



The Australasian Institute of  
Judicial Administration Incorporated

# **TRIBUNAL INDEPENDENCE**

**Associate Professor Pamela O'Connor**  
**Monash University**

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The Australasian Institute of Judicial Administration Incorporated ('AIJA') is an incorporated association affiliated with Monash University. Its main functions are the conduct of professional skills courses and seminars for judicial officers and others involved in the administration of the justice system, research into various aspects of judicial administration and the collection and dissemination of information on judicial administration. Its members include judges, magistrates, legal practitioners, court administrators, academic lawyers and other individuals and organisations interested in improving the operation of the justice system.

The AIJA Secretariat, which has been in operation since February 1987, is funded substantially on a composite government funding basis through the Standing Council on Law and Justice (SCLJ) formerly known as Standing Committee of Attorneys-General.

Published 2013

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ISBN: 978-0-9590029-3-5

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## **FOREWORD**

Tribunals are an important part of the justice system. They provide a quick, cheap and relatively informal means of dispute resolution. Like other justice institutions, tribunals rely ultimately on public confidence and the consent of the governed. The extent to which a tribunal is independent of the Executive influences public perception about the tribunal's impartiality. Impartiality is essential for the determination of just, predictable decisions and the acceptance of those decisions by the community. It is for this reason that tribunal independence matters.

This research paper examines the institutional provisions and arrangements that enable tribunals to perform their functions impartially and independently. On behalf of the Council of Australasian Tribunals (COAT) I welcome the publication of this paper and congratulate Associate Professor O'Connor on this important and substantial contribution to the debate about the contextual factors which safeguard impartial adjudication by tribunals.

Justice Iain Ross AO  
Chair  
Council of Australasian Tribunals



## **ACKNOWLEDGMENT**

The AIJA is pleased to have been associated with the important research undertaken by Associate Professor Pamela O'Connor on Tribunal Independence.

The AIJA has had a long association with tribunals having, on its own account, for a number of years, and more recently with the Council of Australasian Tribunals (COAT) conducted the Annual Tribunals Conference.

This is the second occasion on which the AIJA has been associated with and financially supported research by COAT, having been involved in the development of the Tribunals Bench Book.

Thanks are due to Associate Professor O'Connor, to Justice Iain Ross AO who has chaired the Steering Committee for the research, Judge Kevin O'Connor AM, President of the Administrative Decisions Tribunal of New South Wales and Greg Reinhardt, Executive Director of the AIJA, who formed the Steering Committee for the Project. I also acknowledge assistance from the Heads of Tribunals, the Executive of COAT and those interviewed by Associate Professor O'Connor.

I commend the research to you.

Justice Michelle May  
President, AIJA  
2013





## PREFACE

This is a study of institutional provisions and arrangements that enable tribunals to perform their functions impartially and independently. The primary function of Australian and New Zealand tribunals is the resolution of disputes, and the principal method is adjudication. There is a growing international interest in identifying, enhancing and measuring the institutional arrangements that safeguard impartial adjudication by tribunals. They include legislative provisions, common law rules of judicial review, government policies, procedures and guidelines, funding arrangements, service agreements, administrative practices and conventions, cultural and societal norms, values and attitudes. They are found in variable combinations and interact in complex ways.

The study was undertaken by Associate Professor Pamela O'Connor of Monash University ('the researcher') under a consultancy agreement with the Council of Australasian Tribunals, with a funding contribution from the Australian Institute of Judicial Administration. The project was carried out in consultation with the funding bodies, but the views expressed in this report are those of the researcher.

The measurement of independence as an area of tribunal quality raises difficult conceptual questions. We lack a developed theoretical and empirical understanding of the institutional design elements required to secure independence in various settings. Since the 1990s, international aid donors have invested in projects to build judicial independence in various countries, but no consensus model has emerged. Much of the learning on judicial independence is applicable to tribunals which have adjudicative functions. There are also factors which are peculiar to the tribunal sector, including the diversity of tribunals, their membership, their place in the system of government, and their accountability mechanisms. Tribunal independence overlaps judicial independence, but raises distinctive issues.

The study is premised on the idea that independence is at least partly a function of institutional design for impartial adjudication. It examines the various types of legislative provisions and other administrative arrangements currently in use, to assess their value in protecting tribunal independence. The success of tribunals ultimately depends upon public trust in the quality and impartiality of their adjudication, but institutional safeguards for independence help to reinforce public trust. They are also the factors which are readily observable and liable to change through direct policy intervention.

The research for the study comprised three stages: a literature review, a legislation review, and a series of interviews with tribunal heads. First came an examination of the international literature on both judicial and tribunal independence, drawing upon development, economics and social science as well as legal scholarship, reports of law reform and government bodies and addresses by tribunal heads and members, and court decisions. The contributions were examined for theoretical insights, approaches, definitions and conceptualisation of issues, empirical data, and to assess support for various forms of institutional arrangements for independence.

The second stage was an examination of a selection of current tribunal statutes in each jurisdiction from which the Council's member tribunals are drawn: the Commonwealth, New Zealand, all Australian States and the Australian Capital Territory. Since tribunals are creatures of statute, the degree of their independence is conditioned by the terms of their enabling legislation. The object of the legislative survey was to assess the variation in the types of provisions that have been proposed in the literature as significant for tribunal independence.

The third stage of the research consisted of telephone interviews with 17 current heads and (on the nomination of the relevant current heads) 2 former heads, of the Council's member tribunals, to obtain information about appointment and reappointment practices. The President and National Executive of the Council assisted the researcher by inviting heads of member tribunals to take part. The interviewees were self-selected, since all who agreed to participate were interviewed. They included heads of tribunals from each of the territorial jurisdictions represented in the Council's membership. They are listed in Appendix A.

The interviews were not surveys and did not provide quantitative data. The interviewees were asked about their knowledge of actual practices, during their term as head, relating to the appointment and reappointment processes for members of their tribunals. The questions focused on this area because publicly available information about the processes is limited.

The interviews were semi-structured, and the questions were modified to take account of the legal framework for the particular tribunal. As the questions raised sensitive issues relating to the relations between the tribunal, ministers and departments, interviewees were assured that their responses would be treated as confidential and would not be attributed to them personally or to their tribunal without their consent. The researcher used the responses to identify issues, perspectives, and approaches, to assess the impacts of practices upon tribunals, and to check understandings.

Since the interviewees were all heads or former heads of tribunals, their responses presented a tribunal management perspective. It is likely that interviews with current and former tribunal members or with the appointing Ministers would yield a different set of perspectives. The tribunal heads were selected as the most knowledgeable group with respect to the processes leading to the appointment and reappointment decisions. The researcher is most grateful for their assistance.

This study does not propose an ideal model of institutional design for tribunals, nor does it make recommendations for improving the independence of particular tribunals. It is intended to support the evaluation and improvement planning envisaged by the Framework, with respect to independence as an area of excellence. It offers an integrated package of concepts, language, criteria and evaluated models of legislation and practice. The package will assist tribunals to measure the strength and consistency of their institutional design for independence and to plan for improvement. It will provide the basis for improving the legislative design of new tribunal statutes and inform the reviews of current statutes.

Readers who are looking for an Executive Summary may wish to proceed directly to Chapter 7 where the main themes and findings are summarised.

Associate Professor Pamela O'Connor  
Monash University



## Chapter 1: Introduction and Conceptual Issues

As Creyke observes, tribunals defy definition.<sup>1</sup> Any definition of ‘tribunal’ is either too narrow to capture their diversity, or too broad to distinguish them from courts and executive agencies. The NZ Law Commission suggests that the term ‘tribunal’ refers to a cluster of features that are said to distinguish tribunals from courts, but a body that lacks some of the features can still be a tribunal.<sup>2</sup> For purposes of this study, it is proposed to adopt the Council of Australasian Tribunals’ functional definition of a ‘tribunal’ as any Commonwealth, State, Territory or New Zealand body whose primary function involves the determination of disputes, including administrative review, party/party disputes and disciplinary applications, but which in carrying out this function is not acting as a court.<sup>3</sup>

### TRIBUNALS IN THE SYSTEM OF GOVERNMENT

The position of tribunals in the system of government and their boundary with the courts varies from one country to another, and even among territorial units within a single country. Cane observes that in the US federal system, ‘tribunals’ are mainly regulatory bodies with policy functions.<sup>4</sup> Administrative adjudication is a judicial function undertaken by administrative judges, who are typically embedded in specialist executive agencies but operate with a degree of institutional separation.<sup>5</sup> The embedded model is not considered to be inconsistent with the American conception of the separation of powers, provided that the adjudicators’ decisions can be reviewed by a court.<sup>6</sup>

In the UK, tribunals are regarded as ‘belonging to the same genus as courts’,<sup>7</sup> and as exercising essentially judicial functions.<sup>8</sup> The guarantee of judicial independence in the *Constitutional Reform Act 2005* (UK) has been extended to tribunals.<sup>9</sup>

In Australia, Commonwealth tribunals are regarded as exercising executive powers. The *Australian Constitution* has been interpreted as embodying a formal separation of executive, legislative and judicial powers in the federal system. The legislative and executive branches are not institutionally separate, because the

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<sup>1</sup> Robin Creyke, 'Where Do Tribunals Fit into the Australian System of Adjudication?' in G Huscroft and M Taggart (eds), *Inside and Outside Canadian Administrative Law: Essays in Honour of David Mullan* (Uni of Toronto Press, 2006) 81, 81.

<sup>2</sup> New Zealand Law Commission, *Tribunals in New Zealand*, Issues Paper No 6 (2008), 285-86 ('NZLC, *Tribunals in New Zealand*').

<sup>3</sup> Peter Cane, *Administrative Tribunals and Adjudication* (Hart Publishing, 2009), 80-81.

<sup>4</sup> *Ibid* 4-5.

<sup>5</sup> *Ibid* 4-5, 80-82, 90.

<sup>6</sup> *Ibid* 5.

<sup>7</sup> *Ibid* 90, 95.

<sup>8</sup> *Ibid* 90, 95-96.

<sup>9</sup> Sections 3(1), (7), (7A) (7B) as amended by the *Tribunals, Courts and Enforcement Act 2007* (UK) s 1.

Ministers must be members of Parliament,<sup>10</sup> but the separation of the federal judiciary from the other branches is strictly maintained.<sup>11</sup> The Constitution has been interpreted to mean that no entity other than a court can exercise judicial power and, with limited exceptions, federal judges cannot exercise executive power.<sup>12</sup> As a result, the Commonwealth Parliament could not establish a body such as the Victorian Civil and Administrative Tribunal ('VCAT') with jurisdictions to hear civil disputes, nor could it empower a court to review administrative decisions on the merits.

New Zealand and the Australian states and territories are not bound by a strict constitutional separation of judicial power.<sup>13</sup> Parliament can authorise a tribunal or a court to make administrative decisions, to review the decisions of government agencies on the merits, or to adjudicate civil disputes between private parties by determining private rights. The functions can be allocated to courts and tribunals under different institutional arrangements. Some jurisdictions have consolidated both administrative and civil (or 'court substitute') tribunals into large, multi-jurisdictional tribunals, a model pioneered by Victoria in 1998 with the establishment of VCAT.<sup>14</sup> This model can be contrasted with Tasmania, which has few tribunals and relies on the Magistrates Court to review administrative decisions made under more than 50 enactments.<sup>15</sup>

Australian and New Zealand tribunals, considered collectively, do not fit neatly into the tripartite classification of government powers. They span a spectrum from the executive to the judicial branches.<sup>16</sup> Commonwealth administrative tribunals exercise executive power, and some state and New Zealand tribunals, such as the Disputes Tribunal (NZ) are declared to be courts and exercise judicial authority.<sup>17</sup> A state or territory Parliament can grant judicial power to a tribunal.<sup>18</sup> A state tribunal can even be 'a court of a State', capable of being granted Commonwealth judicial

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<sup>10</sup> Cane, *Administrative Tribunals and Adjudication*, above n 3, 17-19; *Australian Constitution* s 64.

<sup>11</sup> Cheryl Saunders, 'The Separation of Powers' in B Opeskin and F Wheeler (eds) *The Australian Federal Judicial System* (Melbourne University Press, 2000), 1, 10-16.

<sup>12</sup> *Attorney-General (Aust) v The Boilermakers' Society of Australia* [1957] AC 288; *Re Adams and Tax Agents' Board* (1976) 12 ALR 239, 241-242; *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245; *Lane v Morrison* (2009) 239 CLR 230; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1; Saunders, *ibid* 7-15.

<sup>13</sup> Philip Joseph, *Constitutional and Administrative Law in New Zealand* (Thomson Brookers, 3<sup>rd</sup> ed, 2007), [7.6]. For the Australian states and territories, the principle is subject to the limits implied from Ch III of the Constitution as enunciated in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 and subsequent cases.

<sup>14</sup> *Victorian Civil and Administrative Tribunal Act 1998* (Vic). A 'civil' tribunal determines disputes between private parties or under private law, such as tenancy and consumer disputes.

<sup>15</sup> *Magistrates Courts (Administrative Appeals Division) Act 2001* (Tas).

<sup>16</sup> NZLC, *Tribunals in New Zealand*, above n 2, [2.8], [2.11]-[2.14]; *Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)* [2001] 2 SCR 781, [32].

<sup>17</sup> *Disputes Tribunal Act 1998* (NZ) s 4(3); *Disputes Tribunal Act 1998* (NZ) s 4(3); *Inferior Courts Procedure Act 1909* (NZ) s 2(b); *Dust Diseases Tribunal Act 1989* (NSW) s 4; Joseph, above n 13, [7.2.3], [7.5].

<sup>18</sup> *Owen v Menzies* (2012) 293 ALR 571.

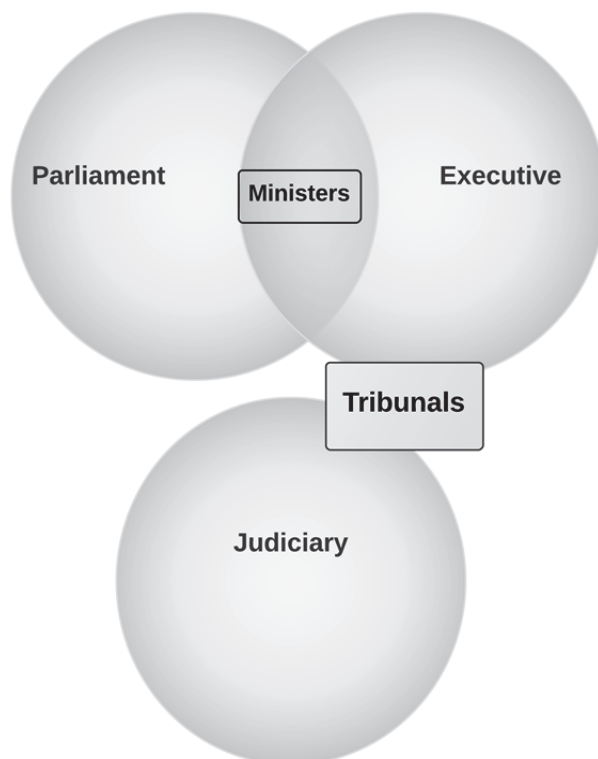
power, if it satisfies judicially-defined standards of institutional independence and integrity.<sup>19</sup>

The position of Australian and New Zealand tribunals in the system of government as currently understood is represented in Figure 1 below. It depicts some tribunals (including all Commonwealth administrative tribunals) as part of the executive branch, some as part of the judiciary, and some with mixed or unclassified functions falling in between. It also shows the overlap of the executive and legislative branches and the separation of the judicial branch.

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**Figure 1: The position of Australian and New Zealand tribunals in the system of government**

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<sup>19</sup> In *Owen v Menzies*, *ibid*, the Queensland Court of Appeal held that the Queensland Civil and Administrative Tribunal ('QCAT') was a court of a State within the meaning of s 77(iii) of the Constitution and capable of being invested with the judicial power of the Commonwealth. In *Commonwealth v Wood* (2006) 148 FCR 276, the Anti-Discrimination Tribunal of Tasmania was held to be a court of the state of Tasmania for purposes of federal jurisdiction. See generally, Duncan Kerr, 'State Tribunals and Ch III of the Australian Constitution' (2007) 31 *Melbourne University Law Review* 622.



## Reconceptualising the place of tribunals in the system of government

New conceptual models have been proposed which place tribunals within a framework of government review and accountability institutions.<sup>20</sup> The conventional tripartite separation of powers does not easily accommodate the emergence of oversight, scrutiny and review bodies established by legislation, such as ombudsmen, integrity commissions, parliamentary committees, auditors-general, information and privacy commissioners and administrative tribunals. All of the bodies need to operate independently of executive agencies in order to hold them to account.

McMillan identifies three theories which update the concept of the separation of powers by incorporating the new government accountability mechanisms.<sup>21</sup> The first is the idea of a 'national integrity system' which encompasses courts, administrative tribunals and other bodies that have the function of promoting integrity in government.<sup>22</sup> The second theory is that administrative tribunals, ombudsmen and other oversight bodies collectively form a fourth 'integrity' branch of government, at least for purposes of defining their functions and relationship with executive agencies.<sup>23</sup> The third idea is that tribunals form part of 'the justice system', which includes all the bodies which have the function of resolving disputes between people and government.<sup>24</sup> This concept, which has been adopted in the UK,<sup>25</sup> is the only one of the three to accommodate both civil and administrative tribunals.

## JUDICIAL INDEPENDENCE AND TRIBUNAL INDEPENDENCE

Concepts of tribunal independence in Australia, the UK, Canada and New Zealand have developed by analogy with judicial independence. The concept of judicial independence comprises multiple elements, which are commonly reduced to an individual and a collective aspect.<sup>26</sup> Le Dain J explained the duality in *Valente v The Queen*:

It is generally agreed that judicial independence involves both individual and institutional relationships: the individual independence of a judge, as reflected in such matters as security of tenure, and the institutional independence of the court or tribunal over which he or she presides, as reflected in its institutional or administrative relationships to the Executive and legislative

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<sup>20</sup> John McMillan, 'Re-thinking the Separation of Powers' (2010) 38 *Federal Law Review* 423, 423-24, 439-443.

<sup>21</sup> *Ibid* 423-24.

<sup>22</sup> *Ibid* 423-24, 439-440.

<sup>23</sup> *Ibid* 423-24, 440-441; Jacob Spigelman, 'The Integrity Branch of Government' (2004) 78 *Australian Law Journal* 724.

<sup>24</sup> McMillan, above n 20, 423-24, 441-42.

<sup>25</sup> Tribunals, Courts and Enforcement Act 2007 (UK) sch 7 cl 13(4); UK, Tribunals for Users: One System, One Service – Report of the Review of Tribunals (2001) [2.12] ('Leggatt Report').

<sup>26</sup> *R v Beauregard* (1986) 2 SCR 56 [23] (Supreme Court of Canada, Dickson CJ).

branches of government.<sup>27</sup>

The individual aspect is also called ‘decisional’ or ‘adjudicative’ independence. It is concerned with protecting the ability of a court to decide matters impartially and free from external influence.<sup>28</sup> The collective aspect, which Berman and Wheeler call ‘branch independence’,<sup>29</sup> is concerned with ensuring that the courts can perform their functions of interpreting the constitution and holding the other branches to account.<sup>30</sup> In *R v Beauregard*, Dickson CJ said that, while decisional independence relates to the role of judges in deciding individual cases, the collective sense of independence ensures the ability of the judiciary to act as ‘protector of the Constitution and the fundamental values embodied in it’.<sup>31</sup>

The concept of branch independence emerged more recently than the individual aspect,<sup>32</sup> and its implications are still being worked out. Judges and other commentators have suggested that it may not be consistent with the current arrangements in some jurisdictions which give an executive agency control of courts governance, funding and services.<sup>33</sup> In their report on courts governance, Alford et al said that ‘the reliance of the courts on Parliament and/or the Executive for their funding must always raise questions of the extent to which this reliance on the courts makes the decisions of courts open to influence by the Executive’.<sup>34</sup>

### **Independence from whom?**

The dual concepts of decisional and branch independence suggest different answers to the question: independence from whom? Threats to decisional independence can arise from multiple sources, while branch independence is concerned with shielding the courts from improper influence from the other branches of government.

In *R v Lippé*, the Supreme Court of Canada considered whether an ‘independent tribunal’ within the meaning of section 11(d) of the *Canadian Charter of Rights and Freedoms* must be independent from the government and from the parties to the

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<sup>27</sup> [1985] 2 SCR 673, 685, 687 (Le Dain J).

<sup>28</sup> Gordon Bermant and Russell R Wheeler, ‘Federal Judges and the Judicial Branch: Their Independence and Accountability’ (1995) 46 *Mercer Law Review* 835, 838-39; Marilyn Warren, ‘Does Judicial Independence Matter?’ (2011) 150 *Victorian Bar News* 12, 12-14.

<sup>29</sup> Bermant and Wheeler, above n 28, 844.

<sup>30</sup> Ibid 837-38; Jacob Spigelman, ‘Judicial Appointments and Judicial Independence’ (2008) 17 *Journal of Judicial Administration* 139, 141-42.

<sup>31</sup> (1986) 2 SCR 56 [24] (Sup Ct Can).

<sup>32</sup> Ibid [21]-[22]. Bermant and Wheeler describe branch independence as ‘a relatively new idea’: above n 28, 837.

<sup>33</sup> Eg, Warren, above n 28, 15-17; Ninian Stephen, ‘Southey Memorial Lecture 1981, Judicial Independence: A Fragile Bastion’ (1982) 13 *Melbourne University Law Review* 334, 338; Guy Green, ‘The Rationale and Some Aspects of Judicial Independence’ (1985), 59 *Australian Law Journal* 135, 135; Tim Smith, ‘Court Governance and the Executive Model’ (Paper presented to the Judicial Conference of Australia Colloquium, Canberra, 2006), *passim*.

<sup>34</sup> John Alford, Royston Gustavson and Philip Williams, *The Governance of Australia’s Courts: A Managerial Perspective* (AIJA Inc, 2004), 41.

dispute.<sup>35</sup> Lamer CJ said that under Canada's constitutional tradition, the principle of judicial independence is limited to independence from 'the government', including the legislative and executive branches and any person or body acting under the authority of the state.<sup>36</sup> Gonthier J disagreed, on the ground that the restrictive interpretation of judicial independence was not consistent with international usage.<sup>37</sup> His Honour preferred the broader view of Dickson CJ in *R v Beauregard*:

Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider - be it government, pressure group, individual or even another judge - should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision.<sup>38</sup>

Australian commentators generally accept the broader view, with the proviso that the executive is the main source of threat to judicial independence.<sup>39</sup>

### **Independence and impartiality**

Parker defines judicial independence as 'a set of arrangements designed to promote and protect the perception of impartial adjudication'.<sup>40</sup> In *Valente v The Queen*,<sup>41</sup> Le Dain J observed that impartiality and independence are conceptually distinct values, although closely related. Impartiality refers to a state of mind which is free of actual or perceived bias, while independence

connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the Executive Branch of government, that rests on objective conditions or guarantees.<sup>42</sup>

## **THE CONCEPTUAL BASIS FOR TRIBUNAL INDEPENDENCE**

There is a need to redefine tribunal independence on its own terms, free of strained analogies with judicial independence. To the extent that branch independence relies on the separation of judicial power and the role of the courts as protectors of the constitution, it is not inclusive of tribunals. The concepts and

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<sup>35</sup> [1991] 2 SCR 114.

<sup>36</sup> Ibid [63]-[69] (Lamer CJ, Sopinka and Cory JJ agreeing).

<sup>37</sup> Ibid [2]-[15] (Gonthier J, La Forest, L'Heureux-Dubé, and McLachlin JJ agreeing)

<sup>38</sup> [1986] 2 SCR 56, 69.

<sup>39</sup> Eg, Spigelman, 'Judicial Appointments and Judicial Independence', above n 30, 141; Warren, above n 28, 12-14.

<sup>40</sup> Stephen Parker, 'The Independence of the Judiciary' in B Opeskin and T Wheeler (eds) *The Australian Federal Judicial System* (Melbourne University Press, 2000) 62, 71.

<sup>41</sup> [1985] 2 SCR 673 [15], [22] (Supreme Court of Canada).

<sup>42</sup> Ibid [15].

categories of tribunal independence should reflect the distinctive nature and function of tribunals.

Cane suggests that concerns about embedded tribunals and independence in the UK reflect the particular form that the separation of powers takes in the UK system of government.<sup>43</sup> In the Westminster system, the executive and legislative branches are not institutionally separate, as the Ministers of state must be members of Parliament. The independence of the judiciary from the other branches is essential to enable it to hold the executive to account.

Cane observes that the US conception of separation of powers places less importance on isolating the judiciary, because the legislature is separate from the executive and can keep a check it.<sup>44</sup> In the US federal system, review functions are undertaken by administrative judges or adjudicators who are embedded within executive agencies.<sup>45</sup> Their decisions are implemented as agency decisions and are subject to judicial review.<sup>46</sup> Cane concludes that ‘the fundamental difference between the UK and the US models – the difference between embedded and free-standing administrative adjudication – is a function of different understandings of separation of powers’.<sup>47</sup>

Although Australia and New Zealand have the Westminster system, the position of tribunals in the separation of powers is more equivocal than in the UK. In the UK, tribunals are regarded as an adjunct to the courts, and requiring similar independence.<sup>48</sup> Commonwealth tribunals exercise executive power, while New Zealand, state and territory tribunals can have mixed executive and judicial powers.<sup>49</sup> Since our tribunals are not considered to be part of the judiciary, the case for administrative independence must be based on what is required for impartial adjudication, not on the separation of powers.

The starting point for tribunal independence is to ask what tribunals require to carry out their functions.<sup>50</sup> It is generally agreed that independence is not an end in itself, but is required for the effective performance of the functions of courts and tribunals.<sup>51</sup> Scholars have identified a range of social and economic functions that courts and tribunals serve, including: legitimising the exercise of government power

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<sup>43</sup> Cane, *Administrative Tribunals and Adjudication*, above n 3, 4-5, 80-81.

<sup>44</sup> *Ibid* 80-82.

<sup>45</sup> *Ibid*.

<sup>46</sup> *Ibid* 269.

<sup>47</sup> *Ibid* 82.

<sup>48</sup> *Ibid* 269; *Leggatt Report*, above n 25, [2.18].

<sup>49</sup> See Chapter 1.

<sup>50</sup> Parker proposes said that the inquiry for judicial independence should begin with what is needed for impartiality: Stephen Parker, *Courts and the Public* (AIJA Inc, 1998) 65.

<sup>51</sup> Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report No 39 (1995) [2.13] (*ARC, Better Decisions*). Bermant and Wheeler observe that independence is an instrumental value, not a fundamental value: above n 28, 838.

by providing avenues of review for aggrieved persons,<sup>52</sup> channelling relationships, behaviour and expectations,<sup>53</sup> asserting a dominant normative order,<sup>54</sup> mediating competing values and interests in society,<sup>55</sup> improving agency decision making by elaborating rules and modelling process values,<sup>56</sup> and allocating resources and losses more efficiently.<sup>57</sup>

At a concrete level, the principal activity of courts and tribunals is dispute resolution.<sup>58</sup> The primary method by which they resolve disputes is adjudication, whether or not other methods such as mediation are also practised. In adjudication, the court or tribunal is empowered, whether by statute or by the prior agreement of the parties, to resolve the dispute by deciding the outcome. It reaches its decision by making findings of fact based on the evidence, and by applying the law to the facts as found.<sup>59</sup> Adjudication is a participative process, in which the parties have the opportunity to present evidence and reasoned arguments.<sup>60</sup>

Shapiro describes adjudication as a ‘triad’ relationship in which two parties to a dispute submit the matter to a neutral third party to decide.<sup>61</sup> The paradigm of the triad is so compelling that virtually all societies employ it to resolve disputes.<sup>62</sup> Adjudication retains its triadic character irrespective of whether the procedure is adversarial or inquisitorial,<sup>63</sup> and whether there are two or more parties.

Adjudication is the most characteristic function of courts exercising judicial power, but can also be used to review and re-exercise the executive power of government. Tribunals which review the decisions of a government agency on the merits may be empowered to exercise some or all of the powers and discretions of the primary decision maker. The tribunal’s decision is implemented by the government agency as if it were its own decision. In this sense, administrative

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<sup>52</sup> Peter Cane, *Administrative Law* (Oxford University Press, 4th ed, 2011) 214-17; Parker, *Courts and the Public*, above n 50, 8, citing J L Waltman and K M Holland (eds), *The Political Role of Law Courts in Modern Democracies* (McMillan, 1998).

<sup>53</sup> British Columbia, Ministry of Attorney General, *On Balance White Paper: Guiding Principles for Administrative Justice Reform in British Columbia* (2002) 208.

<sup>54</sup> *Ibid* 208, 212.

<sup>55</sup> Parker, *Courts and the Public*, above n 50, 8.

<sup>56</sup> *Ibid*; Roger Cotterell, *The Sociology of Law* (Butterworths, 2<sup>nd</sup> ed, 1992), 208. For discussion of the ‘normative effect’ of tribunal decisions, see ARC, *Better Decisions*, above n 51, [2.10]-[2.11], Ch 6.

<sup>57</sup> Parker, *Courts and the Public*, above n 50, 8; Stephen Bottomley and Stephen Parker, *Law in Context* (2<sup>nd</sup> ed, Federation Press, 1997) ch 13.

<sup>58</sup> *Eg* Cotterell, above n 56, 209.

<sup>59</sup> Peter Cane and Leighton McDonald, *Principles of Administrative Law: Legal Regulation of Governance* (Oxford University Press, 2nd ed, 2012) 250; Cotterell, above, n 56, 209-10.

<sup>60</sup> Lon Fuller, ‘The Forms and Limits of Adjudication’ (1978) 92 *Harvard Law Rev* 353, 363-70.

<sup>61</sup> Martin Shapiro, *Courts: A Comparative and Political Analysis* (University of Chicago Press, 1981) ch 1; Cotterell, above n 56, 209.

<sup>62</sup> Shapiro, above n 61, 1.

<sup>63</sup> Cane and McDonald, above n 59, 250-51.

review tribunals exercise executive rather than judicial power, but through a different process. Cane and McDonald observe that decision making by executive agencies is essentially a ‘bipolar’ process in which an official (the ‘primary decision maker’) makes a decision which affects another person.<sup>64</sup> A tribunal uses a tripolar (or triadic) adjudicative process to review the official’s decision.<sup>65</sup>

### **Adjudication and impartiality**

An effective adjudication requires that the parties to the dispute trust the adjudicator to decide impartially. An impartial adjudicator has no personal stake in the matter to be decided, and is free of any improper influence to decide in a particular way.

