Commonwealth Law Conference 2009
Session C11: Tribunal Reform

The Honourable Justice Garry DOWNES AM
President of the Administrative Appeals Tribunal
Judge of the Federal Court of Australia

Australian Tribunal Reforms

The Tribunal Revolution

Three aspects of modern life and government have combined to promote a dramatic increase in the use of tribunals in most common law countries. The three aspects or factors are:

- The extent and intrusiveness in everyday lives of government decision-making.
- The importance of human rights and of transparency in government.
- The cost of court litigation.

The process has led to the tribunal reform of which our topic speaks. Tribunal reform has involved reform of tribunals which has led to reform by tribunals. The reform of tribunals has been characterised by the extension of the jurisdiction of tribunals and the creation of many new tribunals. The reform by tribunals has been characterised by improved provision of government and consumer services.

Australian Background

Australia is a federation made up of a Commonwealth government and separate governments in Australia's states and territories. Government at the federal or Commonwealth level is overshadowed by a strict separation of powers, between the legislature, the executive and the judiciary, which is imposed by the Constitution[1]. State governments are not affected.

The executive government of the Commonwealth cannot exercise judicial power. This is the province of the courts. Courts, on the other hand, generally cannot exercise executive or administrative power. The distinction leads to a simple, but very important, consequence for tribunals. Not being courts, tribunals cannot exercise the judicial power of the Commonwealth. Courts are bodies that can enforce their judgments and are made up of judges with tenure to a retirement age imposed by the Constitution[2]. Tribunals do not generally satisfy these tests. Judicial power is the power to determine disputes between parties, both public and private and to enforce the resulting judgment. These powers are

---

[1] *The State of New South Wales v The Commonwealth* [1915] HCA 17; (1915) 20 CLR 54 at 88 per Isaacs J; *R v Kirby Ex parte Boilermakers' Society of Australia* [1956] HCA 10; (1956) 94 CLR 254 at 273 per Dixon C.J., McTiernan, Fullagar and Kitto JJ.

[2] *The Attorney General for the Commonwealth v Breckler and others* [1999] HCA 28; (1999) 197 CLR 83 at 125 per Gleeson C.J., Gaudron, McHugh, Gummow, Hayne and Callinan JJ

not open to tribunals. The power to make administrative decisions which are binding on government departments and agencies and so do not require enforcement is not a judicial power but an administrative power even though the process does involve the resolution of a dispute between a public party and a private party. Tribunals, accordingly, exercise the administrative or executive power of the Commonwealth.

Two Types of Tribunal: Merits Review and Claims Resolution

The result is that tribunals in Australia are viewed as falling into one of two categories: those which review government decisions and those which determine claims, often associated with consumer and tenancy disputes. It would be unconstitutional for the Commonwealth parliament to seek to confer power on a tribunal to determine such claims. They would be exercising judicial power.

Although the distinction between review tribunals and claims tribunals is critical within Commonwealth jurisdictions in Australia, it does not apply in the states. In consequence, there are many state tribunals which are both review tribunals and claims tribunals. I must add that the distinction seems also not to apply anywhere else in the world. Tribunals have long been regarded as part of the judiciary in the United Kingdom[3].

It should not be thought that the distinction between review tribunals and claims tribunals is clear cut. The one clear distinction is that review tribunals will always review decisions of government ministers, departments or agencies, whereas claims tribunals will not. However, Commonwealth employees' compensation claims are handled by a tribunal at the Commonwealth level in Australia, because it reviews decisions of government agencies, even though the same kinds of decision are often made elsewhere in court proceedings against an insurer.

This paper will deal with both review tribunals and claims tribunals, although the author, as president of the Australian Administrative Appeals Tribunal, a review tribunal, is more familiar with the former.

Returning to the three factors underlying tribunal reform, although all of them have contributed to tribunal evolution, concerns about intrusiveness of government decisions and ideals of government transparency are more relevant to review tribunals and concern over litigation cost is more relevant to claims tribunals.

