



## **TRIBUNALS IN AUSTRALIA: THEIR ROLES AND RESPONSIBILITIES**

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### **Administrative Tribunals in Australia**

Modern tribunals play an important part in society. Not that tribunals are a new idea. Their origins lie in the Roman tribune whose task was to stand between plebeian citizens and patrician magistrates.

Tribunals can be Government sponsored or private. They can be administrative or civil. Administrative tribunals are concerned with executive actions of government. Civil tribunals are concerned with resolving private disputes.

In 1975 the Australian Government established the Administrative Appeals Tribunal as a general administrative tribunal to review a broad range of government decisions. These include social security, veterans' entitlements, Commonwealth employees' compensation, taxation, migration, freedom of information, corporations, insurance, fisheries and many other areas. Other administrative tribunals established by the Commonwealth include the Social Security Appeals Tribunal, the Veterans' Review Board and the Migration and Refugee Review Tribunals. The Commonwealth has also established other tribunals such as the National Native Title Tribunal and the Superannuation Complaints Tribunal.

There are a range of tribunals in the states which also review administrative decisions of governments. The largest is the Victorian Civil and Administrative Tribunal. That tribunal also has jurisdiction to determine a range of private disputes. The Administrative Decisions Tribunal in New South Wales also has a limited jurisdiction in relation to private disputes. Tribunals such as the New South Wales Consumer, Trader and Tenancy Tribunal are primarily concerned with resolving private disputes such as building and tenancy disputes.

It is apparent that Commonwealth tribunals are largely strict administrative tribunals while state tribunals are both administrative and civil.

### **The Separation of Powers**

The explanation for this is in the Australian Constitution. The first three chapters of the Australian Constitution are headed "The Parliament" (the legislature), "The Executive Government" (the administration) and "The Judicature" (the judiciary). In the early years of Federation, the High Court of Australia held that the Constitution required a separation of these three functions. Accordingly, the executive or administration cannot exercise judicial power. Judicial power can only be exercised by courts. The High Court also defined what courts are. Courts are required to be comprised of independent judicial officers with security of tenure and to have the power to make and enforce orders. Accordingly, tribunals are not courts.

It is for this reason that Commonwealth tribunals must not exercise judicial power. Civil tribunals generally will not comply with this test. The National Native Title Tribunal only has powers to mediate and arbitrate. The Superannuation Complaints Tribunal reviews decisions as to entitlements regulated under Commonwealth legislation. In some respects its activities may be compared with the way Commonwealth employees' compensation and social security decisions are reviewed.

However, this strict separation of powers doctrine never operated in the United Kingdom and it does not operate in the states. There is no inhibition on tribunals in the states exercising judicial power. Accordingly, there are tribunals in the states with civil jurisdiction as well as administrative jurisdiction.

### **The Importance of Administrative Review**

The establishment in Australia in 1975 of a tribunal with general jurisdiction to review a large range of government administrative decisions involved very advanced thinking. It reflected an understanding of the intrusion of administrative decision-making into every aspect of society and the lives of citizens. It reflected a determination that such wide and significant decision-making should be made with a high level of fairness. No similar tribunal exists in the United Kingdom, Canada or New Zealand although the Leggatt Committee in the United Kingdom recommended that existing tribunals should be brought together in a unified structure. Nowhere is there an administrative review structure as comprehensive and general as in Australia. The presence of a general review tribunal has promoted the concept of providing for review of administrative decisions generally. In practice consideration is given to administrative review in connection with all new pieces of Commonwealth legislation. There are now nearly 400 Acts of the Commonwealth Parliament which confer jurisdiction on the Administrative Appeals Tribunal.

### **Merits Review**

The Commonwealth administrative tribunals and many state tribunals are merits review tribunals. They reconsider the decision under review and determine whether it is the correct or preferable decision. Correct, when there is only one decision; preferable, when a range of decisions is available. Administrative review tribunals are accordingly concerned with more than determining legal rights. They may determine, for example, whether a development should proceed or what conditions should be imposed on a broadcasting licence. Merits review has been said to involve the

administrative review tribunal “standing in the shoes” of the original decision-maker.

