to an end on 15 May and so resigning from that position is not necessary. I have given notice of my resignation as a Federal Court judge.

I thought it might be appropriate to review what has happened to the Tribunal over my ten years. Although 20 of you have shared the whole journey with me, seventy of you have not. It has been a time of change.

The Administrative Review Tribunal

On 28 June 2000 the Government introduced a bill into the Parliament to establish an Administrative Review Tribunal in place of the Administrative Appeals Tribunal which was to be abolished. The bill went through a lengthy process of examination and deliberation before it was finally rejected in the Senate on 26 February 2001. No one suggested that returning to the idea that all merits review should be conducted by one general tribunal was a bad idea, but the tribunal proposed was seen to be a compromised tribunal without the independence and authority that the Administrative Appeals Tribunal had. Nevertheless, pursuing the proposal remained active Government policy.

It was in this state of affairs that I was appointed President on 2 April 2002. I was appointed Acting President. As the Attorney-General, Daryl Williams, explained to me, I would either preside over the burial or the resurrection of the Tribunal, depending upon the Government's ultimate decision.

On 6 February 2003, two years after the bill was rejected in the Senate, the Attorney-General announced that the Government would not pursue the enactment of the bill, but, rather, seek to achieve the efficiencies which had motivated it, by administrative means. An inter-departmental committee was established which became known as the Tribunals' Efficiency Working Group. It was made up of representatives of all the tribunals and of the departments with which they were associated.

At the same time the Government proposed to amend the Tribunal Act, largely to improve the efficiency of the Tribunal. Restrictions on the way the Tribunal could be constituted were, for example, to be removed, in favour of conferring a broad discretion on the President. There were, however, two matters of concern to some people, which remained from the ART proposal. First, the requirement that the President should be a Federal Court judge was to be removed. Secondly, the provision which permitted the appointment of members with tenure to age 70 was to be removed. This power had not been used for a number of years in favour of term appointments, but the power remained.

The Tribunal supported the bulk of the amendments, which were the subject of significant consultation with it. The Tribunal was neutral on the two controversial matters. The Administrative Review Council supported the change to all appointments being for a term, which regularised the de facto position, but did not support the change in qualifications for the President. It was not proposed, mind you, that the President could not be a Federal Court judge, merely that the President need not be one.

All of this played out over another two years until at 12.44 pm on 17 March 2005 the Senate accepted amendments proposed in the House of Representatives and the bill was passed. The Tribunal President must continue to be a Federal Court judge, but all new appointments would be for a term not exceeding seven years.

I was appointed President of the Tribunal for a term of seven years from 16 May 2005. This was my fifth appointment as president. I was appointed Acting President in 2002, 2003, 2004 and 2005. The 2005 appointment was one month prior to the permanent appointment.

The Tribunal Efficiencies Working Group

The Tribunal Efficiencies Working Group, which had been established in February 2003, reported in June 2004. A significant recommendation was that tribunals should continue the practice, which had been in place for some time, of cooperating with one another in connection with the acquisition of services and the use of assets. Before the Working Group was established the Tribunal already made space and services available to other tribunals in a number of registries. This practice has continued and been expanded.

The heads of the tribunals and their registrars now meet twice a year to examine existing cooperation and review the possibilities for further cooperation. The Working Group recommended against co-location of tribunal premises and joint procurement of services, however, other than through this cooperative approach.

Finance

The reversal of the decision to replace the Tribunal was a very positive one for the Tribunal. It gave the signal that the Tribunal's future was secure. Members and staff were no longer thinking so much about alternative employment. Advertisements attracted quality candidates. But there was still one problem. In anticipation of the rundown, and final abolition of the Tribunal, the Department of Finance had characteristically removed funding from the Tribunal in advance. The amount was quite significant. It was more than $1 million.

Fortunately the then Attorney-General, Philip Ruddock, was on our side. He arranged a meeting with the then Minister for Finance, Senator Nick Minchin. I well remember Doug Humphreys, Steve Wise and myself going to Canberra for the meeting. I am still nonplussed about it. Something told me that the mere agreement to see us by the Minister meant that we would succeed. After all, we all know what getting money out of the Department of Finance is like. Rejections come from on high and are generally delivered by a messenger. So, notwithstanding the long wait near the Minister's office, I was hopeful of a short and friendly discussion. Not so. The meeting lasted more than an hour. I did not think the Minister for Finance would waste more than a minute about such a paltry sum as a couple of million dollars. But we had to make out our case point by point. In the end, however, and uncharacteristically in dealings with the Department of Finance, justice prevailed and we had our funding restored and increased.

