PROFESSOR HARRY WHITMORE LECTURE
THE TRIBUNAL DILEMMA : RIGOROUS INFORMALITY

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Tonight I want to trace for you the fortunate history of the Administrative Appeals Tribunal, and, I venture to suggest, many other tribunals established in Australia in the last 30 years.

In the journey I want particularly to concentrate on the contribution of one man, Professor Harry Whitmore.

Harry Whitmore was a senior lecturer when I encountered him on 13 March 1964. That was the first day of lectures in the optional course on Administrative Law at the University of Sydney. It was from Harry Whitmore that I learned administrative law, and much more than that, developed a feeling for the subject.

Because most of you were not around in 1964, and certainly not studying law, I think I should put the period in context.

By comparison with today, administrative law was in its infancy. Merits review was confined to special areas such as town planning and taxation. The tribunals which were studied most were industrial commissions and crown employers appeal boards.

Judicial review was tied to a process of classification of powers, long since abandoned, which was rooted in the separation of powers doctrine. Judicial review depended upon a court finding something called a duty to act judicially. Administrative law courses placed great emphasis on the circumstances in which the prerogative writs would issue. Standing was a vital topic. So was the importance of finding error on a record. Absent jurisdictional error, prerogative writs would not issue for error of law unless any error could be found on the face of the record.

The text book in 1964 was Friedmann and Benjafield, *Principles of Australian Administrative Law* (1962). It was published in 1962. Although Harry Whitmore was not an author, his contribution is acknowledged in the Preface. He was an author of the next edition, with Professor Benjafield. Far sighted though this little book was, it described a system of administrative law very removed from the present sophisticated and complex structure.

The longest chapter in the book, the last, is titled 'The Problem of Administrative Justice'. The United Kingdom's Franks Committee (the Committee on Administrative Tribunals) had reported five years earlier. That Committee reported, amongst other things, on the desirability of a general administrative appeals tribunal. However, it rejected the idea and the United Kingdom is only now moving, through its unified tribunal's service, to something akin to a general tribunal.

A general administrative tribunal had been advocated by Professor A.W. Robson as early as 1928. It had been considered earlier in England by the Committee on Ministers' Powers which also rejected the idea.

The Franks Committee Report was subject to a good deal of consideration in Australia. One matter that gained particular attention was the idea of a general administrative review tribunal, even though the Franks Committee had rejected it. In the final chapter Friedmann and Benjafield discussed the arguments for and against and clearly came out in favour. Harry Whitmore, no doubt, contributed to the thinking.

He devoted a substantial part of his lecture on 19 June 1964 to the Franks Committee recommendations on tribunals. The seeds of Harry Whitmore's interest in tribunals show through his lectures.

The Commonwealth Administrative Review Committee, generally known as the Kerr Committee, was established on 29 October 1968 by the Commonwealth Attorney-General. It reported on 25 August 1971.

The original members of the Committee were Justice John Kerr, then of the Commonwealth Industrial Court, Mr Anthony Mason QC, Commonwealth Solicitor-General (who retired on appointment to the New South Wales Court of Appeal on 1 May 1969), Mr Robert Ellicott QC, who succeeded Sir Anthony Mason as Solicitor-General, and Harry Whitmore, who by then was Professor Whitmore and Dean of the Faculty of Law of the Australian National University. All members of the Committee signed the report.

The Committee's primary requirement was "[t]o consider the jurisdiction to be given to the proposed Commonwealth Superior Court to review administrative decisions."[1] A subsidiary term of reference referred to "the procedures whereby review is to be obtained."[2] Nothing was said about tribunals. Nothing was said about merits review.

Notwithstanding the relatively narrow scope of the terms of reference, the Committee must have felt expansive. They said they did not consider the

[1] Commonwealth Administrative Review Committee, *Report: August 1971*, Commonwealth Government Printing Office, Canberra, 1971, at [1].
[2] Ibid.

terms of reference to constrain them to an examination of review jurisdiction "to be exercised by a superior court".[3] They said administrative review "requires to be considered in its entirety" because judicial review, standing alone, "cannot provide for an adequate review of administrative decisions".[4] With this introduction, a committee largely charged with the task of examining judicial review of administrative decisions by courts undertook the most extensive examination of merits review by tribunals which had ever been undertaken.

I cannot help feeling that the persuasive logic of Harry Whitmore was behind all of this. I know he wrote the first draft of the Committee's report.