Tribunal Reforms

Recent years have seen a dramatic increase in the relevance of tribunals. The impetus has reached the point in Australia that a combined review/claims tribunal has recently been established in Western Australia[4] and one is about to be launched in Queensland[5]. The United Kingdom has adopted a unified tribunals structure through a two-tier tribunal

[3] Tribunals for Users- One System, One Service, *Report of the Review of Tribunals by Sir Andrew Leggatt*, March 2001, p. 15
[4] State Administrative Tribunal (SAT) http://www.sat.justice.wa.gov.au/
[5] Queensland Civil and Administrative Tribunal (QCAT) http://www.tribunalsreview.qld.gov.au/

system[6]. New Zealand is about to create a wide ranging general Tribunal[7]. Why and how have these changes come about?

I will begin with review tribunals and spend more time on them because of my greater familiarity with them. There is, of course, nothing new about tribunals. The name is ancient, going back to the Roman tribunes whose role involved standing between plebeians and patricians[8]. Specialised tribunals dealing with subjects such as taxation and town planning have been around for a long time. However, it is only in the last thirty years or so that tribunals have become so important and influential. An early place for reform was Australia[9].

Australian Reforms

In Australia, the change can be traced back to a Committee called the Kerr Committee which was established by the Commonwealth Government in 1968. Its establishment was a direct response to concerns about the conflict inherent in government secrecy, and the closed nature of its decision-making, in a climate in which the decisions were impacting more and more on the lives of citizens.

The Kerr Committee recommended the establishment of a general tribunal with wide jurisdiction to review government decisions of all kinds affecting individual rights. It also made a number of subsidiary recommendations[10]. This was the first recommendation for the establishment of a general merits review tribunal. The Franks Committee in England, established eleven years earlier, had rejected such a proposal[11].

The Kerr Committee was technically appointed to advise the Government about a proposal for a Commonwealth superior court to review administrative decisions. In the opening paragraphs of its report, however, the Committee explained that review of administrative decisions necessarily involved the notion of merits review. The Committee spent a large portion of its report addressing that issue.

The result was, after another intervening report, that Australia adopted a completely new regime for administrative law at the Commonwealth level. This was in the mid 1970s. The Administrative Appeals Tribunal was established[12]. But that was just part of a larger package.

The establishment of the Federal Court of Australia was part of the scheme[13]. Part of the jurisdiction of this court arose under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) which codified the common law grounds of judicial review[14]. Most importantly, that Act imposed a statutory obligation upon decision-makers to give written

---

[6] *Tribunals, Courts and Enforcement Act* 2007, Part 1 s 3
[7] *Hon Rick Barker*, Tribunals in New Zealand, the Government's Preferred Approach to Reform Public Consultation Document, July 2008
[8] The New Encyclopaedia Britannica, 15th Edition, Volume 11 at 919
[9] Tribunals for Users- One System, One Service, *Report of the Review of Tribunals by Sir Andrew Leggatt*, March 2001, p. 19
[10] Commonwealth Administrative Review Committee Report, August 1971, *Parliamentary Paper No. 144*
[11] Report of the Committee on Administrative Tribunals and Inquiries; HMSO; Cmnd.218; July 1957
[12] *Administrative Appeals Tribunal Act 1975* (Cth)
[13] *Federal Court of Australia Act 1976* (Cth)
[14] *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 5-7

reasons for their decisions[15]. The common law in Australia had stopped short of requiring reasons for all administrative decisions[16]. Without reasons it was difficult to challenge decisions because there was usually nothing upon which to base a challenge.

The legislative scheme also included the establishment of the Administrative Review Council[17], to advise the Government on all matters of administrative law, and the establishment of the office of Ombudsman[18]. Freedom of information legislation followed[19].

The Administrative Appeals Tribunal

The Administrative Appeals Tribunal was 30 years old in July last year. The first President of the Tribunal was Sir Gerard Brennan who ultimately became Chief Justice of Australia. He published a number of landmark decisions in the first years of the Tribunal's operation. They set the Tribunal on its path to success. They still guide its decision-making today. The form which the Administrative Appeals Tribunal took was dictated by the Constitutional issues to which I have referred. It was established exclusively as a tribunal which reviews administrative and executive decisions.

