Level 4, 190 Queen Street, Melbourne 3000 Telephone: 1800 144 188 Fax: 03 9642 5185
Operations in: Adelaide, Brisbane, Canberra, Darwin, Melbourne, Perth, Sydney and Alice Springs
Email: aatorders@dtiglobal.com

TRANSCRIPT OF PROCEEDINGS

ADMINISTRATIVE APPEALS TRIBUNAL

CEREMONIAL SITTING

BEFORE:

THE HON JUSTICE DUNCAN KERR, President
THE HON JUSTICE RICHARD EDMONDS, Acting President Designate
MISS STEPHANIE FORGIE
THE HON BRIAN TAMBERLIN QC
MR PHILIP HACK SC
MR JAMES CONSTANCE
MS FIONA ALPINS
PROFESSOR ROBERT DEUTSCH
MS KATHERINE BEAN
MR GARY HUMPHRIES
DR CHRISTOPHER KENDALL
DR IRENE O'CONNELL
MR JIM WALSH

AND AS FORMER PRESIDENTS:

THE HON SIR GERARD BRENNAN AC KBE QC
THE HON DARYL DAVIES QC
THE HON JANE MATHEWS AO
THE HON GARRY DOWNES AM QC

SPEAKERS:

SENATOR THE HON G BRANDIS QC, Attorney-General
THE HON MR R ELLICOTT QC
MR D McCONNEL, President, Law Council of Australia

SYDNEY REGISTRY
10.05 AM WEDNESDAY, 1 JULY 2015

PRESIDENT: Mr Attorney-General.

MR BRANDIS: Thank you, Mr President. Might I begin by acknowledging you and acknowledge the fact that we are joined at this special ceremonial sitting of the Administrative Appeals Tribunal by four former Presidents of the Administrative Appeals Tribunal: the inaugural President, the Honourable Sir Gerard Brennan, along with the Honourable Daryl Davies QC, the Honourable Jane Mathews and the Honourable Garry Downes AM QC; indeed, all but one of the men and women who have served as President of the Administrative Appeals Tribunal take their seat on the Bench this morning.

Might I also acknowledge the presence of the Honourable Bob Ellicott QC, a former Attorney-General and one of those of whose brainchild this Tribunal was, and from whom we will hear shortly. Might I acknowledge all of the Deputy Presidents and Members of the Administrative Appeals Tribunal, now a much larger population than it was yesterday, heads of the various state administrative review tribunals who have joined us, Mr Graham Perrett MP, the Parliamentary Secretary to the Shadow Attorney-General, Mr Duncan McConnel, the President of the Law Council of Australia, other distinguished guests, ladies and gentlemen.

Today is a red letter day in the history of Australian administrative law by any measure because today we gather both to convene for the first time the Administrative Appeals Tribunal in its significantly expanded form, but also to commemorate not one anniversary but two, the 40th anniversary of the Proclamation of its Act in 1975 and, as Sir Gerard Brennan reminded me a moment ago, the 39th anniversary of its inception in 1976. The history of the Administrative Appeals Tribunal goes all the way back to the Gorton Government when, in 1968, the Kerr Committee was convened. The members of the Kerr Committee, as well as Sir John Kerr, were Bob Ellicott, who sits beside me - the only person ever to have served at different times in the offices of both Solicitor-General and Attorney-General of the Commonwealth - Sir Anthony Mason and Professor Harry Whitmore.

The Kerr Report of 1971, among its principal recommendations, recommended the creation of a single Commonwealth merits review tribunal. That idea was carried forward during the time of the Whitlam Government and the Act, which constitutes this Tribunal, was passed in 1975. No sooner had the Administrative Appeals Tribunal convened for the first time, though, the following year, then over a period of time, other merits review tribunals with specialist jurisdiction emerged. It became apparent by the late 1990s that the original genius of the Kerr Report, which was to have a single comprehensive merits review tribunal responsible for all Commonwealth administrative review, was at risk of being lost amid the profusion of separate review tribunals.

The event we mark today in fact has its origins almost 20 years ago when work began - I said in the late 1990s but, in fact, it was in the middle 1990s - to amalgamate the various merits review tribunals within the Administrative Appeals Tribunal. That work began under the Keating Government, it continued throughout the long period of the Howard Government, it continued through the period of the Rudd/Gillard/Rudd Governments and has now, at last, been brought to fruition today.

I mentioned a moment ago the seminal role of the late Sir John Kerr but, as I have said before, the accomplishment that we mark this morning is, in fact, a tale of two Kerrs, a tale of two Justice Kerrs - Sir John Kerr and you, Mr President, the Honourable Duncan Kerr - because the achievement that we mark today would not have been possible without your steadfast cooperation, support, attention to detail and encouragement for which, on behalf of the Commonwealth, I thank you.