It is often stated that an independent decision maker is inherent in the concept of adjudication, although there are different explanations of the link.<sup>66</sup> Harsel suggests that a decision would not be adjudicative if it ceases to depend on the decision maker’s assessment of the facts and the law.<sup>67</sup> For Fuller, the defining feature of adjudication is that it allows affected parties to participate in the decision by offering evidence and reasoned arguments.<sup>68</sup> If the adjudicator’s mind is not open to reason because of personal interest or bias, the integrity of adjudication itself is denied because there is no real participation.<sup>69</sup> Other commentators propose that impartiality is necessary to maintain public trust in the adjudicator or to make the process or the decision legitimate, valid or acceptable.<sup>70</sup>

Shapiro identifies consent as the element that links adjudication to independence.<sup>71</sup> The logic of the courts relies on the independence of the adjudicator, because adjudication is a process based upon ‘an element of consent’ by both parties.<sup>72</sup> Without independence, the courts would become coercers.<sup>73</sup> The triad would become a dyad, in which the court is aligned with one party against another.<sup>74</sup>

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<sup>64</sup> Ibid. See also Fuller, above n 60, 365, pointing out that participation by the parties distinguishes adjudication from the mode of decision making by administrators in executive agencies.

<sup>65</sup> Ibid.

<sup>66</sup> Creyke, ‘Where do Tribunals Fit?’, above n 1, 94; ARC, *Better Decisions*, above n 51, [4.4].

<sup>67</sup> Justin Harsel, ‘Tribunals in the System of Justice: The Need for Independence’ (1997) *Australian Journal of Administrative Law* 200, 201.

<sup>68</sup> Fuller, above n 60.

<sup>69</sup> Ibid, 365.

<sup>70</sup> Gabriel Fleming, ‘Tribunal Independence: Maintaining Public Trust and Confidence’ (Paper presented at the 6<sup>th</sup> AIJA Tribunals Conference, Sydney, 2003), 2-5.

<sup>71</sup> Shapiro, above n 61, 2, 12.

<sup>72</sup> Ibid 19. Fuller does not agree that all adjudicative tribunals draw their powers from the consent of the parties: Fuller, n 60, 353-54.

<sup>73</sup> Shapiro, above n 61, 19.

<sup>74</sup> Ibid 2; Cotterell, above n 56, 209.

Where this is perceived to have occurred, the losing party will no longer accept the adjudicator's decision as valid.<sup>75</sup> Nor will any fair-minded onlooker.

In support of his argument that the consent of the parties is fundamental to adjudication, Shapiro points to the efforts that courts make to entice both parties to attend and participate in the process, and to resolve issues by agreement.<sup>76</sup> Even though courts and tribunals are authorised to exercise the coercive powers of the state, they strive to defend the paradigm of the consensual triad on which their social logic depends.<sup>77</sup> By demonstrating their neutrality and inviting participation, they reassure parties that the process remains triadic.

### ***The importance of trust in adjudication***

What Shapiro calls 'an element of consent' could be extended to the idea of 'trust' or 'confidence' arising from the perceived independence of the court or tribunal and the fairness of its procedures. 'Trust' involves the idea that by consenting to (or at least accepting) the rules and the process for the adjudication, parties indirectly consent to the decision that results from it, whether the outcome is favourable or unfavourable to them.

The law recognises the importance of trust through the common law rules of natural justice. The rules require fair procedures and opportunities to participate, independently of the justice of the decision outcome. Social psychological research indicates that the law is right to treat procedural fairness as having its own normative foundation. Empirical research repeated in diverse settings has found that a participant's assessment of the fairness of the procedures of a court has an independent effect on the participant's response to the decision outcome,<sup>78</sup> and may even be the more important determinant of satisfaction.<sup>79</sup> In other words, participants are more likely to accept a decision if they perceive that it was arrived at through fair procedures.

The criteria by which participants assess the fairness of the process include the neutrality and trustworthiness of the adjudicator, the degree of respect with which they are treated, and the quality of opportunity to participate.<sup>80</sup> The research

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<sup>75</sup> Shapiro, above n 61, 7-8.

<sup>76</sup> Ibid 2, 12-13.

<sup>77</sup> Ibid 8.

<sup>78</sup> For reviews of the studies, see Michael Adler, 'Understanding and Administering Administrative Justice' in Michael Adler (ed), *Administrative Justice in Context* (Oxford; Portland, 2010) 129, 129, 131-137; Richard Moorhead, Mark Sefton and Lesley Scanlan, 'Just satisfaction? What drives public and participant satisfaction with courts and tribunals: A review of recent evidence', Ministry of Justice Research Series 5/08, (Ministry of Justice (UK), 2008) 14-15, 37-40 <<http://www.law.cf.ac.uk/research/pubs/repository/1854.pdf>>.,

<sup>79</sup> Moorhead et al, above n 78, ii, 37-40, 45.

<sup>80</sup> Ibid 39-40; Adler, above n 78, 133-35, citing Tom Tyler, 'Social Justice: Outcome and Procedure' (2000) 35 *International Journal of Psychology* 117, 121.

indicates that the perceived independence of the court or tribunal enhances acceptance of its decisions by building trust.<sup>81</sup>

One reason for the spectacular growth of tribunals in recent decades is that they possess design features that are well adapted for building trust. Tribunals encourage participation by all parties because they are less constrained by formal and adversarial procedures, are normally housed in less formal settings, and do not as a general rule award costs against the losing party.<sup>82</sup> Their membership includes persons trained in alternative dispute resolution methods. Collaborative problem-solving approaches are used even in adjudicative processes.

The presence of trust improves the efficiency of the adjudication. It encourages both parties to attend, which increases the chances of settling disputes by consent. It encourages the parties to participate, which improves the flow of evidence and submissions required by the adjudicative process. It reduces complaints from the losing party and enhances voluntary compliance,<sup>83</sup> which lowers enforcement costs.<sup>84</sup>

By securing the trust of participants, the court or tribunal also builds public trust in the court and confidence in the administration of justice. Public trust assists the court or tribunal in garnering external support for its role and for the continued flow of resources.<sup>85</sup> It promotes social welfare by promoting respect for the rule of law,<sup>86</sup> by giving credibility to the state's promises to respect human rights and to enforce contracts and property rights, and by constraining unlawful exercises of state power.<sup>87</sup> It ensures that executive agencies will comply with the decisions of the court or tribunal.<sup>88</sup>

Public confidence in the impartiality of courts and tribunals is a precondition for their operation, as Lamer CJ explained:

Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is,

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<sup>81</sup> Adler, above n 78, 133-35, Tyler, above n 80, 119-21.

<sup>82</sup> The *Leggatt Report* highlighted opportunity to participate as a key reason for establishing tribunals: above n 25, [1.11].

<sup>83</sup> International Consortium for Court Excellence, *International Framework for Court Excellence* (2<sup>nd</sup> ed, 2013) 16; Parker, *Courts and the Public*, above n 50, 17; Tyler, above n 80, 120-22.

<sup>84</sup> *International Framework for Court Excellence*, above n 83, 16.

<sup>85</sup> *Ibid.*

<sup>86</sup> Tom Tyler, *Why People Obey the Law* (1990, Yale University Press); Tyler, 'Social Justice: Outcome and Procedure', above n 80.

<sup>87</sup> Julio Rios-Figueroa and Jeffrey K Staton, 'An Evaluation of Cross-National Measures of Judicial Independence' (2012) *Journal of Law, Economics and Organization* 2012, 1 <<http://jleo.oxfordjournals.org/search>>.

<sup>88</sup> Roberto Laver, 'The World Bank and Judicial Reform: Overcoming Blind Spots in the Approach to Judicial Independence' (2011-12) 22 *Duke Journal of Comparative & International Law* 183, 192-93.



therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception.<sup>89</sup>

The importance of trust in maintaining the logic of adjudication explains why the perception of impartiality matters. Perceptions are crucial because they influence behaviour independently of the actuality of independence, and also because actual independence is difficult to define and measure.<sup>90</sup>

### ***Whose perception?***

It is often said that an adjudicator must not only be impartial, but must be seen to be impartial.<sup>91</sup> This formulation begs the question of whose perceptions should be the measure of impartiality. There are a number of audiences who may have a perception concerning an adjudicator's impartiality, and they may have different levels of knowledge about the circumstances.

For purposes of assessing a bias claim, the courts consider the perspective of a hypothetical fair minded lay observer.<sup>92</sup> In Australia, the test is whether the observer, after considering the circumstances, might apprehend that the decision maker might not be impartial in the circumstances.<sup>93</sup> In New Zealand, the question is whether a fair minded and informed observer would conclude that there was a real possibility that the observer was biased.<sup>94</sup>

In a recent survey of the case authorities, Groves discusses the characteristics and knowledge that are attributed to the lay observer.<sup>95</sup> He finds that it is now settled that the fictional observer is neither a party to the case nor a judge,<sup>96</sup> and is 'an objective and reasonable person'. The observer is not credited with particular personal qualities such as age or gender, but is a 'single amalgam' representing the diversity of society.<sup>97</sup>

The outcome of a bias claim can turn on what the hypothetical observer is deemed to know about the court or tribunal and its processes. The more knowledge that is

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<sup>89</sup> *R v. Lippé* [1991] 2 SCR 114 (Supreme Court of Canada)

<sup>90</sup> Parker, 'The Independence of the Judiciary', above n 40, 70-71.

<sup>91</sup> *Ebner v Official Trustee* (2000) 205 CLR 337 [6], [7] (Gleeson CJ, McHugh, Gummow, Hayne JJ), citing *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256, 259 (Hewart CJ).

<sup>92</sup> *Ebner v Official Trustee* (2000) 205 CLR 337 [6], [7]; *Mair v Commissioner of Inland Revenue* [2007] NZCA 334.

<sup>93</sup> *Ebner v Official Trustee* (2000) 205 CLR 337 [6] (Gleeson CJ, McHugh, Gummow, Hayne JJ); *Webb v The Queen* (1994) 181 CLR 41.

<sup>94</sup> *Porter v Magill* [2002] 2 AC 357, 494; *Muir v Commissioner of Inland Revenue* [2007] 3 NZLR 495.

<sup>95</sup> Matthew Groves, 'The Imaginary Observer of the Bias Rule' (2012) 19 *Australian Journal of Administrative Law* 188.

<sup>96</sup> *Ibid* 189, noting the importance of *Webb v The Queen* (1994) 181 CLR 41 in prioritising the views of the public over the views of judges.

<sup>97</sup> *Ibid*, 189-90.

attributed to the observer, the more the observer's perspective resembles that of a court or tribunal insider.<sup>98</sup> Imputing to the observer knowledge of peculiar tribunal practices can 'run the risk of having the insider's blindness to the faults that outsiders can so easily see'.<sup>99</sup>

Courts expect the lay observer to know about the ethical and professional standards of judges and tribunal members and to place at least some weight on them.<sup>100</sup> For example, in some cases a lay observer has been deemed to know that a judge has taken an oath of office to decide impartially.<sup>101</sup> In *Gillies v Secretary of State for Work & Pensions*,<sup>102</sup> the House of Lords rejected a claim of apprehended bias where a doctor who provided four medical reports per month to a benefits agency sat as a part-time member of a tribunal that reviewed decisions of the agency in other cases. Their Lordships found that the fair-minded observer would expect the medical member to exercise an independent professional judgment when evaluating reports presented by the agency, and would not expect her to be predisposed to favour the views of the agency.<sup>103</sup>

Groves contrasts *Gillies* with an earlier decision in which the House of Lords struck down a practice under which senior counsel were permitted to appear as advocates before a tribunal panel which included lay members with whom they had previously sat as part time judges.<sup>104</sup> Their Lordships credited the observer with knowledge of a contrary practice in jury trials in the criminal courts, and also deemed the observer to know that lay members of the tribunal would 'look to the judge for guidance on the law'.<sup>105</sup>

Critics point to the lack of an explicit theoretical or empirical basis for attributing knowledge to the observer in a consistent and realistic way.<sup>106</sup> Statements in the bias cases about what the lay observer knows or understands are normative, not empirical. They have little application beyond the bias rule, which limits the lawful exercise of powers. They tell us very little about how a court or tribunal is perceived by the different groups that Parker calls the 'communities' or 'publics' that it serves.<sup>107</sup> The trust of participants and the public, which is required to maintain adjudication, is an empirical phenomenon about which we know relatively little.

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<sup>98</sup> See, eg, criticisms by Kirby J in *Johnson v Johnson* (2001) 201 CLR 488 at 491.

<sup>99</sup> Groves, above n 95, 197, quoting *Gillies v Secretary of State for Work & Pensions (Scotland)* [2006] 1 All ER 731 [39] (Baroness Hale).

<sup>100</sup> Groves, above n 95, 195.

<sup>101</sup> *Ibid* 195, fn 36, citing as example, *Johnson v Johnson* (2000) 201 CLR 488 at 493.

<sup>102</sup> [2006] 1 All ER 731.

<sup>103</sup> *Gillies v Secretary of State for Work & Pensions (Scotland)* [2006] 1 All ER 731 at [20]; *R (PD) v West Midlands and North West Mental Health Review Tribunal* [2004] EWCA Civ 311.

<sup>104</sup> *Lawal v Northern Spirit Ltd* [2004] 1 All ER 187; Groves, above n 95, 197, fn 48.

<sup>105</sup> *Lawal v Northern Spirit Ltd* [2004] 1 All ER 187 [21].

<sup>106</sup> Groves, above n 95, 199-200, citing *Johnson v Johnson* (2001) 201 CLR 488, 491 (Kirby J).

<sup>107</sup> Parker, *Courts and the Public*, above n 50, 12-14.

### *Impartiality and independence as perceived from different viewpoints*

Much of the uncertainty in discussions of judicial and tribunal independence arises from the emphasis on *perceived* impartiality, and the diversity of the ‘publics’ whose perceptions may be considered. The institutional arrangements for a tribunal’s independence may have considerable influence on how some groups perceive the tribunal’s impartiality, while failing to register at all with other groups.

The diversity of viewpoints is illustrated by a user satisfaction survey for the Administrative Appeals Tribunal (‘AAT’) as reported by its former President, Justice Gary Downes, in 2005.<sup>108</sup> Applicant participants rated the perceived independence of the tribunal at 3.5 out of a maximum value of 5, significantly lower than the ratings given by legal practitioners for applicants (4.4) and by representatives of government departments and agencies (4.8). The low rating by applicants was interpreted by the President as indicating that ‘individual applicants see the Tribunal as a continuum in the decision making process and not necessarily as an independent body’.<sup>109</sup>

Some tribunals are constituted in a manner that is designed to enhance the perception of impartiality from the viewpoint of a section of the public. Legislation may require that some members are appointed on the nomination of stakeholder or community organisations, and that hearing panels include the members.<sup>110</sup> For example, the *Veterans Entitlements Act 1986* (Cth) s 158(2) provides that the Veterans Entitlements Board shall at all times have among its members persons appointed as Service Members who are chosen from lists of names submitted to the Minister by veterans’ organizations.<sup>111</sup> Except with the approval of the Minister, the Board must be constituted with a Services Member to review a decision on the application of a veteran or the dependent of a veteran.<sup>112</sup>

Another way of demonstrating impartiality is by ‘balancing’ the tribunal’s overall membership or the composition of a hearing panel with members qualified by their experience with different stakeholder groups. For example, the Workcover Premium Review Panel (SA) is constituted with four members, including one with expertise in the interests of employers, one with expertise in the interests of workers, and one with expertise in the interests of the Workcover Corporation, plus a legal Chair.<sup>113</sup> Once appointed, members become subject to the duty to serve the tribunal in preference to the interests of the stakeholder group which nominated them or for

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<sup>108</sup> Gary Downes, ‘Address to the Forum of Commonwealth Agencies Network’, 15 Sept 2005, <<http://www.aat.gov.au/Publications/>>.

<sup>109</sup> Ibid.

<sup>110</sup> Eg, *Mental Health Act 2007* (NSW) s 141(1), (2)(c), (4).

<sup>111</sup> See also *Mental Health Act 2007* (NSW) s 141(2)(c); *Mental Health Act 1986* (Vic) sch 2, cls (1), (2).

<sup>112</sup> *Veterans Entitlements Act 1986* (Cth) s 141.

<sup>113</sup> ‘Premium Review Panel Determination 2012’, *South Australian Government Gazette* (10 May 2012) 1617.

which they previously served.<sup>114</sup> Balanced tribunals have been most often used in the industrial and employment fields.

### ***Impartiality, independence and tribunals***

A number of human rights instruments recognise the right of a person to have their rights and obligations determined by an independent and impartial tribunal.<sup>115</sup> Each jurisdiction allocates the subject areas for adjudication to courts and tribunals in a different pattern. Since the human right is held by a person, it does not vary according to whether the adjudication is provided by a court or by a tribunal. The UK's *Leggatt Report* reasoned that because tribunals are established to provide justice as alternatives to the courts, they must be seen to demonstrate similar independence and impartiality to the courts.<sup>116</sup> While the principle is widely accepted, it does not mean that the legislative and institutional arrangements to protect independence need to be the same for tribunals as for courts.

### **ASPECTS OF INDEPENDENCE**

The most advanced conceptual model for tribunal independence is one proposed by Bryden for the Canadian tribunals.<sup>117</sup> Bryden distinguishes four aspects, which he called adjudicative independence, institutional independence, administrative autonomy and policy independence.<sup>118</sup> His 'adjudicative independence' is defined and enforced by the common law bias rule of natural justice, and does not require additional safeguards.<sup>119</sup> By 'institutional independence', he means 'structural guarantees designed to satisfy litigants that tribunal members are protected from improper governmental influence in their decisions'.<sup>120</sup> The guarantees include those traditionally required for judicial independence, such as security of tenure and security of remuneration, together with control over listing and allocation of cases to particular members and panels.<sup>121</sup> 'Administrative autonomy' is the ability of tribunals to secure and manage the resources that they need to perform their adjudicative functions, including control of their finances and staff.<sup>122</sup> The fourth

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<sup>114</sup> *Bennetts v Board of Fire Commissioners of NSW* (1967) 87 WN (Pt 1) 307, 310; *SGH Ltd v Commissioner of Taxation* (2002) 210 CLR 51; *Dhami v Martin* (2010) 79 ASCR 121 [21].

<sup>115</sup> The instruments include: European Convention for the Protection of Human Rights and Fundamental Freedoms art 6(1); International Covenant on Civil and Political Rights art 14(1); Universal Declaration of Human Rights art 10; Charter of Human Rights and Responsibilities Act 2006 (Vic) s 24(1); Human Rights Act 2004 (ACT), s21(1); Canadian Charter of Rights and Freedoms, s 11(d).

<sup>116</sup> *Leggatt Report*, above n 25, [2.12].

<sup>117</sup> Phillip Bryden, 'How to Achieve Tribunal Independence: A Canadian Perspective' in Robin Creyke (ed) *Tribunals in the Common Law World* (Federation Press, 2008) 62.

<sup>118</sup> *Ibid.*

<sup>119</sup> *Ibid* 72-72.

<sup>120</sup> *Ibid* 74.

<sup>121</sup> *Ibid.*

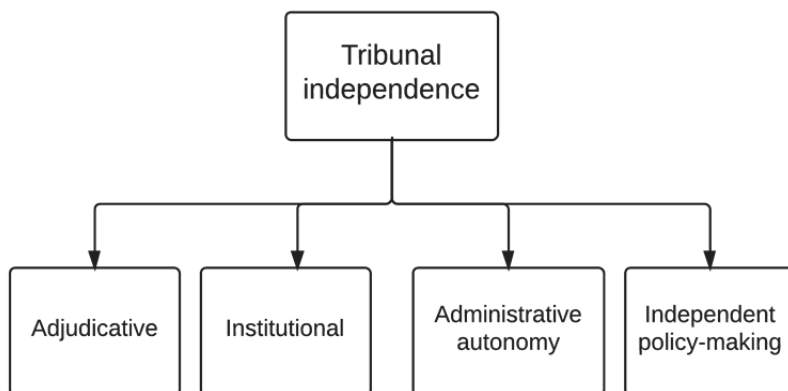
<sup>122</sup> *Ibid* 81.

aspect, ‘independent policy –making’, concerns independence from other tribunal members, from the courts and from executive directions.<sup>123</sup>

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**Figure 2: Bryden’s model of tribunal independence**

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The model proposed in this study adopts two of Bryden’s categories: administrative autonomy (renamed ‘administrative independence’),<sup>124</sup> and institutional independence. Bryden’s ‘adjudicative independence’ is defined in terms of the bias rule, which invalidates decisions tainted by interference from any source.<sup>125</sup> A wider definition is needed to include legislative provisions which safeguard the impartiality of adjudicators. Although ‘decisional’ independence is often used as an alternative, the term is best confined to judicial independence because the High Court of Australia has extended its scope to define the constitutional limits of what legislatures can require courts to do.<sup>126</sup>

Bryden’s fourth category, ‘independent policy-making’, primarily concerns administrative tribunals. Its elements can be incorporated under a broader concept of adjudicative independence.

The model used in this study comprises the three aspects of independence as outlined below, which are separately discussed in Chapters 3-6.

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<sup>123</sup> Ibid 83-84. Creyke observes that Cabinet directives on the application of executive policies are not such a concern in Australia as in Canada: Creyke, ‘Where do Tribunals Fit?’, above n 1, 95-101, 111.

<sup>124</sup> Bryden uses the term ‘administrative autonomy’ to distinguish it from ‘administrative independence’ which, in Canadian case law, means control over listings and allocation of caseload: *ibid* 81.

<sup>125</sup> *Ibid* 72.

<sup>126</sup> See eg, *State of South Australia v Totani* (2010) 242 CLR 1; see generally, Robert French, ‘Essential and Defining Characteristics of Courts in an Age of Institutional Change’ ((Paper presented at the Supreme and Federal Courts Justices Conference, Adelaide, 21 Jan 2013) 17-20.

## **Administrative independence**

The concept of branch independence for the judiciary includes a claim by the courts to control their governance, finances and personnel. Tribunals, like courts, require resources to maintain effective adjudication. The World Bank observes: ‘Not only judges personally but also courts as institutions need protection from external pressure, and for courts to operate independently requires funding – both sufficient and stable’.<sup>127</sup> In many jurisdictions, tribunal finances are allocated through a budget bid process managed by a large government department. Even when finances have been allocated to the tribunal, the department retains control of the funds, and may re-allocate them to other areas.<sup>128</sup> Lack of control over resources can reduce the tribunal’s ability to maintain the administrative, procedural, staffing and spatial arrangements that ensure impartial and effective adjudication.

There is evidence that lack of administrative independence can impair the perception of impartiality.<sup>129</sup> Some tribunals depend upon the department or administrative agency whose decisions they review (‘host agency’) to provide their registry staff, personnel management systems, IT server and systems and other resources and infrastructure, and may even be co-located with the agency.<sup>130</sup> Commenting on this type of arrangement, the New Zealand Law Commission said:

While historically this may be understandable, it throws their independence and neutrality into question. Tribunals, like courts, must be both independent and seen to be independent.<sup>131</sup>

## **Institutional independence**

Institutional independence is concerned with the tribunal’s structural and institutional relationship to the executive. The ‘executive’ includes the Ministers and Cabinet, departments or ministries of state and other administrative agencies of government. The executive is empowered to make key decisions relating to tribunal members, including appointment, reappointment, promotion, term of office, rates of remuneration and allowances, conditions of office, suspension and removal from office. Decisions made by the executive about these matters directly affect the financial and career interests of members. The executive may be an interested party in the review of its administrative decisions by a tribunal, or may otherwise have policy interests in the outcomes of the tribunal’s decisions. Institutional independence is about arrangements to ensure that executive powers to appoint and remunerate members do not influence the outcome of tribunal decisions or impair the perception of impartiality.

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<sup>127</sup> World Bank, Project Appraisal Document on a Proposed Credit in the Amount of SDR 8.6 Million (US\$ 11.4 Million Equivalent) to the Republic of Armenia for a Judicial Reform Project, Report No. 20820-AM (Aug. 21, 2000) 9-11; cited in Laver, above n 88, 204.

<sup>128</sup> Alford et al, above n 34, 38-40.

<sup>129</sup> See Chapter 3, below.

<sup>130</sup> New Zealand Law Commission, *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals*, Report No 85 (2004) 284 (‘NZLC *Delivering Justice for All*’); Michael Barker, ‘The Emergence of the Generalist Administrative Tribunal in Australia and New Zealand’ (paper presented at the 8<sup>th</sup> Annual AIJA Tribunals’ Conference, Sydney, 9-10 June 2005) 19.

<sup>131</sup> NZLC, *Tribunals in New Zealand*, above n 2, [1.40]-[1.41].

## **Adjudicative independence**

Adjudicative independence derives from the ‘individual’ aspect of judicial independence. It is concerned with the ability of tribunal members and panels to make decisions impartially, free from external interference or improper influence from any source, including the executive, the parties, other external persons, and even from the tribunal head and other members. Formal safeguards include judicial review and its grounds, including the common law bias rule, tribunal codes of conduct, and provisions in tribunal legislation relating to matters such as oath of office, immunity from suit, disclosure of interests, disqualifications and restrictions on employment. Many of these provisions are individual accountability mechanisms, which place duties and restrictions on adjudicators to preserve their own impartiality.

Some models of adjudicative independence propose a second dimension which is not related to impartiality.<sup>132</sup> Melton and Ginsburg call it ‘power or efficacy (the ability to make decisions stick)’.<sup>133</sup> It is based on the idea that a tribunal cannot be called independent if its decisions can be ignored or overturned by the executive.<sup>134</sup> The *International Framework for Tribunal Excellence* includes the efficacy aspect in its measures of ‘adjudicatory or decisional independence’.<sup>135</sup> While impartiality is required for the decision making process, efficacy relates to the effect given to a decision after it is made.

## **Integration of elements in a conceptual model**

The focus of each of the three aspects of independence can be distinguished as follows. Administrative independence (see Chapter 3) is about the arrangements that enable the tribunal as an entity to perform its statutory functions. Institutional independence (Chapters 4 and 5) is about executive powers that affect the members of the tribunal as constituted from time to time. Adjudicative independence (Chapter 6) is about relationships that affect members and panels in operation as adjudicators.

A conceptual model of the aspects of independence, and their relationship to impartiality and effective adjudication, is illustrated in Figure 3 below. It shows that institutional and adjudicative independence maintain the impartiality required for effective adjudication. Administrative independence supports impartiality by securing control of the resources required for institutional and adjudicative independence. It also contributes to effective adjudication in other ways, such as by enabling the provision of competent and effective registry services.

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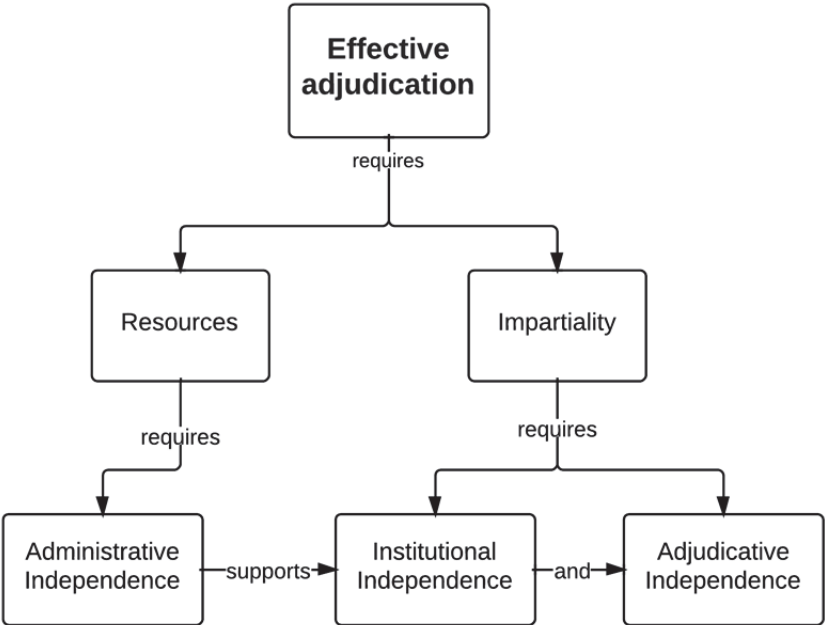
<sup>132</sup> Rios-Figeoroa and Staton, above n 87, 4-5; James Melton and Tom Ginsburg, ‘Does De Jure Independence Really Matter? A Reevaluation of Explanations for Judicial Independence’ University of Chicago Institute for Law and Economics Olin Research Paper No 612 (2012) 5.

<sup>133</sup> Melton and Ginsburg, above n 132, 5.

<sup>134</sup> Rios-Figeoroa and Staton, above n 87, 4.

<sup>135</sup> Council of Australasian Tribunals, *International Framework for Tribunal Excellence* (Nov 2012) <<http://www.coat.gov.au/>>, 8-9, items 6, 9 – see Appendix B, below.

**Figure 3: An integrated conceptual model of independence**







## Chapter 2: Measuring Independence

If independence is ‘a set of arrangements designed to promote and protect the perception of impartial adjudication’,<sup>136</sup> it is an aspect of tribunal quality. Tribunals are developing models, methodologies and tools for the purpose of ongoing self-evaluation and improvement across all areas of quality. For the purpose of measurement, independence must be reduced to a few key indicators which can be applied generally and are suitable for benchmarking.

The *International Framework for Tribunal Excellence* developed under the leadership of the Council of Australasian Tribunals (‘COAT’), identifies independence, or ‘the degree of separation from the Executive’, as one of the eight areas for measurement of tribunal excellence’.<sup>137</sup> The areas of excellence are derived from a set of ten ‘core tribunal values’ which include impartiality, independence, integrity and accountability.<sup>138</sup>

The *International Framework for Tribunal Excellence* is designed to guide a holistic measurement of tribunal excellence through evaluation of all areas of tribunal excellence.<sup>139</sup> It provides concepts, terms, criteria (measures) and metrics (scoring tools) for each of the areas. It lists a number of indicia of independence that have been identified by COAT and its stakeholders. The indicia are expressed in the form of 11 questions, of which two require the answer ‘yes’ or ‘no’, and nine are answered on a 0-5 frequency scale. After considering the eleven indicia, the assessor arrives at an overall perception of the tribunal’s independence on a scale of 0 to 10, in which 0 represents ‘none’ 10 represents ‘fully independent’.<sup>140</sup> The questionnaire instrument is reproduced at Appendix B.

The challenge of measuring independence as an aspect of tribunal quality poses the following issues

1. Whether formal safeguards of independence (‘de jure independence’) have a causal relationship to the degree of independence which the tribunal actually enjoys (‘de facto independence’)
2. Which types of institutional arrangements (‘provisions’) have a significant effect on a tribunal’s independence, and what is the theory or evidence that connects them to independence?
3. How to ensure that the provisions and any measuring tools are flexible enough to take account of the diversity of tribunals and the special needs of their jurisdictions.

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<sup>136</sup> Parker, ‘The Independence of the Judiciary’, above n 40, 71.

<sup>137</sup> *International Framework for Tribunal Excellence*, above n 135, 1-6, 8. The other seven areas are: leadership and effective management, fair treatment, accessibility, professionalism and integrity, accountability, efficiency, and client needs and satisfaction.

<sup>138</sup> Ibid 2-3.

<sup>139</sup> Ibid 6.

<sup>140</sup> Ibid 7-9.

## MEASURING DE FACTO AND DE JURE INDEPENDENCE

One of the issues in measurement is the gap that can exist between de jure and de facto independence. De jure independence is the tribunal's degree of legal or formal independence. It can be assessed by examining the tribunal's governing legislative and legal framework. De facto independence is the degree of independence that the tribunal enjoys in practice. Cultural norms, behaviours, conventions, practices, understandings, expectations, values and attitudes influence the way that legal powers are exercised.

