



OVERVIEW OF TRIBUNALS SCENE AUSTRALIA

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Preface

Like all good debaters, I should first define the subject. What is a tribunal? The Oxford English Dictionary says that the original meanings of the word “tribunal” included “judgment seat”. Edmund Spenser in the *Faerie Queen* used the word in this context: “And crowne your heads with heavenly coronall, such as the Angels wear before Gods Tribunall”. In this exclusive gathering of tribunal aficionados, I thought it appropriate to begin by recognising the proper status to be accorded to Tribunals.

The role of the Roman tribune was to protect the interests of the plebeians against the patricians. That is a more apt parallel to the role of the modern tribunal.

By the way, the literal meaning of tribunal is “head of a tribe”. It follows that the first three letters (“tri”) never suggested a panel of three persons as I have sometimes heard.

“Tribunals” in Australia

“Tribunal” is not a word of precise meaning. However, relevantly in Australia, it has come to describe institutions fulfilling one or more of three functions:

- Reviewing administrative decisions or the executive decisions of government;
- Making original administrative decisions;
- Resolving disputes in areas including consumer trading, tenancy and similar matters.

Tribunals are flourishing in Australia both within the Commonwealth Government and in the state and territory governments.

Administrative Law Reform in the 1970's

There is, of course, nothing new about tribunals of the modern kind which have been in place for many decades. However, it is fair to say that a series of legislative reforms which were passed by the Commonwealth Parliament in the mid-1970's have had a significant impact on the Tribunal scene in Australia. A central plank of these reforms was the establishment of the Administrative Appeals Tribunal in 1976. It celebrates its 30th anniversary in a couple of months.

The Franks Committee in the United Kingdom, which reported in 1957, gave currency to the issue of tribunals. The report excited academic interest in Australia. I know it excited Professor Harry Whitmore of the University of Sydney because, as a student, I listened to him lecturing about it.

The real impetus for the 1970's reforms in Australia was the Kerr Committee. Its Chairman was Sir John Kerr. It included Sir Anthony Mason who subsequently became Chief Justice of Australia. And it included Professor Whitmore.

Professor Whitmore wrote the first draft of the report. It reflected his ideas. The Committee recommended a general merits review tribunal for administrative decisions in Australia. The Franks Committee had come to a different view but their consideration of the idea of a general administrative appeals tribunal must have been a factor giving the idea sufficient credibility for it to be considered by the Kerr Committee.

In addition to the establishment of the Administrative Appeals Tribunal, the reforms of the 1970's in Australia included the establishment of the Federal Court of Australia and the office of the Ombudsman and the enactment of the *Administrative Decisions (Judicial Review) Act 1977 (Cth)*, which codified the law of judicial review.

The Administrative Appeals Tribunal

The creation of a general tribunal for the review of administrative decisions was, at the time and remains today, subject to what is happening as we speak in the United Kingdom, unique in the common law world, which is the same as saying unique in the world.

The Administrative Appeals Tribunal now has jurisdiction to review administrative decisions made under more than 400 Acts of the Commonwealth Parliament. The topics subject to merits review range from aviation to veterans' entitlements and encompass bankruptcy, broadcasting licenses, corporate and insurance regulation, customs, employees' compensation, fisheries, social security and many more along the way. I recently decided that a permit should be issued to Melbourne and Sydney Zoos, pursuant to an international convention on endangered species, for the importation of Asian elephants. The week after next I will be hearing a case in Northern Victoria in which I will establish wine region boundaries, a kind of *Australian Appellation Controlée*.

The Administrative Appeals Tribunal has members at four levels. There are judicial members who are Federal Judges. Next there are Deputy Presidents

who are distinguished lawyers. The next rank is Senior Members. Most of them are experienced lawyers. Finally there are members. A number of them are lawyers but most of them bring other expertise. They include medical practitioners, scientists, retired senior members of the armed services, aviators, accountants, tax experts, business and insurance people, engineers and others.

There are full-time and part-time members at all levels. The Tribunal can be comprised of panels of one, two or three persons.

The Tribunal has no internal appeal process. It reviews decisions, directly, of original decision-makers and it reviews decisions of intermediate tribunals, such as the Social Security Appeals Tribunal and the Veterans' Review Board.

Nowadays members of the Tribunal also issue surveillance and telephone intercept warrants as well as exercising jurisdiction under proceeds of crime legislation.

There still are specialist tribunals in Australia at the Commonwealth level. In addition to the two just mentioned the other major tribunals are the Migration Review Tribunal and the Refugee Review Tribunal.

State Tribunals

Since 1975 the model of the Administrative Appeals Tribunal as a general merits review tribunal has been reproduced in the states. In Victoria there is the Victorian Civil and Administrative Tribunal. In New South Wales there is the Administrative Decisions Tribunal. And in Western Australia there is the State Administrative Tribunal. Each of these tribunals have jurisdiction to review decisions on a range of issues. However, their merits review jurisdiction is not as extensive as the Administrative Appeals Tribunal.

Whereas Commonwealth Tribunals are only able to review administrative decisions, state tribunals may be given much more jurisdiction. Accordingly, state tribunals are generally empowered to hear consumer, trading, tenancy and similar disputes.

Separation of Powers in Australia

The reason why state tribunals but not Commonwealth tribunals can be given these extra powers lies in the nature of the Australian polity.

Australia is a federation. It is governed by a federal or Commonwealth government and by state and territory governments. Division of powers is regulated by the Constitution. Commonwealth powers are controlled by the Constitution. State powers are largely controlled by the states themselves.