I also want to acknowledge the dedication and professionalism demonstrated by the other heads of jurisdiction who are amalgamated within the Administrative Appeals Tribunal from today: Jane Macdonnell, the Principal Member of the Social Security Appeals Tribunal, as it was; and Kay Ransome, the Principal Member of the Migration Review Tribunal and Refugee Review Tribunal, as they were until today. They too, have made critical contributions to the success of the amalgamation.

The amalgamation of the four key Commonwealth merits review tribunals is, as I've said, a significant landmark in the history of Australian administrative law. It returns us to the coherent merits review framework first envisaged when the AAT was established 40 years ago today. The achievement of this outcome at the political level owes its accomplishment in part to the cooperation of the Minister for Social Services and the Minister for Immigration and Border Protection, and I want to thank them for their participation and contribution. At the time most of the work was done, the Minister for Social Services was the Honourable Kevin Andrews MP, and the Minister for Immigration and Border Protection was the Honourable Scott Morrison MP. In the way of politics, both of those gentlemen have moved on to other important roles but it is appropriate to acknowledge their contribution and cooperation.

I also want to acknowledge the cooperation of the Honourable Mark Dreyfus QC MP, the Shadow Attorney-General, who gave this measure bipartisan support in Parliament and who is represented here this morning, as I've said, by his Parliamentary Secretary Mr Perrett. I thank the members and staff of the various tribunals, the officers of the relevant departments for their hard work, my own officers, in particular, and I acknowledge the presence of, and wish to thank Mr David Fredericks, the Deputy Secretary of the Attorney-General's Department, in particular, for their cooperation, their dedication and their collegiality in implementing the amalgamation.

This new AAT will be a strong, generalist body which will nevertheless retain the key specialist expertise of the MRT, RRT and the SSAT.

All the amalgamating tribunals bring an impressive membership and staff. The new AAT will have the benefit of all the strengths and expertise of its constituent parts while recovering the crystalline purity of Sir John Kerr's vision. Looking towards the future of the AAT, we can clearly see that all of the constituent elements stand to gain from this amalgamation. The amalgamated AAT will support and promote independence, transparency and efficiency in decision-making and good public administration, features which the community have correctly come to expect and to which the community is entitled.

Amalgamation creates an environment that harnesses and shares the knowledge of the membership and staff of the four tribunals. That extends beyond technical subject matter knowledge to encompass best practice, good procedure and wise decision-making. While we meet today for a formal and celebratory occasion it is, of course, the sense of informality that the tribunals pride themselves on which will continue to be essential to their character and to the dispatch of their daily work. Informality is an integral feature of the merits review process; it enhances effective engagement and accessibility for those seeking independent, quick and fair review of administrative decisions.

In closing, I want to quote the words of Kerr J who reflected on the purpose and function of the AAT when he took office as President three years ago. Mr President, this is what you said then:

> *The collective strength of the AAT resides with its extraordinary team of skilled and independent-minded decision-makers and with the experienced staff who support them. Any sensible person would first want to draw on that collective experience and I look forward to drawing on that experience.*

That vision will not only remain intact upon amalgamation, it will flourish. The new expanded AAT will continue to operate with the existing rigour of all of the constituent tribunals strengthening its essential and respected position within the administrative law landscape.

Thank you, once again, Mr President, for your instrumental role in what has been achieved today and I wish the Members and the staff of the amalgamated Administrative Appeals Tribunal every success as you embark on this exciting new chapter.

PRESIDENT: Thank you, Mr Attorney. Yes, Mr Ellicott.

MR ELLICOTT: It's a very difficult task today when I look at all of you and realise that you're all either old friends or old colleagues or judges of the Federal Court or the Supreme Court, people that I've known throughout my life, and it's a great privilege today to be able to come here and talk to you. I didn't realise it was going to be so grand, but thank you for asking me.

I wanted to make a confession at the start because I had a love affair in the '40s. I had a couple of others I'm not going to talk about, but I had a love affair with administrative law. Now, that's a strange thing but I seem to get worked up about the rule of law on the one hand and droit administratif on the other. I felt so strongly that - you know what I did - I arranged to become an academic; I actually wrote to the London School. I arranged my accommodation, I arranged all the things that I had to do and suddenly I said to myself, "What on earth are you doing?" I had this strange idea that I could be an academic and I said to myself, "Do you want to be an academic or do you want to be a barrister?" and I opted for barrister. I didn't jump in the car but, in effect, I went off and I married the girl that I had chosen and I started life as a barrister.

Now, those '50s and '60s are some of the glamour years in law reform in Australia and I want to say this at the beginning: nothing that is done later you'll find - you'll find various people claiming the star position, that it was their reform. That period was a period of immense reform, there were people talking about the High Court, what was going to happen to it, and that was the centrepiece, and I want to take you back to that because it led to other ideas manifesting themselves. There was a person called Rae Else-Mitchell who some of you will remember. He was full of ideas. When he went to the court I said to him, "For heaven's sake, what are you doing?" He was just a vibrant person, and he continued to be, but he fed into the system lots of ideas.