Membership of the Tribunal

At the time of my first appointment there were 77 members of the Tribunal, including judges. Now there are 90 members. The number of full-time members, however, has fallen from 20 to 17. In reality, the budget cost of members has not changed but the composition of the Tribunal has. There is a wider spread of disciplines represented by expert members. There are more judge members. The most significant change, however, may be a change that not everyone has noticed. In 2002 there were 4 part-time senior members. Now there are 18. Nearly all lawyer members of the Tribunal are now senior members. Most of them were appointed as

senior members. A number of them were members who were reappointed as senior members.

The appointment of more judge members and the change in the percentage of Tribunal members who are senior members has been part of a process calculated to enhance the reputation of the Tribunal.

Committees

In 2002 there were no active committees in the Tribunal. The organisation and management of the Tribunal was anything but democratic. This partly reflected the undoubted dampening effect of the Tribunal being subject to a proposal by the Government that it should be abolished, which persisted over four years and was not finally resolved for a further two years. The Bill was purportedly based on the *Better Decisions* report of the Administrative Review Council which had been published in 1995. So the issue was current for a decade. There are again suggestions that the Government might now reconsider a larger general Tribunal. Indeed, there have been rumblings about it since not long after the proposal was abandoned. Any new proposal will, however, follow the ARC's recommendation for a Tribunal with independence and authority and will not suffer from the defects which attended the ART proposal.

Shortly after my appointment, I established a number of committees in the Tribunal, including the Practice and Procedure Committee and the Professional Development (then called Performance Encouragement) Committee. The Committees will meet next Thursday. Giving policy roles to a wider section of the Tribunal improves the quality of decision-making and, by being inclusive, improves the sense of ownership and morale of members.

An important theme which has been present in much that has happened in the Tribunal in the last decade has been uniformity. One manifestation of the theme was seeking to achieve uniformity in the way the Tribunal is constituted to hear particular cases. In 2002, for example, medical members were not frequently used in hearings in some places, while, in others, there were. To the end of uniformity a Constitution Committee was established. The problem was that the Tribunal can be constituted

with one, two or three members and each member can come from a range of backgrounds. Deputy President Hotop wrote a very significant paper which still today guides the constitution of the Tribunal. Once guidelines were in place the need for the committee passed.

In due course other committees were established. The Alternative Dispute Resolution Committee is active. The Library Committee has done excellent work rationalising our collection while ensuring that anything useful is available to us. A Warrants Committee was recently established.

An Executive Committee was established to assist during the gap between Doug Humphreys' departure and Philip Kellow's arrival. It played a particularly important role in putting the Tribunal's process for adopting its budget on a firm basis. We are indebted to Deputy President Hack and, more lately, Deputy President Constance, for their help on this committee. Simon Webb was a significant help to me both through the Committee and directly, throughout the change.

The management structure of the Principal Registry has now been overhauled by Philip Kellow and we have two Executive Directors in place of one Assistant Registrar. The new structure is working so well that I doubt we will need the Executive Committee any longer although I would encourage my successor to retain the Budget Committee.

Uniformity

While differences in the size of registries will inevitably lead to some differences in practices within the Tribunal, we are a national Tribunal serving the people of Australia, wherever they may live. In consequence, an application for review in Western Australia should be handled in the same way as a parallel application in Queensland.

The very process of having national committees which meet twice a year ensures that we deal with issues on a national basis that has, as a primary object, increasing uniformity. But there are still matters which need attention. For example, we charge for summonses in some places but not in others.

The national conference is one of the most important aids to increasing uniformity because it allows individual members to discuss issues and how they are handled in each registry. The best practice will be exposed and followed.

Executive Deputy Presidents

In the beginning of my term there were Listing Coordinators in each state. This role had never been strictly defined, but the emphasis was on listing. It seemed to me that there should be a member in each state and territory who led the Tribunal in that place. Greater emphasis was accordingly placed on the roles of the listing coordinators. Since most of them were Deputy Presidents, the title Executive Deputy President seemed more appropriate. Most recently, the leadership role of the EDP's has been defined in a memorandum.

