2016 COAT National Conference

Opening Address

Hobart 9 June 2016

The Hon Justice Duncan Kerr *Chev LH*

1 July 2016 will mark the first anniversary of the amalgamation of the former Migration Review Tribunal - Refugee Review Tribunal ("MRT-RRT") and Social Security Appeals Tribunal ("SSAT") with the Administrative Appeals Tribunal ("AAT").

The same date will also mark the 40th anniversary of the opening of the AAT.

Those two milestones provide us with the occasion to reflect on how far Commonwealth, State and Territory and New Zealand tribunals have travelled since the establishment of the AAT provided an autochthonous Australasian model; copied, modified and, I am sure sometimes improved on, for independent merits review of government decisions.

One of the most significant developments in administrative law since the creation of the AAT, at least in my view, has been the establishment of larger generalist civil and administrative tribunals in the various states and territories. This is not to say the case for specialist tribunals cannot be powerful in specific cases. However certain key functional capacities such as libraries, induction and mentoring programmes, and support training and development of tribunal members may be outside the budget of smaller institutions. The development of larger 'super-tribunals' took place initially at a state, rather than the national, level.

The Commonwealth has now moved in the same direction. Since its amalgamation the AAT has received more than thirty seven thousand lodgements and made more than thirty four thousand finalisations. The AAT is on the cusp of becoming the integrated generalist Commonwealth merits review tribunal recommended by the Kerr Committee some forty-five years ago.

The AAT: Achievements and Constraints

In the past year the AAT has:

- co-located its registry premises in Canberra, Hobart and Sydney with good progress with co-location in Adelaide, Brisbane, and Perth;
- ensured that all of its registries can accept applications across all divisions;
- launched an online lodgement system which allows applicants to apply online for a review of a decision in any division;
- created Case Finder, a new case management tool, which allows users to search across all case management systems for basic case information and contact details;
- set up harmonisation working groups which have driven the integration of functions in client and administrative services, member support, and listing and proceedings; and
- evolved a new series of 'Whole of Tribunal' reports to allow the AAT to more effectively monitor and manage its caseload.

That said, very significant constraints continue to limit the AAT's capacity to utilise its resources most effectively.

Many of those constraints are the legacy of differences in statutory procedures left untouched in the translation of the former stand-alone tribunals to divisions of the AAT.

That is an observation, not a criticism. It is doubtful that any amalgamation could have been achieved in the time required by the government, or at all, without a pragmatic decision by all concerned in its design to not let the perfect become the enemy of the good.

However, with that goal achieved the AAT has identified the task of harmonising its procedures to the greatest degree possible as its highest priority.

That must not mean throwing out the baby with the bathwater. Integration does not require uniformity—indeed it would be folly to work on the premise that one size fits all. As my predecessor as the President of the AAT, the Honourable Justice Garry Downes AM, noted in a paper marking the 30th anniversary of the tribunal, each of the tribunal's major jurisdictions "has particular characteristics that impact on the way in which those cases proceed towards resolution". His Honour recognised, as all generalist tribunals must, that jurisdiction-specific guidelines or practice directions can assist "to ensure that the case management process is best adapted to the nature of the case".[1]

However the existing reality at this stage of the AAT's amalgamation can be compared to the government's bringing together different state rail systems while leaving for future consideration inefficiencies due to different heritage rail gauges, different systems for managing freight consignment and different rules for engine drivers operating the system's freight and passenger trains.

It is unfinished work.

But impatience is unhelpful. From time to time I have to remind myself of a meeting I attended with senior members of the then MRT-RRT, shortly after the announcement by the government of its intention to proceed with the MRT-RRT's amalgamation with the AAT. Despite the former MRT having been administratively amalgamated with the former RRT for several years, the senior members of those former tribunals were still sitting on different sides of the conference table. At least to a significant extent, years later, their separate ways of thinking had remained significantly untouched.

It was a useful lesson that the task of achieving a single integrated organisation is never the work of a day.

Moreover, such challenges are far from unique.

Creating effective integrated organisations after bringing together a collection of smaller former tribunals, as has been the case with the establishment of state and territory civil and administrative tribunals and the amalgamated AAT, is not merely a question of legislation—it is also a matter of building a new common culture.

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[1] Garry Downes, 'Making the AAT more relevant—reflections on its 30th anniversary' (Paper presented at the AIAL National Administrative Law Forum, Canberra, June 2007); *AIAL Forum,* No 59 (Dec 2008).

When humans create organisations, inevitably we also build and reinforce cultural norms. Such cultural norms have much positive work to do. They are essential in transmitting and reinforcing values. They allow tribunals to build teamwork and their members and staff to share common commitments. Yet those same cultural norms, too often, can also create invisible barriers to repel outsiders and their ideas.

Achieving the full benefits of integration in such organisations requires time, coupled with a positive strategy, before it is possible to bring down the invisible internal barriers preventing former outsiders from becoming colleagues.

COAT: Benefits and Direction

COAT and its conferences can play a significant, if fortuitous and unintended, role assisting in overcoming those barriers.