There were people like John Kerr, of course, and others, Nigel Bowen and Barwick when he was Attorney-General; all these people have contributed. Maurice Byers was another, and I'm sure there were many others I don't mention but I just want to say that, when you come to this reform, it is the contribution made by lots of people during that period and you must understand that it was a period of great research and great insight into what the future held. I just say that because that's what we need to remember today because this is the fruition of things that have come about.

Needless to say, I quickly found myself in administrative tribunals. As many of you know I read with Nigel Bowen, extraordinary man - an extraordinary man - a person whom we should remember today because I'm sure it was his initiative that put the Kerr Committee into place in October 1968, and I'm sure that you have to see that in history as part of his contribution to this Tribunal.

I found myself in strange company at times; I thought I was in front of the Taxation Boards of Review one day. I was sitting there, junior to Simon Isaac and Barwick is for the taxpayer and suddenly there's a halt and I hear this voice descending on me saying, "Bobby, you're going bald." All the informalities, but also all the - in other words, going back to Sun newspapers, an administrative tribunal is what you call it apparently and sometimes the tribunal has adopted the judicial method but it is really what you call it, what you set out to make it, and that's exactly the basis upon which these things happen.

Now, what the surprise I got when I became Solicitor-General and I find this great love for administrative law is not only been practised but now has come to fruition; we're going to do something about it. So that was a big surprise. I came in at a time when Mason, Kerr and Whitmore had done a lot of work; they'd been there for, say, 12 months or more. So I came in at a time when the ideas were starting to formulate and the atmosphere was - of course, John Kerr was a judge of the Industrial Court and he was sort of everywhere. He had his finger in the salaries before the Remuneration Tribunal was set up and I would see him at Parliament House during that period.

When you talk about a person like John Kerr it's a very difficult thing to describe. In a way he was complex, a complex person, but he had the capacity to research and no doubt that came out of his past and his experiences during the war, but you would sit down with him in the committee and you would go up every alley and you would search them and the discussion would go on. It was in this complexity of mind but, nevertheless, simplicity of decision-making, that this came about. A great deal of the work was done by Harry Whitmore, I'm sure. Mason and I were then sort of on the loose in the sense that we couldn't devote hours and hours because we had other tasks and I remember during that period I was in the Gove Aboriginal Land Dispute and that took six or eight weeks so I would have been away.

So the contributions were, in a sense, unequal but the decision-making was clear, but you have to think that a lot of it was certainly the work of John Kerr and Harry Whitmore and, no doubt, the perceptive and deep-seated analytical mind of Mason. I won't talk about my contribution, but we did arrive at those basic decisions.

Now, part of the complexity of the situation - do you know what John Kerr and I were doing on 21 July? We were doing something which would be surprising. This report went in in August 1971 but, on 21 July 1971, we were down at Manuka Oval and we were sitting on the grass and we were there as protesters, you know, that's how we felt. We were going down there to protest and can you imagine that? These people that became part of our history, they're never studied or understood, or really appreciated. If you mention the word "Kerr," well, you have to think about that personality.

So the Report comes in and eventually, as you know - another thing happens actually. When the Whitlam Government came in I thought this is the time to get some reform done so I knew Gough Whitlam and Kerr had been on the same floor, and I gave him a list of things that the government could do by way of law reform, and it had all these administrative reforms in it. I saw this as their chance and my opportunity to get this on the statute book. The only thing that came through was the Administrative Appeals Tribunal and, of course, we took part - I was then in Parliament - in the debate and we agreed to it, of course, it was part of my side of politics' policy and we agreed with it.

So it was there and then, of course, November the 11th, December the 13th and I become Attorney-General and what a surprise I got. Here I am, I had this love affair in 1949 with administrative law and, here I am, I've got this task of setting up this Tribunal. Now, those days were frenetic but there are a number of things I just want to say about what is important. May I say, before that, I read a speech, Administrative Review Council which I gave in 1976 at the establishment of the Council and I spoke of the Tribunal. Mr Ellicott said:

> *Although there had not been an avalanche of work so far at the Administrative Appeals Tribunal, the Tribunal would end up as a very substantial body.*

Then I said this, and I must say I was hands-on, I would've said this - not only said it but written it or approved it:

> *It will probably grow beyond the size of any court in the country in terms of the various hearings, the number of applications for review, the make-up of the Tribunal and the personnel. Eventually, it will incorporate social security appeals, repatriation appeals, appeals under ordinances of the Australian Capital Territory -*

Hasn't happened -

> *and will cover a very wide field.*

Now, that may have been December 1976. There were challenges in setting up this body and they're all important today. The most important thing is to remember that we are engaged in the pursuit of excellence. There's nothing less than that that we can accept. We will not accept it from an Attorney-General who won't give us funds, we've got to pressure him for them; we've got to do that. That's the task of the Tribunal and those who support administrative law. He may not have the funds or he might say something that's quite pleasant but, nevertheless, passes you by. But you've

got to do it. Important, terribly important, that we pursue excellence everywhere and not forget it.