The Tribunal was unique when it was established. It remains unique. I know of no similar Tribunal with a broad jurisdiction to review government decisions generally, including decisions of Cabinet ministers, anywhere outside Australia (including civil law countries as well as common law countries). The Tribunal's jurisdiction does not extend to decisions with substantial government policy content but it does include operational policy. It was established early on that the Tribunal was not bound by government policy although it should proceed carefully before departing from it[20].

When the Tribunal opened its doors on 1 July 1976 Sir Gerard Brennan and his Registrar were looking for work. At first it came slowly. However, that position did not last. Now the Administrative Appeals Tribunal receives 8,000 applications each year. It has jurisdiction conferred on it by more than 400 acts of the Commonwealth Parliament or legislative instruments made under those acts. Most acts confer jurisdiction with respect to more than one area of executive decision-making. Many acts confer jurisdiction with respect to a multiplicity of subjects.

- **Jurisdiction**

The jurisdiction of the Tribunal covers a huge range of executive decision-making. In some areas a high level of discretion is involved. In others the Tribunal is acting more like a court. In all cases, the role of the Tribunal is to substitute its decision for the decision of the original decision-maker[21]. It stands in the shoes of the original decision-maker[22]. It must arrive at the correct or preferable decision in the cases before it: correct if only one

---

[15] s 13
[16] *Public Service Board of NSW v Osmond* [1986] HCA 7; (1986) 159 CLR 656
[17] *Administrative Appeals Tribunal Act* 1975 s 48
[18] *Ombudsman Act 1976* (Cth)
[19] *Freedom of Information Act 1982* (Cth)
[20] *Becker v Minister for Immigration and Ethnic Affairs* (1977) 1 ALD 158 at 161; [1977] AATA 12 per Brennan J
[21] *Administrative Appeals Tribunal Act* 1975 s 43(6)
[22] s 43 (1), *What Decisions should be Subject to Merits Review?* Administrative Review Council July 1999, p. 1

decision is available; preferable when it is choosing from a range of equally satisfactory decisions[23]. We call this merits review[24]. Merits review can be defined by the potential result. In every case before it the Administrative Appeals Tribunal is empowered to affirm, vary or set aside the decision it is reviewing. Where a decision is set aside the Tribunal can substitute a decision or return the matter to the decision-maker with a direction about how the decision is to be remade[25]. The power to remake any decision before the Tribunal is complete. Let me illustrate.

I have heard an appeal from a decision of the Commonwealth Minister for the Environment authorising the importation into Australia of eight Asian elephants for the Sydney and Melbourne Zoos[26]. That case involved discretionary decision-making. It was not judicial review. The Tribunal did not decide whether the Minister's decision was lawful. It determined the matter afresh uninfluenced by the decision and reasons of the Minister.

More recently I have determined how the wine growing districts of North East Victoria should be divided and what they should be called[27]. The case related to a kind of Australian "appellation contrôlée". I have also heard a case relating to the protection which should be afforded to an endangered species of shark, called the grey nurse[28]. As in the elephants case, this involved reviewing a decision of a member of the Cabinet.

The Tribunal also hears, however, claims for employees' compensation. Most of these claims relate to the entitlements of Commonwealth employees. This sounds like the work of a court. But in form, it is reviewing administrative decisions of a government agency that determines whether and to what extent compensation should be paid.

What we call the bulk jurisdictions in the Tribunal are taxation, workers' compensation, social security and veterans' entitlements. The other jurisdictions range through broadcasting licences, corporate and insurance regulation, aviation, bankruptcy, customs, fishing and many other areas. Sometimes the decision-making is broad. In a broadcasting case the question is often simply whether fairness requires that a condition should or should not be imposed on a licence[29]. What is involved is simply a matter of judgment. In others the decision-making is quite constrained.