The duality of independence was discussed by the Supreme Court of Canada in *Canadian Pacific Ltd v Matsqui Indian Band*.<sup>141</sup> The Court was considering whether a tribunal was 'an independent and impartial tribunal' within the meaning of section 11(d) of the *Canadian Charter of Rights and Freedoms*. Sopinka J said that the legislative scheme should be assessed in the light of how the tribunal actually operates in practice.<sup>142</sup> The operational context could include facts and circumstances such as the actual appointment terms of members, remuneration policies, and members' individual connections to the executive.<sup>143</sup> Lamer CJ strongly disagreed. His Honour said that institutional independence is objectively assessed by considering whether the tribunal's legal framework and structure guarantees that members will be reasonably independent of the executive.<sup>144</sup> Independence which depends on the discretion of those who appoint the tribunal is 'illusory'.<sup>145</sup>

### Does de jure independence determine de facto independence?

De facto independence is an empirical concept. As de jure independence is formal and textual, it is more readily measured. It is also widely believed to be an important determinant of de facto independence, and may be its best predictor.<sup>146</sup> De jure independence is more amenable to adjustment by deliberate action. Rules and guidelines can be changed through reform of law and administration, while informal cultural change is difficult to orchestrate.

Since 1996, multilateral aid and donor agencies such as the World Bank have invested in projects in many countries to improve judicial independence, to protect and enhance the rule of law, human rights and efficient market institutions.<sup>147</sup> Scholars evaluating project outcomes disagree about the effectiveness of formal constitutional and legal safeguards in achieving de facto independence.<sup>148</sup> Some

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<sup>141</sup> [1995] 1 SCR 3 (Sup Ct Can).

<sup>142</sup> [1995] 1 SCR 3 [110], [116-124] (Sopinka J).

<sup>143</sup> Ibid [120], citing *Alex Couture Inc. v. Canada (Attorney-General)* (1991), 83 D.L.R. (4th) 577 (Quebec Court of Appeal).

<sup>144</sup> [1995] 1 SCR 3 [98]-[104] (Cory J agreeing).

<sup>145</sup> Ibid [104].

<sup>146</sup> Bernd Hayo and Stefan Voigt, 'Mapping Constitutionally Safeguarded Judicial Independence- A Global Survey' (December 13, 2010) 2, SSRN <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1724696](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1724696)>.

<sup>147</sup> Rios-Figeoroa and Staton, above n 87, 2.

<sup>148</sup> Melton and Ginsburg, above n 132, 2.

studies have found little or no correlation while others have identified a significant relationship.<sup>149</sup> It is difficult to draw conclusions from the studies due to lack of agreement about which indicators should be used to measure de facto independence.

Formal structural safeguards are recognised as important but not sufficient to ensure de facto independence.<sup>150</sup> They can be ignored or manipulated in countries where they are not supported by cultural institutions and societal values.<sup>151</sup> The experience of aid agencies in implementing judicial independence projects around the world has led to a greater appreciation of the cultural determinants of de facto independence.<sup>152</sup>

Justice Kirby identifies some of aspects of our legal culture which support and protect an independent judiciary:

Although there are legal protections, a substantial element of protection is found in the legal culture; the traditions of the practising legal profession; the history of judicial institutions; the long tradition of independent office-holders; the absence of public corruption; and the high quality of legal education and training.<sup>153</sup>

The de facto independence of tribunals is conditioned by norms operating in government, the judiciary and the wider community. Creyke observes that 'the attitude towards, the degree of understanding of, and respect accorded to, tribunals by the other arms of government also affects their independence'.<sup>154</sup>

Public opinion can influence executive actions in relation to tribunals, as Heerey J explains.

A public expectation that the independence of the Tribunal will be respected by the Government is in itself a circumstance of some significance' in determining whether a tribunal is and appears to be independent and impartial.<sup>155</sup>

The public expectation that the Executive will respect a tribunal's independence can be affirmed and strengthened by de jure measures, for example, legislative provisions that protect members against arbitrary removal from office.

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<sup>149</sup> Ibid.

<sup>150</sup> Laver, above n 88, 214.

<sup>151</sup> Ibid.

<sup>152</sup> Ibid 215-220.

<sup>153</sup> Michael Kirby, 'Judicial Independence and Accountability: An Asia-Pacific Perspective' (Paper presented at the Colloquium on International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors, Bangkok, 18 August 2008), 16.

<sup>154</sup> Creyke, 'Where do Tribunals Fit?', above n 1, 111.

<sup>155</sup> *Commonwealth v Wood* (2006) 148 FCR 276 [73].

### *Narrowing the gap by legislation*

Oversight mechanisms and shared responsibility for decisions can narrow the gap between de jure and de facto independence. Melton and Ginsburg find that the gap is likely to be greater where powers are vested in a single office or branch of government and are exercised without any scrutiny or supervision by other offices or branches.<sup>156</sup> They suggest that de facto independence is enhanced by arrangements that involve multiple bodies or offices in the appointment, promotion and removal processes. They hypothesize that the sharing of functions is self-enforcing, as each party has an interest in exercising their assigned powers.<sup>157</sup>

The strategy of involving multiple actors in the decision making process is seen in legislative provisions or government procedures that require nomination, recommendation or consultation processes before members are appointed.<sup>158</sup> The processes provide a number of benefits including broadening the recruitment pool, collecting evidence, sharing information, testing views and understandings, communicating norms and values and building consensus and trust.

Commentators on judicial and tribunal independence in Australia, New Zealand, Canada and the UK have placed faith in the value of formal legal safeguards, particularly legislation.<sup>159</sup> Australia and New Zealand have not adopted the approach of British Columbia in enacting a general procedure statute for administrative tribunals.<sup>160</sup> Instead, the provisions are found in the various statutes under which the tribunals are established.

In recent years there has been a great deal of legislative activity in relation to tribunals, which has provided opportunities to review and revise the provisions. Since 1998, new legislation has established large multi-jurisdictional tribunals in Victoria, New South Wales, Queensland, the ACT, and Western Australia. New Zealand's immigration and refugee tribunals have been merged to form a new tribunal, the Immigration and Protection Tribunal. The process of tribunal consolidation has prompted discussion about legislative design for independence. The legislation for the new tribunals was based upon recommendations of government reports and discussion papers which incorporated perspectives from the literature and the views of consultees.

A failed attempt to establish a new Commonwealth review tribunal in 2000-01 prompted a lively debate in Australia about the types of provisions that either impair or enhance de jure independence. A proposal to establish a new amalgamated

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<sup>156</sup> Melton and Ginsburg, above n 132, 5-6.

<sup>157</sup> Ibid 5.

<sup>158</sup> The processes are discussed in Chapter 4, below.

<sup>159</sup> Eg Paul Dawson, 'Tenure and Tribunal Membership' (1997) 4 *Australian Journal of Administrative Law* 140, 147-48; Bryden, 'How to Achieve Tribunal Independence', above n 117, 71; Deirdre O'Connor, 'Administrative Decision-Makers in Australia: The Search for Best Practice' (Paper presented at the 2<sup>nd</sup> International Conference on Administrative Justice, Quebec, 17-20 June 2001), 5, 38, 42.

<sup>160</sup> Administrative Tribunals Act SBC 2004 c 45; Administrative Tribunals Appointment and Administration Act SBC 2003 c 47.

Commonwealth tribunal, to be called the Administrative Review Tribunal (the ‘ART’), was widely criticised, and the bills were ultimately defeated by a vote in the Senate in 2001.<sup>161</sup> A number of features of the ART proposal were perceived by some commentators as unacceptably restricting independence.<sup>162</sup>

There was particular concern about the relationship between the ART and the ‘portfolio Ministers’ responsible for the departments whose decisions would be reviewable by the ART.<sup>163</sup> The Ministers would be empowered to select members for appointment to the relevant divisions of the ART, and to give practice directions to the divisions without consultation with the head. The ART would need to negotiate funding from the portfolio departments for five of its six divisions.<sup>164</sup> There was controversy about other provisions including the ability to remove a member for failure to comply with a performance agreements or code of conduct, restricted access to second tier review, and the lack of a requirement that the President be a judge or even legally qualified.<sup>165</sup>

Bacon observes that the comment and debate generated by the ART Bills provides useful soundings concerning the types of provisions which stakeholders are likely to support or not to support in tribunal legislation.<sup>166</sup> They also indicate the areas and types of provisions which are perceived as significant for independence.

### *Non-statutory tribunals*

It is often said that tribunals are ‘creatures of statute’,<sup>167</sup> but not all adjudicative tribunals are established directly by legislation. They can result from executive action. For example, South Australia’s Workcover Premium Review Panel is established by an executive determination of the Board of the Workcover Corporation of South Australia.<sup>168</sup> The Board delegates to the Panel its statutory powers to determine applications for review of certain classes of decisions made by the Workcover Corporation.<sup>169</sup> The Panel members are appointed by the Board and include persons from outside the Commission. The terms of appointment of members and the Panel’s procedures are regulated by the Board’s determination.

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<sup>161</sup> The *Administrative Review Tribunal Bill 2000* and the *Administrative Tribunal (Consequential and Transitional) Bill 2000* (‘the ART Bills’) were defeated in the Senate on 14 Feb 2001. For an overview of the debate, see Creyke, ‘Where do Tribunals Fit?’, above n 1, 92-94. For an analysis of the ART bills, see Rachel Bacon, ‘Amalgamating Tribunals: A Recipe for Optimal Reform’ (PhD thesis, University of Sydney, 2004) Ch 6.

<sup>162</sup> Bacon, above n 161, Ch 6.

<sup>163</sup> Ibid 198-201.

<sup>164</sup> Bacon reports that the funding arrangements were not in the Bills but in the Explanatory Memorandum for the Bill: ibid 203-04; Senate, *Hansard*, 26 February 2001, 21928 (Senator Ellison).

<sup>165</sup> Senate, *Hansard*, 26 February 2001, 21841 (Senator Bolkus); 21853 (Senator Ludwig); 21853 (Senator Greig).

<sup>166</sup> Bacon, above n 161, 197.

<sup>167</sup> See eg, Creyke, ‘Where do Tribunals Fit?’, above n 1, 92.

<sup>168</sup> ‘Premium Review Panel Determination 2012’, *South Australian Government Gazette* (10 May 2012) 1617.

<sup>169</sup> Pursuant to the power of delegation in the *Workcover Corporation Act 1994* (SA) s 17.

It is possible for a tribunal which is established by the executive without legislation to enjoy de facto independence. It may be permitted by the executive to conduct its affairs and adjudicate without interference. But in the absence of adequate de jure provisions, the tribunal's de facto independence is insecure. It exists at the pleasure of the executive. The determination that establishes the tribunal and governs its membership and operations can be amended or revoked at any time without reference to Parliament. The tribunal is likely to be perceived as lacking independence.

## **ANALYTIC AND COMPARATIVE MEASUREMENT OF INDEPENDENCE**

Independence is not absolute but exists as a matter of degree.<sup>170</sup> A method for measuring independence would need to include a wide range of areas of activity and types of provisions. In Chapters 3-6, areas and types of provisions are discussed that have been identified in the literature as significant, under the headings of institutional, adjudicative and administrative independence.

Commentators have proposed lists of areas and provisions which they consider to be important for tribunal independence. Mullan and Creyke discuss independence from each of the three branches of government, while acknowledging that executive power is the main source of threat.<sup>171</sup> Mullan identified the following as major issues for Canadian tribunals: appellate supervision of tribunals by the executive, Cabinet directives on the application of executive policies, insecure tenure for members, lack of controls on patronage appointments, and executive control of tribunal resources and staffing.<sup>172</sup>

Creyke finds that in Australia, the first two items on Mullan's list are not of concern.<sup>173</sup> Among the matters she identifies as significant for independence are: methods of appointment, terms, tenure and reappointment, performance appraisal of members, funding sources, and the attitude to tribunals by the other arms of government.<sup>174</sup>

The New Zealand Law Commission ('*NZ Law Commission*') noted that the factors commonly thought necessary to secure independence include: 'a politically neutral appointment process, neutral administrative support, security of tenure and financial security.'<sup>175</sup>

Fleming reports that there is general agreement on the following structural measures of independence:

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<sup>170</sup> Bermant and Wheeler, above n 28, 839.

<sup>171</sup> David Mullan, 'Where do Tribunals Fit into the System of Administration and Adjudication? - A Canadian Perspective' in R Creyke (ed) *Administrative Tribunals: Taking Stock* (CIPL, ANU, 1992) 1, 7; Creyke, 'Where do Tribunals Fit?', above n 1.

<sup>172</sup> Mullan, above n 171, 7-10.

<sup>173</sup> Creyke, 'Where do Tribunals Fit?', above n 1, 99-100.

<sup>174</sup> Ibid 95-101, 111.

<sup>175</sup> NZLC, *Tribunals in New Zealand* above n 2, [5.2].

the terms of appointment of members; administrative independence from the primary decision-making agency; the degree of policy control over the decision-making process; restrictions on appellate and judicial review of tribunal decisions; and the extent of legislative and regulatory control of tribunal members by Parliament and the executive (including the degree of discretion conferred on the tribunal member by legislation, regulation or direction.<sup>176</sup>

Fleming observes that no single factor determines whether a tribunal is sufficiently independent to provide fair and impartial decision making.<sup>177</sup> A tribunal can achieve independence in different ways, through a combination of factors which are suited to its jurisdiction, composition and legislative framework. He proposes that the following ten characteristics should form the basis for an overall assessment of the degree to which a particular tribunal demonstrates independence:

judicial leadership, administrative and financial autonomy and appellate review ...transparent member appointment processes, members' tenure, the fair determination of members' remuneration and conditions, and the establishment of a performance management system that does not interfere with decision making in the instant case ... a clear statement of legislative intent in relation to independence, the development of statutory consultation structures and public reporting.<sup>178</sup>

Any list of institutional features cannot be exhaustive, as we lack a comprehensive model of independence. Provisions relating to the institutional aspect of independence, such as security of tenure and remuneration, are identified as significant by all commentators and warrant close examination.

### **Assessment of strength of provisions**

While some provisions either exist, or do not exist, in relation to a particular tribunal,<sup>179</sup> others can exist in different degrees. Based on normative values in cases and literature, it is possible to identify descriptors and examples which represent the strong and weak ends of the spectrum of current arrangements, and one or more intermediate points. Table 1 below provides an example of a spectrum of provisions for one area of institutional independence, the determination of rates of remuneration to which a member is entitled during a term of office.

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<sup>176</sup> Gabriel Fleming, 'Tribunals in Australia: How to Achieve Independence' in R Creyke (ed) *Tribunals in the Common Law World* (Federation, 2008) 86, 87.

<sup>177</sup> Ibid 92-93.

<sup>178</sup> Ibid.

<sup>179</sup> Such as whether the tribunal is established by legislation or not.



**Table 1: example of spectrum of provisions**

AREA	SIGNIFICANCE	PROVISIONS		
		Strong	Intermediate	Weak
Determination of rates of remuneration and allowances to which members are entitled during term of office	Security of remuneration during term limits scope for executive influence	Rates for classes of member are reviewed and published by a statutory tribunal	Rates are determined by the Governor or Minister and specified in the instrument of appointment	A member is entitled to such remuneration as the Minister may from time to time determine in respect of the member

**Discussion**

Judicial and tribunal independence is enhanced if the remuneration and allowances to which a judge or member is entitled cannot be reduced during their term of office without their consent. The principle is widely recognised by commentators, although rarely stated in legislation.<sup>180</sup>

The ‘strong’ provision approximates the judicial standard. It provides for independent review, increase of rates during term, determinations applicable to classes of appointee, and publication.

The ‘weak’ provision provides no formal guarantee that rates will not be reduced during the term, no independent determination of rates, no requirement of publication, and allows the Minister to determine a rate that is particular to an individual member.

The ‘intermediate’ provision lacks the features of the ‘strong’ provision, but at least prevents the rates being reduced during the term.

The provisions which are most easily measured on the tabular scale are formal legal safeguards created by legislation or public documents. Some informal arrangements can also be measured in this way, where they are observable or ‘transparent’. For example, tribunals commonly negotiate arrangements with Ministers and their departments for advertising and recruitment strategies, and the assessment of applicants by selection committees. The existence of these arrangements is apparent from information made available to all applicants. Informal arrangements may be less stable, as they require the assent of each new Minister, but are otherwise functionally similar to formal safeguards.

Tabulating different examples of provisions on a spectrum from strong to weak will enable comparative assessment of an individual tribunal in respect of each area and type of provision. It is likely that an assessment for any given tribunal will find that the various provisions are clustered within a range of the scale. In other words, the degree of independence permitted to a tribunal is likely to be consistent across

<sup>180</sup> For a rare example, see *State Administrative Tribunal Act 2004* (WA) ss 119(3).

different areas and types of provision. For example, a large tribunal with multiple jurisdictions and divisions, established under its own statute, with judicial leadership and some full time members, is expected to show a clustering of provisions at the strong end of the spectrum.

A measurement scale could assist in identifying inconsistencies in the provisions for linked areas. For example, it might be expected that a strong provision for the appointment process would correlate with a strong provision for the removal of a member from office.

The scale could also be used by a tribunal to identify provisions which are weaker or stronger than for other tribunals with similar membership and functions. For example, a mental health review tribunal or a guardianship tribunal might use the scale to assess whether its provisions are comparable in strength to the provisions for its counterparts in other jurisdictions. An outlier result in comparative measurement could prompt a review of the tribunal's statute.

While comparative measures of independence can generate useful information about the degree of independence that is permitted to a tribunal, strong measures are not ideal for all tribunals. The design of arrangements for independence must take account of costs and benefits. Independence measures are not cost-free, and strong independence measures tend to be more costly than weaker ones. For example, an appointment process that involves multiple parties and processes may impose too great an administrative burden on a tribunal which has only one presiding member and a number of sessional members who sit infrequently. The benefits are more likely to justify the costs for a large tribunal which has a number of full time members who are expected to serve multiple terms.

### **Independence and diversity**

Courts have cautioned against applying the judicial standard of independence to tribunals.<sup>181</sup> In the absence of constitutional requirements, the degree of independence permitted to a tribunal is a matter for Parliament to specify in legislation.<sup>182</sup> Independence is assessed by considering multiple characteristics in combination, with no single attribute determining in all cases whether a tribunal is independent or not.<sup>183</sup>

A similar multi-faceted approach is also taken to the assessment of judicial independence. In *North Australian Aboriginal Legal Aid Service Inc v Bradley*, Gleeson CJ observed that within the Australian court system, diverse arrangements exist for judicial appointments, tenure, terms and conditions, and for other matters

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<sup>181</sup> See, eg, *Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)* [2001] 2 SCR 781, [23]-[24] (McLachlin CJ) ('Ocean Port Hotel'); *Claydon v Attorney-General* [2004] NZAR 15 [49]-[53] (Keith J), [90]-[98] (McGrath J), [112]-[115] (Glazebrook J) (New Zealand Court of Appeal).

<sup>182</sup> *Ibid.*

<sup>183</sup> *Ocean Port Hotel* [2001] 2 SCR 781; *Bell v Canadian Telephone Employees Association* [2003] 1 SCR 884; *Ell v Alberta* [2003] 1 SCR 857; Harsel, above n 67, *passim*; Fleming, 'Tribunals in Australia', above n 176, 92-93, 102-03.

capable of affecting independence.<sup>184</sup> His Honour said that there is ‘no single ideal model of judicial independence, personal or institutional’, and that there is ‘room for legislative choice in this area’.<sup>185</sup>

A standard of independence is applied for purposes of determining whether a state court can be granted Commonwealth judicial power. To be capable of exercising federal power, a state court must have institutional independence and impartiality.<sup>186</sup> These attributes can be secured by a combination of provisions and arrangements.<sup>187</sup> There is no general rule as to the essential or minimum characteristics which are required to meet the standard.<sup>188</sup>

Mechanisms to ensure independence and impartiality can vary according to the nature of the court, its place in the system of courts and even historical circumstances.<sup>189</sup> In *Forge v ASIC*, Gummow, Hayne and Crennan JJ said that courts of summary jurisdiction (Magistrates courts) do not need *Act of Settlement* tenure (appointment during good behaviour with guarantee against reduction in remuneration).<sup>190</sup> Their Honours said that the impartiality of these courts had historically been ensured through the common law bias rule and by provision for appeals and judicial review by the Supreme Court.<sup>191</sup> The majority decided that the appointment of acting judges to a state Supreme Court did not necessarily impair the institutional independence of the court.<sup>192</sup>

A tribunal may be capable of exercising federal judicial power if it has the required characteristics of a court.<sup>193</sup> In *Owen v Menzies* the Queensland Court of Appeal held that the Queensland Civil and Administrative Tribunal (‘QCAT’) is ‘a court of a State’ within the meaning of the Commonwealth Constitution and is capable of exercising federal judicial power to interpret the Constitution.<sup>194</sup> A key issue in the appeal was whether QCAT has the independence required of a court, given that senior and ordinary members who form the majority of its members are

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<sup>184</sup> (2004) 218 CLR 146 [3], [5]. See also *Forge v ASIC* (2006) 228 CLR 45 [82]-[85].

<sup>185</sup> *Ibid.* See also *Owen v Menzies* (2012) 293 ALR 571, 576, where the remarks of Gleeson CJ were applied to a tribunal; and *Claydon v Attorney-General* [2004] NZAR 15, [96] (McGrath J) (New Zealand Court of Appeal).

<sup>186</sup> *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 [29].

<sup>187</sup> *Forge v ASIC* (2006) 228 CLR 45, [43].

<sup>188</sup> *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 [30]-[32].

<sup>189</sup> *Forge v ASIC* (2006) 228 CLR 45 [82]-[85].

<sup>190</sup> *Ibid* [82]-[85]; referring to the Act of Settlement 1710 (UK).

<sup>191</sup> *Ibid* [84].

<sup>192</sup> *Ibid.* See further, James Stellios, *The Federal Judicature: Chapter III of the Constitution* (LexisNexis Butterworths, 2010) [8.68]-[8.80].

<sup>193</sup> *Commonwealth v Wood* (2006) 148 FCR 276; *Owen v Menzies* (2012) 293 ALR 571. See also *Trust Co of Australia Ltd v Skiwing Pty Ltd* (2006) 66 NSWLR 77 which held that the Administrative Decisions Tribunal (NSW) was not a court.

<sup>194</sup> (2012) 293 ALR 571.

mostly part-time, and are appointed for short terms of three to five years on specified condition.<sup>195</sup> They can be removed from office by the executive government for performing their duties carelessly, incompetently or inefficiently, or for conduct which would warrant dismissal from the public service.<sup>196</sup> The court held that these provisions alone do not deny QCAT's independence.<sup>197</sup> De Jersey CJ said that the availability of judicial review to challenge a removal provides a safeguard against arbitrary interference by the executive government.<sup>198</sup>

*Owen v Menzies* shows that even wide and ill-defined grounds for removal are not necessarily inconsistent with the institutional independence required for a court, if the legislation provides other safeguards of independence. What is required is an analytic approach. Elements of the tribunal's institutional framework must first be evaluated individually, and then integrated into an overall assessment.

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<sup>195</sup> Ibid 574, [15] points 6-8, 585; *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 183(7), 186(1) ('*QCAT Act*').

<sup>196</sup> *QCAT Act* s 188(1)(a); s 183(7).

<sup>197</sup> (2012) 293 ALR 571, 574 [15] items 4, 6,7,8, 585..

<sup>198</sup> Ibid 574, [15], item 6.



### Chapter 3: Administrative Independence

A key aspect of independence is the tribunal's ability to control and secure the premises, facilities, services, staffing and other resources that it needs to carry out its adjudicative functions independently of the executive. There is a concern that actual or perceived independence may be compromised if tribunals are in the position of 'supplicants to executive government' to obtain the resources they need to do their job,<sup>199</sup> or if the executive unduly controls their management choices.<sup>200</sup>

Tribunals in Australia and New Zealand operate with varying degrees of administrative autonomy. Some have a high degree of dependence on an 'interested agency', being a government department or other executive body whose decisions the tribunal reviews, or which has a policy interest in the outcome of the tribunal's decisions.

#### EMBEDDED TRIBUNALS

A relationship of dependence can arise where the agency decides to establish a tribunal to provide review services or dispute resolution services for one of its programs. As the tribunal is intended to be part of the machinery for administering the program, it may be housed, provisioned and administered by the agency. Although a form of internal separation may be in place to sequester the tribunal's business from the host agency, an embedded tribunal may not be perceived as independent. The UK's *Leggatt Report* explained the problem as follows:

For most tribunals, departments provide administrative support, pay the salaries of members, pay their expenses, provide accommodation, provide IT support (which is often in the form of access to departmental systems), are responsible for some appointments, and promote the legislation which prescribes procedures to be followed. At best, such arrangements result in tribunals and their departments being, or appearing to be, common enterprises.<sup>201</sup>

The Report observed a tendency for host agencies to consult tribunals in the development of agency policies and legislation.<sup>202</sup> A culture can develop in which the tribunal is seen by the agency as its partner in policy development.<sup>203</sup> This can compromise the tribunal's independence if the policies and legislation are under consideration in future proceedings.<sup>204</sup>

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<sup>199</sup> Parker, 'The Independence of the Judiciary', above n 40, 85 (referring to the judiciary).

<sup>200</sup> Dawson, above n 159, 142.

<sup>201</sup> *Leggatt Report*, above n 25, [2.20].

<sup>202</sup> *Ibid* [2.21].

<sup>203</sup> *Ibid*.

<sup>204</sup> *Ibid* [2.20], [2.21].

Leggatt noted a growing number of challenges to court and tribunal decisions under the access to justice provisions of the European Convention on Human Rights ('ECHR'), particularly under article 6(1), which provides (in part):

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

The scope of the convention was unclear, but there was reason to think that it might be taken to require institutional or structural independence for administrative tribunals.<sup>205</sup> Leggatt appears to have been concerned that some tribunals might be open to challenge under the ECHR if they are too closely associated with the department whose decisions they review.<sup>206</sup>

In 2004, and again in 2008, the NZ Law Commission questioned the lack of independence of embedded tribunals, noting that concerns had been raised as early as 1965.<sup>207</sup> The Commission said, in relation to a group of embedded tribunals, that they 'in all probability function independently', and 'their members would be unlikely ever to consider themselves captured by their host agency'.<sup>208</sup> Nevertheless, it suggested, the tribunals 'may not enjoy the full confidence' of those bringing appeals due to the 'potentially tainting link' with the Department'.<sup>209</sup>

The Commission and Leggatt concluded that the advantages of embedding tribunals in host agencies were outweighed by the need to ensure independence.<sup>210</sup> Leggatt noted that 'a clear majority' of consultees and submissions indicated the same view.<sup>211</sup> The Commission said that 'the most stringent standards of institutional independence ought to apply' in the case of administrative review tribunals, since their decisions always involve a government party.<sup>212</sup>

### **Reform through restructuring**

In most Australian jurisdictions, some embedded tribunals have been absorbed into larger multi-jurisdictional tribunals which are administered by the department of the Attorney General or Minister for Justice. The consolidation of small embedded tribunals into larger cross-agency tribunals helps to concentrate organisational resources and to reduce dependence on host agencies.

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<sup>205</sup> Ibid [2.11]-[2.16]. Leggatt at [2.12] notes also that art 6(3) had been applied to civil cases by the European Court of Human Rights in *Airey v Ireland* (1979), 2 EHRR 305.

<sup>206</sup> Ibid [2.11]-[2.22]. The concern is not stated expressly.

<sup>207</sup> NZLC, *Delivering Justice for All*, above n 130, [63], [64]; NZLC, *Tribunals in New Zealand*, above n 2 [1.40]-[1.41], [5.25].

<sup>208</sup> NZLC, *Delivering Justice for All*, above n 130 [64].

<sup>209</sup> Ibid [63]; see also NZLC, *Tribunals in New Zealand*, above n 2 [5.25]-[5.30].

<sup>210</sup> NZLC, *Delivering Justice for All*, above n 130, [7.14]; NZLC, *Tribunals in New Zealand*, above n 2, [5.24]; *Leggatt Report*, above n 25 [2.1], [2.2].

<sup>211</sup> *Leggatt Report*, above n 25 [2.2].

<sup>212</sup> NZLC, *Tribunals in New Zealand*, above n 2 [5.25].

In the UK, Leggatt recommended bringing the administration of all tribunals into a unified Tribunals Service reporting to the Lord Chancellor.<sup>213</sup> The recommendations were put into effect by legislation in 2007.<sup>214</sup> The NZ Law Commission also recommended that responsibility for tribunals be removed from host agencies, and they should be administered by a dedicated branch within the Ministry of Justice.<sup>215</sup> A tribunals unit was established in the Ministry of Justice which provides administrative support to 28 tribunals, but a number of tribunals continue to operate outside this framework.<sup>216</sup>

## AREAS OF ADMINISTRATIVE INDEPENDENCE

The *International Framework of Tribunal Independence* identifies the following areas of administrative independence: control by the tribunal over expenditure of its budget allocation; control over the premises in which it sits ‘and all necessary resources and facilities’; provision of ‘the means and resources, financial or otherwise, needed for the proper discharge of its functions and duties’; and its structural or institutional independence from the executive and legislative branches.<sup>217</sup>

In 2004, the Victorian Courts and VCAT issued a *Courts Strategic Directions Statement*.<sup>218</sup> The Statement identified certain minimum requirements for institutional independence of courts and VCAT. The right of the courts and VCAT to exercise control over their building and facilities was essential to ensure the access, security, and environmental conditions required for adjudication.<sup>219</sup> Control of budget expenditure was needed to ensure that the executive could not withhold items required for adjudication, such as funding for travel or transcripts.<sup>220</sup> The Statement also proposed that courts and VCAT should have independent authority to hire and dismiss their registry staff, which would bring the staff under their management, direction and control.<sup>221</sup>

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<sup>213</sup> *Leggatt Report*, above n 25, [2.3].

<sup>214</sup> Tribunals, Courts and Enforcement Act 2007 (UK).

<sup>215</sup> NZLC, *Delivering Justice for All*, above n 130, [63]-[68], rec 142.

<sup>216</sup> See Patricia McConnell, ‘The Future of Tribunals in New Zealand’ in R Creyke (ed), *Tribunals in the Common Law World* (Federation, 2008) 194.

<sup>217</sup> *International Framework for Tribunal Excellence*, above n 135, 8-9, items 2, 5, 10 – reproduced in Appendix B below.

<sup>218</sup> The statement is extracted in Smith, above n 33, app A.

<sup>219</sup> *Ibid*, app A [5.2.2].

<sup>220</sup> *Ibid*.

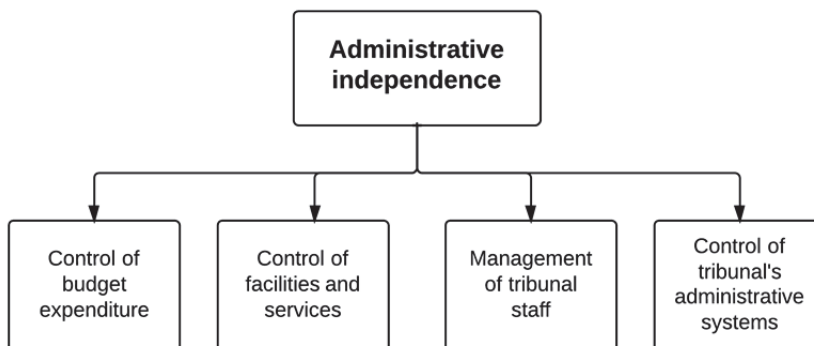
<sup>221</sup> *Ibid*, app A [5.4.2].



