



WHY DOES AUSTRALIA HAVE A GENERAL REVIEW TRIBUNAL?

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I studied law at the University of Sydney. I was there between 1963 and 1966. My class included the present Attorney-General of Australia and the Attorney-General of New South Wales. They come from the opposite side of politics. It was an interesting class.

Administrative law was an optional subject. It was taught by Professor Harry Whitmore. He became the author of the text on Administrative Law originally written by Professor David Benjafield. During my time it was Friedman and Benjafield. It was last published in the 1980's under the editorship of Professor Stan Hotop who is now a Deputy President of the Australian Administrative Appeals Tribunal.

Professor Whitmore was a charismatic lecturer and he had a significant influence on me. It was through him that I developed my interest in what is now called public law – a kind of companion to Constitutional law.

In the early 1960's the United Kingdom Franks Committee Report was prominent. Professor Whitmore was influenced by it. It was an important

background to his lectures. He was also influenced by the Scandinavian concept of an ombudsman.

These matters were given prominence in Professor Whitmore's thinking because of the ever increasing influence of Government decision-making on citizens - whether it be taxation, social security and pensions or licences and permits. Government decision-making was coming to effect every citizen's everyday life. So extensive and pervasive had this decision-making become that some mechanism wider than judicial review began to seem appropriate. It seemed necessary for decisions to be reviewed on their merits by someone independent of Government.

There is nothing new about independent tribunals which review administrative decisions on their merits. They existed long before the 1960's. However, there were not so many of them. Australia had Taxation Boards of Review. The Australian states had tribunals reviewing decisions relating to land development. There were guardianship and mental health tribunals. However, the intervening years have seen ever increasing numbers of tribunals established in the United Kingdom, Canada and New Zealand. Australia was no exception. However, Australia adopted a new approach to the problem.

On 29 October 1968 the Australian Government established a committee which became known as the Kerr Committee. The Chairman was Sir John Kerr. This was long before he became Governor-General. Sir Anthony Mason, subsequently Chief Justice of Australia, who was Solicitor-General at the time, was a member. Robert Ellicott QC, subsequently Solicitor-General, Attorney-General and also a Federal Court judge was also a member. The final member was Professor Whitmore.

There is no doubt in my mind that Professor Whitmore was the driving force behind the Committee. He certainly wrote the first draft of its Report.

The Kerr Committee had been appointed to advise the Government about a proposal for a Commonwealth superior court to review administrative decisions. In the opening paragraphs of its Report 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. This was in the mid 1970's. The Administrative Appeals Tribunal was established. But that was just part of a large package. The establishment of the Federal Court of Australia was itself part of the scheme. Part of the jurisdiction of the court came under the *Administrative Decisions (Judicial Review) Act 1975* which codified the common law grounds of judicial review. Most importantly, that Act imposed a statutory obligation upon decision-makers to give written reasons for their decisions. The common law had stopped short of requiring reasons for all administrative decisions. 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, to advise the Government on all matters of administrative law, and the establishment of the office of Ombudsman.

By now I expect that you may see the hand of my old professor, Harry Whitmore behind all this. The Franks Committee had reminded him of the need for merits review. The Scandinavian office of Ombudsman had demonstrated to him the need for an independent office to scrutinise the process of decision-making, particularly at the mundane and ordinary level. He did not forget the need for regularisation of judicial review. The role of Sir Anthony Mason, one of Australia's greatest administrative lawyers, should not be underestimated, but to my mind the similarity between what I was taught at law school in the mid 1960's and the reforms which occurred in Australia in the mid 1970's is no coincidence.

The Administrative Appeals Tribunal will be 30 years old in July next year. It has had a distinguished history. A bi-partisan Senate Committee earlier this year said its reputation was “impeccable”. 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.

What is the Tribunal? Why is it different to a collection of specialised tribunals? To understand the Tribunal fully requires an understanding of the Australian constitutional arrangements.

Australia is a federation – a federation of the former colonies as states. The constitution confers legislative power on the Federal Parliament in a number of defined areas. The residue belongs to the states.