The other thing that's important: I don't know exactly how it happened but I had a car stolen in 1955, it was a Holden and I had to give it up. I had left it down in the street in Sir John Young Crescent, where you could park all day then, and when I came back it wasn't there. So I got one of these Ford Zephyrs which was a rust bucket and a dust bucket and I wasn't very happy, but two years later I get this phone call from the police asking me to go up to Brisbane. When I get there I'm introduced to this young fellow called Gerry Brennan and there he was, he was appearing for the defendant who pinched my car. Now, of course, they removed all the numbers on the car and I was able to, by a brilliant piece of advocacy, I pointed to an ice cream cone mark on the ceiling where my daughter had pushed it up and I was able to identify it was my car. Well, that took the wind out of his sails. But the next thing he does he starts questioning me, not fairly, on New South Wales criminal law and, of course, I'm not a criminal lawyer and I expected him to know that but he didn't. That's how it all started.

I knew that the most important thing - because I had observed it, I had been around for five years in government - to have was the right person in charge. I then went in search and I'd had something to do, as I said, about Aboriginal land rights and I learned about this fellow Gerry Brennan. We really didn't have a lot to do with one another from that odd occasion because we were both busy in practices in our states and now and again we may have, but it's gone from this old 88-year-old mind. What I recall is that he had been counsel before the Royal Commission into Aboriginal Land Rights and had done a magnificent job, and I learned about this and I remembered that occasion, of course, and I satisfied myself that I had somebody of immense merit to do the job that was needed. So I chose Gerry Brennan and that was the first thing to tick off. If I hadn't chosen Nigel Bowen, if I hadn't gotten him to become the first Chief Judge of the Federal Court, that Court could have been a failure because it had enemies all around the Commonwealth. They're always there, they're there today; there are people in state courts who don't understand why the Federal Court exists.

One reason at that time was that no Commonwealth government was going to give the right to stand in judgement of their public servants to a state court. That was enough reason to set up the Federal Court. It also had other jurisdictions. It was meant to be a confined court at first but it's exploded. I talk about law reform, there are big issues about law reform, about the judicial system in Australia now that need to be asked. Have we got the best system? What's going to happen when the criminal jurisdiction in federal matters, as it surely will, will go to the Federal Court? What is going to happen? You've just got to ask the question.

But, if I may say so, the Bars, the lawyers are about other things. I know human rights are important, but this is important to our country at that level and that's the sort of debate we should be having today but the Federal Court then was the centrepiece. Just saying, I knew I had to get the right person for that and I did. I had to take Deane up to the top floor to get him to go over from the state court and show him this wonderful vista up the harbour and I said, "You'll be President of a Trade Practices Tribunal and you will be able to sit in these wonderful chambers." He came. I'm not saying that that's what attracted him, of course, but he came. So we got the Court off. We got this Tribunal off because we had the wonderful capacity of its first President.

When you work it out, these are the important things: the pursuit of excellence; the right to reasons. One of the things that bedevilled us in the previous period were the prerogative writs certiorari, mandamus and there were lots of people who didn't have a remedy, they couldn't go to court you'd have to say, "Sorry, it's not on the record". If it wasn't on the record you couldn't get through. If you had a tribunal like the Taxation Boards of Review well, that was all right, you could hope to be able to deal with the issues, know the reasons and then a sort of judicial method, have the matter dealt with, but you couldn't under the prerogative writs and that meant that the ordinary citizen couldn't get there. That's what it meant because, have in mind that - I know there are a lot of you here today probably that the enemy is actually the heads of departments. They're the ones who will try and stop the process being extended.

I can't tell you how difficult it was - I don't know why I did it but I resigned; I think I do know why. But it kept me out of this portfolio and I just noticed what was happening, that they were just delaying the schedule; remember, a schedule had to be determined. Well, you know because it's still going. In a sense, that happened because of the resentment of the upper public service at the time, Sir Frederick Wheeler and others, who were sort of actively trying to stop the thing. It's important to know - I use the word "enemy" and you know what I mean, I'm not being too dramatic in saying that but there is a natural resistance not to have somebody overlooking your discretions. It's embedded in the public service, that's their job. They do it and sometimes they succeed.

So that's another thing that was well in mind at the time and it had to be overcome. The ADJR Act didn't come into force until 1980 and I found myself again surprised. I would go the Federal Court myself and I sit there for two years, but I'm sitting on the first applications that are coming in under the ADJR Act, notwithstanding that the Bill was introduced by me in 1976 and passed, I think, in early 1977.