How fortunate we are that the Committee took the step, unusual at the time, of construing its terms of reference in a way which enabled it to tackle a subject it had not been asked to address but which has proved so important to Australia. By contrast, the Franks Committee did not address the subject everyone thought it had been asked to consider, namely *ad hoc* enquiries, where it was thought that citizens' rights needed greater protection, because it was outside its terms of reference.

Paragraph 291 of the Kerr Committee's Report contains its relevant recommendation:

> "291. Stated broadly, our view is that the work of the Court should be complementary to a system of administrative review on the merits. As we have already indicated, we are disposed to the view that, as part of any comprehensive system of administrative law in Australia, there should be a general Administrative Review Tribunal."[5]

The form of general tribunal recommended, however, was not the Administrative Appeals Tribunal we know today. It was not, for example, to exclude the establishment of other parallel tribunals. It was to be a tribunal

[3] Id at [4].
[4] Id at [5].
[5] Id at [291].

with only three members: a federal judge as chairman with two other members – one from the Commonwealth department or agency involved and the other a layman. The sexist language is the language of the Report.

The Kerr Committee was followed by the Bland Committee. That committee was the Committee on Administrative Discretions. The members were Sir Henry Bland, the former secretary of the Department of Defence and of Labour and National Service, Mr P.H. Bailey, the deputy secretary of the Department of Prime Minister and Cabinet and Professor Harry Whitmore, by now Professor of Law and Dean of the Faculty at the University of New South Wales.

The Bland Committee tendered its final report on 17 October 1973. The preferred version of a general tribunal is much more like the tribunal we know today. It would not have a departmental representative. It should have judicial and non-juridical members, full time and part time members. It should sit in panels of one or three.

Neither Committee said a great deal about the procedures of the tribunal. However, the Kerr Committee did say that the rules of evidence should not apply and that the tribunal should be able to inform itself as it thought fit.

The Bland Committee said this:

> "We believe that, in most cases, the investigative or inquisitorial process would be most apposite. It should have the added consequences of shorter hearings, less need of legal representation and hopefully of better decisions, the more so when the Tribunals are acting as an extension of the administrative process. This is not to say that, in some cases, the adversary process might not be the best way of testing facts. Difficult though it may be for the legal profession to accommodate itself to the processes we have sketched, the real burden of achieving this will, under our proposals, rest upon the President of the Tribunal and Chairmen of Divisions. It will fall to them to make or mar the process."[6]

[6] Committee on Administrative Discretions, *Final Report: October 1973*, Government Printer of Australia, Canberra, 1975, at [172].

When originally enacted the *Administrative Appeals Tribunal Act 1975* (Cth) contained the same s 33(1)(b) it contains today:

> "(b) the proceeding shall be conducted with as little formality and technicality, and with as much expedition, as the requirements of this Act and of every other relevant enactment and a proper consideration of the matters before the Tribunal permit"[7]

The rules of evidence did not apply.

The Act, nevertheless, contains provisions imposing a certain formality on the Tribunal. The Act, as originally enacted:

1. Conferred the status of parties on participants, including the person who made the decision (s 30).
2. Generally required a hearing (s 35).
3. Required the hearing to be in public (s 35).
4. Conferred a right to representation (s 32).
5. Required it to act on evidence *albeit* not regulated by the rules of evidence (s 40).
6. Gave it power to take evidence on oath and to summons witnesses and the production of documents (s 40).

It has been said that Harry Whitmore originally wanted a very informal tribunal. In his speech on the occasion of the twentieth anniversary of the Administrative Appeals Tribunal, Sir Gerard Brennan, the very distinguished first president of the Tribunal, who later became Chief Justice of Australia, said this:

> "The model adopted by the AAT necessarily reflected the functions committed to it. At the beginning, Professor Harry Whitmore, who had been a member of the Kerr Committee, was an advocate of the administrative model. He had envisaged the AAT as a shopfront reviewer of administrative decisions in the large volume as well as small volume areas, righting the wrongs suffered by individual

[7] *Administrative Appeals Tribunal Act 1975* (Cth), s 33(1)(b).

> members of the public. Professor Whitmore did not envisage a high-powered institution engaged in statutory construction and the time-consuming enunciation of reasons for decision. But there were practical impediments to the implementation of an AAT based on the shop-front model."[8]

Whatever Harry Whitmore's original thoughts were, neither the Kerr nor Bland Committee's views appear to reflect the informality Sir Gerard Brennan has referred to. Rather, they contemplate, what the Act largely set up, a tribunal which permitted flexible procedures which took advantage of the right combination of formality, to ensure rigour, and informality, to avoid rigidity.