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**Figure 4: Areas of administrative independence**

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### **Funding, premises and resources**

There are different ways in which tribunals receive funding. Some tribunals are funded by an annual one-line parliamentary appropriation, giving them control over the expenditure of their allocated budget.<sup>222</sup> The ARC recommended this funding arrangement because it delivers a greater degree of administrative autonomy and control, and makes changes in funding levels from year to year transparent.<sup>223</sup>

A second mode of funding is where the tribunal is funded by a central agency of government, such as the Attorney-General's Department or Justice Ministry, which receives the parliamentary appropriation. The department allocates funds using an output budgeting model which funds specified outputs such as the number of cases determined, rather than for processes or expenditure items such as building rental.<sup>224</sup> Similar arrangements are used in some jurisdictions to allocate funding to the courts. In their study of courts governance, Alford et al heard that allocations to courts are not fixed, and the courts may find that some of their budget has been reallocated by the department to other areas.<sup>225</sup> Expenditure against budget is monitored, and approval by the department or the Treasury may be required for the reallocation of expenditure on items within the budget.<sup>226</sup>

Alford et al found that there are different models of court governance in use in Australia.<sup>227</sup> Commonwealth courts and the AAT receive their own appropriation. In

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<sup>222</sup> ARC, *Better Decisions*, above n 51, [7.16].

<sup>223</sup> *Ibid* [7.16], [7.17].

<sup>224</sup> Alford et al, above n 34, 37.

<sup>225</sup> *Ibid* 39, 85.

<sup>226</sup> *Ibid* 3, 40; Barry Cotterell, 'Tribunals: Improving Access to Justice?' (paper presented at the 7<sup>th</sup> AIJA Annual Tribunals Conference, Brisbane 2004) 35.

<sup>227</sup> Alford et al, above n 34, 3.

South Australia the appropriation is made to the Courts Administration Authority, which provides financial and administrative support to the courts under a model jointly managed by all the heads of jurisdiction.<sup>228</sup> In the other jurisdictions, the appropriation is made to the Attorney General's Department or Justice Department, which controls court staff, buildings and information systems.<sup>229</sup> The administering department tends to centralise functions and facilities in ways that may not be responsive to the needs of courts and tribunals.<sup>230</sup>

From July 2014, Victoria will have a governance model in which administrative services and facilities for the courts and VCAT are provided by a new statutory body, Courts Service Victoria ('CSV').<sup>231</sup> CSV will be directed by a Courts Council chaired by the Chief Justice, comprising the heads of each jurisdiction and two non-judicial members appointed by the judicial members of the Council.<sup>232</sup> CSV will provide staff and facilities to each jurisdiction in accordance with the budget for the jurisdiction,<sup>233</sup> which cannot be reduced by the Courts Council without the approval of the head of the jurisdiction.<sup>234</sup> Each jurisdiction will have its own Chief Executive Officer who is appointed by the Courts Council on the nomination of the head of jurisdiction and is subject to direction by the head on matters relating to the jurisdiction.<sup>235</sup>

### ***The purchaser/provider funding model***

A common mode of funding is the contractual purchaser/provider funding model.<sup>236</sup> A specialist tribunal negotiates a funding agreement with the department or agency whose decisions make up its caseload. It may also negotiate a memorandum of understanding or service level agreement with the department or agency for the provision of administrative and other support services. A number of tribunals operate under this model, such as the Veterans' Review Board and the Social Security Appeals Tribunal.

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<sup>228</sup> Kathy Laster, 'Separation of Powers Through Separation of Administration?' (2011) *Alternative Law Journal* 135; *Courts Administration Act 1993* (SA).

<sup>229</sup> Alford et al, above n 34, viii, 3.

<sup>230</sup> Smith, above n 33, 9-10, 16.

<sup>231</sup> Court Services Victoria Bill 2013 (Vic) pt 2.

<sup>232</sup> *Ibid* pt 3 div 2.

<sup>233</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 30 Oct 2013, 3661, 3663 (Robert Clark) (Court Services Victoria Bill 2013, Second Reading Speech).

<sup>234</sup> *Ibid* s 41.

<sup>235</sup> *Ibid* pt 4 div 2.

<sup>236</sup> The term was used by the Victorian Bar in its submission to the Senate Committee in relation to the ART Bills: Senate Legal and Constitutional Legislation Committee, *Inquiry into the Provisions of the Administrative Review Tribunal Bill 2000 and the Provisions of the Administrative Review Tribunal (Consequential and Transitional Provisions) Bill 2000* (Feb 2001) 3.5-3.11 ('Senate Report on the ART Bills').

The ARC recommended that a review tribunal's funding should not be from the budget of an agency whose decisions it reviews.<sup>237</sup> It identified the risk to independence which the practice creates:

If a tribunal is dependent for resources on such an agency, it is possible that the tribunal's independence will be (or will be perceived to be) prejudiced by that arrangement. That is, the tribunal may be put under pressure, or be seen to have been put under pressure, to favour the agency if it is dependent upon the agency for the provision or negotiation of its funding.<sup>238</sup>

Contrary to the ARC's recommendation, the proposal for the Administrative Review Tribunal in 2000-2001 would have required five of the tribunal's six divisions to negotiate funding with the departments whose decisions they were to review.<sup>239</sup> The government expected the arrangement to provide incentives for departments to improve their decisions by internalising the cost of review.<sup>240</sup> The lack of independence inherent in the funding arrangement was criticised by politicians and others prior to its defeat in the Senate.<sup>241</sup>

There is an ongoing debate about whether administrative independence should be prioritised over other considerations such as improving agency decision making or the efficiency of program delivery. Those who favour allowing agencies to resource tribunals commonly raise arguments about incentive effects. Some departments and tribunal members told the NZ Law Commission that administering agencies have an incentive to provide adequately for tribunals that operate in their policy area.<sup>242</sup> The Administrative Review Council ('ARC') heard that where a tribunal is funded by an executive agency whose decisions it reviews, funding is more likely to be provided for changes in workload.<sup>243</sup> It also noted that the tribunal's decisions would be more likely to influence decision making by the agency in future cases if the tribunal is funded by the agency.<sup>244</sup>

## Staff

Alford et al observe, in the context of the courts, that the impartiality and competence of the registry staff can affect the institutional integrity of the court.<sup>245</sup> For example, a court relies upon its staff to maintain the security of documents and

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<sup>237</sup> ARC, *Better Decisions*, above n 51 [7.15], rec 78.

<sup>238</sup> *Ibid* [7.14].

<sup>239</sup> Bacon, above n 161, 198, 201. Bacon notes that the funding arrangement was in the Explanatory Memorandum for the Bill.

<sup>240</sup> Senate, *Hansard*, 26 February 2001, 21925 (Senator Ellison).

<sup>241</sup> Senate, *Hansard*, 26 February 2001, 21841 (Senator Bolkus); 21853 (Senator Ludwig); 21853 (Senator Greig); Bacon, above n 161, 202-03.

<sup>242</sup> NZLC, *Tribunals in New Zealand*, above n 2 [5.24].

<sup>243</sup> ARC, *Better Decisions*, above n 51, [7.13], [7.18].

<sup>244</sup> *Ibid* [7.19].

<sup>245</sup> Alford et al, above n 34, 54.

the confidentiality of information. Alford et al argue that a court-controlled model for management of staff is more suited to ensuring judicial independence, impartiality and quality of service.<sup>246</sup>

There are different ways in which the registry staff of the tribunal may be employed. A tribunal can be established as a statutory agency for the purposes of employing and managing registry staff. The staff of the AAT is engaged under the *Public Service Act 1999* (Cth), and the Registrar is deemed to be an agency head with all the rights and powers of an employer under that Act.<sup>247</sup> The assistant registrars and staff of the tribunal have the functions given to them by the President.<sup>248</sup>

Under the *Migration Act 1958* (Cth), the registrar and other officers of the Migration Review Tribunal and the Refugee Review Tribunal are appointed by the Minister, hold office under the Public Service Act, and have the duties and functions given to them by the Principal Member.<sup>249</sup>

The provisions in some tribunal statutes implement a model in which an administering agency such as the Department of Justice is under a statutory duty to provide the tribunal with staff. For example, the *Weathertight Homes Resolution Services Act 2006* (NZ) s 108 provides that the Secretary for Justice must provide all employees required by the tribunal to perform its function and exercise its jurisdiction effectively. It also provides that the Secretary may designate ministry employees to act as officers of the tribunal under the general direction of the Secretary.

For some tribunals, staff members are employed by an agency whose decisions are reviewed by the tribunal, and are assigned to work in the tribunal.<sup>250</sup> The ARC was critical of this arrangement, which it said could impair the perception of independence, and create confusion about who is responsible for human resources management decisions.<sup>251</sup> It considered that the best option was for all tribunal staff to be employed by the tribunal and to be subject only to the direction of the tribunal head.<sup>252</sup>

At the weak end of the spectrum of institutional arrangements, some tribunal statutes establish tribunals but make no provision for them to be supplied with staff, premises and resources. The tribunal is placed in an insecure and dependent

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<sup>246</sup> Ibid 63-65.

<sup>247</sup> *AAT Act* ss 24N(4), 24P; *Public Service Act 1999* (Cth) ss 20, 22.

<sup>248</sup> *AAT Act* s 24N(5).

<sup>249</sup> *Migration Act 1958* (Cth) ss 407, 472.

<sup>250</sup> ARC, *Better Decisions*, above n 51 [7.36], citing the example of the Veterans Review Board: *Veterans Entitlements Act 1986* (Cth) s 172.

<sup>251</sup> Ibid [7.40].

<sup>252</sup> Ibid [7.42], rec 83.

position, as the host agency is under no statutory duty to provide it with the staff and resources which it needs to perform its duties.

## Chapter 4: Institutional Independence: Appointments

This Chapter focuses on the fairness and transparency of procedures for appointments of tribunal members in Australia and New Zealand. There is general agreement that appointment processes are of crucial importance for tribunal independence. The Chapter does not discuss the additional issues which arise in re-appointment of incumbent members, such as whether members are re-appointed without undergoing an externally competitive selection process. It deals with re-appointments only to the extent that they follow the same process as appointments. Reappointments are discussed in Chapter 5.

### APPOINTMENTS AND TRIBUNAL INDEPENDENCE

Tribunal statutes commonly provide for the appointment (and reappointment) of tribunal members by the Governor in Council (in the case of an Australian State or the Governor-General in Council (in the case of Australia and New Zealand) on the nomination of a Minister. In such cases the appointment decision is under the effective control of the Minister, the Prime Minister, Premier or chief Minister, and the Cabinet.<sup>253</sup> Some other statutes give a Minister a power to appoint members directly, but the Minister may be required by Cabinet procedures to submit the proposed appointment for endorsement by Cabinet.<sup>254</sup> A tribunal statute may or may not require the Minister to consult the tribunal head before recommending an appointment.<sup>255</sup>

The power to nominate or appoint tribunal members is commonly given to the Minister ('portfolio Minister') who is responsible for a program area in which the tribunal exercises jurisdiction. The Minister may also be responsible for an agency whose decisions are reviewed by an administrative tribunal. For tribunals that exercise jurisdiction across portfolios, and especially for tribunals which have judicial members, the power to nominate Ministers is usually given to the Attorney-General or Justice Minister who is also responsible for appointments to the judiciary. The legislation or Cabinet procedures typically require consultation with other Ministers about appointments.<sup>256</sup>

#### Political appointments

Control of appointments by the political executive (Ministers and Cabinet) involves a degree of secrecy that creates opportunities for political patronage and bias. Creyke notes that 'claims of bias and political affiliation in tribunal appointments have periodically been made' in Australia'.<sup>257</sup> Similar criticisms have

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<sup>253</sup> ARC, *Better Decisions*, above n 51, [4.27].

<sup>254</sup> See, for example, New South Wales Department of Premier and Cabinet, *Ministerial Handbook* (June 2011) 14-15.

<sup>255</sup> For an example of an express statutory requirement to consult, see *QCAT Act* s 183(2).

<sup>256</sup> See eg, *Weathertight Homes Resolution Services Act 2006* (NZ) s 103(2); *Immigration Act 2009* (NZ) s 219(2).

<sup>257</sup> Creyke, 'Where do Tribunals Fit?', above n 1, 99.

been made about the process for judicial appointments.<sup>258</sup> Several Canadian jurisdictions have experienced what Sossin describes as ‘scandals, patronage and partisan politics’ in tribunal appointments.<sup>259</sup> Allegations of such misconduct continue to be made.<sup>260</sup> McNaughton summarises the types of appointment decisions which have aroused concern in Canada:

Reported abuses include appointments without consultation with the chair; unexplained failure to re-appoint capable adjudicators on the expiry of their original term; replacement of competent and experienced tribunal members with unqualified political friends; re-appointment of non-performing members with strong political connections; and disregard in the selection process for important, relevant qualifications.<sup>261</sup>

An appointment may be considered ‘political’ even if it not based on partisanship or affiliation to a political party or faction. The NZ Law Commission suggested that appointments may be seen as political if members are selected for the reason that they are expected to favour the government’s policies or interests in matters coming before the tribunal.<sup>262</sup>

### **Who should have power to recommend appointments?**

Control of tribunal appointments by the political executive (Ministers and Cabinet) is consistent with the process for the judiciary and statutory office holders, and is also the practice in most common law countries. Evans and Williams argue that Ministers should remain responsible for judicial appointments because they are accountable to the Parliament and the public, but that Ministers’ direct involvement in the appointments process should be restricted and subject to greater transparency and accountability.<sup>263</sup>

The ARC and the NZ Law Commission agreed that Ministers should remain responsible for recommending appointments to tribunals, and that the risk to tribunal

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<sup>258</sup> Lenny Roth, *Judicial Appointments*, Briefing Paper No 3/2012, NSW Parliamentary Library Research Service (2012) >, 3-4 <<http://www.parliament.nsw.gov.au>>.

<sup>259</sup> Lorne Sossin, ‘The Uneasy Relationship between Independence and Appointments in Canadian Administrative Law’ in G Huscroft and M Taggart (eds), *Inside and Outside Canadian Administrative Law: Essays in Honour of David Mullan* (University of Toronto Press, 2006) 50, 67-69.

<sup>260</sup> CBC News, ‘Appointees to plum tribunal jobs gave money to Tories’ (27 May 2013) <<http://www.cbc.ca/news/politics/story/2013/05/27/pol-tribunal-patronage-donations.html>>.

<sup>261</sup> Heather M McNaughton, ‘Future Directions for Administrative Tribunals: Canadian Administrative Justice - Where Do We Go From Here?’ in R Creyke (ed) *Tribunals in the Common Law World* (Federation Press, 2008) 203, 214.

<sup>262</sup> NZLC, *Tribunals in New Zealand*, above n 2 [5.8].

<sup>263</sup> Simon Evans and John Williams, ‘Appointing Australian Judges: A New Model (2008) 30 *Sydney Law Review* 295, 299-300.

independence could be controlled by requiring open recruitment and a merit-based, transparent selection process before appointments are made.<sup>264</sup>

The NZ Law Commission and many commentators have argued that portfolio Ministers should not select tribunal members because they are not seen to be disinterested parties.<sup>265</sup> The ARC reported considerable support for this view in submissions.<sup>266</sup> The argument, as Dawson puts it, is that ‘executive governments have the power to appoint persons sympathetic to their policies, with the expectation that they will make favourable decisions’.<sup>267</sup> As Ministers’ appointment decisions are not transparent, allegations of political appointments are difficult to prove. The propriety of a round of appointments to the Immigration Review Tribunal in 1994 was the subject of inquiry by a parliamentary committee, which divided on party lines.<sup>268</sup>

Where portfolio Ministers are responsible for recommending appointments, they are likely to take advice from the department, and may allow the department to conduct the recruitment and assessment process. New Zealand’s State Services Commission guidelines give the Minister’s department effective control over appointment processes, subject to consultation with the chair of the tribunal.<sup>269</sup> The guidelines state that while the Minister has ‘ultimate responsibility for the appointment’, ‘the appointment processes are deemed to be delegated to the department concerned, unless the Minister wants them handled differently’.<sup>270</sup> The NZ Law Commission suggests that a tribunal may not be perceived as independent if its members are appointed by the department which appears before the tribunal or is otherwise interested in the outcome of its decision.<sup>271</sup>

## MODELS FOR APPOINTMENT PROCESSES

An appointment process can be divided into four main stages: recruitment, assessment, selection and appointment. Recruitment involves the identification of potential candidates for consideration. In the assessment stage, the candidates are assessed for suitability, and those found to be unsuitable are excluded from further consideration. Selection is the process of deciding which of the candidates assessed as suitable will be appointed or nominated for appointment. The appointment stage includes the checks, inquiries, consultations and other steps required to obtain

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<sup>264</sup> ARC, *Better Decisions*, above n 51 [4.28], [4.35], [4.36], see also [4.27]; NZLC, *Tribunals in New Zealand*, above n 2, [5.8]-[5.15].

<sup>265</sup> NZLC, *Tribunals in New Zealand*, above n 2 [5.12]-[5.15]; O’Connor, above n 159, 10; McNaughton, above n 261, 212.

<sup>266</sup> ARC, *Better Decisions*, above n 51, [4.49], [4.52]. The ARC did not share this view: at [8.33], rec 92.

<sup>267</sup> Dawson, above n 159, 146.

<sup>268</sup> Parliament of Australia, Joint Standing Committee on Migration, *The Immigration Review Tribunal Appointments Process* (Dec 1994).

<sup>269</sup> New Zealand, State Services Commission, *Board Appointment and Induction Guidelines* (2006, updated March 2012, Wellington) 6, 8 (‘NZ State Services Commission Guidelines’).

<sup>270</sup> *Ibid* 8.

<sup>271</sup> NZLC, *Tribunals in New Zealand*, above n 2 [5.12].



Cabinet approval, which can be quite extensive. Once Cabinet has endorsed the appointment, the making of an order by the Executive Council is a formality.

The models used in common law jurisdictions for both judicial and tribunal appointments are of three broad types, which may be called the ‘nomination’ method, the ‘assessment panel’ method and the ‘independent commission’ method. Where the ‘nomination’ method is used, the Minister selects a candidate who has been identified through a consultation process and has been assessed by the Minister as suitable. The ‘assessment panel’ method involves selection by the Minister after receiving a report from a panel which has assessed the suitability of candidates. The ‘independent appointments commission’ method provides for appointment by the executive based on a selection or shortlisting of candidates by an independent statutory appointments commission.

#### A. THE NOMINATION MODEL

The ‘nomination’ model is used for a significant number of tribunal appointments in Australia and New Zealand. When a need arises to fill a tribunal vacancy, the Minister causes discreet enquiries to be made through networks, to identify persons who might be suitable to appoint.<sup>272</sup> Depending on the functions of the tribunal and the class of member, the networks consulted might include professional associations, the Chief Justice, government agencies and stakeholder organisations. For some tribunal appointments, certain stakeholder bodies are invited to nominate potential candidates.<sup>273</sup> The Minister consults the tribunal head about the tribunal’s needs, and may also seek the head’s views about who may be suitable for appointment. A potential candidate is invited to submit an expression of interest to the Minister. Since the selection process is not truly competitive, a candidate may be appointed without interview. It can happen that the tribunal chair learns of the appointments only after they are made.

The nomination model has long been used for both judicial and tribunal appointments, usually with integrity, and has led to many fine appointments.<sup>274</sup> It offers the practical advantage that appointments can be made quickly and with minimal investment of resources. The ‘secret soundings’ through trusted networks generates reliable information about the work-related knowledge, skills and professional reputation of the nominated candidates.<sup>275</sup>

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<sup>272</sup> Roth describes a similar model as one of two which are used to make judicial appointments in Australia: Roth, above n 258, 5-6.

<sup>273</sup> This may be required by the tribunal statute, eg, *Mental Health Act 2007* (NSW) s 141(2)(c), (4); *Veterans Entitlements Act 1986* (Cth) s 158(2), (3).

<sup>274</sup> Evans and Williams observe that the traditional appointment process has not failed, but has indeed produced a judiciary of outstanding quality: above n 263, 295.

<sup>275</sup> Jeffrey Jowell, ‘The Growing International Consensus in Favour of Independent Judicial Appointment Commissions’ in Jowell et al, *Judicial Appointments: Balancing Independence, Accountability and Legitimacy* (Judicial Appointments Commission UK, 2010), 1, 2-3.

### *Equity, diversity and legitimacy issues*

The nomination model came under sustained criticism by the early 1990s.<sup>276</sup> The closed nature of the recruitment process was seen as an ‘old boy network’ that gave privileged access to certain social groups and perpetuated a narrow membership profile. As Evans and Williams observe, the problem with the nomination model is not that it selects unsuitable candidates, but that it ‘systematically overlooks others who do have the required qualities’.<sup>277</sup> Persons not already known to the networks are unlikely to be nominated. Qualified persons from under-represented groups may be passed over because they lack attributes associated with other members, even though the attributes are not actually required to perform the functions of office.<sup>278</sup> A more equitable process was needed to allow all suitably qualified persons to be considered.

At the same time, there was a demand for gender and ethnic or cultural diversity in the make-up of tribunals.<sup>279</sup> The conception of a single ‘public’ was giving way to a more complex concept that courts and tribunals serve a number of ‘publics’ with different needs and attributes.<sup>280</sup> Broadening the membership base was expected to enhance the tribunal’s social and cultural sensitivity and enable it to bring a range of perspectives to bear on matters for decision.<sup>281</sup> It has also been suggested that a broader membership would enhance ‘public confidence’ in the institution’.<sup>282</sup> A UK report invoked the political concept of ‘legitimacy’:

In a democratic society it is unacceptable for an unelected institution that wields the power of the judiciary to be drawn from a narrow and homogenous group that [does not reflect] the diversity of society... Failure to appoint well-qualified candidates from diverse backgrounds to judicial office represents exclusion from participation in power. A judiciary which is visibly more reflective of society will enhance public confidence.<sup>283</sup>

To promote both equity of access to tribunal appointments and diversity in the membership, it was proposed that recruitment should be opened up by advertising for expressions of interest from time to time, and by taking further steps to seek out nominations and to encourage applications from under-represented groups.<sup>284</sup>

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<sup>276</sup> ARC, *Better Decisions*, above n 51 [4.54].

<sup>277</sup> Evans and Williams, above n 263, 301.

<sup>278</sup> Rachel Davis and George Williams, ‘Reform of the Judicial Appointments Process: Gender and the Bench of the High Court of Australia’ (2003) 27 *Melbourne University Law Review* 819, 834.

<sup>279</sup> ARC, *Better Decisions*, above n 51, [4.22].

<sup>280</sup> See further, Parker, *Courts and the Public*, above n 50.

<sup>281</sup> Jowell, above n 275, 3; Julia Neuberger, *Report of the Advisory Panel on Judicial Diversity 2010* <<http://www.judiciary.gov.uk>> 15.

<sup>282</sup> Michael McHugh, Women Justices for the High Court (Speech delivered at the High Court dinner hosted by the West Australian Law Society, 27 October 2004).

<sup>283</sup> Neuberger, above n 281, 14.

<sup>284</sup> For examples of how this is done, see Victoria, Department of Justice, *Reviewing the Judicial Appointments Process in Victoria*, Discussion Paper (July 2010) 15-17.

Additional measures were proposed to make the processes fairer and to reduce social bias in selection. Assessing all candidates by reference to common merit-based selection criteria would allow applicants from non-traditional sources to demonstrate their suitability for appointment.

The same principles and processes were also expected to limit political patronage and bias in appointments. The ARC considered that a 'rational, merit based and transparent' selection and appointment process would enhance independence by making tribunals less susceptible to improper influence.<sup>285</sup> The NZ Law Commission agreed that merit-based selection following a fair and neutral process would enhance public confidence in the integrity of tribunal appointments and dispel suspicion of political patronage.<sup>286</sup>

## **B. THE ASSESSMENT PANEL MODEL**

In line with changed public service appointment practices, a new model developed in which a panel constituted by the Minister assessed the suitability of the applicants and made recommendations to the Minister. In 1994, the ARC noted that Commonwealth tribunals were adopting standardised processes as follows:<sup>287</sup>

For most tribunals, batches of vacancies are now typically advertised, with express selection criteria, and a normal public service process followed to determine suitability. Recruitment panels will now typically include a principal or other senior member of a tribunal, a departmental representative, and a third party. The panel will normally put forward a list of suitable candidates but will not rank them or make specific recommendations.

In its final report in 1995, the ARC welcomed a trend to more transparency in appointment processes, including advertising and dissemination of information about selection criteria and processes, and broader composition of selection panels.<sup>288</sup> It made recommendations to extend and improve the model. It proposed that tribunals should collaborate to develop a statement of the core skills and abilities required for a tribunal member, from which a set of standard selection criteria would be derived.<sup>289</sup> Additional criteria could be developed for particular classes of member and approved by the Minister. The consensus on core attributes would put merit-based assessment on a firmer footing, and also demonstrate to the public the qualifications required for tribunal members.<sup>290</sup>

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<sup>285</sup> ARC, *Better Decisions*, above n 51 [4.34], [4.35], [4.21].

<sup>286</sup> NZLC, *Tribunals in New Zealand*, above n 2 [5.8]-[5.11].

<sup>287</sup> Administrative Review Council, *Review of Commonwealth Merits Review Tribunals: Discussion Paper* (Sept 1994, AGPS, Canberra), [4.54]-[4.59] ('ARC Discussion Paper'). Guidelines were issued for AAT appointments in 1993.

<sup>288</sup> ARC, *Better Decisions*, above n 51 [4.23].

<sup>289</sup> *Ibid* [4.15]-[4.17].

<sup>290</sup> *Ibid* [4.47], [4.15]-[4.17].

### ***Implementation of the assessment panel model***

The assessment panel model is intended to provide open, merit-based and transparent recruitment and assessment stages. Recruitment is ‘open’ if there is a real opportunity for all suitably qualified persons to apply and be considered. Assessment is ‘merit-based’ if the candidates’ suitability for appointment is assessed in terms by reference to ‘the relationship between a person’s job-related qualities and those genuinely required for performance’ in the relevant office.<sup>291</sup> Transparency requires at least public disclosure of the assessment processes and the selection criteria, and may also include giving candidates access to the assessment relating to them.<sup>292</sup>

Key elements of the assessment panel model are now widely accepted as good practice, and are incorporated into government or departmental procedures and guidelines. The following requirements are commonly included: competency-based selection criteria developed through broad consultation and approved by the Minister; transparent selection criteria and processes; advertising for expressions of interest from time to time; additional steps to identify potential candidates from under-represented groups and encourage them to apply; establishment of assessment panels with participation by the tribunal head or nominee; evidence-based assessment of candidates by the panel against the selection criteria (including interviews and checking referees); and an assessment report with shortlisting of suitable candidates for the Minister’s consideration.

These elements are found in the processes used for appointments to most tribunals in each jurisdiction, particularly the large and multi-jurisdictional tribunals. The nomination method is still used for a number of the smaller tribunals, including in particular the ‘embedded’ tribunals which depend for their staffing, resourcing (and sometimes their accommodation) upon a host department or other government agency within the Minister’s portfolio.

Where the Minister has a choice of appointment method, it is likely that the tribunal’s resources, size and membership composition are important considerations. The assessment panel method is suited for screening large numbers of candidates attracted by open recruitment, but requires more time and resources than the nomination method. It may be uneconomic to conduct a full appointment process for a tribunal which has few or no full time members, or which has a large component of sessional members who are not guaranteed any sitting days if appointed. Tribunal amalgamation and consolidation tends to extend the adoption of the advisory panel method by allowing greater concentration of resources in one tribunal.

Even if a tribunal uses the assessment panel method for rounds of multiple appointments, the nomination method may also be used in some circumstances, such as to fill casual vacancies where an urgent appointment is required. Tribunals sometimes have difficulties in recruiting members with certain specialist qualifications and skills. If open recruitment does not attract applicants with the

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<sup>291</sup> Clare Burton, ‘Merit – What is it?’ (Public Service and Merit Commission, 1996), quoted in O’Connor, above n 159, 265, fn 11.

<sup>292</sup> ARC, *Better Decisions*, above n 51 [4.44]-[4.47], rec 38.

desired attributes, there may be an ongoing search to identify potential appointees. The *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (*‘VCAT Act’*) s 15(6) expressly reserves the Minister’s right to appoint a person who has not applied for appointment.

### ***Commonwealth guidelines for appointments to tribunals***

The assessment panel method makes the recruitment and assessment more open, transparent and merit-based, but does not mean that the appointment process overall will have those attributes. In its Better Decisions report, the ARC sought to extend elements of transparency and merit protection into the selection stage, in a way that preserved Ministerial discretion in appointments.<sup>293</sup>

The ARC proposed that the assessment panel should assess and report on candidates against the selection criteria without ranking them in order of merit.<sup>294</sup> To make the assessment process more transparent and accountable, candidates should be able to see their own assessment report.<sup>295</sup> The Minister should be free to select among those rated by the panel as suitable and to further evaluate them, but appointments should be made only from within the panel’s list of suitable candidates.<sup>296</sup> A Minister who wished to consider a particular person for appointment could encourage the person to apply, but could select them only if the panel assessed them as suitable.<sup>297</sup> The Minister would retain the discretion to make further appointments from the panel’s shortlist as the need arose after the initial appointments were made.<sup>298</sup>

The Commonwealth’s *Merit and Transparency* framework adopts some of the ARC’s suggestions for an assessment model, but preserves full ministerial discretion in selection.<sup>299</sup> The framework was introduced in 2008 to ensure fair, open and merit-based appointments for certain Australian Public Service agency heads and statutory offices. In February, 2008, the Cabinet Secretary and Special Minister of State Senator John Faulkner issued an administrative notice that extended the framework to Principal and Senior members of the Commonwealth tribunals, and to members where multiple members are appointed on a full time or part time basis.<sup>300</sup> The framework is applied subject to provisions in the tribunal legislation.

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<sup>293</sup> Ibid [4.36].

<sup>294</sup> Ibid [4.35], [4.44], [4.47], rec 35.

<sup>295</sup> Ibid [4.35], [4.45], rec 38.

<sup>296</sup> Ibid [4.35], [4.44], [4.47], rec 36.

<sup>297</sup> Ibid [4.36].

<sup>298</sup> Ibid [4.37].

<sup>299</sup> Australian Public Service Commission, *Merit and Transparency: Merit-based selection of APS heads and APS Statutory Officers* (4<sup>th</sup> ed, Oct 2012) (*‘Merit and Transparency’*).

<sup>300</sup> Senator John Faulkner, *‘New Arrangements for Merit and Transparency in Senior Public Service Appointments’*, Media Release 02/2008, 5 Feb 2008; and list of statutory offices: <[http://www.senatorjohnfaulkner.com.au/Media/list\\_of\\_agencies\\_attachment\\_4Feb08.pdf](http://www.senatorjohnfaulkner.com.au/Media/list_of_agencies_attachment_4Feb08.pdf)>.