The 2005 Amendments

The process of review of the Tribunal's activities culminated in the amendments of 2005. The amended Act has guided the Tribunal's activities since. The major amendments affecting the day to day management of the Tribunal were:

- Imposing an obligation on agencies to assist the Tribunal (s 33(1AA))
- Removing, from many Acts, restrictive provisions relating to the way the Tribunal must be constituted (e.g. that it must be constituted by a Deputy President for a s 501 Migration Act case)
- Establishing a set of principles to guide the President and delegates in determining how the Tribunal should be constituted (s 23B)
- Empowering the President to reconstitute the Tribunal in a range of circumstances making it practically necessary or desirable to do so (ss 23 and 23A)
- Simplifying the principles operating when Tribunal members do not agree and ensuring that there will be a decision (s 42)
- Conferring greater powers on members and conference registrars, including conferring powers on conference registrars to issue directions (ss 33 and 59A)

- Extending the Tribunal's powers to resolve matters through alternative dispute resolution (ss 3 and Part IV Division 3).

Premises

During the early part of my term all the Tribunal's leases (except those in Commonwealth Law Courts buildings) came to an end. We were able to negotiate new leases at advantageous rentals in all places except Western Australia where we now occupy colourful new premises. The work associated with the renewal was very time consuming particularly for the Registrar and Chris Shead our then property officer.

Duty Lawyer Schemes

Doug Humphreys came to the Tribunal as Registrar in 2003. He came from the Legal Aid Commission in New South Wales. That proved to be good news for the Tribunal because Doug had the idea of improving the situation of unrepresented applicants. Over the course of time he made representations to all the legal aid authorities and the result was a duty lawyer scheme, giving advice to unrepresented applications, and improved prospects of full grants of legal aid.

Thirtieth Anniversary

The twenty-fifth anniversary of the Tribunal in 2001 passed almost unnoticed, overshadowed, as it was, by pending legislation to abolish the Tribunal. However, things were different by the thirtieth anniversary in 2006.

The thirtieth anniversary of the Tribunal was marked by a ceremony in the House of Representatives Chamber in the old Parliament House in Canberra on the afternoon of 2 August 2006 followed by a reception in Kings Hall and a dinner in the Parliamentary Dining Room. The guest speaker at the ceremony was then Chief Justice Gleeson and the guest speaker at the dinner was the newly appointed Chief Justice of Western Australia, Wayne Martin, who had just retired as President of the Administrative Review Council. The function was attended by many people associated with the history of the Tribunal and its early years.

Concurrent Evidence

The Tribunal has always been very innovative. When I came to the Tribunal consideration was already under way for a case study of concurrent evidence. It began in New South Wales in late 2002 and continued for a year. The study was carried out and evaluated in accordance with good scientific principles. It is a piece of work carried out by Tribunal members and staff which remains significant today. It is, as far as I know, the only carefully conducted assessment of concurrent evidence.

Since the study was commenced, concurrent evidence has been used regularly in the Tribunal to significant effect. I have used it myself on many many occasions. I have used it twice this year, once last week.

Members of the Tribunal recently considered that it was time to revisit concurrent evidence and the New South Wales Professional Development Committee conducted a very successful one day seminar at which Justice Garling of the Supreme Court of New South Wales was a keynote speaker. The seminar exposed the practical difficulties of using concurrent evidence in general cases, particularly when experts are medical practitioners, because of the difficulty of getting them together to give evidence. Useful ways of avoiding the problem were discussed and the matter is now being progressed further.

Professional Development

An important part of the rebirth of the Tribunal in Australia was meeting the challenge of demonstrating that its high reputation was entirely justified. An adequate professional development program was important to this goal.

To my mind professional development is multi-faceted. Training and improvement are vital. So is mentoring and assisting members. But an important concomitant to all this is a system of assessment or appraisal. The object of appraisal is not to conduct an examination which carries a risk of failure but to be satisfied that the professional development program is working at its best.