The right to reasons, therefore, is immensely important. I think we need also to understand that merits mean merits. In other words, there should be a wide definition or idea about what merits mean. To me, they mean all the facts

and all the law; that's the understanding that the Kerr Committee had and I believe that that should still be the understanding. If there's any right at law that a person might have in relation to the Commonwealth when it's exercising a discretion, then that right should be available to them, whether it be founded in law or in equity, using the old expressions, or in a statute. That's fundamental to the Tribunal: unless it sticks to that, then it's denied its authority, and that is its authority; a wide view of the merits appeal.

We need also a wide view of person aggrieved. Actually, one of the decisions that I gave was Toohey's case and that remained the definition until more recently the High Court had another go at the issue and they quoted the judgment, but it gave - for some reason I had added and it would include - business matters in relation to a person aggrieved.

So far as the people who can come it needs to be wide and, as I saw it - and I believe it should still be the basis - that people are entitled to come basically if they had an interest which was greater than other members of the public, because you can't tell at the end whether the preferable or correct decision which the appeals tribunal is going to give is going to assist those people or not. If it's a business interest it may come to them sideways so they don't have a direct right but somehow they get a benefit out of it. So you need that wide view of person aggrieved.

The role - and this completes my address - of the Administrative Review Council, as we saw it, is immensely important and, again, the quality of the people that are on it has to be maintained and it has to represent a broad set of interests. They must be not only lawyers but lay people, departmental people and they must be of the highest quality that you can get. They need to be funded - Attorney-General, it's pretty important - I'm not saying they're not being, but they need to be seen as the fulcrum of the Administrative Appeals Tribunal and the other things that are happening in administrative law. They're the engine room, they're the defenders of the faith, if you like. They're the ones who are driving this pursuit of excellence in review.

In conclusion, it's a great honour to me to be able to be here today and to talk to you and I hope I haven't delayed you too long with these side bits. Thank you.

PRESIDENT: Thank you very much, Mr Ellicott. Mr McConnel.

MR McCONNEL: Thank you, Mr President. May it please the Tribunal. It is a great honour to appear on behalf of the Law Council of Australia representing more than 60,000 Australian practising lawyers through the constituent bodies of the Bars and law societies. Can I also depart from the script momentarily and say that that was a most wonderful and enlightening speech by Mr Ellicott there, it was really truly fascinating.

Today represents another milestone for the Administrative Appeals Tribunal. Since the legislation which established it came into effect in July 1976 it has expanded in a way that is a tribute to the robust nature of democracy in Australia.

The Attorney has already noted that the Kerr Report in 1971 in fact recommended a single generalist tribunal. In 1976, when the AAT was established, the Australian Law Journal remarked that it had taken the government a full five years to do so. It said:

> *One can but echo the comment in the leading article of the Sydney Morning Herald of 2 July 1976: never let it be said that the Commonwealth acts overhastily in such matters but better late than never.*

We'll just have to wait to see what the Australian Law Journal might say about the time it's taken to see the amalgamation complete its vision. On the learned Attorney's version it's 20 years but on Mr Ellicott's version, it's something nearing 60 years. The Attorney-General has spoken to the practical importance of the amalgamation as being recognised today; a view which the Law Council shares. It should promote the sharing of best practice in tribunal operations and generate significant efficiencies and savings. This has certainly been the experience of states that have gone down this road, most recently in New South Wales with the New South Wales Civil and Administrative Tribunal.

The Law Council is acutely aware that over many years it has harangued and harassed successive governments for more money to fund publicly-available legal assistance, more accessible tribunals and courts and judges and members of courts and tribunals. Any efficiencies that will free up valuable resources to those ends is greatly appreciated and acknowledged. The success of this tribunal over the past four decades owes much to its founders, as we've heard. As Attorney-General Robert Ellicott convinced his parliamentary colleagues that the time had come for a body which reviewed across all levels of government, he appointed Sir Gerard Brennan, the future Chief Justice of the High Court, as the Tribunal's first President and who is universally regarded as having been pivotal to the acceptance and the workability of this Tribunal. It is a great privilege, indeed, to be in the company of both men today.

Before Mr Ellicott's administrative law package was introduced into Australian law, as administrative law it was neither particularly well-known nor regarded as, indeed, a separate area of law, but the establishment of a Commonwealth Administrative Appeals Tribunal was part of a wider movement, including in the United Kingdom and New Zealand, to establish a means of merits review of administrative action. It was an extension of the concept of judicial review which Sir Gerard Brennan had later described as

neither more nor less than the enforcement of the rule of law over executive action. It is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly.

It's the modern embodiment of the concept of restraint on executive power reflected in Thomas Fuller's famous expression, "Be you none so high, the law is above you". The Administrative Appeals Tribunal has been a very effective part of the solution, at least in the area of public law. It has been described as a system that is just, quick and cheap, although the former New South Wales Chief Justice James Spigelman has been said to have observed the importance of the comma appearing after the word "just" when using that meaning of the expression.