*Merit and Transparency* specifies a full selection process for appointments to vacancies, except where the Prime Minister on the application of a Minister approves a departure due to special circumstances.<sup>301</sup> It requires consultation with the Minister about the scope of advertising and any additional selection criteria, assessment of candidates by a panel against approved selection criteria, and a report to the Minister recommending ‘a shortlist of suitable candidates for the Minister’s consideration’.<sup>302</sup> The panel is not required to rank the candidates but is encouraged to do so ‘where there is a clear order of merit or an outstanding candidate’.<sup>303</sup>

*Merit and Transparency* and the *Cabinet Handbook* jointly specify the processes required at the appointment stage. The *Cabinet Handbook* requires that in any proposal for appointment or reappointment, the Minister must explain the selection process and how *Merit and Transparency* was applied.<sup>304</sup> The Minister is also required to confirm that the person proposed has appropriate qualification and experience, that due regard has been paid to gender and geographic balance in appointments, and that any required consultation with ministerial colleagues has taken place.<sup>305</sup>

*Merit and Transparency* requires that if the Minister selects a person who has not been recommended by the panel,<sup>306</sup> or decides not to appoint a candidate who has been recommended by the panel,<sup>307</sup> the Minister must write to the Prime Minister giving the reasons.<sup>308</sup> The Minister’s reasons for the departure will be seen by Cabinet, if the appointment requires Cabinet approval,<sup>309</sup> but are not transparent in the sense of being open to public scrutiny. There is no requirement to notify the Prime Minister and Cabinet if the ministers depart from the panel’s order of merit ranking (if any).

In sum, the Commonwealth procedures retain full ministerial discretion in selection, while making the Minister accountable to the Prime Minister and Cabinet for certain departures from the panel’s advice. They do not make the selection and appointment stages more transparent, but assessment of relative merit becomes ‘the primary consideration’ in selection.<sup>310</sup> The primacy of merit does not exclude other considerations, including ‘gender and geographic balance in appointments’.

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<sup>301</sup> *Merit and Transparency*, above n 299, 7, 11.

<sup>302</sup> *Ibid* 3, 6, 10.

<sup>303</sup> *Ibid* 10.

<sup>304</sup> Australian Government, Department of Prime Minister and Cabinet, *Cabinet Handbook* (7<sup>th</sup> ed, 2012) annex J, [7], [8] (*‘Australian Cabinet Handbook’*).

<sup>305</sup> *Ibid* annex J [10].

<sup>306</sup> *Merit and Transparency*, above n 299, 3, 7.

<sup>307</sup> *Ibid* 7.

<sup>308</sup> *Ibid*.

<sup>309</sup> *Ibid*.

<sup>310</sup> *Ibid*.

### ***Cabinet procedures in jurisdictions other than the Commonwealth***

In other jurisdictions, guidelines issued by a central agency of government apply to appointments to specified tribunals or classes of tribunal member. For example, the New Zealand State Services Commission's *Board Appointment and Induction Guidelines* are expressed to apply to appointments to statutory tribunals, and are for implementation by the relevant government department.<sup>311</sup> The Guidelines give instructions for consultation with the Minister as to the appointment process, skills analysis and position description, consultation with specified 'nominating agencies' to identify potential candidates among under-represented groups, establishment of an interview panel including the tribunal chair, and shortlisting of candidates for interview.<sup>312</sup> Declarations of interest and other 'due diligence' inquiries (eg probity, security and criminal checks) are conducted after shortlisting and are followed up at interview.<sup>313</sup>

The *Guidelines* mention a 'recommendation brief' to the Minister,<sup>314</sup> but do not specify whether the recommendation should take the form of an assessed pool of candidates for the Minister to consider, a ranked shortlist, or a single name for each vacancy. Consultations with other ministers, government departments and stakeholders (if required) take place after the Minister receives the recommendation. Following consultation, the Minister's recommendation is discussed by the Appointments and Honours Committee and the Cabinet, and the Minister may also arrange consideration by caucus and other political parties before the appointment is confirmed.<sup>315</sup>

Although the *Guidelines* state that the Minister will select 'the candidate who he or she considers best meets the full range of requirements to be an effective board member',<sup>316</sup> the Cabinet submission does not require the Minister to state that the candidate has been selected on the basis of relative merit. The Minister must certify to Cabinet that 'an appropriate appointment process has been followed',<sup>317</sup> but is not required to disclose any disagreement with findings or recommendations of the panel.

A similar gap is found in Queensland's *Cabinet Handbook*.<sup>318</sup> The Minister must outline the appointment process followed in the Cabinet submission,<sup>319</sup> and must

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<sup>311</sup> *NZ State Services Commission Guidelines*, above n 269, 6, 8, 9.

<sup>312</sup> *Ibid* 8, 9, 11-15, 26-27.

<sup>313</sup> *Ibid* 9 at step 8, 18-23, 26-27.

<sup>314</sup> *Ibid* 9, at step 9.

<sup>315</sup> *Ibid* 28-29.

<sup>316</sup> *Ibid* 28.

<sup>317</sup> *Ibid* 30; see also New Zealand Cabinet Office, *Cabguide* <<http://www.cabguide.cabinetoffice.govt.nz/procedures/appointments/guidelines#certification>> ('*New Zealand Cabguide*') (no page numbers).

<sup>318</sup> Queensland, Department of Premier and Cabinet, *Cabinet Handbook* [5.4.1] <<http://www.premiers.qld.gov.au>> ('*Queensland Cabinet Handbook*').

<sup>319</sup> *Ibid* [5.4.2].

certify to the Premier that ‘the Minister is satisfied with the suitability of the nominees’.<sup>320</sup> The Minister is not required to state whether the proposed appointment is consistent with any recommendation or ranking that results from a panel assessment.

One reason that ministers are not required to justify departures from panel recommendations is that the panel’s assessment of merit is not the only consideration in the Minister’s selection. Cabinet procedures require additional steps, including consultations, resolving disagreements arising from consultations,<sup>321</sup> and considering how to achieve the government’s equity and diversity targets or goals.<sup>322</sup>

Cabinet procedures indicate a range of broader matters on which the Minister must report to Cabinet at the appointment stage. For example, New Zealand’s Cabinet Guide requires the Cabinet submission to disclose matters relating to a proposed appointee’s suitability, such as ‘public perception issues’, other appointments held by the person, and how the appointment will achieve a balance of skills and experience on the tribunal.<sup>323</sup>

Queensland’s *Cabinet Handbook* requires that the Cabinet submission for the appointment of a full time or part time member of a tribunal must list all existing members as well as the proposed appointees, and must indicate how the proposed appointments will affect the gender balance and regional representation of the membership.<sup>324</sup> The Minister must also detail the process used to achieve gender balance or explain why it could not be achieved.<sup>325</sup>

The New Zealand Cabinet procedures require the Minister to confirm that ‘full consideration has been given to an appropriate balance on the board in gender, age, ethnic and geographical terms, and that the contribution of disabled people is reflected’.<sup>326</sup>

Tasmania’s *Cabinet Handbook* requires a Tasmanian Women’s Register Appointment Certification Form to accompany the appointment submission, if the proposed membership of the tribunal does not meet the Government’s target of equal gender representation.<sup>327</sup>

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<sup>320</sup> Ibid [6.2.1].

<sup>321</sup> *Queensland Cabinet Handbook*, above n 318 [5.4.3].

<sup>322</sup> Some jurisdictions are committed to achieving gender equality in the membership of government boards or bodies: eg, Queensland’s *Women on Boards Strategy - Stage 2*: ibid 6.2.1

<sup>323</sup> *New Zealand Cabguide*, above n 317.

<sup>324</sup> *Queensland Cabinet Handbook*, above n 318, [5.1.7], [5.1.2], [5.4.2], [5.1.7].

<sup>325</sup> Ibid [5.4.2], [6.2.1].

<sup>326</sup> *New Zealand Cabguide*, above n 317.

<sup>327</sup> Tasmania, Department of Premier and Cabinet, Cabinet Office, *Cabinet Handbook* (2012) [2.4.7] (*Tasmanian Cabinet Handbook*).



The Cabinet procedures cited above do not make it clear whether diversity is to be considered only in the recruitment and assessment stages, or whether it should also be considered by the Minister in making a selection, or by Cabinet in approving a selection. Different stages of the appointments process are sometimes conflated, as, for example, in the following statement from the New Zealand *Cabinet Guide*: ‘Ministers preparing papers on appointments are invited to seek nominations for vacancies on boards from the Ministers of Maori Affairs, Pacific Island Affairs and Women’s Affairs’.<sup>328</sup>

The Senate Legal and Constitutional Affairs References Committee (‘the Senate Committee’) found similar lack of clarity in the criteria provided by the Commonwealth Attorney-General’s Department for appointment of a High Court judge.<sup>329</sup> The Committee noted that it is not clear whether diversity is actively considered in the selection process.

There is a contrived ambiguity in the way the procedures for Cabinet appointments are drafted. On a literal reading, they merely require the Minister to explain how the recruitment process satisfied the government’s equity and diversity guidelines, if the proposed appointments do not meet the government’s targets. At the same time, the procedures convey an expectation that ministers will select candidates who are suitable for appointment and whose appointment will contribute to achievement of the targets.

The *QCAT Act* s 183 provides a more transparent approach to the criteria for recommending an appointment. Section 183(7) directs the Minister to have regard to the need for gender balance, inclusion of indigenous people and cultural and social diversity in the membership.

### ***The role of diversity considerations in appointments***

There has been much debate as the relationship between merit and diversity in appointments to judicial office. The Senate Committee reported in 2009 that the ‘overwhelming view put to the committee is that merit should be the fundamental criterion in judicial appointments, and the committee itself was strongly of the same view’.<sup>330</sup> The Committee did not believe that encouraging diversity in appointments was inconsistent with selection on merit.<sup>331</sup>

The suggestion of inconsistency arises because of limitations inherent in the assessment of merit through standard selection criteria. On one view, the concept of merit should be widened somehow to encompass diversity. The ARC suggested in its *Better Decisions* report that ‘the desirability of achieving an appropriate balance or overall profile of members – in terms of ... gender, ethnic or cultural background

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<sup>328</sup> *New Zealand Cabguide*, above n 317.

<sup>329</sup> Parliament of Australia, Senate, Legal and Constitutional Affairs References Committee, *Australia’s Judicial System and the Role of Judges*, (2009) [3.57] <<http://www.aph.gov.au>> (‘Senate Committee Report on the Judicial System’).

<sup>330</sup> *Ibid* [3.26], [3.58].

<sup>331</sup> *Ibid* [3.58].

... can be built into the selection criteria for a particular round of appointments'.<sup>332</sup> The ARC did not suggest how this might be done. Evans and Williams also suggested that greater representation may be achieved by encouraging a more diverse pool of applicants and 'by better expressing what is meant by merit'.<sup>333</sup>

On another view, merit and diversity are complementary elements within a broader selection exercise. The Senate Committee received a number of submissions to the effect that broader considerations should be taken into account in selection for judicial office, once candidates have been individually assessed for relative merit.<sup>334</sup> The International Commission of Jurists submitted that 'the best judicial appointment [also] turns on how it contributes to the make-up of the judicature in terms of impartiality and a reflection of society'.<sup>335</sup> Gageler argues that the idea of selection for judicial appointments solely on the basis of merit is frankly unrealistic:

The notion that appointment can only validly be based on 'merit' is naïve... There are no uniquely 'right' legal answers, and there is no unique measure of judicial 'merit'. There are some people who will display more strongly than others the essential attributes I have described, and that should be given a very great deal of weight. But at this point wider considerations can, and ought legitimately to be, brought to bear. Considerations of geography, gender and ethnicity all can, and should, legitimately weigh in the balance.<sup>336</sup>

The Senate Committee concluded that 'an approach consistent with the *Constitutional Reform Act 2005* (UK) (*'Constitutional Reform Act'*) which emphasises merit and diversity, is worthy of consideration'.<sup>337</sup> Although it had received submissions arguing for an independent Judicial Appointments Commission, the Committee was not satisfied that the cost of establishing a commission was justified.<sup>338</sup>

### **C. THE INDEPENDENT COMMISSION MODEL (UK)**

The Judicial Appointments Commission established under the Constitutional Reform Act has the function of selecting both judicial officers and tribunal members. There is currently no independent appointments commission in Australia or New Zealand, although various reports and articles have proposed one for the judiciary. For example, the Victorian Department of Justice released a discussion paper in 2010 seeking submissions on the process for appointing Victorian judicial

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<sup>332</sup> ARC, *Better Decisions*, above n 51, [4.40].

<sup>333</sup> Evans and Williams, above n 263, 313-14.

<sup>334</sup> *Senate Committee Report on the Judicial System*, above n 329 [3.48]-[3.57].

<sup>335</sup> Submission no 5, p 1, cited in *Senate Committee Report on the Judicial System*, above n 329 [3.54], 39.

<sup>336</sup> Stephen Gageler, 'Judicial Appointments' (2008) *Sydney Law Review* 159, 160.

<sup>337</sup> *Senate Committee Report on the Judicial System*, above n 329 [3.60].

<sup>338</sup> *Ibid* [3.89].

officers.<sup>339</sup> One of the options it examined was the establishment of an independent Judicial Appointments Commission to assess candidates and make recommendations to the Attorney General.<sup>340</sup> The paper did not suggest that the commission would make recommendations for appointments to VCAT or other Victorian tribunals.

Although there is no current proposal to establish an independent appointments commission for tribunals, it is worth considering the UK's Judicial Appointments Commission as an example of a model that circumscribes ministerial discretion in appointments, and requires selection of judicial and tribunal members solely on merit and good character.

In its 2003 Consultation paper, the UK Department of Constitutional Affairs considered two main options for reform of the judicial and tribunal appointments system.<sup>341</sup> The first was an 'appointing commission', which would be empowered to make appointments directly without ministerial intervention.<sup>342</sup> The second option was a 'recommending commission' which would conduct a selection process and make recommendations to the Minister, who would decide whom to appoint.

Within the second option, different levels of discretion might be reserved for the Minister. If a broad discretion is required, the Minister would be free to select among a pool of candidates, all of whom had been recommended by the commission as meeting the criteria for appointment<sup>343</sup> (the 'assessed pool option'). If a more limited discretion is preferred, the commission would provide a ranked shortlist of two or three names, from which the Minister would normally select the first name<sup>344</sup> ('the ranked shortlist option'). For the most circumscribed ministerial discretion, the commission would recommend only one name, its preferred candidate (the 'single name option'). The Minister would have to accept the name, reject it or ask the commission to reconsider.<sup>345</sup>

The Department preferred the 'recommending commission' with the single name option, because it would achieve much of the benefit of an appointing commission while retaining ministerial accountability to Parliament for appointments.<sup>346</sup>

The range of assessment models and options, as they affect the scope of the Minister's discretion in selection, is represented in Figure 5.

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<sup>339</sup> Victoria, Department of Justice, *Reviewing the Judicial Appointments Process in Victoria*, Discussion Paper (2010).

<sup>340</sup> Ibid 19-24.

<sup>341</sup> UK, Department of Constitutional Affairs, *Constitutional Reform: A New Way of Appointing Judges* CP 10/03 (2003) ch 2 ('*UK Constitutional Reform Paper*'). The third model was a hybrid of the first two.

<sup>342</sup> Ibid ch 2.

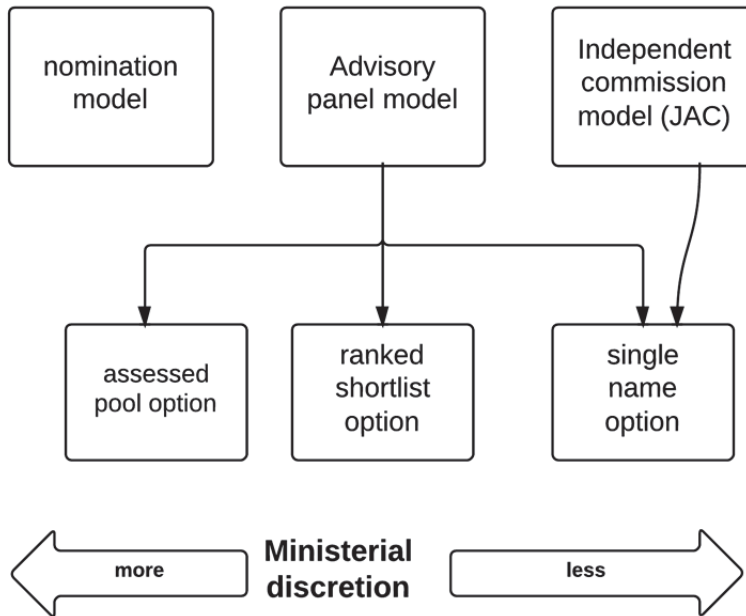
<sup>343</sup> Ibid [44].

<sup>344</sup> Ibid [45].

<sup>345</sup> Ibid [46].

<sup>346</sup> Ibid [50]-[52].

**Figure 5: Appointment models and ministerial discretion**



***The independent commission model - UK***

The Constitutional Reform Act sets out a comprehensive legislative scheme for tribunal and judicial appointments in England and Wales.<sup>347</sup> It places the Lord Chancellor and other ministers under a duty to uphold the continued independence of ‘the judiciary’, which is defined to include the heads and members of a list of specified tribunals.<sup>348</sup> Part 4 of the Act establishes a broad-based and independent Judicial Appointments Commission (‘JAC’),<sup>349</sup> and gives it the function of selecting a person for a judicial or tribunal appointment at the request of the Lord Chancellor.<sup>350</sup> The Lord Chancellor (who is the responsible Minister) must make a request to the JAC in relation to each appointment, unless the Chief Justice agrees that a vacancy remain unfilled.<sup>351</sup>

<sup>347</sup> The Act applies only in England and Wales. Scotland already had an independent commission for judges, and one had been agreed for Northern Ireland: *UK Constitutional Reform Paper*, above n 341, 4.

<sup>348</sup> Constitutional Reform Act 2005 (UK) s 3(1), (7), (7A) (7B), as amended by the Tribunals, Courts and Enforcement Act 2007 (UK) s 1 (‘Constitutional Reform Act’).

<sup>349</sup> Constitutional Reform Act s 61, sch 12.

<sup>350</sup> *Ibid* ss 85-87, sch 14 pt 3.

<sup>351</sup> *Ibid* ss 85- 87, sch 14 pt 3.

The JAC determines the selection process to be followed and carries it out. It selects one name only for each appointment to be made,<sup>352</sup> unless it finds that the selection process has failed to identify candidates of sufficient merit.<sup>353</sup> The Act allows the Lord Chancellor to reject the JAC's selection or ask it to reconsider on two occasions, but must accept the JAC's third selection.<sup>354</sup>

### ***Diversity as a consideration in selection***

Prior to the enactment by the UK Parliament of the Constitutional Reform Act, there was debate both in and out of Parliament about how to encourage diversity in appointments consistently with selection based on merit. Since the Lord Chancellor's discretion to reject a JAC selection was strictly limited, any consideration of diversity would have to take place before the JAC made its selection.

Sumption identifies two broad positions about how the selection decision should be made.<sup>355</sup> The first, which he called the 'minimalist position', is that the commission should identify a shortlist of suitable candidates, and make the final selection based upon diversity criteria. The second view, which he called the 'maximalist' view, was that selection should be based solely on merit, as measured by a candidate's relative ability to perform the functions and duties of office. On this view, the effect of an appointment on the overall composition of the court or tribunal should not be taken into account.

The maximalist view prevailed.<sup>356</sup> Section 64(1) of the Constitutional Reform Act requires the Judicial Appointments Commission to 'have regard to the need to encourage diversity in the range of persons selected for appointments', but this duty is expressly subject to s 63 which states that 'selection must be solely based on merit', subject to an overriding requirement of good character. Sumption summarises the resulting model as one in which the commission must encourage applications from the widest field of qualified candidates, and then select from among them solely on the basis of their aptitude for the functions of office.<sup>357</sup>

Merit is not defined in the Act. The JAC has developed its own merit criteria. The broad criteria are: intellectual capacity, personal qualities, an ability to understand and deal fairly, authority and communication skills, and efficiency.<sup>358</sup> In July 2011 the JAC decided that the criterion of 'an ability to understand and deal fairly' should include 'an awareness of the diversity of the communities which the courts and

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<sup>352</sup> Ibid s 88(4).

<sup>353</sup> Ibid ss 88(2), 92(4), 93.

<sup>354</sup> Ibid ss 90-92.

<sup>355</sup> Jonathan Sumption, 'The Constitutional Reform Act 2005' in Jowell, above n 275, 31, 35-37.

<sup>356</sup> Constitutional Reform Act ss 90-93.

<sup>357</sup> Sumption, above n 355, 37.

<sup>358</sup> See further, Neuberger, above n 283, app ix.

tribunals serve and an understanding of differing needs'.<sup>359</sup> The amendment was made following community consultation, in response to a need to find a way to incorporate a consideration of the benefits of a diverse membership.

There are concerns in England and Wales about the speed of progress towards judicial diversity under the Constitutional Reform Act. In 2009, an Advisory Panel on Judicial Diversity was established in response to concerns about the slow rate of change in achieving a more diverse judiciary at all levels.<sup>360</sup> The Panel made a large number of recommendations, but concluded that the principle of selection solely on merit and good character should remain. It said:

The clear view expressed during consultation was that the current legislative focus on selection solely on merit and good character reflects the correct approach for judicial appointments. Selection on merit through an open and transparent process promotes confidence in the system.<sup>361</sup>

The Panel recommended that the JAC should make use of the positive action provisions in the Equality Bill (now the Equality Act 2010 (UK)), which allows a person with a 'protected characteristic' to be treated more favourably in recruitment than another person who does not have the characteristic.<sup>362</sup> This would allow the JAC to 'tip the balance' in favour of a candidate who possesses a protected characteristic where the candidates are otherwise indistinguishable on merit.<sup>363</sup> The JAC may apply the provisions where it reasonably thinks that the participation in the judiciary by persons with the protected characteristic (such as age, gender, race or religion) is disproportionately low.

## REFLECTIONS AND CONCLUSIONS

There is a high degree of consensus in Australia and New Zealand that the assessed panel model is preferable to the nomination model, although ministers may not regard it as efficient for all tribunals and all appointments. The process of tribunal amalgamation and consolidation over the past two decades has extended the use of the assessed panel method, by bringing more tribunals into an organisational framework which has the resources to conduct the processes. Among the tribunals that use the model, there is a significant degree of consistency in the key features, and in the acceptance of the guiding principles of openness, fairness, *Merit and Transparency*.

Although tribunals have developed the assessed panel model to a high degree of excellence, it does not guarantee that the appointment processes overall are fair,

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<sup>359</sup> Judicial Appointments Commission, Response of the Judicial Appointments Commission to the consultation exercise on amending the JAC's merit criterion: 'an ability to understand and deal fairly' (July 2011) <<http://jac.judiciary.gov.uk>>.

<sup>360</sup> UK Government, Improving Judicial Diversity: Progress Towards Delivery of the 'Report of the Advisory Panel on Judicial Diversity 2010 (May 2011) 4, <[www.gov.uk](http://www.gov.uk)>.

<sup>361</sup> Neuberger, above n 281 [96].

<sup>362</sup> Ibid [99], rec 21; *Equality Act 2010* (UK) ss 4-12, 158, 159.

<sup>363</sup> Neuberger, above n 281 [99].

merit-based and transparent. The elements which are commonly called ‘selection criteria’ are in fact assessment criteria. They are used to assess the relative merit of individual candidates. In all jurisdictions, ministers to take into account a broader range of criteria which relate to the needs of the tribunal and its overall composition.

None of the jurisdictions have accepted any limit on the Minister’s discretion in appointment, nor have they taken steps to increase the transparency of the later stages. At most, ministers are accountable within the political executive for their selection decisions. The Commonwealth’s *Merit and Transparency* framework makes ministers accountable to the Prime Minister and Cabinet for appointing without full selection process, for appointing someone not in the panel’s assessed pool of candidates, and for not appointing someone whom the assessment panel recommends. Ministers can reduce their accountability by asking the panel not to rank candidates nor recommend that a particular candidate be appointed. Some of the Cabinet procedures in the other jurisdictions require the Minister to provide an account of the selection process, which should reveal a departure from the expected process. Accountability could be strengthened by adding an express requirement to disclose any departure, along similar lines to *Merit and Transparency*.

There is a special need for accountability where a Minister selects someone for appointment who has not been assessed by the panel in the same way as other candidates. Circumstances can exist in which an appointment from outside the assessed panel is warranted, but there is potential for a perception of favouritism to arise. In the context of proposals for a Judicial Appointments Commission, Davis and Williams proposed that when the government appoints a person who is not in the commission’s assessed pool, a statement should be made to Parliament.<sup>364</sup> Others have proposed that the Minister should make a disclosure to the commission or to the public.<sup>365</sup> The number of appointments made from outside the assessed pool could be included in the tribunal’s annual report to Parliament.

There has been little support in Australia for circumscribing the Minister’s discretion to the extent that the Constitutional Reform Act has done in the UK. The models that have been proposed for a judicial appointments commission in Australia do not propose a selecting commission.<sup>366</sup> Evans and Williams evaluated the English model for the judiciary and proposed a modified version under which the Minister would have to choose from the commission’s shortlist of three candidates or ask the commission to reconsider.<sup>367</sup> A similar degree of ministerial discretion was proposed in a policy paper released by the NSW Liberals and nationals in 2008.<sup>368</sup>

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<sup>364</sup> Davis and Williams, above n 278, 862-63.

<sup>365</sup> NSW Liberals and Nationals, *Restoring the Faith in Justice: Promoting transparency in judicial appointments in NSW* (2008) 13 <<http://www.justinian.com.au/>> .

<sup>366</sup> See Roth’s review of the various proposals for an independent commission in Australia: Roth, above n 258, 18-24

<sup>367</sup> Evans and Williams, above n 263, 311, 322.

<sup>368</sup> NSW Liberals and Nationals, above n 365, 13.

In all Australian jurisdictions and in New Zealand, there is widespread view that ministers should have a choice among candidates which have been pre-assessed as suitable to appoint. As the ARC put it, the effect of particular appointments on the overall make-up of the tribunal is a matter for the Minister to take into account ‘when choosing from the panel of otherwise similarly suitable candidates’.<sup>369</sup> Although the ARC suggested that diversity could be built into the selection criteria for a particular round of appointments,<sup>370</sup> it is difficult to see how this could be done. The panel would need to model the effect of different appointment options on the overall composition of the membership. This is not a task suitable for a panel whose primary function is to assess the attributes of individuals.

Diversity in appointments is a matter for which the executive government is politically accountable. The public expects governments to ensure that appointments to tribunals, courts and other important government offices achieve over time a membership that is as diverse as the society it serves. Making progress on diversity is important for social justice and cohesion, and for ensuring that the exercise by tribunals of state power is accepted as legitimate by all communities.

The Senate Committee favoured the approach to diversity and merit in the Constitutional Reform Act. The approach relies on the recruitment stage to produce a diverse pool of applicants, from which selections are made solely on merit and good character. Yet despite extensive consultation and discussion, the JAC has not found a way of incorporating into its merit criteria the benefits of a more diverse membership. The merit criteria were amended in 2011 to include ‘an awareness of the diversity of the communities which the courts and tribunals serve and an understanding of differing needs’, but this describes a personal attribute which must be assessed on the basis of evidence. The JAC would not be entitled to assume that a candidate from an under-represented group possesses the attribute to a greater degree than any other candidate. If ‘merit’ refers to the personal attributes which can be assessed by a panel against selection criteria on the basis of evidence, then it is unrealistic to think that diversity goals can be built into merit assessment.

While achieving judicial diversity is a highly complex matter that requires multiple strategies, the lack of progress under the Constitutional Reform Act indicates reason for caution in adopting its approach. Tribunals exercise the power of the state, and the executive government is politically accountable for the quality and diversity of their membership. If selection decisions are made by an independent commission, the executive government loses control over the pace of progress towards achieving greater diversity in the make-up of tribunals.

Merit does not have to be the sole consideration in selection. The Commonwealth’s *Merit and Transparency* makes it ‘the primary consideration’, leaving room for other considerations which could include the achievement of a more representative membership. Appointments can be called ‘merit-based’ if they are made from within a pool of candidates who have been assessed as meeting the

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<sup>369</sup> ARC, *Better Decisions*, above n 51 [4.40].

<sup>370</sup> *Ibid.*



selection criteria. To say that a tribunal appointment is ‘merit-based’ means only that the appointment was made after a merit-based assessment process.<sup>371</sup>

More could be done to improve transparency in the selection and appointment stages. There could be a requirement for ministers to report on the number of appointments of persons who were not assessed by a panel. The Senate Committee recommended that for appointments of federal judicial officers, there should be publication of the number of nominations and applications received, and also the number of candidates in any shortlist given to the Minister.<sup>372</sup> In its response, the Government accepted the recommendation in part.<sup>373</sup> It agreed that an announcement of a federal judicial appointment should include the number of nominations and applications received.

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<sup>371</sup> For an example of this approach, see British Columbia’s *Administrative Tribunals Act* SBC 2004 c 45, s3(1), which relevantly states: ‘A member ... may be appointed ... after a merit based process and in consultation with the chair’.

<sup>372</sup> *Senate Committee Report on the Judicial System*, above n 329 [3.23], [3.24], rec 3.

<sup>373</sup> The undated Government response is published on the Senate Committee’s website: *Inquiry into Australia’s Judicial System and the Role of Judges, Government Response* (undated) <<http://www.aph.gov.au>>.

## Chapter 5: Institutional Independence: Security of tenure and Remuneration

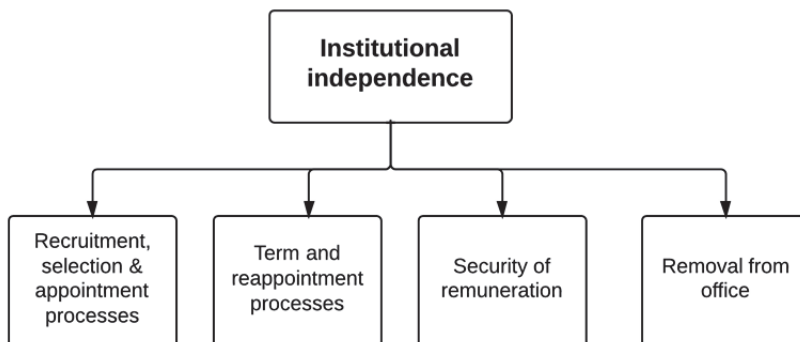
Institutional independence is concerned with structural guarantees to ensure that members are reasonably independent of those who appoint and remunerate them.<sup>374</sup> Its focus is executive powers which affect the tribunal's membership and the interests of its members, including appointment and reappointment, security of tenure (including terms and removal from office) and security of remuneration.<sup>375</sup> Apart from reappointment, these are also the traditional areas of concern for judicial independence. Some commentators take a broader view of institutional independence, extending it to other matters that affect members, such as promotion, conditions of appointment, working conditions, maintenance of the real value of remuneration during appointment, and even the adequacy of remuneration.<sup>376</sup>

This Chapter considers the strength and adequacy of current legislative provisions and arrangements affecting security of tenure (including terms, removal and vacation of office provisions and reappointments) and security of remuneration. It complements the discussion of appointments in Chapter 4.