During a visit to London I approached Mary Holmes, Senior Training Adviser to the Judicial Studies Board of England and Wales, and asked her to come to Australia to help establish a Framework of Competencies for the Tribunal which would serve, as well, as a basis for peer appraisal.

I asked Mary Homes, during her visit, to speak personally to every Tribunal member and to conduct wider sessions. The result was the production of the set of competencies which still guide us today. Along the way, I must say, Deputy President Handley and a number of others had some important input, ensuring that the Framework reflected Australian values and the unique role of the Administrative Appeals Tribunal.

We have now completed appraisals for all members of the Tribunal as at the time the round was concluded. The process, under the steady leadership of Deputy President Jarvis, was a great success. He must take a great share of the praise for what was achieved. He worked out how the process should be undertaken, he recommended the persons who should be appointed, he arranged the training and he supervised every step of the process and more.

I should also mention Narelle Bell who undertook the parallel role of arranging mentoring, particularly for new members. Naturally, Athena Ingall must also be thanked for her untiring efforts in making it all happen.

It is a tribute to all these people and to Tribunal members that the professional development program, including appraisal, was adopted by all members of the Tribunal. It has since operated very successfully. The list of competencies and the program have since been followed by the State Administrative Tribunal of Western Australia, the Victorian Civil and Administrative Tribunal and the New South Wales Workers Compensation Commission.

Non-Compliance

Unfortunately, in 2002, parties did not, on the whole, regard Tribunal directions as binding with respect to time and there was a practice among some regulars of setting about complying with a direction only after follow up contact from the Tribunal.

That practice has now largely gone. Since 2002 the Tribunal has endeavoured to make it clear that Tribunal directions must be complied with. The practice of having tough compliance hearings in place of friendly follow up phone calls was introduced. They still continue, though with many less matters.

In some cases more extreme steps were necessary to change attitudes. A report was sent to me each month of the worst cases. In some cases I had directions hearings requiring the senior representative to attend. In others I wrote letters. I even wrote on one or two occasions to the professional body of the non-complying representative. None of this has been necessary for a long time.

One aspect of non-compliance was late applications for adjournment. This led to the Practice and Procedure Committee adopting a Listing and Adjournment Practice Direction which made it clear that accepting a date for hearing implied acceptance that the party would be ready on the date. Adjournments were only to be granted in exceptional cases. We still experience too many adjournments but the practice direction has led to a significant improvement.

Practice Directions

In 2002 a general practice direction had been in place in the Tribunal for many years. The practice direction was intended to apply to all matters. By 2002 some jurisdictions in the Tribunal were sufficiently prominent and specialised that it seemed appropriate to introduce special practice directions to guide these matters.

The Tribunal has since introduced specific guidelines for the Workers Compensation and Social Security Jurisdictions.

The Tribunal's most recent activity in this area has been the introduction of Expert Evidence Guidelines tailored specifically to the Tribunal. These have been well received and I have dealt with two matters already to which they applied.

Case Management

Until the 1980's the Tribunal's management was directed and financed through the Attorney-General's Department. For a long time the then Chief Justice of the High Court, Sir Garfield Barwick, had been pushing the Government to give that Court, with its Constitutional significance, separate funding in the budget which would enable it to manage itself. Sir Garfield's campaign began in the 1960s. I know that well because I worked for him at the time.

Sir Garfield was successful. So successful that by the 1980s the Government agreed that all Commonwealth Courts and tribunals should have separate funding and manage their own affairs.

At the time the separation of the management function occurred the Tribunal inherited a case management system many of you will nostalgically remember as AATCAMS. At the same time the Federal Court inherited FEDCAMS (CAMS stands for CAse Management System).

Notwithstanding its age in a field where a year is a long time AATCAMS was still around in 2002 when we set about replacing it. AATCAMS did not permit the use of a mouse and required an advance course in information technology to operate it.

Doug Humphreys and Paul Hoffmans, who is no longer with the Tribunal, took a leading role in deciding what should replace it. You might not be surprised to hear that I was very much involved as well. We had detailed proposals and presentations from a number of tenderers. I remember sitting through the detailed presentations.

The result was TRACS (TRibunAl Case System). It had its teething problems but is now working well. Importantly, it cost the Tribunal a small percentage of what other courts and tribunals paid over the years for their case management systems.