One gains some further clues to Harry Whitmore's views from a successor to Friedmann and Benjafield. By 1978, the field had expanded to the point that one text for Australian Administrative Law was no longer enough. The topic was divided into two. In that year Harry Whitmore and Mark Aronson published *Review of Administrative Action*. The text was settled in May 1977, in the earliest days of the Tribunal and contains no reference to Tribunal cases.

After an introductory chapter, chapter 2 deals with the Administrative Appeals Tribunal and the Administrative Review Council. It was written by Harry Whitmore.

In the first paragraph, under the heading 'Procedure', Harry Whitmore noted both the statutory requirement of informality and the provision that the rules of evidence do not apply. He continued:

> "The member presiding at a hearing may, on matters not dealt with in the Act and regulations, give directions about the procedure to be followed. This section seems broad enough to permit the Tribunal to develop new hearing techniques and, if it wishes, to move towards a more inquisitorial form of hearing together with preparation of a written "brief" on a continuing basis. In the writers' opinion such movement would be advantageous; in this context a rigid adherence to standard

[8] Brennan, G., 'Twentieth Anniversary of the AAT: Opening Address' in McMillan, J. (ed.), *The AAT – Twenty Years Forward: Passing a Milestone in Commonwealth Administrative Review*, Australian Institute of Administrative Law, Canberra, 1998, p. 6.

> adversary techniques of fact-finding would be disastrous. Informality and expedition will probably be assisted by the provision made for conferences which may settle matters without need for a hearing."[9]

These thoughts, formed at the very start of the work of the Tribunal, by one of its principal architects, encapsulate what to me, more than 30 years later, is the Tribunal ideal. While I prefer to avoid reference to inquisitional and adversarial processes I note that Harry Whitmore also used words I prefer, namely informality and expedition, which are found in the Tribunal's Act.

I particularly note Harry Whitmore's reference to conferences. The conference process within the Tribunal continues to this day. It now provides the Tribunal's front line and most effective method of alternative dispute resolution. Every case in the Tribunal is dealt with in at least one conference with a conference registrar. This is the primary method of case management. It is also, however, the primary method of alternative dispute resolution. The process is mostly intuitive, not structured mediation. It nevertheless accounts for a very large compromise rate within the Tribunal.

What are we to make of the suggestion that Harry Whitmore favoured a "shop-front" style of tribunal? The idea does not seem to be reflected by either the Kerr or Bland Committee Reports or by the original Act. It was not a feature of Professor Whitmore's lectures more than 40 years ago. If it was an idea he originally had he must have modified it after consideration.

I want now to say a little about how the Tribunal operated in its early period and to compare that with the present Tribunal.

It would be difficult to overemphasize the number of issues that the Administrative Appeals Tribunal in 1977 was facing for the first time. There was no similar body anywhere in the world to look to for guidance. There were many specialist tribunals, but what was unique about the Administrative Appeals Tribunal was that it was a general tribunal and had a general role in

[9] Whitmore, H., and Aronson, M., *Review of Administrative Action*, The Law Book Company,

executive government. By way of illustration, two important questions which the Tribunal faced from the outset were whether it was bound by government policy and whether it retained jurisdiction when the decision under review was beyond power and a nullity.

The first volume of the reports of Administrative Law Decisions contains decisions of the Tribunal made between 16 December 1976 and 6 December 1978. Many of them were decisions of Sir Gerard Brennan. In *Becker v Minister for Immigration and Ethnic Affairs*,[10] decided in August 1977, Sir Gerard determined that the Tribunal was not bound by government policy. In *Brian Lawlor Automotive Pty Ltd v Collector of Customs (New South Wales)*[11] Sir Gerard decided that a decision beyond power could still be reviewed by the Tribunal. The decisions, subsequently endorsed by appellate courts, still guide the Tribunal today.

Sir Gerard Brennan has often described the first days of the Tribunal. A good example is the opening paragraph of his Twentieth Anniversary address:

> "It was a cold, crisp Canberra morning on Thursday 1 July 1976 when my wife and I walked down Northbourne Avenue and around London Circuit to the Wales building. The doors of the AAT were opened without ceremony. The bare space was interrupted by the occasional desk and powerpoint. The AAT name was on the noticeboard downstairs but months would pass before anybody needed to find it."[12]

The newly formed Tribunal faced at least two challenges. First, was it to align itself with the methods of the executive or was it to follow the judicial model? Secondly, what were to be its procedures?