When we gather as members of COAT we have to leave behind the comfortable shelter of our respective organisations and our status within those organisations.

As participants in COAT's national and state conferences and as members of its executive, we are exposed to new perspectives and invited to see ourselves as part of a larger whole.

Through COAT we become informed about the broad sweep of things—trends that we as tribunals and tribunal members must anticipate and plan for and, sometimes, emerging issues we need collective will, as can only be expressed through COAT, to resist.

Attendees of COAT conferences become aware, not only through the content of our speakers' presentations but also through informal personal contact with New Zealand and interstate colleagues, of this reality.

The way we undertake our individual work as tribunal members and the way our tribunals conduct their operations are not necessarily pre-ordained. Other—perhaps better—options may exist, or are in the planning stage or being trialled elsewhere.

I remain convinced of the importance of COAT remaining an Australasian, rather than solely an Australian, institution. We on both sides of 'the ditch' have much to gain from mutual trans-Tasman exchanges and I warmly welcome those attending this conference from New Zealand.

New Zealand has of yet resisted the trend to amalgamation.

That observation seems a useful jumping-off point for me to recognise that, notwithstanding the general trend, many smaller jurisdiction-specific Australian tribunals remain in existence. Single jurisdiction tribunals still undertake a very significant part of the work of merits review. Smaller tribunals need this organisation to represent their interests. COAT must never allow itself to become representative of only the larger tribunals and their numerically greater memberships. Indeed, in the face of systemic changes that have occurred, COAT may have to give greater priority to ensuring that it focusses upon their needs.

For that reason, I am particularly proud that COAT has sponsored and funded the development of a package of generic online training modules that can be used as part of tribunal member induction. It undertook that work in the realisation that many

smaller tribunals may lack sufficient internal resources and funding to service that function as effectively as they require.

A challenge ahead for Tribunals

A concern I suspect we all share is the impact intelligent systems will have on tribunal work.

When in 1958 Lucien Mehl published his seminal article 'Automation in the Legal World' at a conference held in Teddington, England on the Mechanisation of Thought Processes and proposed the employment of logic for legal information retrieval and inference, one of the discussants, in response, described this as "very premature, to put it mildly".[2]

That scepticism needs reconsideration. Artificial intelligence already is used by legal firms in Australia and elsewhere for high volume tasks such as discovery, and this Technology Assisted Review or 'TAR' has been recently endorsed for the first time in the first reported decision of the English High Court.[3] However, we may be on the brink of far more significant changes. An example is ROSS Intelligence claimed to be the first AI lawyer. ROSS was built upon IBM's 'Watson' technology. ROSS can gather evidence, read through laws and draw inferences about the material it has collected.

In May 2016, BakerHostetler—a US firm with more than 900 lawyers—employed ROSS for litigation preparation in bankruptcy matters. Where this will lead is speculative but it seems inevitable that large changes are on the way for the legal profession and even for courts and tribunals.

Notwithstanding the High Court of Australia's disfavour of item-by-item sentencing in favour of intuitive synthesis, many parts of the world are embracing computerised sentencing support systems, intended to provide decision makers with a list of correct choices, backed with analytic reasoning:[4]

- In England and Wales, 'Computer Assisted Sentencing' assists magistrates with their sentencing decisions;
- In Israel, 'Judge's Apprentice' provides support to judges in sentencing rape and robbery crimes by retrieving similar cases and assisting in the selection of the most suitable case amongst them;
- In the Netherlands, 'NOSTRA' provides judges with outcomes and arguments in previous similar cases, limited to a scope of offences which involve sentencing decisions that are not too complex;
- In NSW, Australia, a Sentencing Information System (SIS) has been built to ensure consistency and rationality of sentencing decisions by providing data available on the internet and other databases; and

[2] Footnote 4, Edwina Rissland, Kevin Ashley and RP Loui, 'AI and Law: A fruitful synergy' Artificial Intelligence 150(2003) 1.
[3] *Pyrrho Investments Ltd v MWB Property Ltd* [2016] EWHC 256 (Ch); Mark Chesher, 'Technology Assisted Review – court approves use of "Artificial Intelligence" in disclosure' *Lexology* (Online), 22 April 2016 <http://www.lexology.com/library/detail.aspx?g=ba26aec8-bc85-40a8-82de-7d82d10f1834>.
[4] Onyeka Uche Ofili, 'Bail Decision Support System' 3(8) Int Jnl of Engineering and Science 45, 52-53.

- In Scotland, the NSW SIS was adopted by Lord Justice Clerk who was inspired by a demonstration of the NSW system in a conference of the Commonwealth of Learning held in Canada.

It is most unlikely that similar trends will not significantly impact our tribunal environment.

As an illustration, in February 2015, the UK Civil Justice Council's Online Dispute Resolution Advisory Group published a report recommending that ODR services be introduced for low value civil claims in English and Welsh Courts, where members of the judiciary would decide cases on an online basis, interacting electronically with parties.[5] The HM Online Court will handle claims under 25,000 British Pounds and provide online self-help, dispute containment and dispute resolution. The Advisory Group's report even ponders the prospect of 'artificial intelligence' resolving disputes by analysing coded parties' arguments and generating proposed solutions or even a final decision.