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**Figure 6: Areas of institutional independence**

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### SECURITY OF TENURE

Secure tenure is internationally regarded as a key guarantee of judicial independence. The reason is that ‘judges are less independent if their terms are renewable because they have an incentive to please those who reappoint them’.<sup>377</sup>

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<sup>374</sup> *Canadian Pacific Ltd v Matsqui Indian Band* [1995] 1 SCR 3 [104] (Lamer CJ, Supreme Court of Canada).

<sup>375</sup> Harsel confines the discussion to these matters: above n 67, 207-15.

<sup>376</sup> For elements of the broader view, see O’Connor, above n 159.

<sup>377</sup> Hayo and Voigt, above n 146, 5.

Judges are appointed until a statutory retiring age, and can be removed only for cause. In Australia, the requirement of life tenure for federal judges was removed by constitutional amendment in 1977, and they are now appointed until the age of seventy years.<sup>378</sup>

Security of tenure does not require appointment to a statutory retirement age.<sup>379</sup> In *Valente v The Queen*, Le Dain J said that security of tenure means ‘a tenure, whether until an age of retirement, for a fixed term, or for a specific adjudicative task, that is secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner.’<sup>380</sup> This definition has been adopted by Australian courts.<sup>381</sup>

### **Terms and tenure**

Although courts in Australia and Canada have said that fixed term appointments can be consistent with institutional independence, renewable terms can affect the appearance of independence. The Minister responsible for reappointment takes advice from the departments, and the department may conduct portions of the reappointment process. A perception can arise that members will not be reappointed if they set aside decisions of the department or decide matters against its interests or policies.<sup>382</sup>

In an extreme case, there may be an attempt to influence the decisions of tribunal members by intimating that, in considering whether to reappoint, the Minister will have regard to the member’s record of departing from executive policy or setting aside decisions of the department.<sup>383</sup> Even without any explicit threat to their chances of reappointment, members may feel pressured to conform to ministerial and departmental expectations if they know that their set-aside rates are being monitored.<sup>384</sup>

The changing profile of tribunal membership may affect the actual or perceived independence of members seeking reappointment.<sup>385</sup> Tribunals are in transition from a community service model to a career model of membership. In 2001, Justice O’Connor welcomed the ‘emerging phenomenon’ of career tribunal members, who combine or alternate tribunal appointments with periods of professional practice, universities or government administration.<sup>386</sup> Her Honour suggested that career

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<sup>378</sup> Australian Constitution s 72.

<sup>379</sup> *Claydon v Attorney-General* [2004] NZAR 15 [115] (New Zealand Court of Appeal).

<sup>380</sup> [1985] 2 SCR 673, 698 (Supreme Court of Canada).

<sup>381</sup> *Forge v ASIC* (2006) 228 CLR 45, [13]; *Owen v Menzies* (2012) 293 ALR 571, 573; *Baker v Commonwealth* [2012] FCAFC 121, [37].

<sup>382</sup> ARC, *Better Decisions*, above n 51, [4.57].

<sup>383</sup> Stephen Legomsky, ‘Refugees, Administrative Tribunals and Real Independence: Dangers Ahead for Australia’ (1998) 76 *Washington University Law Quarterly* 243.

<sup>384</sup> See generally, Bacon, above n 161, 226-27.

<sup>385</sup> O’Connor, above n 159, 26-27.

<sup>386</sup> *Ibid* 24-27.

members seeking reappointment ‘may be more conscious of the way in which their decisions are perceived’ by the portfolio Minister, and that reappointment processes would need to be fair and transparent.<sup>387</sup>

Different views have been expressed about how to maintain the tribunal’s independence in relation to renewable terms. In 1990, the ARC suggested that tribunal members should be appointed for one fixed term without possibility of reappointment.<sup>388</sup> In 1995, the ARC resiled from its earlier view.<sup>389</sup> It recognised that non-renewable appointments would deny tribunals the benefit of retaining skilled and experienced members, and would harm recruitment by discouraging potential candidates.<sup>390</sup>

A contrary approach is that fixed term appointments should be renewed as a matter of course. The review of UK tribunals chaired by Sir Andrew Leggatt recommended that all tribunal appointments should be for a renewable term of five to seven years, and that renewal for further terms should be automatic up to 70 years of age, except for cause.<sup>391</sup> The causes would be similar to the grounds for removal of a member during term, such as misbehaviour and incapacity.<sup>392</sup> The recommendations were consistent with Leggatt’s view that tribunals are established as alternatives to the courts to perform similar adjudicative functions, and require similar safeguards of independence.<sup>393</sup>

When the Commonwealth established the Administrative Appeals Tribunal, members were appointed with the same tenure as federal judges. Justice O’Connor explains that judicial tenure was thought necessary to ensure the high standing of the tribunal, which would be called upon to decide matters involving sensitive policy issues.<sup>394</sup> Members are now appointed for a period of up to seven years, and are eligible for reappointment.<sup>395</sup>

In 1995, the ARC found a divergence of views about whether tribunal appointments should be tenured or renewable.<sup>396</sup> The ARC did not favour tenured appointments, which it thought would impair the ability of tribunals to ensure that their membership is adapted to meet the changing needs of users and the functions

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<sup>387</sup> Ibid.

<sup>388</sup> ARC, *Better Decisions*, above n 51 [4.57], fn 124, citing the ARC’s submission to Joint Select Committee on Tenure of Appointees to Commonwealth Tribunals as reported in ARC, *Fourteenth Annual Report 1989-90* (AGPS, Canberra, 1990).

<sup>389</sup> ARC, *Better Decisions*, above n 51 [4.58]-[4.61], recs 41, 42.

<sup>390</sup> Ibid.

<sup>391</sup> *Leggatt Report*, above n 25 [7.7], recs 121, 124.

<sup>392</sup> Ibid [7.7], recs 122, 123; *Tribunals, Courts and Enforcement Act 2007* (UK) sch 2 ss 3, 4(2); sch 3 s 4.

<sup>393</sup> *Leggatt Report*, above n 25, [2.18].

<sup>394</sup> O’Connor, above n 159, 34.

<sup>395</sup> *AAT Act* s 8(3).

<sup>396</sup> ARC, *Better Decisions*, above n 51 [4.59].

of office.<sup>397</sup> It recommended that members should be appointed for three to five year terms, with longer terms for senior members to ensure continuity, and that terms should be renewable.<sup>398</sup>

The NZ Law Commission agreed with Leggatt that tribunals need a similar degree of independence as the courts, but did not accept that tenured appointments are necessary to secure their independence.<sup>399</sup> The Commission said that fixed term appointments can be consistent with independence, provided that the term is long enough and that members have sufficient security from removal without cause during the term.<sup>400</sup>

In Australia, the relationship between tenure and independence has been considered in the context of whether a state court has the ‘institutional independence and impartiality’ required to be a court within the federal system.<sup>401</sup> The standard can be satisfied by different sets of institutional arrangements. Judicial tenure and security of remuneration are relevant factors to be considered in combination with others, but are not essential for a state court.<sup>402</sup>

Not everyone accepts that a term as short as three to five years is sufficient to provide security of tenure. Despite the concerns, it appears that governments and legislatures in Australia and New Zealand do not support tenured appointments.<sup>403</sup> Fixed term renewable appointments are the norm in tribunal legislation. Maximum terms for most ordinary members are three to five years, and can be up to seven years for presidential members.

Most tribunal statutes fix a maximum term of appointment, but no minimum term. It is not uncommon for members to be appointed to terms as short as one year, for example, to align the expiry date with the next planned round of appointments. In some cases, short terms have been offered in anticipation of an organisational restructure. Justice O’Connor has said that legislation should fix the minimum duration of a term.<sup>404</sup> The *State Administrative Tribunal Act 2004* (WA) (*SAT Act*) adopts a structured discretionary approach. In fixing the period of appointment (which cannot exceed five years), the Act requires that consideration be given to security of tenure and to ‘the development and retention of a membership that has experience and expertise in the exercise of the Tribunal’s jurisdiction.’<sup>405</sup>

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<sup>397</sup> Ibid [4.55], [4.56].

<sup>398</sup> Ibid [4.57]-[4.61], recs 41, 42.

<sup>399</sup> NZLC, *Tribunals in New Zealand*, above n 2, [5.2].

<sup>400</sup> Ibid [5.18].

<sup>401</sup> *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, [29].

<sup>402</sup> Ibid; *Forge v ASIC* (2006) 228 CLR 45, [36], [84]-[85]; *Baker v Commonwealth* [2012] FACFC 121, [51]. See also Stellios, above n 192, [8.51]-[8.83].

<sup>403</sup> O’Connor, above n 159, 9-10.

<sup>404</sup> Ibid 42.

<sup>405</sup> *SAT Act* s s 109(1), 117(3), 118(2), 142.

### *Terms, tenure and judicial leadership*

Stakeholders will more readily accept fixed term appointments if the tribunal head is a judge. Some tribunal statutes provide as a qualification for office that the President must be a judge of a superior court. For example, the President of QCAT must be a Supreme Court judge, and the Deputy President must be a District Court judge.<sup>406</sup> The judicial members are appointed to a fixed term of three to five years, and their term in office counts as service to their court.<sup>407</sup>

Because judicial officers have secure tenure in their concurrent appointment to the court, they are not financially dependent upon reappointment to the tribunal. They are in a strong position to withstand pressure from the government. Politically sensitive cases can be listed for hearing before them, to protect other members from any perceived threat to their reappointment.<sup>408</sup>

Judges are expected to demonstrate an independent frame of mind, which is part of their professional socialisation as judges, and which arguably influences the tribunal's organisational culture.<sup>409</sup> Cane acknowledges a 'long-held view that in certain areas and on certain issues, only judges of superior courts have the status and kudos to stand up effectively to central government'.<sup>410</sup>

Judicial leadership is believed to enhance public trust and confidence in the independence of the tribunal.<sup>411</sup> In dealings with the tribunal, the president's judicial title and status signal to ministers and departments that the tribunal has quasi-judicial functions. The NZ Law Commission said that judicial leadership of a proposed unified tribunal for New Zealand was essential to ensure its neutrality and independence.<sup>412</sup>

For tribunals operating in a specialist jurisdiction or within one portfolio, judicial leadership is not usually required under current legislation. Some statutes specify that the President must be a legal practitioner of not less than a specified number of years standing. For small single-jurisdiction administrative tribunals, particularly embedded tribunals, the statute may require no special qualifications for President beyond the qualifications required for appointment as a member.

In 1995, the ARC proposed that judicial office should no longer be a statutory qualification for appointment for the President of the AAT.<sup>413</sup> The Council said that

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<sup>406</sup> *QCAT Act* ss 175, 176.

<sup>407</sup> *Ibid.*

<sup>408</sup> Bacon n 384, 229, 338, (reporting on an interview with a member of VCAT); NZLC, *Delivering Justice for All*, above n 130, [60].

<sup>409</sup> Bacon, above n 384, 228-29; Harsel, above n 67, 208.

<sup>410</sup> Cane, *Administrative Tribunals and Adjudication*, above n 3, 271.

<sup>411</sup> Fleming, 'Tribunals in Australia', above n 176, 102; Harsel, above n 67, 208; NZLC, *Delivering Justice for All*, above n 130 [60].

<sup>412</sup> NZLC, *Delivering Justice for All*, above n 130 [59].

<sup>413</sup> ARC, *Better Decisions*, above n 51, [8.32], [8.33], recs 90, 91.

persons who have ‘high level legal skills equivalent to those of a judge’ should not be precluded from appointment as President.<sup>414</sup> Subsequently the Commonwealth government introduced a Bill for a new two-tier amalgamated tribunal, the Administrative Review Tribunal Bill 2000 (Cth) (‘ART Bill’), which specified no judicial or even legal qualification for the President.<sup>415</sup> This aspect of the Bill was strongly criticised by some commentators on the ground that it would diminish the independence of the proposed ART.<sup>416</sup> Most multi-jurisdiction tribunals established since the defeat of the ART Bill are under judicial leadership.<sup>417</sup>

## REAPPOINTMENT PROCESSES

Tribunal legislation is generally silent about the processes for reappointment. It falls to the Minister to decide what the process will be for each round. The default position is that a member seeking a further term will apply and be assessed under the same processes as for a vacancy. If an assessment panel is used, the member applies in competition with external candidates and is assessed by the panel, although the process may not be exactly the same.

The Commonwealth’s *Merit and Transparency* policy includes procedures, timelines and responsibilities for reappointment decisions to Commonwealth tribunals.<sup>418</sup> It requires the Minister to notify an incumbent, at least four months before their term is due to expire, whether it is intended to reappoint, not to reappoint, or to test the available field by advertising the position and conducting a merit-based selection process.<sup>419</sup> If the decision is to reappoint, a full assessment and selection process is not required, but the reappointment requires particular justification in the Minister’s submission to Cabinet.<sup>420</sup>

As little about the reappointment process is on the public record, a number of heads and former heads of tribunals were interviewed for the study, and agreed to provide information on a confidential basis. The following information is based on the information provided by them and is unattributed.

The Minister may decide to reappoint some or all of the incumbent members who seek reappointment without requiring them to apply through a competitive process. For a round of reappointments, or for a class of members such as those seeking a second term, the Minister may be willing to consider appointing on a recommendation by the head, based on an agreed assessment process and criteria.

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<sup>414</sup> Ibid [8.33].

<sup>415</sup> Administrative Review Tribunal Bill 2000 (Cth) cls 17(1), 21(1).

<sup>416</sup> Bacon, above n 161, 228-29; Creyke, ‘Where do Tribunals Fit?’, above n 1, 92-93; Barker, above n 130, 17.

<sup>417</sup> Such as the QCAT, the SAT, the Immigration Tribunal (NZ), but *not* the ACTCAT.

<sup>418</sup> *Merit and Transparency*, above n 299.

<sup>419</sup> Ibid 3, 5.

<sup>420</sup> *Australian Cabinet Handbook*, above n 304, annex J [7].

As appointment rounds occur at intervals of years, the identity of the appointing Minister is liable to change from one round to the next. The tribunal head cannot assume that the process followed in the last round of reappointments will be followed in the next. Each reappointment round has to establish its own process. Inquiries are made six to eight months before the expiry of the terms of current members, to ascertain what the process will be. It can take a long time to get a response.

Members need to know at least three or four months ahead of the expiry of their term whether they will be reappointed, but there is no guarantee that the reappointment process will be completed before a current member's term expires. Uncertainty about whether a member will be reappointed causes problems for the tribunal in listing and other administrative arrangements. Some tribunals need to assign matters to members up to six months ahead. In some cases, tribunal heads make repeated calls to the Minister's office, pointing out that further delay in reappointment will make it necessary to cancel hearings listed for the members beyond the expiry of their current term. Some members are reappointed just as their terms are about to expire. Reappointments after expiry of the term are not unknown, and may be more likely to occur if an over holding provision allows a member to continue to exercise powers for a time after expiry of their term.<sup>421</sup>

Once the head's recommendation or report of the assessment panel is submitted to the Minister, the processes for ministerial selection and Cabinet approval are opaque to the tribunal and the members. If the report or recommendation is against reappointment, the member may be informed. Otherwise, the member has to wait for notification of the Minister's decision. In the meantime, the head can give no assurance or information to the members, who wait with growing concern as the date for expiry of their term approaches. The extended uncertainty imposes strain on members, and is a continual reminder of the Minister's power to affect their interests. It can affect their morale, their focus and their productivity.

Government procedures which set time frames for completion of stages of the reappointment process can assist in promoting timely completion, although the time limits are not always observed.<sup>422</sup> Competition for time with other business on the Cabinet agenda may be a contributing cause of delay in some appointments.

### ***Reappointment processes and assessment of competencies***

According to the ARC, the purpose of fixed term appointments is to enable the tribunal 'to ensure that their pool of members remain appropriate to the current set of tasks'.<sup>423</sup> It proposed that members seeking reappointment should apply through a competitive selection process, and that their suitability should be assessed by the same panel against the same selection criteria as for external applicants.<sup>424</sup>

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<sup>421</sup> Eg, Acts Interpretation Act 1931 (Tas) s 21.

<sup>422</sup> An example is *Merit and Transparency*, above n 299 [2.2].

<sup>423</sup> ARC, *Better Decisions*, above n 51, [4.55].

<sup>424</sup> *Ibid* [4.62]-[4.66], rec 43.



The ARC's proposal appears to be premised upon a static conception of tribunal competencies, as attributes that an applicant either possesses or does not possess at different points in time. An experienced member seeking reappointment can be expected to demonstrate higher levels of skills and knowledge than an applicant for a first appointment.

The NZ Law Commission proposed that appointments should be renewable, subject to an assessment by an independent committee that the member has performed well.<sup>425</sup> The proposal was designed to overcome problems in recruitment and retention arising from the lack of a career path for members.<sup>426</sup>

Since the ARC and the Commission made their proposals, tribunals have developed standards for member competencies, performance appraisal systems and competency-based selection criteria. Since 2001, when the Australian Law Reform Commission found that training and professional development opportunities for tribunal members were patchy and unco-ordinated,<sup>427</sup> multiple providers now Minister to members' needs.

The static conception of tribunal competencies has given way to a dynamic model. The Council of Australasian Tribunals' *Tribunal Competency Framework* defines a core set of eight 'headline competencies' required of all members, with associated performance indicators.<sup>428</sup> The *Tribunal Competency Framework* reflects a developmental approach, in which indicators demonstrated on first appointment are progressively improved through tribunal practice and educational programs.<sup>429</sup>

The building of competencies is a joint project of the tribunal and the member. The tribunal invests in its members through performance appraisal and provision of educational programs, and the members invest in their own learning through participation and study.

Reappointment processes need to be aligned with incentives to maintain the developmental partnership. The tribunal has an interest in retaining the member, in order to take advantage of the productivity gain that can be expected to flow from higher competencies. Members who have been encouraged to invest in developing their competencies and who have performed well have reason to expect that their achievements will weigh in their favour when they seek reappointment.

### ***Performance development and reappointment***

Some tribunals have introduced performance appraisal systems, which enable them to monitor and guide the professional development of members. Performance appraisal generates rich information which could inform a reappointment decision,

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<sup>425</sup> NZLC, *Tribunals in New Zealand*, above n 2 [4.37].

<sup>426</sup> Ibid [4.34], [4.37], [4.38], [4.40].

<sup>427</sup> Australian Law Reform Commission, *Managing Justice*, Report No 89 (2001) [2.210].

<sup>428</sup> Council of Australasian Tribunals, *Tribunal Competency Framework: Promoting Professional Excellence* <<http://www.coat.gov.au/sites/default/files/files/TribunalCompetencyFramework.pdf>>.

<sup>429</sup> Ibid 3.

but its use for this purpose is controversial. The question of who sees the data and for what purpose has implications for the design of the performance appraisal system and its acceptance by members.

Performance appraisal is relatively new, and no consensus has yet emerged as to its use in reappointment applications where the member chooses not to rely on it. Some heads consider that a separate performance assessment process should be conducted for members seeking reappointment, and that the regular performance appraisal system should remain confidential, collaborative and developmental.

Another way that the data may be used is for the head or an assessment panel to consider it when deciding whether to recommend to the Minister that a member be reappointed. Members of the Migration Review Tribunal and Refugee Review Tribunal are required by the terms and conditions of their appointment to sign a performance agreement and to participate in the performance appraisal process.<sup>430</sup> The Tribunals' *Annual Report 2006-07* stated that the annual written assessments of a member's performance 'will be taken into account by the Principal Member in the event a Member seeks re-appointment'.<sup>431</sup>

## REMOVAL PROVISIONS

Almost all tribunal statutes provide for the removal of members from office. Although rarely invoked in practice, the provisions are important in defining the extent to which members are 'secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner'.<sup>432</sup> Justice O'Connor observes that removal provisions that specify grounds for removal give confidence that members cannot be removed for political or other improper reasons.<sup>433</sup>

Dawson argues that members should be removed only for objective grounds defined in legislation and under fair and transparent processes.<sup>434</sup> Few tribunal statutes meet these standards. Two aspects of the statutes need to be evaluated: the process for removal, and the grounds.

### *Process for removal*

An example of a fair and transparent process for removal is found in the *VCAT Act* pt 2 div 2. The provisions authorise the Governor in Council to remove a non-judicial member on the ground of proved misbehaviour or incapacity, after specified steps are taken. The process begins when the President, with the approval of the Minister, suspends the member on suspicion that there is ground for removal.<sup>435</sup> The

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<sup>430</sup> The terms are prescribed by a ministerial direction made pursuant to the *Migration Act 1958*, s 499(1). A ministerial direction must be tabled in Parliament: s 499(3).

<sup>431</sup> Migration Review Tribunal and Refugee Review Tribunal, *MRT-RRT Annual Report 2006-07*, app 5 <<http://www.mrt-rrt.gov.au/AnnualReports/ar0607/mrtrrt/appendix5.html>> (accessed 27 Nov 2013).

<sup>432</sup> *Valente v The Queen* [1985] 2 SCR 673, 698 (Sup Ct Can).

<sup>433</sup> O'Connor, above n 159, 37-38.

<sup>434</sup> Dawson, above n 159, 152.

<sup>435</sup> *VCAT Act* s 22(1).

member remains entitled to remuneration and allowances during suspension.<sup>436</sup> The Minister must then appoint an investigator to investigate, make findings and report to the Minister.<sup>437</sup> After receiving the report, consulting the President, and giving the member an opportunity to make oral and written submissions, the Minister may recommend to the Governor in Council that the member be removed.<sup>438</sup> If the Minister decides not to recommend removal, the President must lift the suspension.<sup>439</sup>

Similar processes, although with different grounds of removal, are found in the *SAT Act* pt 6 div 1 sub-div 4; and *QCAT Act* ch 3 pt 3 div 3. They represent the strong end of the spectrum of provisions for removal processes.

New Zealand statutes allow removal of a member on the grounds of disability affecting the performance of duties, bankruptcy, neglect of duty, or misconduct, 'proved to the satisfaction of the Governor-General'.<sup>440</sup> The requirements for proof at the highest level of government ensure a significant degree of scrutiny for a removal decision.

At the weak end of the spectrum are provisions that appear to allow the Governor, or even the Minister acting alone, to remove a member, without specifying any ground or investigative process. For example, the *Mental Health Act 1986* (Vic) states: 'The Governor in Council may, on the recommendation of the Minister made after consultation with the President remove or suspend any member other than the President from office'.<sup>441</sup>

Some provisions specify grounds for removal, but no process.<sup>442</sup> The *Guardianship Act 1987* (NSW) sch 1 cl 1(2) states: 'The Governor may remove a member of the Tribunal from office for inability, misbehaviour or failure to comply with the conditions of the member's appointment.' The member is then deemed by cl 1(3)(d) to have vacated the office.<sup>443</sup> Some New South Wales statutes provide that the Minister can remove a member for 'incapacity, incompetence or misbehaviour'.<sup>444</sup>

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<sup>436</sup> *VCAT Act* s 22(2).

<sup>437</sup> *VCAT Act* s 23.

<sup>438</sup> *VCAT Act* s 23.

<sup>439</sup> *VCAT Act* s 23(8).

<sup>440</sup> Eg *Immigration Act 2009* (NZ) sch 2 cl 1(3); *Disputes Tribunal Act 1998* (NZ) sch 2 cl 1(3); *Weathertight Homes Resolution Services Act 2006* (NZ) sch 3 cl 5(1).

<sup>441</sup> *Mental Health Act 1986* (Vic) sch 1, cl 5(2). See also *Mental Health Act 1997* (NSW) sch 5 cl 8(1)(d), (2).

<sup>442</sup> Eg *South Australian Housing Trust Act 1995* (SA) s 32B(4).

<sup>443</sup> See also, *ACTCAT Act* s 99.

<sup>444</sup> *Administrative Decisions Tribunal Act 1997* (NSW) sch 3 cl 8(2); *Workplace Injury Management and Workers Compensation Act 1998* (NSW) sch 5 cl 6(2) ('WIMWC Act').

### ***Vacation of office provisions***

Apart from a removal provision, many tribunal statutes include a ‘vacation of office’ provision which deems the office of a member to become vacant when a specified event occurs, such as the death or resignation of a member, the expiry of a member’s term without reappointment, or the member ceasing to hold a statutory qualification for appointment. The purpose of the provision is to declare a vacancy that can be filled by a new appointment.<sup>445</sup>

Vacation of office provisions are self-executing. They do not empower anyone to decide that the relevant circumstances exist. It might be expected that they would deem an office to be vacant only in circumstances that are a matter of public record or unlikely to be contested.

Some New South Wales statutes conflate vacation of office provisions and removal provisions.<sup>446</sup> For example, the *Mental Health Act 2007* (NSW) sch 5 has no removal provision, but does have a ‘vacancy in office’ provision. Clause 8(1) states that the office of a member becomes vacant if the member commits certain acts of bankruptcy such as compounding with creditors, becomes a mentally incapacitated person, or engages in any paid external employment without the consent of the Minister. Following the list of enumerated causes in cl 8(1), cl 8(2) states ‘The Minister may remove a member from office at any time’. On one interpretation, cl 8(2) means that the Minister may remove a member from office if the office has at any time become vacant by operation of cl 8(1). If so, the provision reverses the normal order, in which an office becomes vacant upon removal of the incumbent.

More care is required in framing provisions that affect members’ security of tenure. A self-executing provision that terminates a member’s office with no decision, no decision maker and no process is arbitrary. Legislative drafting guidelines are needed to clarify the proper use of vacation of office provisions.

### ***Grounds of removal***

Underlying the diversity of provisions for individual tribunals are three different conceptions about the nature of tribunals. The first is that the tribunal is a quasi-judicial body, which requires a similar degree of institutional independence as a court. The second idea is that the tribunal is like a statutory board or committee, such as a hospital board. Although the analogy with non-adjudicative bodies is false, it is common in appointment and reappointment procedures and in remuneration provisions.<sup>447</sup> The third conception may be called a purchaser/provider or contractual model.<sup>448</sup> It views the tribunal as essentially contracting with a portfolio or agency to provide adjudicative services in accordance with defined performance standards, in return for funding and administrative support from the agency.

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<sup>445</sup> See eg, *Mental Health Act 2007* (NSW) sch 5 cl 9.

<sup>446</sup> Administrative Decisions Tribunal Act 1997 (NSW) sch 3 cl 8(2); WIMWC Act sch 5 cl 6(2); Consumer, Trader and Tenancy Tribunal Act 2001 (NSW) sch 2 cl 7 (2).

<sup>447</sup> See Chapter 4.

<sup>448</sup> For the use of the term in relation to the ART Bills, see above n 236.

The first and third conceptions are normative. Their tendency to polarise commentators was demonstrated in the debates in Australia in 2000-01 leading to the defeat of the *Administrative Review Tribunal Bill 2000* (Cth) in the Senate.<sup>449</sup> The Bill was firmly based on the purchaser/provider model. This aspect of the Bill was strongly criticised by its opponents.<sup>450</sup>

Current tribunal statutes represent different outcomes of the tension between the competing conceptions of tribunals. The quasi-judicial view is demonstrated by statutes which provide for members to be removed on grounds similar to those that apply to judicial officers. Members of VCAT can be removed only on grounds of 'proved misbehaviour or incapacity'.<sup>451</sup> The *Administrative Appeals Tribunal Act 1975* (Cth) ('*AAT Act*') allows the Governor-General to remove a member from office on an address of Parliament on the ground of 'proved misbehaviour or incapacity', but also provides that the Governor-General 'shall remove' a member who commits specified acts of bankruptcy.<sup>452</sup> Non-presidential members of the *ACT Civil and Administrative Tribunal* ('*ACTCAT*') can be removed for misbehaviour, physical or mental incapacity affecting the performance of the member's functions, and failure to disclose a material interest.<sup>453</sup>

A number of tribunal statutes authorise the removal of tribunal members for acts of personal bankruptcy.<sup>454</sup> The duties of a tribunal member do not normally include the financial management of the affairs of an organisation or persons.<sup>455</sup> Provisions that allow removal of a tribunal member on the ground of bankruptcy may be influenced by the conception that tribunal membership is analogous to membership of boards and committees. They may also reflect the social stigma that bankruptcy still carries.

The removal provisions in some statutes reflect the influence of the purchaser/provider model. For example, members of the Consumer, Trader and Tenancy Tribunal (NSW) are under a statutory duty to enter into and to comply with a performance agreement which deals with their performance appraisal and their accountability for their productivity and performance.<sup>456</sup> The Governor may remove a member from office if the member fails to enter into a performance agreement, commits a serious or continuing breach, fails to comply with a direction from the chairperson to take specified action to comply with the agreement, or if a

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<sup>449</sup> As demonstrated in the majority and minority reports of the *Senate Report on the ART Bills* 'ibid.

<sup>450</sup> Senate *Hansard* (26 Feb 2001), 21843 (Senator Bolkus), 21918 (Senator Greig); Bacon, n 384, 225.

<sup>451</sup> *VCAT Act* ss 22-24.

<sup>452</sup> *AAT Act* s 13.

<sup>453</sup> *ACTCAT Act* s 99.

<sup>454</sup> Eg, *Immigration Act 2009* (NZ) sch 2 cl 1(3); *AAT Act* s 13(7) stating that the Governor-General 'shall remove' a member from office.

<sup>455</sup> Justice O'Connor considers that removal for bankruptcy does not impact adversely on independence: O'Connor, above n 159, 13.

<sup>456</sup> Consumer, Trader and Tenancy Tribunal 2001 (NSW) sch 3 cl 1.

Professional Practice and Review Committee recommends that the member should not continue to hold office.<sup>457</sup>

Another type of weak provision is one that allows a member to be removed for breach of a condition of appointment, where the Act imposes no control on the type of condition that may be made. For example, the *Guardianship Act 1987* (NSW) sch 1, cl 1(2) empowers the Governor to remove a member on the ground of ‘failure to comply with a condition of the member’s appointment’.<sup>458</sup> The executive could insert a condition into an instrument of appointment requiring the member to enter into and comply with a performance agreement on terms determined by the President. The result would be to expose the member to removal for failure to perform as specified in the agreement, for example, by failing to meet a productivity target.

Where tribunal legislation imposes specific duties and restrictions on members, care should be taken in framing any link to the removal provision. If a breach of a duty or restriction is deemed to be a separate ground of removal without proof of misbehaviour, members are placed at risk of removal at a low threshold of conduct.

An alternative approach would be to provide for an interim step, in which the head can direct a member to rectify an act or omission which a standards committee of the tribunal finds to be in breach of the member’s duty. The ground of removal would be ‘proved misbehaviour’, which would be defined to include the member’s refusal or failure without reasonable excuse to comply with such a direction. The executive would not be empowered to remove a member for a breach of statutory duty unless it either constitutes ‘proved misbehaviour’, or the standards committee has deemed it to be sufficiently serious to warrant the making of a direction. For breaches that do not in themselves constitute ‘proved misbehaviour’, the member would be given notice and an opportunity to remedy the breach.