The AAT went beyond judicial review to administrative or merits review of such action. The distinction is not always clearly understood but the need for an expansion of judicial functions into such merits review is something that was identified as socially significant in the 1970s. In a paper delivered by Sir Gerard Brennan in 1979, while still President of the AAT, he reflected upon what Lord Scarman called in 1974 the "remaindering of the law to death in a forgotten corner". Lord Scarman had warned that:

> *Our legal structure lacks a sure foundation upon which to build a legal control of the beneficent state activities that have developed in this country. As the traditional business of the civil court falls away… the business of the so-called administrative tribunals which guard the citizen, where the administrator has taken over from the law, is certain to increase. Unless the legal profession adjusts its practice to this new forensic world, its own place in society will become unsure and the relevance of the law and lawyers to the solution of modern problems is suspect.*

Sir Gerard described the AAT as containing the seeds of development which will, I think, engage the attention of lawyers to an increasing extent:

> *As our society grows more complex, the growth of public law is to be expected. The limits of judicial review in their traditional forms would leave without adequate supervision large areas of decision-making which affect individual interests. The power so to affect individual interests is reposed for the most part in the bureaucracy which, under the Westminster system, is answerable to a minister. The orientation of administrative action is towards a purpose, ministerially defined.*
>
> *A system of external review, regarded as part of the judicial arm of government and independent of the executive, can hold the*

balance between the purposive activity of the bureaucracy and the individual interests of the citizen.

The Administrative Appeals Tribunal, the Migration Review Tribunal, the Refugee Review Tribunal and the Social Security Appeals Tribunal are all regarded by practitioners as professional and independent review bodies of the utmost integrity. They have made justice reasonably accessible and affordable and underlined the importance of procedural fairness in our justice system. The noted academic, Professor Cheryl Saunders, said that one lesson we could learn from other countries was to be proud of the Commonwealth administrative review system. She described it as:

An object of envy by those who know and understand it, matched only by a wonder that changes of that magnitude could politically have been achieved.

Today marks another such change of significant magnitude. History will record that today's Attorney-General, Mr Brandis, has achieved a similar political feat and the Attorney has today graciously acknowledged the bipartisan support that was necessary to fulfil it. It is indeed fitting, and a privilege, for the Attorney to be present at today's proceedings amongst so many of the other significant agents of change in this important jurisdiction. The Law Council is proud to be invited to participate in today's historic event, an event which has at its heart the two fundamental concepts which define us, namely, access to justice and the rule of law operating together in practice.

If I may depart from the brief for a moment on this occasion and also acknowledge, Mr President, that today also marks the swearing in of Dr Chris Kendall as Deputy President. Dr Kendall was, until his appointment last Friday, a member of the Executive of the Law Council of Australia. It is a great appointment for the Tribunal, and a great loss for the Law Council. I shall miss his wise counsel, laced with his characteristically acerbic wit, and, most importantly, his guidance and his confidence. I wish him well in this next phase of his already distinguished career. May it please the Tribunal.

PRESIDENT: Thank you indeed. Well, thank you, Mr Attorney-General, Mr Ellicott, and Mr McConnel. On behalf of the Administrative Appeals Tribunal, I welcome our special guests Sir Gerard Brennan, the Honourable Daryl Davies, the Honourable Jane Mathews and the Honourable Garry Downes, each former presidents of this Tribunal. They join me, Edmonds J, Deputy Presidents and our Acting Division Heads on the Bench, and we are honoured to have you with us as our guests for this ceremonial sitting.

I acknowledge at the Bar table and welcome the Honourable Graham Perrett, Shadow Parliamentary Secretary to the Shadow Attorney-General who is representing Mark Dreyfus MP on this historic occasion. We also welcome,

as our honoured guests, the President of the New South Wales Civil and Administrative Tribunal, Wright J, and the President of the Western Australian State Administrative Tribunal, Curthoys J.

The President of the AAT must be a judge of the Federal Court of Australia and, joining us today, is the Honourable Michael Black AC QC who served as Chief Justice of the Court for almost two decades and I am delighted that he, also, has honoured us with his presence. The AAT acknowledges also Mr Stuart Clark, the President-elect of the Law Council of Australia. I welcome all of the members of the SSAT, RRT and MRT who are with us today. Each of those organisations has its own rich culture. Finally, and most importantly, I welcome everybody in this hearing room and around Australia watching by video-link. Members and staff of the tribunals which have merged, this is another stage of the development of administrative law in Australia, and we have much we can learn from each other.

The Kerr Committee that has been referred to by all of the speakers concluded in 1971 that:

> *The basic fault of the entire administrative law structure is, however, that review cannot, as a general rule, be obtained on the merits, and this is what the aggrieved citizen is seeking.*

The Kerr Committee recommended that merits review should be undertaken by a single, highly skilled, generalist body. Four decades later, with bipartisan support, that recommendation has been finally implemented. But as simple and commonsense as that achievement may now seem, we should never forget how fierce the opposition originally was to the principle of merits review.