Merits review in an administrative appeals tribunal is to be contrasted with judicial review in a court. Courts reviewing administrative decisions are concerned with the lawfulness of the decision rather than its correctness. A court may set aside a decision because, for example, the decision-maker has wrongly understood the legal basis for it, or acted on wrong material, or not permitted the parties a proper opportunity to be heard. It may not set aside a decision because it does not agree with it unless the decision is so unreasonable that no reasonable person could have made it. Such a decision is contrary to law.

### **Procedural Fairness**

Whether tribunals are seen to be exercising judicial power or not, a characteristic of all of them is informality. Although most tribunals conduct hearings of a kind, the rules of evidence do not usually apply. In the first tier Commonwealth tribunals, such as the Social Security Appeals Tribunal and the Veterans’ Review Board, as well as in the migration tribunals, the original decision-making department is not represented. Hearings there are more informal and include a dialogue between the applicant and the tribunal decision-maker.

The universal aim of tribunals is to resolve disputes fairly, informally, efficiently, quickly and cheaply. It should not be thought that the goals of economy, speed and efficiency compromise the supervening requirement for fairness. The absence of formality and the technical requirements of the rules of evidence does not displace due process, natural justice or procedural fairness.

In a tribunal, evidence may be received in a form which would not be permitted in accordance with the rules of evidence. However, the opposing parties will always be given the opportunity to test the evidence if it is

reasonably challenged. Broadly speaking, procedural fairness requires tribunals to do what is fair in the circumstances of each case.

Acting fairly will always require disclosure of the case being made against a party and giving the party an opportunity to respond to that case. Sometimes that may require a tribunal to require facts to be established in ways closer to the methods required by the rules of evidence. Sometimes greater informality will still yield a fair result. However, when greater formality is required it will not be because the rules of evidence are being applied but because fairness in the circumstances requires a stricter approach to the establishing of facts in dispute.

Fairness is not confined, however, to methods of proof. It also requires disclosure and the giving of an opportunity to respond. Disclosure of a serious claim at a hearing without giving a proper opportunity for the other party to respond will itself be likely to offend against procedural fairness. Tribunal procedures generally seek to anticipate and avoid such problems by ensuring that any claim which might not be anticipated is communicated to the parties before a hearing commences.

### **Applicants in Person**

The cost of legal representation and the informality of processes in tribunals has led to a substantial number of claimants presenting their own cases before tribunals. Accordingly, tribunals have established procedures to assist self represented applicants. In the Administrative Appeals Tribunal there are client service offices and, in larger registries, dedicated outreach officers to assist applicants in person. Nearly all matters in the Administrative Appeals Tribunal are listed for a preliminary conference before specialised conference registrars who are also able to assist unrepresented applicants. Tribunal members hearing cases are also ready to help applicants to understand the issues in their cases and the procedures in the Tribunal where they can.

Problems can arise, however, if tribunals become too involved in assisting parties. Procedural fairness requires tribunals to be fair to all parties to any dispute. Procedural fairness also requires impartiality. Accordingly, tribunal members and officers must be careful that offers of assistance do not appear to extend to advocacy.

The Administrative Appeals Tribunal has recently introduced a pilot system in its Sydney and Melbourne registries, conducted by the Legal Aid Commissions in New South Wales and Victoria, under which solicitors attend regularly at the Tribunal to offer free advice to applicants when it is requested. This system offers greater assistance to applicants and avoids perceptions of partiality.

### **Costs**

Consistent with objects of economy and informality, tribunals often have limited or no power to award costs against the losing party. This is the case in the Administrative Appeals Tribunal except in a small number of defined areas such as Commonwealth employees' compensation. Such a provision discourages legal representation in many cases, particularly where costs would represent a significant inroad into the amount of any benefit awarded. Nevertheless it should not be thought that tribunals are concerned only with small sums. Taxation cases in the Administrative Appeals Tribunal can involve millions and even billions of dollars. Export development grants and similar cases can involve substantial claims by large corporations.

### **Conclusion**

Modern administrative tribunals fulfil an important role in Australia. Ordinary Australians are more likely to experience proceedings before a tribunal than before a court. In many such proceedings, particularly in the Administrative Appeals Tribunal and the state general tribunals, they are taking part in a unique and forward thinking system instituted by the governments of Australia to provide the highest quality in decision-making in areas of administration.

Civil tribunals bring similar desirable informality and economy to the resolution of disputes in areas where more costly dispute resolution procedures are not warranted, particularly in consumer and similar disputes.