A significant number of removal provisions specify grounds that are ill-defined and lack objective criteria. For example, the *QCAT Act* s 188(1)(a) allows removal on grounds that include performance of the member’s duties ‘carelessly, incompetently or inefficiently’, contravening a condition of appointment, or having ‘engaged in conduct that would warrant dismissal from the public service if the member were a public service officer’.<sup>459</sup> A member of the Housing Appeal Panel of South Australia can be removed by the Minister for ‘failure or incapacity to carry out official duties satisfactorily’.<sup>460</sup> The *Guardianship Act 1987* (NSW) sch 1 cl 1(2) allows the Governor to remove a member for ‘inability’. Members of some New South Wales tribunals can be removed by the Minister for ‘incapacity, incompetence or misbehaviour’.<sup>461</sup> The *Guardianship and Administration Act 1995* (Tas) s 5(1)

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<sup>457</sup> Ibid sch 2 cl 2.

<sup>458</sup> See also, South Australian Housing Trust Act 1995 (SA) s 32B(5)(a).

<sup>459</sup> *QCAT Act* s 188(1)(a). The *Commercial and Consumer Tribunal Act 2003* (Qld) s 13(1) is in similar terms

<sup>460</sup> South Australian Housing Trust Act 1995 (SA) s 32B(4).

<sup>461</sup> Administrative Decisions Tribunal Act 1997 (NSW) sch 3 cl 8(2); WIMWC Act sch 5 cl 6(2).

empowers the Governor to suspend or remove a member if satisfied that the member is 'unable to perform adequately' the duties of office.

There is significant potential for misuse of vague criteria such as incompetence, unsatisfactory performance, inability and inefficiency, particularly if the process for the removal decision is inadequate.<sup>462</sup> Even if no misuse occurs, the provisions give little assurance that members are protected against arbitrary interference by the executive.

## SECURITY OF REMUNERATION

It has long been seen as an essential guarantee of judicial independence that the executive cannot reduce the salary of a judge after appointment.<sup>463</sup> The purpose of secure remuneration is to insulate judges from pressure to favour the executive in their decisions, or from being tempted to supplement their income from other sources.<sup>464</sup>

In *Valente v The Queen*,<sup>465</sup> the Supreme Court of Canada identified three requirements for the independence of a court: security of tenure, secure remuneration and administrative control (meaning control over arrangement of the tribunal's listing and case allocation). In relation to a court, security of remuneration means that the judge's entitlement to a salary should be established by law, and should not be subject to arbitrary interference by the executive in a way that might affect the judge's independence.<sup>466</sup> In *Canadian Pacific Ltd v Matsqui Indian Band*,<sup>467</sup> Lamer CJ said that the court's ruling in *Valente* provides guidance in assessing the independence of an administrative tribunal.

A rare example of a provision that expressly guarantees the principle of security of remuneration is the *SAT Act* s 119(3) which states: 'The emoluments and benefits to which a non-judicial member is entitled cannot, during the member's term of office, be changed to be less favourable without the member's consent'.

Tribunals have different classes of member, who may be under different remuneration provisions. Part time and full time members are generally salaried. Sessional members are paid a fee for tribunal work assigned to them. They are not guaranteed sitting days or a particular income.

A range of approaches to the fixing of remuneration can be seen in tribunal statutes. Some provide that salaried members are remunerated in accordance with rates determined by a statutory tribunal such as the Commonwealth Remuneration Tribunal. This type of provision allows independent determination of remuneration,

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<sup>462</sup> B Cotterell, above n 226, 28-29; O'Connor, above n 159, 13-14.

<sup>463</sup> See eg, Australian Constitution s 72(iii).

<sup>464</sup> Parker, 'The Independence of the Judiciary', above n 40, 76-78.

<sup>465</sup> *Valente v The Queen* [1985] 2 SCR 673.

<sup>466</sup> *Ibid* [40] (Le Dain J).

<sup>467</sup> [1995] 1 SCR 3 [75].

at arm's length from the political process and from any executive agency that administers the tribunal's finances. Rates are fixed for categories of officers and are reviewed from time to time. Sometimes the fixing of remuneration by a remuneration tribunal is reserved for presidential or judicial members only.<sup>468</sup>

Some statutes provide that classes of salaried members are entitled to be paid the remuneration and allowances specified in the instrument of the appointment.<sup>469</sup> This at least ensures that rates cannot be reduced during term. The instrument of appointment might provide for increase in the rate during term.

At the weak end of the spectrum are statutes which state that members are entitled to be paid at the rates fixed by the Governor or the Minister from time to time, and which specify no process and criteria for fixing the rates. For example, the *Mental Health Act 1997* (NSW) sch 3 cl 2 provides that 'a member, other than the President or a Deputy President, is entitled to be paid such remuneration (including travelling and subsistence allowances) as the Minister may from time to time determine in respect of the member'.<sup>470</sup> These provisions do not provide security against a reduction in remuneration during term.

The ARC recommended that rates of remuneration for members of Commonwealth tribunals should be determined independently by the Remuneration Tribunal.<sup>471</sup> This method would provide better security than linking them by statute to public service grades, which can be changed by regulation.<sup>472</sup> The NZ Law Commission agreed that the rates for tribunal members should be determined by an independent body such as the Remuneration Authority.<sup>473</sup>

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<sup>468</sup> Eg *Immigration Act 2009* (NZ) sch 3 cl 4.

<sup>469</sup> Eg, *QCAT Act* s 186(2).

<sup>470</sup> See also *Immigration Act 2009* (NZ) sch 3cl 4(2); *Fees and Travelling Allowances Act 1951* (NZ) ss 3, 4.

<sup>471</sup> ARC, *Better Decisions*, above n 51 [4.73], rec 44; ARC, *Discussion Paper*, above n 287 [4.83]-[4.91].

<sup>472</sup> ARC, *Better Decisions*, above n 51 [4.72].

<sup>473</sup> NZLC, *Tribunals in New Zealand*, above n 2 [4.35].





## Chapter 6: Adjudicative Independence

Adjudicative independence derives from the ‘individual’ aspect of judicial independence. At its core is the ability of an adjudicator or panel to decide a matter without improper interference from the executive, the parties, pressure groups and the views of other colleagues.<sup>474</sup>

It is increasingly recognised that the executive can interfere with a decision before *or after* it is made. A broader sense of adjudicative independence includes the scope of the tribunal’s power to make a decision that cannot be overruled or ignored by the executive,<sup>475</sup> an attribute which Melton and Ginsburg call ‘power or efficacy’.<sup>476</sup>

### OVERVIEW OF THE SAFEGUARDS

Judicial review has long been the principal legal safeguard of adjudicative independence. Superior courts can review what lower courts and tribunals do, and can set aside decisions that result from legal error. Through their supervisory jurisdiction, courts apply and enforce the principles of administrative law, which developed from the common law grounds of judicial review. They include the ‘hearing’ and ‘bias’ rules of natural justice, which require a fair hearing before an impartial adjudicator. Other grounds of judicial review provide further assurance that the decision will be founded on the adjudicator’s own judgment.<sup>477</sup> They include the rule against abdicating the exercise of a discretionary power or allowing it to be fettered by a predetermined rule,<sup>478</sup> the presumption against delegation of quasi-judicial statutory powers,<sup>479</sup> and the duty not to take into account irrelevant considerations.<sup>480</sup>

Since judicial review will invalidate an adjudicator’s decision that is tainted by improper influence, Bryden proposes that nothing more is needed to ensure impartiality.<sup>481</sup> In his view, adjudicative independence has solely negative implications for institutional design.<sup>482</sup> It requires that tribunal statutes authorise no improper interference with independent adjudication.

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<sup>474</sup> Bryden, ‘How to Achieve Tribunal Independence’, above n 117, 72; *Beauregard v. Canada* [1986] 2 SCR 56, 69; Warren, above n 28, 12.

<sup>475</sup> Rios-Figeoroa and Staton, above n 87, 4-5; Melton and Ginsburg, above n 132, 5.

<sup>476</sup> Melton and Ginsburg, above n 132, 5.

<sup>477</sup> Bryden, ‘How to Achieve Tribunal Independence’, above n 117, 73.

<sup>478</sup> *Rendell v Release on Licence Board* (1987) 10 NSWLR 499; Robin Creyke and John McMillan, *Control of Government Action: Text, Cases & Commentary* (LexisNexis Butterworths, 3<sup>rd</sup> ed, 2012) [11.2.6]-[11.2.10].

<sup>479</sup> *Re Kinsey and Veterans’ Review Board* (1992) 29 ALD 109; Creyke & McMillan, *Control of Government Action*, above n 478 [8.5.15].

<sup>480</sup> *Roberts v Hopwood* [1925] AC 578.

<sup>481</sup> Bryden, ‘How to Achieve Tribunal Independence’, above n 117, 72-73.

<sup>482</sup> *Ibid.*

Bryden's confidence in the common law alone to protect adjudicative independence is not widely shared. The gap is widening between what the bias rule regards as disqualifying circumstances and public expectations of adjudicative neutrality. Noting the pattern and increase in bias allegations reported in the cases, a leading Australian text comments that 'bias is becoming more widely defined in the community at the same time as it is becoming less tolerable'.<sup>483</sup> The authors conclude that more care should be taken in the institutional design of tribunals, and less reliance placed on the bias rule.<sup>484</sup>

The common law rules are not sufficiently clear and comprehensive to assure impartiality. Tribunal statutes and codes of conduct usually impose higher or additional requirements. For example, a tribunal member is under no common law duty to disclose facts and circumstances unless they legally disqualify the member from hearing a matter.<sup>485</sup> Some tribunal statutes and codes of conduct demand a more exacting standard. A common provision requires members to disclose an interest that could conflict with the proper performance of their functions, and to withdraw from the proceedings unless all parties agree otherwise.<sup>486</sup> The higher standard reduces the chances that a breach of the common law bias rule will occur. It also enhances public confidence in the tribunal's impartiality.

Tribunal statutes commonly include provisions that place specific duties and restrictions on members to protect their impartiality. Members may be under a statutory duty to take an oath of office to decide impartially, to disclose an interest, to maintain the confidentiality of information or to comply with a code of conduct. The statute may restrict them from engaging in external employment, representing a party to a proceeding before the tribunal, or taking part in hearing a matter in which they have an interest that could conflict with the proper performance of their functions.

Some of the duties and restrictions exist at common law, but the legislation specifies them in an authoritative, textual and accessible form which promotes compliance. Incorporating them in the tribunal statute also signals to government and to the public that the independence of adjudicators is strictly maintained. The provisions require careful drafting to ensure that they do not impair institutional independence, particularly if they are linked to the provision for removal of a member from office.

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<sup>483</sup> Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (3<sup>rd</sup> ed, Lawbook Co, 2004) 569. The remarks do not appear in the latest edition of the work..

<sup>484</sup> *Ibid* 570.

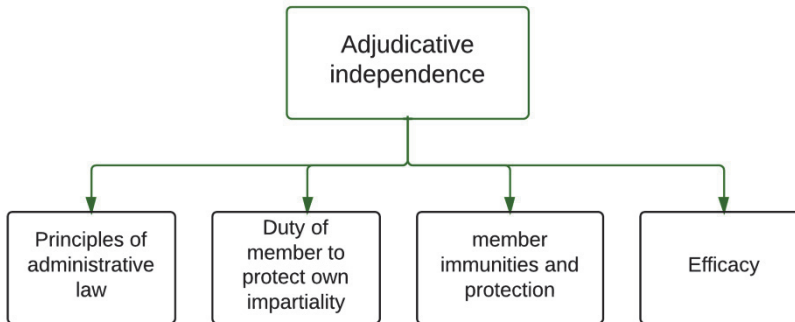
<sup>485</sup> *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 360.

<sup>486</sup> Eg, *ACTCAT Act* ss 50, 5; Australian Review Council, *A Guide to Standards of Conduct for Tribunal Members* (2001, rev 2009) ('*ARC Guide*') 12, 26-28.

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**Figure 7: Areas of adjudicative independence**

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## **DUTY OF MEMBER TO PROTECT OWN IMPARTIALITY**

### **Code of conduct**

One of the limitations of the common law rules as institutional safeguards is that they developed as grounds of judicial review and are applied by courts to facts and circumstances that have already occurred. It is difficult to extract from them clear guidelines about what adjudicators should or should not do in future.

Tribunals have developed codes of conduct to guide and inform members about the standards of conduct expected of them. Codes are usually developed by the members under the leadership of the head, often in consultation with stakeholders. A tribunal statute may authorise or require the head to develop a code.<sup>487</sup> It may also impose a duty on members to comply with a code of conduct approved by the head.<sup>488</sup>

The Australian Review Council's *A Guide to Standards of Conduct for Tribunal Members* ('*ARC Guide*') provides a set of principles for tribunal conduct, together with sources and references to assist tribunals in drafting their own codes.<sup>489</sup> The *ARC Guide* references standards of conduct for the courts, members of Parliament, the public service and public statutory officers. It covers matters such as fairness, ex parte dealings, investigations, disclosure obligations, courtesy and respect for persons, sensitivity in dealing with persons, diligence and timeliness, confidentiality, and use of information and resources obtained in the course of tribunal duties. A number of tribunals have adopted the *ARC Guide* and its principles of conduct as their code.

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<sup>487</sup> Eg, *QCAT Act* s 172(2)(c)(i); *Immigration Act 2009* (NZ) s 220(2)(b).

<sup>488</sup> Eg *SAT* s 121(3).

<sup>489</sup> *ARC Guide*, above n 486.

Adopting a code helps to maintain the tribunal's impartiality in several ways. First, it provides practical guidance which reduces the risk that an actual breach of impartiality will occur through inadvertence. Second, it enhances the perception of independence by documenting the high standards of conduct that the tribunal expects of its members. Third, the adoption of a code demonstrates that the tribunal is able to regulate its own members in a transparent and accountable manner, independently of oversight by an executive agency. A tribunal that lacks its own code may be required by legislation to conform to a public sector code which is not designed or suitable for an adjudicative body. The following example shows how self-regulation through voluntary adoption of a code can forestall inappropriate external regulation.<sup>490</sup>

In 2013 the *Public Service Act 1999* (Cth) s 41(2) was amended to provide that, subject to regulations, statutory office holders are bound by the *Australian Public Service Code of Conduct* ('*APS Code*'). The *APS Code*, which is expressed to bind an 'APS employee', includes a requirement to uphold APS Values. The heads of three Commonwealth merits review tribunals were concerned that, unless exempted by regulation, their members would as statutory office holders be bound by the *APS Code*, and possibly also the APS Values. The heads were also concerned that on one view of the provisions, their members would be subject to the powers of the Australian Public Service Commissioner to inquire into an alleged breach of the *APS Code* and to determine whether such a breach had occurred.

The heads took the view that the provisions were inconsistent with the quasi-judicial role of the members, and inconsistent also with the need to ensure that members are seen to be immune from pressure from government. Importantly, the heads were able to show that the external regulation and oversight were unnecessary. Their members were already subject to a tribunal code of conduct in the terms of the *ARC Guide*, which was at least as extensive as the *APS Code*. The tribunals had internal accountability mechanisms which were consistent with maintaining their adjudicative independence. The Minister responded positively to the submission and accepted the force of the heads' arguments. Members of all the Commonwealth tribunals were subsequently exempted by regulation from the application of the *APS Code*.

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<sup>490</sup> The example is based on information provided to the author by Hon. Justice Duncan Kerr, President of the Administrative Appeals Tribunal, by email to the author dated 12 April 2013 (copy on file with the author).

## Duty to act impartially or independently

The duty to act impartially exists as a requirement of the rules of natural justice, and is recognised in tribunal codes. The *ARC Guide* states as one of its principles of conduct that ‘a tribunal member should perform their tribunal responsibilities independently and free from external influence’.<sup>491</sup> Some statutes include the duty of impartiality in a prescribed form of oath which members are required to take before commencing their duties. For example, the oath prescribed by the *State Administrative Tribunal Act 2005* (WA) (*‘SAT Act’*) s 39 and sch 2, requires members to serve ‘without fear or favour’. The *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 109 and sch 1 (*‘ACTCAT Act’*) require members to give an undertaking to ‘do right to all people, according to law, without fear or favour, affection or ill will.’ The *Immigration Act 2009* (NZ) s 2 prescribes an oath that the member will ‘faithfully and impartially perform his or her duties as a member’.

The implications for independence are spelled out more clearly in the *QCAT Act* s 162, which states that ‘in exercising its jurisdiction, (a) the tribunal must act independently and (b) is not subject to direction or control by any entity, including any Minister’.<sup>492</sup>

It could be said that s 162 of the *QCAT Act* merely declares what the common law would require in any case, and is therefore unnecessary. But not everybody understands the legal nature of tribunals as adjudicative bodies, and the implications for how to deal with them. Executive officers, ministerial staff and even ministers occasionally conduct themselves in ways that are not consistent with the independence of tribunals. An express statement of adjudicative independence in legislation has an educative effect that can alter behaviour.

Many countries have a constitutional provision which declares the independence of the judiciary. Some commentators are sceptical as to whether such provision have much practical effect, due to lack of consensus as to what judicial independence requires in practice.<sup>493</sup> Melton and Ginsburg suggest that specific provisions that promote judicial independence are more likely to be enforced than general statements.<sup>494</sup>

The UK protects the independence of courts and tribunals by imposing duties on those who might otherwise interfere with it. The Constitutional Reform Act s 3(1) declares that the Lord Chancellor, ministers and all with responsibility for matters relating to the judiciary or the administration of justice ‘must uphold the continued independence of the judiciary’. The *Courts and Enforcement Act 2007* (UK) s 1 extends the protection to most tribunals, by amending the definition of ‘judiciary’. Section 3(5) of the Constitutional Reform Act prohibits the Lord Chancellor and ministers from attempting to influence particular judicial decisions through special access.

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<sup>491</sup> *ARC Guide*, above n 486, 35.

<sup>492</sup> See also s 96, which makes similar provision for adjudicators.

<sup>493</sup> Eg, Melton and Ginsburg, above n 132, 6.

<sup>494</sup> *Ibid* 9.

## Professional development and training

The *ARC Guide* proposes that both tribunals and members are responsible for ensuring that members acquire and develop the competencies required to perform tribunal functions.<sup>495</sup> One of the principles of conduct for members identified in the Guide is: ‘A tribunal member should take reasonable steps to maintain and to enhance the knowledge, skills and personal qualities necessary to the performance of their tribunal responsibilities.’<sup>496</sup>

Some tribunals have introduced performance appraisal systems to assess member competencies and levels, and to identify training and development needs. The *VCAT Act* s 38A and the *QCAT Act* s 173(1) empower the President to direct a member or class of members to participate in particular professional development or particular continuing education or training activity. Under the latter Act, failure to comply without reasonable excuse is ground for removal of a member from office.<sup>497</sup>

## Duty to maintain confidentiality of information

In order to maintain the trust and confidence of the parties and the public, adjudicators must respect the confidentiality of the information that they receive in the course of their duties. They must also consider the provisions of other legislation such as the *Privacy Act 1988* (Cth) and the *Information Privacy Principles* therein.<sup>498</sup>

Some tribunal statutes include a provision which deals with the protection of confidential information.<sup>499</sup> For example, the *Migration Act 1958* (Cth) imposes a duty on tribunal members and staff not to make a record of or to communicate to any person information or documents concerning a person obtained in the course of performing functions under the Act, except for a purpose authorised by the Act.<sup>500</sup> A ‘strong’ provision will also provide that members and staff cannot be required to produce a document or to communicate any information of the type except for the purposes of the Act or for other specified grounds.<sup>501</sup> This gives members protection against being compelled to produce documents or to testify.

## Managing conflicts

Tribunal statutes and codes commonly include provisions that are intended to minimise the likelihood of conflicts which might give rise to an allegation of apprehended bias or impair the perception of independence.

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<sup>495</sup> *ARC Guide*, above n 486, 44-45.

<sup>496</sup> *Ibid.*

<sup>497</sup> *QCAT Act* ss 173(1),(3), 188(1)(a)(ii).

<sup>498</sup> *ARC Guide*, above n 486, 48.

<sup>499</sup> Eg, *AAT Act* s 66.

<sup>500</sup> Eg *Migration Act 1958* (Cth) ss 377, 439.

<sup>501</sup> Eg *Ibid* ss 377, 439; *Weathertight Homes Resolution Services Act 2006* (NZ) s 105.

### ***External employment***

Some tribunal statutes prohibit full time members from taking paid employment outside the duties of their office except with the consent of the President,<sup>502</sup> or of the Minister.<sup>503</sup> The purpose of the restriction is to enable the President or the Minister to assess whether the external employment might impair the member's actual or perceived impartiality or the discharge of the member's responsibilities.

Restrictions on external employment of part time members are less common. The *SAT Act* s 120(2) allows a part time member to engage in paid outside employment, other than as a public sector employee, if the President has advised the member that to do so would not conflict with the member's duties of office. Dawson observes that part-time members may rely for their present or future employment on organisations which are parties to tribunal proceedings, and this could create a perception of bias.<sup>504</sup> If there is no statutory restriction, the *ARC Guide* advises members to arrange their employment or business to minimise the chances of a conflict with their tribunal responsibilities.<sup>505</sup>

A few statutes provide that breach of the restriction on paid outside employment is a separate ground to remove the member from office.<sup>506</sup> For example, under the *Migration Act*, the Governor-General may remove a full-time member from office if the member engages in paid employment outside the duties of office without the Minister's written consent.<sup>507</sup> This ground of removal is separate from the ground of 'proved misbehaviour'.<sup>508</sup>

### ***Representation of parties in proceedings before the tribunal***

A part time member may be permitted to practise a profession, including as an advocate. Where a part time or sessional tribunal member represents a party in proceedings before the tribunal in which they sit, a perception of bias is likely to arise. In *Lawal v Northern Spirit Ltd*,<sup>509</sup> the House of Lords criticised a practice that had developed in an English tribunal, where barristers appeared as advocates before a tribunal which included lay members with whom the barristers had previously sat as judges.

The matter is dealt with in few tribunal statutes. The *VCAT Act* s 25A forbids a member of a list, or a person who has been a member of a list within the preceding two years, from representing a party in any proceedings in the list. The *SAT Act* s

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<sup>502</sup> *QCAT Act* s 187(4); *VCAT Act* s 18; *SAT Act* s 120(1).

<sup>503</sup> Eg *Mental Health Act 2007* (NSW) sch 5, cl 8(1)(h).

<sup>504</sup> Dawson, above n 159, 147.

<sup>505</sup> *ARC Guide*, above n 486, 28-29.

<sup>506</sup> Eg, *Mental Health Act 2007* (NSW) sch 5, cl 8(1)(h).

<sup>507</sup> *Migration Act 1958* (Cth) ss 403(2)(g), 468(2)(g).

<sup>508</sup> *Ibid* ss 403(2)(g), 468(2)(g).

<sup>509</sup> [2004] 1 All ER 187; Groves, above n 95, 197, fn 48.



120(4) provides that a non-judicial member appointed on a part time basis is not allowed to represent another person in a matter that is before the tribunal.

### ***Disclosure of interest and disqualification***

The common law bias rule requires an adjudicator to disclose to the parties the existence of an interest that legally disqualifies the adjudicator from taking part in a proceeding.<sup>510</sup> In *Ebner v Official Trustee in Bankruptcy*, it was suggested that, although not strictly required by law, it is prudent for judges to disclose interests ‘if there is a serious possibility that they are potentially disqualifying’.<sup>511</sup>

There is a widespread view that tribunal members should be subject to higher duties of disclosure and disqualification than are required by the common law bias rule. The *ARC Guide* proposes that disclosure should not be limited to interests which are legally disqualifying.<sup>512</sup> It advises members to ‘disclose anything to the parties which they consider might have a bearing on their impartiality’.<sup>513</sup> The purpose of disclosure is to give the parties an opportunity to make submissions that the member should withdraw from taking any further part in the proceedings.

Tribunal statutes commonly set the threshold for disclosure as ‘an interest that could conflict with the proper performance of the member’s functions in a particular proceeding’.<sup>514</sup> The statute may also supplement the common law rules for managing bias issues, by providing that the member must not continue to sit in the matter unless all the parties consent.<sup>515</sup>

## **IMMUNITY PROVISIONS**

Judges and tribunal members need protection against civil liability for what they say and do in the course of carrying out their functions. In *Mann v O’Neill*, it was said that oral and written statements made in the course of court proceedings are subject to absolute privilege for reasons of public policy.

It is necessary that persons involved in judicial proceedings, whether judge, jury, parties, witnesses or legal representatives, be able to discharge their duties freely and without fear of civil action for anything said by them in the course of the proceedings. Were civil liability to attach or be capable of attaching, it would impede inquiry as to the truth and justice of the matter and jeopardise the

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<sup>510</sup> *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [66]-[71] (Gleeson. CJ, McHugh, Gummow and Hayne JJ).

<sup>511</sup> *Ibid* [69].

<sup>512</sup> *ARC Guide*, above n 486, 27.

<sup>513</sup> *Ibid*.

<sup>514</sup> Eg *SAT Act* s 144(1).

<sup>515</sup> Eg *SAT Act* s 144(3); *Veterans’ Entitlements Act 1986* (Cth) s 165(1)(b); *Weathertight Homes Resolution Services Act 2006* (NZ), s 104(1).

"safe administration of justice".<sup>516</sup>

The court took it to be settled law that absolute privilege also extends to statements made in the course of quasi-judicial proceedings before tribunals which are 'recognised by law' and which act in a manner similar to the way a court acts. A person seeking to rely on the defence of absolute privilege bears the onus of proving that it applies in the circumstances.<sup>517</sup> The terms of the tribunal statute is relevant to determining whether it is 'recognised by law', and whether it is required to act in a manner similar to a court.<sup>518</sup> In applying this test, it is relevant to consider the source of the tribunal's authority to act, the nature of the decision which it is required to make, its procedure and the legal consequences of its conclusions.<sup>519</sup>

An immunity provision in tribunal legislation can strengthen adjudicative independence by clarifying the members' immunity from personal liability. The strongest provisions give members the same protection and immunity as a judge of a specified court has in performing the judge's functions.<sup>520</sup> Others give members qualified privilege for conduct done in the intended performance of tribunal functions, although the terms and scope of the privilege are variable, as shown by a comparison of two following two examples. Members of ACTCAT are protected from personal liability for conduct done honestly, without recklessness and in the reasonable belief that it was in the exercise of their functions.<sup>521</sup> Members of the Weathertight Homes Tribunal are protected from civil and criminal liability for acts, omissions and words undertaken in the course of performing their functions, unless the member acted in bad faith.<sup>522</sup>

An immunity provision can have a positive effect on adjudicative independence beyond its practical operation. A legislative statement that members of a tribunal have the same protection and immunity as a superior court judge sends a strong signal about the quasi-judicial nature of the tribunal's functions. For example, some Commonwealth tribunal members are granted 'the same protection and immunity as a Justice of the High Court' in the performance of their functions.<sup>523</sup>

## **POWER OR EFFICACY**

### **Scope of tribunal's power to review policy**

One of the key issues in tribunal independence is the extent to which tribunals are bound by government policies when reviewing an administrative decision on the

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<sup>516</sup> (1997) 191 CLR 204; (1997) 145 ALR 682, 685-86 (Brennan CJ, Dawson, Toohey and Gaudron JJ); *Attorney General (NSW) v Bar-Mordechai* [2013] NSWSC 129 [121].

<sup>517</sup> *Mann v O'Neill* (1997) 145 ALR 682, 693 (McHugh J).

<sup>518</sup> *Ibid* 696 (McHugh J).

<sup>519</sup> *Ibid*; *Trapp v Mackie* [1979] 1 WLR 377; [1979] 1 All ER 489 (UK House of Lords).

<sup>520</sup> Eg *SAT Act* s 163(2), see also s 164(1),(4).

<sup>521</sup> *ACTCAT Act* s 116(1).

<sup>522</sup> *Weathertight Homes Resolution Services Act 2006 (NZ)* s 122.

<sup>523</sup> *AAT Act* s 60; *Veterans' Entitlements Act 1986 (Cth)* s 167(1).

merits. A ‘policy’ in this context can range from a broad ministerial statement of government objectives to a set of agency guidelines for decision makers as to what matters should be considered or action taken when making a certain type of decision.

Fleming considers the power of administrative review tribunals to depart from government policy as central to tribunal independence.<sup>524</sup> For Bryden, independent policy-making by tribunals is of such importance as to amount to a separate fourth aspect of independence.<sup>525</sup>

In considering the role of policy in tribunal decision making, it is important to consider the nature of administrative review. In *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (*‘Drake No 2’*),<sup>526</sup> Brennan J considered a submission that ‘it would sap the independence of the Tribunal if it were to apply ministerial policy’, and responded as follows:

The Tribunal is rightly required to reach its decision with the same robust independence as that exhibited by the courts, but there is a material difference between the nature of a decision of the Tribunal reviewing the exercise of a discretionary administrative power, and the nature of a curial decision... [T]he adjudication of rights and liabilities by reference to governing principles of law is a different function from the function of deciding what those rights or liabilities should be. The former function rightly ignores the policy of the executive government; the latter should not.<sup>527</sup>

In *Re Becker and Minister for Immigration and Ethnic Affairs*,<sup>528</sup> Brennan J said that in reviewing a discretionary decision in relation to which the Minister had issued a policy, the AAT must first consider whether the policy is lawful, and then decide whether it should apply the policy. His Honour’s view was approved in *Drake v Minister for Immigration and Ethnic Affairs*.<sup>529</sup> Bowen CJ and Deane J said that the tribunal is required to make an independent assessment of whether the decision under review is the correct or preferable decision, not merely whether it conforms to the policy.<sup>530</sup> Where the tribunal reaches its decision in accordance with a government policy, it should make it clear that it has made an independent assessment of the propriety of the policy, and that it has determined that the decision that results from applying the policy to the facts is the correct or preferable decision.<sup>531</sup>

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<sup>524</sup> Fleming, ‘Tribunals in Australia’, above n 176, 90.

<sup>525</sup> Bryden, ‘How to Achieve Tribunal Independence’, above n 117, 95-101.

<sup>526</sup> (1979) 2 ALD 634, 643-45.

<sup>527</sup> Ibid.

<sup>528</sup> (1977) 1 ALD 158, 161-2.

<sup>529</sup> (1979) 2 ALD 60; (1979) 46 FLR 409.

<sup>530</sup> (1979) 46 FLR 409, 420-21. See also 433 (Smithers J).

<sup>531</sup> Ibid.