We cannot assume such proposals will be resisted.

Nor is it entirely clear that they should be. Indeed, the UK's Lord Chief Justice, Lord Thomas, referred to the Advisory Group's report in his speech on the legacy of Magna Carta in Auckland, New Zealand, in September, to the effect that the use of online facilitators rather than judges would be entirely consistent with Magna Carta.[6]

These and like considerations may necessitate COAT to reflect on the correctness of a key proposition advanced by (then) the Honourable Justice Michael Kirby AC CMG of the High Court of Australia, at the turn of the century regarding the inherent necessity of our role in routine decision making:[7] In that paper his Honour contended:

> Whilst automated information systems, in the next quarter century, will doubtless improve vastly the access of lawyer and layman alike to basic legal information, legal training will be essential to finding the needles of relevancy in the haystack of the Internet. For the foreseeable future, judges and lawyers [and I interpose tribunal members] will remain the trained needle detectors.

That conclusion, 18 years on, appears highly contestable at least for some areas of traditional judicial and tribunal decision making. I therefore welcome the foresight of COAT New South Wales to make the theme of the NSW Annual Conference scheduled for later this year, '*Deliberation and Dilemmas in the Digital Age*'. COAT may need to return to such issues repeatedly over coming years.

For my part I suspect computers may soon become better trained needle detectors than we could ever aspire to be—but that the needle-finding function is not at the core

[5] Online Dispute Resolution Advisory Group, 'Online dispute resolution for low value civil claims' (Report, Civil Justice Council, February 2015).
[6] Nick Hilborne, 'Online and in court' *The Impact of Technology* (Online), 9 November 2015 <http://www.legalfutures.co.uk/reports>.
[7] Michael Kirby, 'The Future of Courts-Do They Have One?' (Speech delivered at the Third Annual Colloquium of the Judicial Conference of Australia, Queensland, 1998); (1998) 9(2) Journal of Law, Information and Science 141.

of what we do. I suspect that our essentiality as tribunal members resides more in what we bring by way of human judgment--and for the same reason as we accept that juries confer legitimacy in criminal trials. The legitimacy of juries is conferred not because they are necessarily objectively better decision makers than judges (or computers) but because that process consigns the ultimate decision maker to an accused's fellow citizens. It reflects and expresses our belief in our commonality as citizens.

Tribunals and their members ensure that in critical areas of public law, the citizen will have accessible and inexpensive recourse to an independent third party to evaluate their claims. By this means the citizen is not left to confront what many of them would otherwise perceive as a remote and faceless state.

Such considerations lead me to pose for your consideration whether, in the necessary drive for efficiencies and professionalism, we may have been too ready to restrict the use of multi-member tribunals, including expert and/or lay members, where that option exists. Their use may be particularly justifiable where findings of fact do not compel a particular outcome but involve the making of the preferable decision.

Humans do not share citizenship with computers.

On the other hand, there is no place for Luddite thinking. Intelligent decision-making systems have grown rapidly in sophistication. They continue to do so. Their transformative impact will not leave untouched the matters with which we deal. They inevitably will play an increasing part in the public and commercial spheres.

We cannot put our heads in the sand.

Sensibly preparing for that reality appears to me to have at least three aspects.

First, if we are to review decisions made or contributed to by intelligent systems, our tribunals will need the human resources and technical tools to understand and review the coding of those systems to ensure that they reflect the law accurately and fairly. As the Honourable Justice Perry of the Federal Court discussed in her Honour's speech at the University of Cambridge in 2014:[8]

> In a society governed by the rule of law, administrative processes need to be transparent and accountability for their result, facilitated. Proper verification and audit mechanisms need to be integrated into the systems from the outset. And appropriate mechanisms for review in the individual case by humans, put in place. If such steps are taken – if the proper safeguards are in place – automated decision-making may, in fact, promote transparency and accountability, while enabling the greater efficiencies offered by the use of such processes to be achieved.

[8] Justice Melissa Perry, 'iDecide: the legal implications of automated decision-making' (Speech delivered at the Cambridge Centre for Public Conference 2014, Cambridge, 15-17 September 2014) <http://www.fedcourt.gov.au/publications/judges-speeches/justice-perry/perry-j-20140915#_edn2>.

Second, we should ensure that we move into the online environment at least to the degree that we can be readily accessed by computer literate users. Further, we should be open to innovations such as ODR services, if they can be shown to be useful in meeting our statutory objectives of providing a mechanism of review which is fair, economical and quick.

Third, we must hold, articulate and defend the ground we have where members of tribunals are required to bring their unique human capacities and common citizenship to bear on decision making.

Welcome

I welcome you to Hobart for this exciting conference. I congratulate the conference organisers for a programme which will prompt much discussion. I hope many of you stay for the weekend to enjoy Dark MoFo or other many attractions of Hobart and Tasmania.

I urge you, regardless of your background, to engage with the speakers and fellow tribunal members to reflect on the challenges ahead we share in common.

I now have great pleasure in declaring the 2016 COAT National Conference open.

Duncan Kerr