The Constitution is divided into chapters. Three of them are devoted respectively to the Legislature, the Executive and the Judiciary. From this division the High Court of Australia divined a separation of powers doctrine. Most importantly for present purposes the Executive could not exercise judicial power. Judicial power could only be exercised by a court. Being a court implied, amongst other things, appointees having security of tenure, at first for life, but since a constitutional amendment, until age 70.

Tribunals are generally not courts in the strict sense. They will nearly always fail the security of tenure test. In New Zealand that does not matter. Nor does it matter in the United Kingdom. It does not even matter in the Australian states. All these places have residential tenancy tribunals. They are simply exercising judicial power. They are determining disputes between individuals. However, in Australia, at the Commonwealth level, it does matter. A tribunal whose task was simply to determine disputes would be unconstitutional. The High Court would strike it down. It would be a body exercising judicial power which was not a court.

If the Executive is not to exercise judicial power courts should not exercise administrative power. However, that line of demarcation is not so clear.

These distinctions are behind the establishment of the Administrative Appeals Tribunal as a general tribunal whose sole function is to exercise executive power. The model of the Tribunal was, in due course, followed by many of the states of Australia: the Administrative Decisions Tribunal in New South Wales, the Victorian Commercial and Administrative Tribunal and the State Administrative Tribunal in Western Australia. However, these tribunals exercise both executive and judicial power. 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 Administrative Appeals Tribunal remains unique in that it is the only general tribunal whose sole function is to review executive decisions of government.

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. 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.

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. For example, next Tuesday I will be hearing 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. That case is likely to involve discretionary decision-making. It is not judicial review. The Tribunal will not be deciding whether the Minister's decision is lawful. It will be deciding the

matter afresh uninfluenced by the decision and reasons of the Minister. On the same day the Tribunal will no doubt be hearing claims by Commonwealth employees for workers' compensation. In form, these are reviews of administrative decisions of a Government agency determining whether and to what extent compensation should be paid. However, there are complex and detailed statutory provisions setting out how compensation claims are to be determined so that they involve much less discretionary decision-making.

What we call the bulk jurisdictions in the Tribunal are Commonwealth employees' compensation, social security, Veterans' entitlements and taxation. Taxation is moving rapidly from a minor to a major role. 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 a condition should or should not be imposed on a licence. What is involved is simply a matter of judgment. In others the decision-making is quite constrained.

The United Kingdom is presently moving towards a unified tribunal system. What is proposed, however, is not a general tribunal. Tribunals will be combined and subjected to uniform controls. It remains to be seen whether the idea for a general division within the new structure emerges. In New Zealand, as a result of a report of the Law Commission, consideration is being given to some kind of unified or general system.

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 body. Nevertheless, there is broad general acceptance now in Australia of the Administrative Appeals Tribunal. The Attorney-General, the Hon. Philip Ruddock MP, has often referred to the important normative role of the Tribunal in improving the quality of Government decision-making generally. Providing 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 them from time consuming work interceding with Government agencies.

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 review there is a readily available Tribunal to undertake the review. In other jurisdictions it will usually be necessary to create a new tribunal with the cost, both initial and recurring, and delay associated with increasing bureaucracy.

The Governments of Australia and New Zealand have recently been discussing a common therapeutic goods regime. Administrative review of some decisions may be provided for. In Australia the reviewer would be the Administrative Appeals Tribunal. New Zealand would need to establish a new tribunal.

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 nearly 80 members. A number of them are part time. In addition to lawyers the members include former military personnel (majors-general, brigadiers, a rear admiral and an air marshall), 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 which we are about to hear.

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 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. There must be a hearing. Legal representation is authorised. Accordingly, while the Tribunal is informal in its procedures it goes about its task in a way which has parallels with courts. Procedural fairness reigns. The decision under review is examined thoroughly and with care – often in a way that the original decision-maker could not undertake. 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 and of 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 aspect of the Administrative Appeals Tribunal which adds to its reputation.

The Administrative Appeals Tribunal was an important experiment in 1976. I think we are indebted to Professor Harry Whitmore and the rest of the Kerr Committee for their 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.