- **Essence of the general tribunal**

This brings me to what I think is the essence of the success of the general tribunal in Australia. I refer to its success although I am not sure that all politicians and public servants welcome their decisions being scrutinised by an outside independent body. Nevertheless, there is broad general acceptance now in Australia of the Administrative Appeals Tribunal. Commentators have often referred to the important normative role of the Tribunal in improving the quality of Government decision-making generally. Providing

---

[23] *What Decisions should be Subject to Merits Review?* Administrative Review Council July 1999, p. 1
[24] Pearce D., *Administrative Appeals Tribunal*, LexisNexis Butterworths, Australia, 2003, p. 1
[25] *Administrative Appeals Tribunal Act* 1975 s. 43 (1)
[26] *Re The International Fund for Animal Welfare (Australia) Pty Ltd v Minister for Environment and Heritage* (2005) 93 ALD 594; (2005) 41 AAR 508; [2005] AATA 1210
[27] *King Valley Vignerons Inc and Ors v Geographical Indications Committee and Anor* (2006) 93 ALD 422; [2006] AATA 885
[28] *Nature Conservation Council of NSW Inc v Minister for Environment and Water Resources and Ors* [2007] AATA 1876
[29] *Star Broadcasting Network Pty Ltd v Australian Broadcasting Authority* (2003) 79 ALD 637; [2003] AATA 1348

individual justice is a critical task for the Tribunal but influencing the quality of decision-making generally may be just as important. The Tribunal has also been described as the back-bencher's friend. Harassed back-benchers in their electoral offices can earn thanks by advising constituents about their rights of appeal to the Administrative Appeals Tribunal. This will often save the back-benchers from time consuming work interceding with government agencies.

The Administrative Review Council, which advises the Commonwealth government on matters of administrative law, has recommended that all executive decisions affecting individual rights should be the subject of merits review.

The reason for the large jurisdiction of the Tribunal, the reason for its success, is largely because it is a general tribunal. If the Parliament is considering legislation on a new topic and the question arises whether a decision should be subject to merits review there is a readily available a tribunal to undertake the review. In other jurisdictions it will usually be necessary to create a new tribunal attended by cost, both initial and recurring, and delay, associated with increasing bureaucracy.

- **Constitution**

The need for the Administrative Appeals Tribunal to be ready for anything requires it to be flexible. Accordingly, the Tribunal has four levels of members. In addition to the President, who must be a Judge of the Federal Court of Australia, there are other members who are judges. This does not mean the Tribunal is in any sense a court. The judicial members of the Tribunal exercise administrative or executive power. There are then deputy presidents, senior members and members. The Tribunal can sit in panels of one, two or three members.

The Tribunal's greatest flexibility comes from its diversity in membership. The Tribunal now has over 90 members. A number of them are part time. In addition to lawyers the members include former military personnel (brigadiers, a rear admiral and an air vice marshal), medical practitioners (both general and specialist), scientists, accountants, business people, aviators and many others. A number of members have expertise in more than one discipline.

This breadth of expertise enables the Tribunal to tackle most of the matters coming before it from an informed background. However, that is not always so. Sometimes we must be wholly dependent on expert evidence. An example is the case relating to the Asian elephants.

- **Procedures**

If the most unique aspect of the Tribunal is its general jurisdiction and what inevitably flows from this, there is, nevertheless, another distinguishing characteristic, namely the way the Tribunal carries out its role.

Assisting the early compromise by the parties of the matters before it has always been an important object of the Tribunal. This role has been enhanced by recent amendments to the legislation governing the Tribunal. However, not all cases can be settled. The essential work of the Tribunal remains the determining of the matters before it. It is, after all, quality and consistency in these decisions which enhance the prospects of compromise.

Many Australian administrative review tribunals carry out their roles in an informal environment. In the Social Security Appeals Tribunal and the Veterans' Review Board,

from both of which the Administrative Appeals Tribunal hears appeals, the government agency is not represented. However, before the Tribunal the applicant and the agency are parties[30]. There must be a hearing[31]. There is a right to legal representation[32].