Conferences

The Tribunal has had a history of holding conferences. A conference was held right here, in Lorne, in 1994. A lesser success was a Conference in Coogee in 2000 at

which the Attorney-General announced that the Tribunal was to be abolished. Many stories have been told about that Conference. It was not all bad, however, because it led to one of the funniest after dinner speeches I have heard – given by Don Muller on his retirement at our 2005 conference on the Sunshine Coast.

There was no conference from 2000 until 2003, but by then things were looking up. We held a conference in Launceston. A number of you were there. Since then we have held national conferences on the Sunshine Coast, in the Barossa Valley, and in the Hunter Valley.

DP Robin Handley began a practice in Sydney of holding regional conference. He held a very successful one in the Blue Mountains just before I was appointed. Holding a regional conference between each national conference seemed a good idea and so we have now held two groups of regional conferences in attractive but economical locations.

To my mind, national conferences are very important. They remind us we are one Tribunal. They allow us to get to know the people we will be dealing with from time to time and whose decisions we are reading. They help us to improve our quest for uniformity in the Tribunal. They allow us to explore together. They help make our national Tribunal national.

Council of Australian Tribunals

In 2007 the Administrative Review Council recommended that the tribunals of Australia should establish a national association with the object of fostering their joint interests and arranging cooperative programs for their mutual benefit. I think that a major purpose behind the proposal was to enable larger, better resourced, tribunals to assist smaller tribunals.

The Council of Australian Tribunals (COAT) was established at the annual Tribunals Conference in Melbourne in June 2002. The President of the Victorian Civil and Administrative Tribunal, then Justice Murray Kellam, became the first President and I was appointed Vice President. A year or so later I took over the role of President and remained in that role for nearly five years.

During my presidency, the Council undertook a major role in producing a Practice Manual for tribunals. The manual was professionally commissioner and written by academics at Monash University. Although the Practice Manual was written by academics, every step of its writing was supervised by a COAT Committee and by, in particular, Chris Matthies, who brought his special knowledge of tribunals to the process. It was largely funded from a substantial grant of funds provided through the Standing Committee of Attorneys-General and the Australian Institute of Judicial Administration. The procuring of that grant in itself is a story.

The Practice Manual was intended to be a generic practice manual. It provided advice of the kind that is contained in judges' bench books. Topics included procedural fairness and other topics of general relevance.

The Practice Manual was always intended to be a first volume which would be accompanied by a further manual prepared by each tribunal to address their own specific functions.

During my period as President, the COAT undertook a number of other activities. Of particular note was a conference for Tribunal leaders in New Zealand. The conference was followed by a successful conference for tribunal registrars in Melbourne.

I had always planned that the Practice Manual would be followed by on-line courses for new tribunal members. At the time I retired from the position of President substantial steps had already been taken towards introducing such a course, including detailed discussions with Monash University. We reached the point of choosing between two options. Unfortunately, the proposal has not been furthered in intervening years.

An on-line course for newly appointed tribunal members could, to my mind, be very valuable. It would especially be valuable, as were the Practice Manuals, for smaller tribunals. Even in the AAT, however, such courses would be valuable when we have intakes of small numbers of members, as we have recently had, which do not justify full orientation programs.

The AAT Practice Manual

The AAT followed the COAT Practice Manuel with a Volume 2 for the Tribunal. This is a tribute to the members of the Tribunal who were entirely responsible for its production.

There is accordingly now an AAT companion to the COAT Practice Manual which addresses all the significant jurisdictions in the Tribunal as well as dealing with more general matters which are particular to the Tribunal.

A process is underway to update the volume at present. This will ensure that it remains current.

To my mind, the AAT Practice Manual, along with the COAT Practice Manual are among the most significant of achievements during my period as President.

International Program

I have always had an international outlook to the law. It must always have had its seed in me, but I believe that my interest underwent significant growth when I worked as associate to Sir Garfield Barwick from 1967 to 1970. He took me overseas with him five times during that period. The first was when I was 23.

What I learned then, and which has always stayed with me, is that much more is to be gained from studying different systems than from studying similar systems. Australians, New Zealanders and the English are likely to arrive at the same, or similar, solutions to most problems. It is from the study of different systems that novel and innovative ideas are likely to be generated.