As to the first, the Tribunal adopted the judicial model. This was the way to mark its independence. As to the second, it followed court-like procedures. Neither decision was surprising. At a time when review of decisions of the

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Sydney, 1978, p. 24.
[10] (1977) 1 ALD 158.
[11] (1978) 1 ALD 167.
[12] Brennan, G., above n8, p. 4.

executive was new, and not welcomed by many of its members, it was important for the Tribunal to assert its authority and independence and the adoption of the judicial model was the appropriate way to do this. It was also important for the Tribunal to lay down a set of procedural rules so that the parties before it knew what was required. Both of these decisions, however, inevitably led to a degree of formality.

Sir Gerard Brennan has recognised this. In his Twentieth Anniversary address he said this:

> "The fact that the AAT straddled that divide [between the exercise of executive power and the exercise of judicial power] meant that there were two models available for the AAT to follow. It could follow the administrative model and become, so to speak, a higher tier in the bureaucracy. Or it could follow the judicial model which would mark it as something standing outside the bureaucracy and beyond ministerial power to prescribe the policy it was to follow. It is no secret that the AAT followed the judicial mould, nor that the period of my Presidency was one in which that model was adhered to closely – perhaps too closely. At this time, on the twentieth anniversary of the AAT's foundation, we may reflect on whether the AAT has evolved in a way that, irrespective of the model, practically answers the needs of the community and of government administration."[13]

It has sometimes been said that the early Tribunal was very formal – sometimes too formal. Sir Gerard Brennan has accepted the claim, while defending it. The early model certainly did not accord with Sir Gerard's exposition of Harry Whitmore's original ideas. It may not have accorded precisely with his 1977 views.

To my mind, however, the model adopted in 1977 was the right model. It assisted the Tribunal to establish its credentials and stamp its authority on administrative decision-making. Less formal decisions in cases like *Becker* and *Lawlor* would have had less authority. We will be indebted to Sir Gerard Brennan's leadership of the infant Tribunal for a very long time.

[13] Brennan, G., above n8, p 5.

Adults are to be treated differently to children, however, and the Administrative Appeals Tribunal at age 32, is now fully adult. Constraints which applied in the early years of the Tribunal no longer necessarily apply.

So it is that the Tribunal today is closer to the ideal which Harry Whitmore wrote about in his 1977 text. The Tribunal often sits around a table with the parties. A degree of formality is still preserved. Even the parties expect some formality. After all, important matters to them, are at stake. They do not want their rights determined in a casual conversation. Formality is relaxed enough, however, to avoid parties, particularly unrepresented parties, being put off. The situation in which one side feels like it is in a club with rules it must abide by but does not know, and even worse, rules which are kept secret from it, is avoided. Even cases with senior counsel representing all parties are not quite the same as in courts. They may look very similar, but I still see the surprise on the face of counsel when I reject a question that has not been objected to, or tell counsel that I will admit evidence, but if it is in contest he will need to supplement it, or interrupt submissions to tell counsel what I want the submissions to address, or tell counsel to exchange documents informally rather than using a summons to produce, or tell counsel that if they make a further interlocutory application they will need first to explain to me why they have not been able to agree on what is being sought.

I am not attracted by the use of the words “adversarial” and “inquisitional” to describe tribunal hearings. They are both really pejoratives, the latter if you think of its use in the fourteenth century. More troubling, they suggest one procedure for every case. Worse, although they create a word picture, they are at least misleading and at worst wrong. I prefer to describe the procedures of the Tribunal as flexible and moving on a scale between formality and informality.

The Administrative Appeals Tribunal today is much more found at the informal end of the scale than the formal end. I like to think we are about where Harry Whitmore would like us.

I have spoken a lot today about the Administrative Appeals Tribunal. As some of you may have noticed I like to talk about the AAT. On this occasion, however, it would have been difficult to avoid because of Harry Whitmore's central role in its establishment.

That is not to say that this talk has no relevance to other Tribunals. In their merits review roles many of the state tribunals are successors to the Administrative Appeals Tribunal. In a way, they all trace their origins to the reports of the Kerr and Bland Committees. Their role of merits review is to be found in sections modelled on s 43 of the Administrative Appeals Tribunal Act which is the foundation of what we now call merits review. So, I hope that some of what I have said about the scale between formality and informality will have relevance to those tribunals and, indeed, all tribunals. The balance will, however, be different. We are all seeking to achieve the same goal, however – to provide fair and just review of administrative decisions by employing rigorous methods in a setting which is as informal as possible.