As Robert Ellicott QC has reminded us, and I recall the words of Sir Anthony Mason; Sir Anthony said this:

> *Let there be no mistake about this. There was a very strong bureaucratic opposition to the Kerr Committee recommendations. The mandarins were irrevocably opposed to external review because it diminished their power.*

But, despite their otherwise titanic struggles, Prime Ministers Whitlam and Fraser, each with the support of their respective attorneys-general, committed their governments to the reforms that broke the back of that bureaucratic opposition. The Administrative Appeals Tribunal Act of 1975 was enacted during the term of the Whitlam Government and brought into operation by his successor. What Robert Ellicott QC said today should remind us of the distance we have travelled since the establishment of the Administrative Appeals Tribunal and I thank him for his remarks.

That merits review is taken for granted, as it if were a part of our national constitutional settlement, is no small thing. We owe much of that to Sir Gerard Brennan's initial leadership of the AAT and the leadership of each of the Presidents who have since stood in Sir Gerard's very large shoes. It is also a tribute to all of the men and women who have served so well the cause of merits review, whether they be members or officers of the AAT, the MRT, the RRT, the SSAT, or the Veterans' Review Board. Due to their largely unsung work, Australians take for granted a right to seek merits review.

I welcome that my fellow citizens can make that assumption. But for those of us who have come together today, not only to mark the passage of the Tribunals Amalgamation Act, but also to celebrate the 40th anniversary of the establishment of the AAT, it can be frustrating that the significance of those events is so rarely acknowledged. The AAT Act is our administrative Magna Carta, marking the surrender of unaccountable officialdom. No member of the AAT should ever take any part of that remarkable history for granted.

I am sure that our former Presidents Sir Gerard Brennan, Darryl Davies, Jane Mathews, and my immediate predecessor who helped me find my feet when first appointed, Garry Downes, will join me in welcoming each of you who, yesterday, was a member or officer of the Migration Review Tribunal, the Refugee Review Tribunal or the Social Security Appeals Tribunal as a new and valued colleague within the expanded AAT.

I thank the President of the Law Council of Australia for his remarks. They remind us of the importance of the legal profession and the contribution that legal assistance makes to enable those who have rights before administrative tribunals to have their voice heard. But, most importantly, I want to thank the Attorney-General for honouring us both on this occasion, for his personal commitment and attendance. Without his personal commitment I doubt the outcome we are celebrating today could have been achieved. I would ask him to pass on my appreciation to those in his department who worked so hard behind the scenes to transition this from policy to implementation.

The new AAT will have over 350 members and over 600 staff. It will deal with about 40,000 matters a year. I look forward to the AAT being able to draw on the best know-how that each of the amalgamating tribunals has to offer to ensure that our Australian model remains the best merits review model in the world; and again I echo the remarks of Mr McConnel in his observations. To remain the best we must deliver enhanced efficiencies, but I reject absolutely that fairness of our processes, or the quality of our outcomes, can be a trade-off; that comma is important.

But the AAT's expanded workload obviously cannot be dealt with by a one-size-fits-all approach. The Tribunals Amalgamation Act of 2015 requires our task to be pursued, having regard to what is proportionate to the

importance and complexity of a matter, and provides for the AAT to be led by a President, assisted by Division heads. The capacity to deliver the outcomes expected by the Parliament will depend on strong appointments being made to those latter positions. I look forward to the Attorney-General consulting and making those appointments as soon as is soundly practicable so as to enable the Tribunal to move forward with a settled leadership team.

Meanwhile, as the Attorney has done, I record the debt the AAT owes to the former Principal Members of the SSAT and the MRT-RRT respectively. Jane Macdonnell and Kay Ransome each worked tirelessly, and with selfless dedication, as heads of their respective jurisdictions to ensure the success of this amalgamation. I also want to acknowledge the work undertaken by Deputy President Philip Hack QC who was coopted as a member of the Heads of Jurisdiction team. As a result of his initiatives, the AAT has adopted nationally consistent procedures for its tax and commercial list, and that has been welcomed in user groups that we have held around Australia.

I want to acknowledge the work of the Tribunal's Taskforce, established by David Fredericks and headed initially by Tiffany Karlsson and, more recently, Sara Samios of the AGD's tribunal reform team; and, far from least, the contribution made by the Registrars and staff of the AAT, SSAT, and the MRT-RRT who worked on this project over the past 12 months. There are far too many tribunal staff who have made important contributions for me to name them individually, but, in the forefront of my mind, are our staff who provided the three tribunals with robust financial advice in the planning stages of the amalgamation and the members of the AAT's legal and policy team and their counterparts in the two other tribunals who assisted with draft legislation and regulations, and then ensured that practice directions and delegations necessary for a smooth transfer today could be achieved. We go forward with a strong Change Manager and Registrar in the person of Sian Leathem.