Accordingly, while the Tribunal is informal in its procedures it goes about its task in a court-like manner. Procedural fairness reigns. The decision under review is examined thoroughly and with care - often in a way that the original decision-maker could not have undertaken. This is because original decisions are usually taken in an office atmosphere, without the dialogue that a hearing permits. Sometimes public servants whose decisions have been overruled might be sceptical, but experience demonstrates the value of having something pointed out in person with the opportunity to query and analyse. It seems to me that this process of combining informality with a careful process giving both sides every opportunity to elucidate its point of view is another practice of the Administrative Appeals Tribunal which adds to its reputation.

An important aspect of the Tribunal's procedure is flexibility. A small social security case with a self represented applicant is handled informally around a table. A multi-million dollar tax case with Queens Counsel looks very like a hearing in a superior court.

Although the Tribunal proceeds in a court like manner it is obliged by its Act to provide "a mechanism of review that is fair, just, economical, informal and quick"[33]. It must also conduct proceedings "with as little formality and technicality, and with as much expedition, as [possible]"[34].

The Nature of Merits Review

The separation of powers present in Australia provides a focus on the nature of the review process which may not be present in other jurisdictions. Tribunals are making administrative decisions rather than resolving disputes, although each decision will incidentally resolve a dispute. As administrative decision-makers, tribunals are acting analogously to courts of admiralty acting "in rem". Many administrative decisions necessarily affect others who are not parties to the proceedings. A good example is decisions relating to individual fishing quotas where there is a total catch which is not being reviewed. Increasing the quota of one fisherman must reduce the quantity available to others[35]. In the same way decisions relating to social security claims affect the budget for social security payments and migration decisions affect the make up of the population even if individual cases have no quantifiable impact.

These matters have led to a recognition in Australia that administrative decision-making in tribunals involves a different process of decision-making to that in courts. Special rules have been developed, for example, as to the moment at which decision-makers must make their decision and the facts on which it must be based. Litigation in courts focuses on the moment proceedings are commenced and the facts at that time. The question is whether a breach of contract occurred prior to the commencement of proceedings not after they were

[30] *Administrative Appeals Tribunal Act* 1975 s 30 (1)
[31] s 34J
[32] s 32
[33] s 2A
[34] s 33(1)(b)
[35] *Re Friend v Australian Fisheries Management Authority*[2006] AATA 954 at para 57 per Downes J

commenced. The fact that there are now generally limited rights to plead facts occurring after proceedings were commenced does not affect the principle.

The quality of administrative decisions will generally be enhanced, however, if they are up to date and based on the latest available facts. This has been recognised by the courts. A former president of the Administrative Appeals Tribunal (President Davies J) said as long ago as 1988 that administrative decision-making took place in a "continuum" so that as decisions were reviewed each reviewer took into account intervening changes in the facts[36].

This approach was upheld last year in the High Court of Australia when a decision of a full Federal Court of Australia, in which I had dissented, was overturned[37]. The case related to a migration agent who had been disqualified by the Authority regulating migration agents. On appeal to the Administrative Appeals Tribunal the member hearing the matter took the view that although the agent's conduct may have justified disqualification at the time of the Authority's decision, the agent was rehabilitated by the time of the tribunal hearing and a lesser penalty was appropriate. The High Court decided that this course was correct. The Tribunal was correct in making its decision at the time the matter came before it on the facts as they then were and not at the time the matter was originally determined by the authority.

The Administrative Appeals Tribunal was an important experiment in 1976. I think we are indebted to the Kerr Committee for its vision. However, the experiment is now over. The Tribunal has a significant reputation. Other countries may care to look at it as a model for high quality and effective review of administrative decision-making.

Other Federal Tribunals

The Administrative Appeals Tribunal is not the only tribunal at the Commonwealth level in Australia undertaking merits review of administrative decisions. There are a number of specialist tribunals which provide external review in particular areas of high-volume government decision-making.