I think this is especially true of the AAT which does not want merely to follow court-like procedures. We can learn much from other systems which employ different methods, e.g. that emphasis on oral traditions are not necessarily the best way to arrive at the best decision.

Another reason for the AAT to be involved in international activities is to enable Australia's world's best practice administrative review system to become known internationally. Improving the systems of international review around the world and improving the reputation of the Australia jurisdiction are both desirable aims in Australia's interest.

Before I came to the Tribunal I had significant experience at an international level. I was a member of the English Bar. I had been, for seven years, the Australian representative member of the International Court of Arbitration of the International Chamber of Commerce. This latter experience exposed me to three person arbitration tribunals with continental European lawyer members.

In 1994 and 1995, I was elected the President of the Union Internationale des Advocats and lived during my presidency in Paris. This gave me much more exposure to international legal thinking and to international problems, such as the Rwanda emergency which was happening at the time.

It is probably not surprising, then, that when I came to the Tribunal I began to look for an international outlet for the AAT – and I found it in the Association Internationale des Hautes Jurisdictions Administratives or the International Association of Supreme Administrative Jurisdictions. I approached Chief Justice Michael Black about the possibility of the Federal Court and the AAT joining it together. He agreed.

The result is that the Federal Court and the AAT has made a significant contribution on the world stage of administrative law, including our becoming the co-Presidents of the Association and hosting its three yearly Congress in Australia in 2010. Many of you know that that led to three of the most important leaders of world administrative courts attending our conference in the Hunter Valley in 2010 and fully taking part in all its sessions. They were Jean-Marc Sauvé, the President of the Counseil d'Etát of France, Lord Justice Carnwath (now Lord Carnwath) the Senior President of Tribunals of the UK and Marion Eckertz-Hofer the President of the Federal Administrative Court of Germany.

At the unsolicited request of the Supreme Administrative Court of Thailand the AAT has engaged in a significant program with that Court including significant exchanges

and the presence of senior members of the court at our conference in South Australia.

We have also had unilateral meetings in France and Germany and offered significant assistance to Lord Carnwath, at his request, in connection with the development of the Uniform Tribunals Service in the United Kingdom.

Most recently we have been approached by South Korea and last year we received a delegation from their Administrative Appeals Committee which has a comparable jurisdiction to ours. I agreed to the signing of a letter of undertaking relating to the development of future programs between us. I will be visiting Seoul in a few weeks, at the special invitation of South Korea, for further discussions and exchanges. I will report on this and proposed steps of implementation before I retire.

Norfolk Island

Norfolk Island is, of course, part of Australia but it also has a significant degree of independence. It is more independent, by a long way, than any of the states of Australia. There is presently no Commonwealth income tax or social security on Norfolk. They have their own customs and immigration rules. The Bounty descendants, who make up the bulk of its citizens, trace their origins to a direct gift from Queen Victoria and not to any settlement from or with Australia.
Nevertheless the Australian government decided some time ago to include Norfolk Island more within the Australian government structure.

One initiative was to create for Norfolk Island domestically an administrative law system based on the Commonwealth model. To the extent to which Norfolk Island was already part of the Commonwealth model the Australian system already applied. The AAT has had jurisdiction on Norfolk Island since the inception but, in the absence of Australian tax and social security, and with virtually no Commonwealth agencies there, requests for review in the Tribunal have been rare.

The Tribunal gained domestic jurisdiction on Norfolk Island on 1 March last. This was the culmination of a significant AAT program of preparation. There may not be many Norfolk Island appeals in the AAT but planning to resume providing a domestic

jurisdiction, as the Tribunal had once done for the Australian Capital Territory, involved significant preparation.

Philip Kellow undertook much of the work, including negotiation with the Norfolk Island Government. All this culminated in a visit to Norfolk Island to coincide with the Tribunal's acquiring of jurisdiction.

The Acting Ombudsman, the Information Commissioner and First Assistant Secretary of the Attorney-General's Department accompanied Philip Kellow, Carolyn Krochmal and me on the visit. There was a launch of the AAT's jurisdiction, but, more importantly, there was also a training program conducted by all the visitors for the administrative decision-making on the Island and a well attended information session for members of the public.

So far we have had no applications from Norfolk, but they will come. Please form an orderly queue.