Commonwealth power is divided between a separate legislature, executive and judiciary. The judicial power of the Commonwealth cannot be exercised by the executive. It can only be exercised by the judiciary. The judiciary is defined by a number of minimum requirements. Judges, for example, must be independent, an indicia of which is security of tenure. Courts must have the power to enforce their orders¹.

In Australia, reviewing administrative decisions on the merits is not an exercise of judicial power, any more than the making of original administrative decisions is an exercise of judicial power. Both are exercises of executive or administrative power. The review of Commonwealth administrative decisions on their merits is appropriately carried out by tribunals not courts. The validity of Commonwealth administrative review tribunals is not in doubt.

However, determining disputes between landlord and tenant or resolving a consumer's claim for compensation does involve the exercise of judicial power. The separation of powers doctrine governing the Commonwealth

¹ *Waterside Workers' Federation of Australia v N.W. Alexander Ltd* (1918) 25 CLR 434 at 442, 443.

Government precludes Commonwealth tribunals from exercising this or any judicial power. They are not courts. They are part of the executive arm of government.

The strict separation of powers required by the Constitution for the Commonwealth does not apply to the states. There is no impediment in the states to a tribunal exercising judicial power. Accordingly, state tribunals, though they are not courts, can and do determine disputes between landlords and tenants and resolve consumers' claims for compensation where that power is conferred upon them by statute. Commonwealth legislation conferring such power on tribunals would be unconstitutional.

Victorian Civil and Administrative Tribunal

It is for these reasons, therefore, that state tribunals often have power to adjudicate on ordinary disputes. Accordingly, the Victorian Civil and Administrative Tribunal, the largest tribunal in Australia, has a considerable jurisdiction outside merits review of administrative decisions. VCAT, as it is known, has three divisions: Civil Division, Administrative Division and Human Rights Division. The first two represent the division between Commonwealth and State powers which I have been describing. The Civil Division includes a Civil Claims List and a Residential Tenancies List which deal with civil disputes. The Administrative Division includes a Planning and Environment List which deals with land development. The President of VCAT is Justice Stuart Morris of the Supreme Court of Victoria. The membership of the Tribunal also includes a number of Victorian County Court judges.

State Administrative Tribunal of Western Australia

The State Administrative Tribunal of Western Australia is less than two years old. Its President, Justice Michael Barker, was also its architect, having led the taskforce whose report recommended its establishment. The SAT has similar jurisdictions to VCAT. Its two Deputy Presidents are District Court Judges.

New South Wales Tribunals

In New South Wales a wider group of jurisdictions is divided between two tribunals and a court: the Administrative Decisions Tribunal, the Consumer Trader Tenancy Tribunal and the Land and Environment Court. The last is a court with tenured judges exercising pure judicial power. However, it has the same planning and environment jurisdictions, exercised generally by non-tenured non-judges, as VCAT and the SAT have. It would probably be unconstitutional if it was a Commonwealth body. The President of the Administrative Decisions Tribunal is Judge Kevin O'Connor.

Other States

There are, of course, tribunals in the other states of Australia, but although some of them exercise multiple jurisdictions there is no other state tribunal with wide general jurisdiction. In some places lower courts exercise both judicial and merits review powers.

Commonwealth Territories

The Commonwealth Territories are subject to the same constitutional restrictions as the Commonwealth itself. There is an Administrative Appeals Tribunal in the Australian Capital Territory which is modelled on the Commonwealth Administrative Appeals Tribunal. Its President is Mr Michael Peedom. This tribunal also has planning and environment jurisdiction. The Northern Territory has no general merits review tribunal.

Other State Tribunals

At the outset I mentioned three kinds of Tribunal. The third kind of tribunal is one which exercises administrative power but really does so as an original decision-maker. These tribunals are only found in the states and generally exercise jurisdiction in areas of mental health and guardianship. They are

found throughout the states, sometimes as part of the general tribunal and sometimes separately.

Council of Australasian Tribunals

At the instigation of the Commonwealth Attorney-General and the Australian Administrative Review Council and with the support of the Australian Institute of Judicial Administration a body called the Council of Australasian Tribunals was formed about three years ago. We call it COAT. I am currently its Chairman. The Council has brought together almost all of the tribunals of Australia and New Zealand with a view to facilitating dialogue and discussion for mutual benefit. In establishing COAT, the founders drew upon the model of the successful Council of Canadian Administrative Tribunals.

The COAT website contains a register of Australasian Tribunals. Most tribunals on the register are members of COAT. The register shows just how many tribunals there are in Australia and how broad their jurisdictions are. I have not covered by subject matter even a small proportion of them.

Conclusion

I always pity visitors to Australia who are interested in the organisation of tribunals here. Australian tribunals have some unique features which, at the least, demonstrate an innovative approach which others may wish to consider. Unfortunately, it requires something bordering on a degree in Australian constitutional law to unravel the system. I hope I have been of some assistance in this regard. The complexity of our constitutional system must restrict the ability of others to discover the advantages of a simple general tribunal reviewing a wide range of administrative decisions on the merits which, in Australia, at the Commonwealth level, is now regarded universally as a necessary part of achieving fairness in administrative decision-making. There may, however, be another contributing factor to the uniqueness of the general review tribunal in Australia. It may be that other governments have not been as willing as the Australian Government to

surrender control of an important part of administration to an independent body. Successive Australian Governments are to be congratulated on their willingness, in the interests of the people of Australia, to take this step.