I have already mentioned the Social Security Appeals Tribunal and the Veterans' Review Board, the decisions of which are reviewable by the Administrative Appeals Tribunal. Two other significant tribunals that undertake merits review are the Migration Review Tribunal and the Refugee Review Tribunal which review a broad range of decisions concerning the rights of non-citizens to enter and stay in Australia.

Review in these tribunals is more informal that in the Administrative Appeals Tribunal. Generally the government party is not represented and the procedure is much less like a court.

Tribunals in the States

Quite apart from the Commonwealth, each of the states and territories of Australia have their own set of institutions which are designed to provide administrative justice.

The Administrative Appeals Tribunal model of a general merits review tribunal has been followed in the Australian Capital Territory, which has its own Civil and Administrative

[36] *Jebb v Repatriation Commission* (1988) 80 ALR 329 at 333-334 per Davies J
[37] *Shi v Migration Agents Registration Authority* [2008] HCA 31

Appeals Tribunal. It has also been followed in some states. New South Wales has the Administrative Decisions Tribunal, Victoria has the Victorian Civil and Administrative Tribunal and there is the State Administrative Tribunal in Western Australia. It is important to note, however, that the state-based tribunals exercise both executive and judicial power. They are claims tribunals as well as review tribunals. One of their functions is to review executive decisions of government. In that role they are modelled on the Administrative Appeals Tribunal. However, they also have roles which might be conferred on courts. The Victorian Civil and Administrative Tribunal is a good example. It is the largest tribunal in Australia. It has divisions dealing both with review of administrative decisions and dealing with claims, particularly tenancy claims. The second largest tribunal in Australia is, however, purely a claims tribunal. It is the New South Wales Consumer, Trader and Tenancy Tribunal. Its name describes its jurisdiction.

The role of claims tribunals in the states has expanded since the 1970s hand in hand with the expansion of review tribunals. The expansion of the claims tribunals is a particular consequence of the discovery that tribunals can provide a simple and more cost effective means of dispute resolution than courts, particularly for small disputes. They fulfil an important dispute resolution role when court litigation is inappropriate because the cost exceeds the amount in issue. The reforms which have led to the wide use of claims tribunals have presumably been driven by cost issues, but I apprehend that review tribunals may share some of the credit for the process because they are largely responsible for showing that tribunals can provide an efficient and cost effective method of dispute resolution.

Conclusion

Fortunately, government institutions have a habit of following and reflecting changes in society. As government intrudes more and more into the daily life of citizens mechanisms to ensure the process is fair are essential. This is no less true of intrusions that are beneficial, such as social security, than it is for presumptive intrusions such as licensing and regulation. Both kinds of activity need to be fairly and evenly conducted.

Expanding the jurisdiction and powers of tribunals has been a significant aid to achieving fairness and equity in government decision-making affecting citizens. A desire to achieve these goals has also been encouraged by modern emphasis on human and individual rights. Again, tribunals have been part of the answer.

Governments have recognised that high cost justice in tribunals would defeat their purposes and tribunals have developed as a balance between fairness and justice on the one hand and economy, informality and speed, on the other. The rapid increase in tribunals over recent years is a testament to the successful balance being found.

Tribunal development has not all been the same. In Australia there has been a steady move towards the development of general tribunals which are characterised by a wide jurisdiction and members with varying expertise. They have two particular virtues. First, their size permits economies of scale, particularly in countries with relatively small populations. Secondly, they provide parliaments with an easy solution to circumstances where decisions will be made which warrant review.

Canada, with the notable exception of Quebec, where there is a sophisticated general tribunal, has opted to continue with specialised tribunals and there are now very many

tribunals there. Until recently, the United Kingdom and New Zealand followed a similar path. However the Unified Tribunals Service in the United Kingdom is creating a de facto federalised general tribunal and New Zealand has plans to introduce a de jure general tribunal.

Tribunals are also understood in Australia to be divided between merits review tribunals and claims tribunals although there are many hybrids at state level.

The future of tribunals is undoubtedly expansion, not contraction. In my opinion this will be for our mutual benefit.