The process of bringing together three significant existing institutions with minimal disruption necessarily has left some issues for the future. Some legacy issues that were incapable of quick agreement were put aside for later attention. There are two quite different funding models that apply to different parts of our single tribunal. There are unnecessary inconsistencies in procedures between different divisions. So the passage of the Tribunals Amalgamation Act is not the end of the amalgamation reform task, but it is an essential and significant beginning. And lest my earlier observations suggest any doubt, this amalgamation has my unqualified support.

As Minister for Justice in 1993 I referred tribunal reform to the Administrative Review Council as an issue for its consideration. The Administrative Review Council's 1995 Better Decisions Report recommended the amalgamation as an independent body within the Attorney-General's portfolio. I thank the Attorney-General for his reference

to this reform process being a tale of two Kerrs. Reflecting bipartisanship, as the Shadow Attorney-General observed in his response to the second reading speech on the Tribunals Amalgamation Bill on 13 May 2015, referring to my present role, he said, "There is a happy symmetry to this little twist of fate."

In my view, it has always been self-evident that appointment of members of the AAT by the First Law Officer of the Commonwealth at arm's length best fits with the independence required for our tasks.

Not only can the AAT exercise inquisitorial powers, but also in cases where it is appropriate, its members manage vigorously contested proceedings between legally represented parties. The commitment for professional development and the time and experience that must be devoted to acquire the skill sets and professionalism required of members is often under-appreciated. As President of the AAT for the past three years, I have come to regard merits review decision-making as a profession or vocation in its own right. The expertise acquired by an experienced member cannot be cheaply replicated. I intend, as far as I can, to ensure that it is valued and, if possible, retained.

In August 2013, shortly after my appointment, I delivered a paper entitled "Keeping the AAT from Becoming a Court" in which I set out the reasons which had persuaded me to reject analogies between the work of courts and the AAT that are sometimes advanced to support the proposition that we should be required to apply the rules of evidence. In my view, requiring merits review to follow the processes of those exercising judicial power would be a very wrong way to go. But, in exercising our statutory jurisdiction, members of the AAT as decision-makers, whether we be lawyers or not, are bound by most of the ethical and legal duties as apply to judges.

Justice Thomas, the author of "Judicial Ethics in Australia", cited Brennan CJ's observations - of course, Sir Gerard became Chief Justice of the High Court of Australia - that:

> *Courts exercise their powers upon finding of facts made on evidence governed by legal rules. The AAT exercises its powers upon findings of fact made by reference to wider sources of information. The courts and the AAT are both bound by and bound to apply the law and to apply it precisely. The major distinction between courts and the AAT is that, generally speaking, the courts are not concerned with administrative policy, while administrative policy is a core concern in some areas of the AAT's jurisdiction.*

Thomas J concluded that members of the AAT had established a reputation and an expectation that their decisions:

Will be made free from political influence and, in a word, judicially.

To enable members of the AAT to carry out their statutory duties fairly and fearlessly, Parliament has conferred on our members the same protection against removal as judges possess. In turn, members are expected to respect that special status by conducting themselves honourably. However, as Thomas J also observed, short, limited-term appointments can make it hard for a member of a tribunal to be brave as the time for renewal of his or her appointment approaches.

Delivering the keynote address to the 2015 National Conference of the Council of Australasian Tribunals in Melbourne the Attorney-General mentioned that he and I had begun discussions regarding how he might make future appointments to the now much enlarged AAT. I am grateful for the Attorney-General's attention to this issue and I look forward to its resolution. This is not just a matter of abstract principle. The government and the AAT will have to work together to link appointments to the Tribunal's capacity needs if we are to ensure that the AAT's expected performance standards can be met.

For example, the number of members transferring across in the transitional arrangements from the SSAT and the MRT- RRT is significantly fewer than was planned for and that which is required. Without sufficient numbers of members being appointed with assignments to the new Social Services, Child Support and Migration Review Divisions of the AAT, the work required in those divisions will suffer delayed hearings and backlogs. I am looking forward to working with the Attorney-General to address those short-term issues, and then to build on the platform of reforms that his advocacy, and Parliament's passage of the Tribunals Amalgamation Act have put in place.

We will need to ensure that, when the formal review that the Parliament has required is conducted, the AAT can demonstrate that the reforms have achieved their objective of providing a mechanism of merits review that is accessible, fair, just, economical, informal and quick, and proportionate to the importance and complexity of a matter.

Australia has been well served for the past 40 years by those who have been members and staff of merits review tribunals. With your support, as members and staff of the renewed AAT, I am confident we will achieve that outcome.

This Tribunal will now adjourn.

ADJOURNED **[11.11 am]**