When the Drake case was remitted to the AAT, Brennan J provided further guidance on the role of policy in tribunal review of decisions. In *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* ('Drake No 2'),<sup>532</sup> His Honour distinguished between broad or basic policies determined at ministerial level (for which there is political accountability) and policies determined at agency level, which will usually relate to the implementation of a broad or basic policy.<sup>533</sup> While the tribunal is free not to apply a policy, Brennan J said that it should adopt the practice of applying lawful ministerial policy unless it would produce an unjust decision in the circumstances of a particular case. The approach recommended by Brennan J in *Re Drake (No 2)* has been widely followed by the AAT and other tribunals.<sup>534</sup>

### ***Legislative requirements to apply policy***

Despite the moderate and cautious approach recommended by Brennan J, there has been controversy about whether tribunals should be free to depart from government policy. At one time there was trenchant criticism for tribunals for failing to apply government policy.<sup>535</sup> The ARC noted in its *Better Decisions* report that some agencies had submitted that the standard for merits review in Commonwealth tribunals should be changed, so that tribunals would give greater regard to government policy.<sup>536</sup> The agencies proposed that instead of being required to reach the correct or preferable decision, the tribunal should be required to defer to the determining agency's view provided that it was lawful and not unreasonable.<sup>537</sup> The ARC did not support the proposal, which it thought was inconsistent with the scope of merits review.<sup>538</sup>

Types of provisions have been included in some tribunal statutes to encourage or require tribunals to defer to government policies. They vary in the extent to which they limit the discretionary power of the tribunals. In some cases, unstructured discretions have been replaced with legislative rules, or administrative policies have been incorporated into delegated legislation. Provisions that require a tribunal to 'have regard' to a statement of government policy do not affect the common law powers of the tribunal to review the lawfulness of policies and to depart from them as explained in the *Drake* cases.<sup>539</sup>

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<sup>532</sup> (1979) 2 ALD 634, 643-45.

<sup>533</sup> *Ibid.*

<sup>534</sup> *Eg, Nevistic v Minister for Immigration and Ethnic Affairs* (1981) 51 FLR 325.

<sup>535</sup> John McMillan, 'Review of Government Policy by Administrative Tribunals' in R Creyke and J McMillan, *Commonwealth Tribunals: The Ambit of Review* (Centre for International and Public Law, ANU, 1998) 27.

<sup>536</sup> ARC, *Better Decisions*, above n 51 [2.7], [2.17].

<sup>537</sup> *Ibid* [2.17].

<sup>538</sup> *Ibid* [2.18].

<sup>539</sup> McMillan, 'Review of Government Policy by Administrative Tribunals', above n 535, 27. For an example of such a provision, see *Social Security (Administration) Act 1999* (Cth) s 9.

Provisions in some tribunal statutes require the tribunal, when reviewing a decision, to apply a statement of policy certified by the Minister. The *SAT Act* s 28 requires the tribunal to have regard to a valid policy statement that was considered in the making of the reviewable decision, if the Minister certifies that it was applicable and had been gazetted prior to the decision. Section 57 of the *VCAT Act* is in similar terms, but does not require the policy to have been gazetted if the applicant knew of it or could reasonably have been expected to have been aware of it.<sup>540</sup> The *Administrative Decisions Tribunal Act 1997* (NSW) s 64 requires the tribunal to give effect to a valid Cabinet or ministerial policy in force at the time of the reviewable decision and certified by a Minister, unless it would produce an unjust result in the circumstances of the case.<sup>541</sup>

The provisions mentioned in the previous paragraph have proved less constraining in practice than might have been expected. The ministerial certification of policy has seldom been successfully invoked. With respect to section 57 of the *VCAT Act*, former VCAT President Stuart Morris said: ‘the provision is rarely used and attempts to rely on it in the absence of ministerial certification have not been successful’.<sup>542</sup> The application of the policy to a reviewable decision is subject to the principles laid down in the *Drake* cases, including that the policy must be lawful, and may not be applied if it would provide an unjust decision in the individual case.<sup>543</sup> The terms of the policy are a relevant consideration, but the tribunal must still exercise an independent discretion.<sup>544</sup>

### **Ministerial directions**

Since 1992, the *Migration Act 1958* (Cth) s 499 has empowered the Minister to give written directions that bind decision makers and all review bodies, relating to the exercise of their powers. Ministers have issued directions on a wide range of matters, including specifying matters to be considered in the exercise of particular discretionary powers.<sup>545</sup> The legislative requirement to table the directions in Parliament is intended as a safeguard against unjustified use, and gives the directions greater standing by subjecting them to parliamentary scrutiny.<sup>546</sup>

Although tribunals are not bound to apply a ministerial direction that is inconsistent with the Act or the Regulations,<sup>547</sup> Ng finds that ‘tribunals show great deference to ministerial directions and tend to apply them without having regard to

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<sup>540</sup> The predecessor of this provision was the *Administrative Appeals Tribunal Act 1984* (Vic) s 25(3).

<sup>541</sup> The Magistrates Court (Administrative Appeals Division) Act 2001 (Tas) s 27 is in similar terms.

<sup>542</sup> Stuart Morris, ‘Tribunals and Policy’ in R Creyke (ed) *Tribunals in the Common Law World* (Federation Press, 2008) 139, 144.

<sup>543</sup> *Number 17 Pty Ltd v Director of Liquor Licensing (Occupational and Business Regulation)* [2010] VCAT 1269, [75].

<sup>544</sup> Creyke, ‘Where do Tribunals Fit?’, above n 1, 99.

<sup>545</sup> For details, see Yee-Fui Ng, ‘Tribunal Independence in an Age of Migration Control’ (2012) 19 *Australian Journal of Administrative Law* 203, 218.

<sup>546</sup> Creyke, ‘Where do Tribunals Fit?’, above n 1, 98; see *Re Drake (No 2)*(1979) 2 ALD 634, 643-45.

<sup>547</sup> *Migration Act 1958* (Cth) s 499(2).

the lawfulness or desirability of the direction'.<sup>548</sup> Her conclusion is based on a study of cases decided by the AAT and the migration tribunals in a five year period prior to 2012.<sup>549</sup> She suggests that the use of ministerial directions under s 499 impairs the decisional independence of the tribunals by limiting their ability to review government policy and to depart from it in individual cases.<sup>550</sup>

### **Executive overruling**

In their review of the international literature on judicial independence, Rios-Figeoroa and Staton observe an aspect of de facto independence which concerns the influence or efficacy of judicial decisions.<sup>551</sup>

A second concept of judicial independence recognizes that, lacking financial or physical means of coercion, courts depend on the assistance of other political authorities to enforce their decision. Under this second concept, the argument is that it makes little sense to call a judge independent if her decisions are routinely ignored or poorly implemented. Judicial independence requires not only that judges resolve cases in ways that reflect their sincere preferences, but also that these decisions are enforced in practice even when political actors would rather not comply.<sup>552</sup>

The literature on tribunals in Australia and New Zealand does not report any experience of executive government ignoring tribunal decisions or refusing to give effect to them. Administrative review tribunals are generally empowered to affirm, set aside or vary the decision under review, and to make a decision in substitution for it, but have no enforcement powers. The lack of enforcement powers has not presented a difficulty, as the agency whose decision is reviewed is required to execute the tribunal's decision as its own. A former President of the AAT, Justice Gary Downes, explained the process as follows:

Government and its agencies would never decline to carry a Tribunal decision into effect. Part of the reason for this approach is that in law the decision of the Tribunal becomes the decision of the relevant government Minister, department or agency. That this is so has the consequence that the Tribunal's rulings on the law, as well as its findings of fact have legal effect.<sup>553</sup>

The *International Framework for Tribunal Excellence* includes in its measures of 'adjudicatory or decisional independence' the question 'Can the tribunal's decision

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<sup>548</sup> Ng, n 545, 219.

<sup>549</sup> Ibid 217-19.

<sup>550</sup> Ibid.

<sup>551</sup> Rios-Figeoroa and Staton, above n 87, 4

<sup>552</sup> Ibid (endnotes omitted).

<sup>553</sup> Hon Justice Gary Downes, The Implementation of the Administrative Courts' Decisions, Speech to the International Association of Supreme Administrative Jurisdictions VIIIth Congress, Madrid, Spain, 26-28 April 2004 <<http://www.aat.gov.au/Publications/>>.

be overruled by the executive?’<sup>554</sup> There is no general practice or provision that prompts the question, but some statutes authorise a Minister or executive person or body to make a decision which revokes, terminates or alters the effect of a decision made by the tribunal. The following examples have come to the notice of the Council of Australasian Tribunals.

The first example is from the *Aboriginal Heritage Act 2006* (Vic). Part 8 div 9 of the Act empowers VCAT to make an interim protection declaration, which operates for a specified period of up to 3 months. Under pt 7, div 1, the Minister may at any time revoke or amend an interim protection declaration, subject to consultation and notice requirements. This appears to mean that the Minister can revoke or amend an interim protection declaration made by VCAT within its specified period of operation.

The second example is from the *Fair Work Act 2009* (Cth). Section 431 empowers the Minister to make a declaration terminating protected industrial action in respect of an enterprise agreement on specified grounds. The Minister may make such a declaration on the basis of a ground that has been unsuccessfully argued before the Fair Work Commission which has refused an order to suspend or terminate the industrial action under pt 7 div 6 of the Act.

Legislative drafting guidelines could be used to limit the use of provisions in legislation that can be used to nullify tribunal decisions. The guidelines could propose the making of a precondition for the exercise of a power to make a new decision that is inconsistent with the tribunal’s decision. The precondition could, for example, be a material change in circumstances, or the elapsing of a specified time interval, since the tribunal made its decision.

A tribunal’s adjudicative independence can also be diminished by a ministerial power to take a matter out of the tribunal’s hands by calling it in for determination by the Minister or by an executive body. Call-in provisions are not unusual in planning legislation. For example, the *VCAT Act* sch 1 cl 58 empowers the Minister to call in a planning decision which the tribunal is reviewing, where the Minister considers that specified grounds exist.

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<sup>554</sup> See below, Appendix B, item 6.

## Chapter 7: Conclusion

‘Tribunal’ is a term of wide usage that cannot be precisely defined. The tribunals considered in this study are bodies established by New Zealand, the Commonwealth, a state or a territory with the function of determining disputes by adjudication, and which are not integrated into the courts system. They include tribunals which review government decisions (‘merits review tribunals’), tribunals which determine disputes arising under private law (‘court-substitute’ or ‘civil’ tribunals), and tribunals which resolve occupational licensing and discipline matters.

Adjudication is not the only process by which tribunals resolve disputes, but it has special implications for independence. In adjudication, the parties to a dispute submit the dispute to an impartial third party (the adjudicator) to determine. An impartial adjudicator is one who decides according to their own assessment of the evidence, the law and the merits, free of influence from anybody to consider extraneous matters.

Impartiality has two facets: actual impartiality, which refers to the adjudicator’s thinking process, and perceived impartiality. Since actual impartiality is a state of mind, it is not easily observed. The perception of impartiality is as important as the actuality, because trust is essential for effective adjudication. Nobody would wish to submit a dispute to an adjudicator who is not seen to be independent.

Impartiality is demanded by human rights, natural justice and the rule of law, three legal norms which underpin a just and democratic civil society. Many human rights instruments guarantee the right to have one’s rights and obligations adjudicated by an impartial and independent court or tribunal. The common law rule of natural justice upholds the right to an impartial decision maker. The democratic principle of the rule of law holds that the government and all citizens are subject to the impartial and equal application of the law, and that government powers must be exercised lawfully and not arbitrarily.

Independence is about the institutional arrangements and societal norms that maintain impartiality. Institutional arrangements include legal and administrative instruments such as legislation, guidelines, procedures and agreements, as well as informal practices and procedures. Societal norms include attitudes, understandings, expectations, values and conventions. They influence behaviour and affect public trust in tribunals and the justice system. This study focuses on institutional arrangements, because they are more susceptible to change through deliberate action than are societal norms. They can also influence societal norms by providing objective safeguards for impartiality and independence.

Adjudication is a function shared by courts and tribunals. It is widely accepted that courts require institutional safeguards for their independence in order to maintain public trust and confidence in their adjudication. The safeguards are needed to protect courts from the threats to impartial adjudication, in particular from the actions of the executive government. Secure tenure of office, removal only for cause, and security against reduction of remuneration during office are considered to be important guarantees of judicial independence. They are required by the constitutions of many nations, to ensure that courts are free to interpret the



constitution and to check excesses of power by the legislature and the executive government.

The international literature on judicial independence distinguishes between de jure and de facto independence. De jure independence refers to the formal legal safeguards such as the legislation and legal framework, while de facto independence is the degree of independence that the court enjoys in practice. De facto independence is an empirical concept, and there is no agreed way of measuring it. This work focuses on de jure independence because it can be assessed by examination of instruments, is more susceptible to alteration through deliberate action, and is believed by some scholars to be a determinant of de facto independence.

Tribunal independence is under-theorised. It has developed through analogy with judicial independence. The analogy is under strain, because the case for judicial independence relies on the institutional separation of the judiciary from other branches of government, and tribunals are not accepted as part of the judicial branch. The concept of 'branch independence' - the independence of the judicial branch - is the collective aspect of judicial independence. There is also an individual aspect, called 'decisional' or 'adjudicative' independence, which is common to both courts and tribunals because it is required for impartial adjudication.

Theories of judicial independence that rely on the idea of branch independence are not inclusive of tribunals. The case for tribunal independence starts, not with the separation of powers, but with a functional question: what is needed for tribunals to perform their adjudicative functions? All tribunals, whether they have executive or judicial powers, need a degree of independence that is sufficient to ensure impartial adjudication.

## **WHAT IS REQUIRED FOR INDEPENDENCE?**

There is no single model of independence, and no agreed minimum standard of institutional features that define a tribunal as independent. Independence is a matter of degree, and is multi-faceted. It can be secured in different ways, by varying combinations of features. An analytical approach to defining and measuring independence is required, one which identifies and evaluates key elements or components of institutional arrangements.

Security of tenure and remuneration during office are most consistently nominated as requirements for judicial independence. In *Valente v The Queen*,<sup>555</sup> the Supreme Court of Canada identified three requirements for the independence of a court ('the *Valente* factors'): security of tenure, secure remuneration and administrative control (meaning control over arrangement of the tribunal's listing and case allocation). Le Dain J said that security of tenure means 'a tenure, whether until an age of retirement, for a fixed term, or for a specific adjudicative task, that is secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner.'<sup>556</sup> In relation to a court, security of remuneration

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<sup>555</sup> *Valente v The Queen* [1985] 2 SCR 673.

<sup>556</sup> [1985] 2 SCR 673, 698 (Supreme Court of Canada).

means that the judge's entitlement to a salary should be established by law, and should not be subject to arbitrary interference by the executive in a way that might affect the judge's independence.<sup>557</sup> The *Valente* factors have been applied to courts in Australia.<sup>558</sup> In *Canadian Pacific Ltd v Matsqui Indian Band*,<sup>559</sup> Lamer CJ said that they provide guidance in assessing the independence of an administrative tribunal.

While judicial decisions such as *Valente* give a useful indication of the minimum requirements of independence for legal purposes, the legal standards are not high enough to maintain public confidence in the impartiality of tribunals. The question of what is needed to secure independence has prompted commentators to propose various lists of areas and types of provisions. The lists are helpful in assessing which factors matter, but are too formless and unwieldy to serve as measurement tools.

### **Aspects of independence**

This work proposes a new conceptual framework for tribunal independence which organises the elements under three aspects: administrative independence, institutional independence and adjudicative independence. The aspects are derived from judicial independence and are modified to remove the reliance on branch independence. Administrative independence means the extent to which the tribunal controls its staff, its budget and expenditure, its premises and facilities and all other resources required to carry out its functions. Control of resources can significantly affect the tribunal's ability to maintain the administrative, procedural, staffing and spatial arrangements required for the tribunal to carry out its functions. While the courts' claim to administrative independence is firmly based on branch independence, tribunals must rely on functional arguments.

Institutional independence refers to a set of arrangements which affect the tribunal's membership and the individual interests of its members. They include provisions for appointments, tenure or term of appointment, security of remuneration during term, reappointments, and removal from office during term. The provisions give the executive power to make decisions that affect the interests of individual members in a direct and concrete way. Safeguards are needed to ensure that the powers do not influence the tribunal's decisions or impair the perception of impartiality.

Adjudicative independence includes the ability of tribunal members to adjudicate impartially in matters assigned to them, free of improper interference or influence. Judicial review is an important safeguard, because it is the mechanism by which the bias rule and other requirements of administrative law are enforced. Since the common law standards and judicial review are not sufficient to guarantee independence, provisions in tribunal codes and legislation impose specific duties and restrictions on members to preserve their impartiality. They include, for example, a duty to take an oath to act 'without fear or favour', to comply with a

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<sup>557</sup> Ibid [40] (Le Dain J).

<sup>558</sup> *Forge v ASIC* (2006) 228 CLR 45, [13]; *Owen v Menzies* (2012) 293 ALR 571, 573, *Baker v Commonwealth* [2012] FCAFC 121, [37].

<sup>559</sup> [1995] 1 SCR 3 [75].

code of conduct, to maintain the confidentiality of certain information, and to refrain from outside employment except with permission. To protect members from external pressure, immunity provisions relieve them from personal liability for things said or done in the performance of their duties.

The three aspects of independence can be broadly distinguished as follows. Administrative independence is about the ability of tribunal as an entity to perform its functions; institutional independence is about the exercise of executive powers that affect the interests of members individually; and adjudicative independence is about the relationships that enable members to decide cases impartially.

### ***Comparative evaluation of types of provisions***

The study proceeds by identifying, for each of the three aspects, key areas and types of provisions which have been proposed as significant in the literature on judicial and tribunal independence. The legislation and other instruments relating to various tribunals were examined to map the diversity of the current provisions. Additional information about appointment and reappointment practices was obtained by interviews with a number of tribunal heads and former heads. Different types of legislative provisions and other arrangements for each component were compared and evaluated in terms of their tendency either to enhance or to impair tribunal independence.

For most components, the types of provisions found in current legislation can be ordered along a spectrum, ranging from examples which provide strong protection for independence to examples which provide relatively weak protection. The ranges are represented in Tables C1 to C3 in Appendix C, and are supported by discussion in chapters 2-6. The purpose of the tables is not to recommend the strong provisions for every tribunal, but to guide assessment of whether the independence provisions for each tribunal are consistent and suitable to its composition, functions, and the special needs of its jurisdiction. The tables enable a more holistic assessment of the tribunal's institutional arrangements for independence, understood as a variable package of provisions across different subject areas.

For most types of provisions, Tables C1-C3 show a pronounced divergence between the strong and weak ends of the spectrum of current examples. Some tribunals in Australia and New Zealand are established with weak to very weak institutional safeguards for independence. A clustering of elements at the weak end of the spectrum is most likely to be found in the provisions for 'embedded' tribunals. Embedded tribunals are housed, staffed and serviced by a department of state or an executive agency responsible for administering the program area in which the tribunal adjudicates.

The strong examples for each component are more likely to be observed in recent legislation establishing large multi-jurisdictional tribunals. Even within this group of tribunals, the strength of the provisions varies, and may not be consistent across all components.

The tables can be used in a number of ways, including: to provide a more comprehensive and integrated tool for overall measurement; to evaluate the strength

and consistency of provisions within a single tribunal or subset of tribunals; to prompt a review of a statute; to provide exemplars for improvement and to demonstrate the diversity of provisions within the tribunal sector.

In the short term, tribunals have little control over their institutional design features. Most are determined by legislation, and any amendments must be proposed by the Minister. In the longer term, tribunals individually and as a sector can influence future developments through constructive engagement with governments. The sector, through the Council of Australasian Tribunals, could take the lead in proposing principles and standards for the institutional design of tribunals, based on the stronger examples of provisions in the tables. Governments would be invited to consider the standards when establishing new tribunals, amending tribunal legislation, or reviewing related guidelines and procedures. The standards could also be used by stakeholders as a benchmark for evaluating actual or proposed legislation.

## **KEY FINDINGS IN RELATION TO EACH ASPECT**

The key findings of this work in relation to each aspect of independence are summarised as follows.

### **Administrative independence**

Tribunals operate with varying degrees of administrative independence. Specialist tribunals which adjudicate matters within a single program or portfolio area are generally dependent to some degree upon an interested agency. This is a government department or agency whose decisions the tribunal reviews, or which has a policy interest in the outcome of the tribunal's decisions.

Concerns about the independence of embedded tribunals have been raised over many years. The tribunals are housed by and co-located with an interested agency, which also provides the tribunal's funding, staff, IT and other support services, and may be responsible for the appointments process. Even if the host agency never attempts to influence the tribunal's decisions and allows it to operate with de facto independence, the tribunal is unlikely to be perceived as independent.<sup>560</sup> Leggatt observed that: 'at best, such arrangements result in tribunals and their departments being, or appearing to be, common enterprises'.<sup>561</sup> Reform activity has centred on absorbing embedded tribunals into larger, free standing tribunals.

Another way in which a specialist tribunal may be established is a contractual purchaser/provider model, in which the interested agency 'purchases', and the tribunal provides, adjudicative services for the agency's programs. The tribunal has premises and identity separate from the agency, but depends on the agency for its funding, staff, facilities and services, which are provided under an agreement. The agreement makes the tribunal accountable for providing specified outputs and quality standards.

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<sup>560</sup> NZLC, *Delivering Justice for All*, above n 130, [63], [64]; NZLC, *Tribunals in New Zealand*, above n 2, [1.40]-[1.41], [5.25].

<sup>561</sup> *Leggatt Report*, above n 25, [2.20].

Although the ARC recommended that a tribunal should not be funded from the budget of an interested agency, a number of specialist tribunals do operate under the purchaser/provider model.<sup>562</sup> Reform proposals have focussed on distancing the tribunal from an interested agency by substituting the Justice (or Attorney-General's) Department as the administering agency.<sup>563</sup> The department which administers the courts is seen as more neutral and more likely to understand what is required for the independence of adjudicative bodies. It is typically given responsibility for administering tribunals which operate across portfolios with jurisdiction under multiple Acts. Specialist tribunals would also benefit from being brought under the administration of the justice department, although interested agencies are likely to object to the transfer of power.

At the strong end of the spectrum for administrative independence stands a tribunal such as the AAT which is established under its own Act as a statutory agency for purposes of employing its own staff, is funded by its own parliamentary appropriation and controls its own premises, services and budget expenditures. There is currently little interest by government in extending this model to other tribunals.

## **INSTITUTIONAL INDEPENDENCE**

### ***The appointment process***

The power to recommend persons for appointment as members is generally reserved by statute for a Minister, and appointments require Cabinet approval. There is wide agreement that appointment processes should be open, fair, transparent and merit-based, to promote equity and diversity and to reduce opportunities for political patronage and bias.

While the older nomination model is still used for some tribunal appointments, there has been a marked shift to the assessment panel model for rounds of appointments. The recruitment and assessment stages are increasingly likely to be managed by the tribunal head, in a manner that is open, merit-based and transparent. Panels assess candidates against public, competency-based criteria and report to the Minister. They may recommend a candidate, provide a shortlist, or identify a pool of candidates assessed as suitable to appoint.

The assessed panel model does not ensure that the appointment processes *overall* are merit-based. The selection and appointment stages remain under the control of ministers and are opaque. It would be more accurate to say, as a British Columbia statute does, that members are appointed 'after a merit based process'.<sup>564</sup>

The dominance of merit in appointment decisions is controversial. The requirement in the UK's Constitutional Reform Act s 63, that selection by the Judicial Appointments Commission 'must be based solely on merit', subject to good

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<sup>562</sup> ARC, *Better Decisions*, above n 51 [7.14], [7.15], rec 78.

<sup>563</sup> NZLC, *Tribunals in New Zealand*, above n 2 [5.13].

<sup>564</sup> Administrative Tribunals Act SBC 2004 c 45, s3(1).

character, has failed to achieve diversity goals for the composition of tribunal.<sup>565</sup> The Commonwealth's guidelines deem merit to be 'the primary consideration'.<sup>566</sup> This formulation leaves room for other considerations. Matters that can be taken into account under Cabinet procedures in various jurisdictions include the need to balance the skills of the members of the tribunal, and the effect of certain appointments on achievement of the government's diversity goals.

There is a debate as to whether diversity is an aspect of merit or a separate consideration, and whether it is suitable for assessment by panels. It has proved challenging to incorporate diversity into selection criteria. The model that has emerged in Australia and New Zealand is that the panel assesses the merit of individuals against competency-based criteria. The Minister reassesses the candidates in the light of the panel's report and also weighs the broader considerations that relate to the tribunal's composition. Under this model, the Minister and Cabinet take political responsibility for progress towards diversity goals.

More could be done to make ministers accountable for their selection decisions. Commonwealth procedures impose a degree of accountability, but only within the political executive.<sup>567</sup> Ministers must notify the Prime Minister if they appoint without full selection process, appoint someone not in the panel's assessed pool of candidates, or not appoint someone whom the assessment panel recommends.<sup>568</sup> To provide an element of public accountability, a requirement could be added to publish the number of such departures for each tribunal.

### ***Security of tenure, terms and reappointments***

Security of tenure and security of remuneration are key elements in institutional independence. According to *Valente v The Queen*, their purpose is to ensure that the office and remuneration of a member is secure against arbitrary interference by the executive during the term. Security of tenure does not require tenured appointment to a statutory retirement age or automatic renewal of terms. It can exist during a fixed term appointment.

Fixed term renewable appointments are the norm in Australia and New Zealand and likely to remain so. If tribunal legislation were to provide for tenured tribunal appointments, it is likely that the executive would make few of them.<sup>569</sup> There would probably be either more use of sessional members, or less use of tribunals. Renewable fixed terms are a key part of the model that enables tribunals to compete with courts for areas of jurisdiction.

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<sup>565</sup> Neuberger, above n 281.

<sup>566</sup> *Merit and Transparency*, above n 299, 7.

<sup>567</sup> *Ibid* 3, 7.

<sup>568</sup> *Ibid*.

<sup>569</sup> Gleeson CJ suggests that life tenure for federal judges before 1977 'probably explained why, before 1977, the federal judiciary was so small, and why so much federal jurisdiction was exercised by State judges': *Forge v ASIC* (2006) 228 CLR 45, [37].

One weakness of the renewable fixed term model is that the process for reappointments is often ad hoc, inconsistent and opaque. Members whose terms are due to expire wait too long for notification of the decision to reappoint or not to reappoint, and are left in doubt as to the criteria for the decision. Where the appointing Minister is also responsible for an agency which has an interest in the outcome of the tribunal's decisions, denial or delay of reappointments can be a means of exerting pressure on individual members. A perception can arise that members may not be reappointed if they set aside decisions of the interested agency or decide matters against its interests.<sup>570</sup>

As expectations of tribunals' productivity and quality have risen, so has their need to attract and retain highly skilled and competent members. The skills and knowledge required to be an effective tribunal member take time and effort to acquire. The introduction of competency frameworks, performance appraisal systems and continuing education programs over the past two decades makes professional development a joint enterprise of tribunals and members. Incumbents seeking reappointment can be expected to demonstrate higher skills than on first appointment. There is a need to align the criteria for reappointment with incentives for members to develop their competencies.

### ***Removal provisions***

Removal provisions are crucial in ensuring that members have security of tenure during their term. Provisions which specify objective criteria and fair, transparent processes are the exception, not the rule, in current statutes. The provisions are highly diverse, and reflect the tension between quasi-judicial and purchaser/provider conceptions of tribunals. The quasi-judicial model is demonstrated by strong provisions that allow removal of members on grounds and under processes similar to those that apply to judicial officers. The purchaser/provider model is seen in weak provisions that allow members to be removed without specifying a fair and transparent process, or on vague grounds for which no objective criteria exist. A provision that allows removal for a failure to comply with a condition of appointment is of concern, particularly if the executive's power to specify conditions is not controlled by the statute.

There is evidence of the cloning of removal provisions in the tribunal statutes of particular jurisdictions, and even in specialist tribunals across jurisdictions. The removal provisions for mental health review tribunals are notably weak in multiple jurisdictions, and for the New South Wales and some Queensland tribunals. The development of legislative drafting standards for tribunal statutes could interrupt the replication of such inadequate provisions.

Legislative drafting standards could control the extended use of vacation of office provisions to effect the removal of a member from office. Vacation of office provisions deem an office to become vacant when a specified event occurs, such as the death of a member. The provisions should not be used to terminate a member's office without an express decision in contestable circumstances such as incapacity or breach of duty.

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<sup>570</sup> ARC, *Better Decisions*, above n 51 [4.57].

### ***Security of remuneration***

The provisions for security of remuneration against reduction during term are variable, with many weak examples. The strongest provide for the remuneration of classes of member to be determined by an independent statutory authority. The weakest provide that the member is entitled to the remuneration and allowances determined from time to time by the Minister in respect of the member. Slightly more security is provided by statutes that fix the member's entitlements to rates that are specified in executive determinations for classes of officers, although these can be amended by the executive without parliamentary scrutiny. If legislative guidelines are drafted, they could include a provision like the *SAT Act 2004* (WA) s 119(3), which expressly guarantees that the remuneration and allowances for a salaried member cannot be reduced during the term.

### **Adjudicative independence**

While judicial review and administrative law remain important institutional safeguards of adjudicative independence, they are not enough to satisfy rising expectations of neutrality. Judicial review is supplemented by tribunal codes of conduct, and statutory provisions that confer powers and immunities and impose duties and restrictions on members.

If adjudicative independence is an adjudicator's ability to decide a matter without improper influence from others, it follows that the others must not seek to influence the decision making process improperly. The prevailing approach has been to promote adjudicative independence asymmetrically, by imposing duties and restrictions on the adjudicators to protect their own impartiality. No duties are imposed on others to uphold the independence of tribunals or to refrain from attempting to influence their decisions through special access. As the executive is the greatest source of threat to adjudicative independence, one might expect to see complementary provisions in legislation or codes of conduct imposing duties and restrictions on ministers, ministerial staff and public servants.

The UK's Constitutional Reform Act s 3 provides a model for a more balanced approach, under which ministers and the executive share responsibility for upholding adjudicative independence, and ministers are prohibited from seeking to influence tribunal decisions through special access. No similar duty or restriction is found in Australian and New Zealand legislation. A Queensland provision obliquely restrains the executive by declaring that QCAT is 'not subject to direction or control by any entity, including any Minister'.<sup>571</sup>

A separate area of adjudicative independence is the power of the tribunal to make an independent assessment of all matters relevant to its decision. At common law, an administrative tribunal's power to review the merits of a decision includes review of any policies that were applied in reaching the decision. Some legislative provisions purport to limit the power of tribunals to depart from government policies. Particular constraints are imposed by provisions which empower a Minister to give the tribunal a binding direction relating to the exercise of its powers.

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<sup>571</sup> *QCAT Act* s 162, see also s 196.



A tribunal cannot be said to be independent if its decisions can be ignored or overturned by the executive. There are examples in current legislation of provisions which allow the executive to revoke, terminate or alter the effect of a tribunal decision other than by means of a statutory appeal. The use of such provisions could be controlled through legislative drafting guidelines which might propose statutory preconditions such as material change of circumstances or the expiry of a specified period of time since the tribunal decision was made.

### **Concluding remarks**

As tribunals mature as a sector, a new conceptual model of tribunal independence is needed. While much can be learned from judicial independence, the starting point for tribunals is not the separation of powers, but the functional requirements for adjudication.

This work identifies types of provisions and arrangements from current practice and evaluates them in terms of their tendency to either impair or enhance independence. The evaluations are largely based on views expressed in the literature of tribunal and judicial independence. They do not cover all areas that are potentially significant for tribunal independence, nor all possible provision types. The outcome is an analytical approach to the measurement of tribunal independence which provides a pathway for improvement in legal and institutional design.

The comments in this work are not intended to prescribe a model set of provisions and arrangements for a truly independent tribunal. Rather, they are intended to support a systematic approach to measuring the de jure independence of individual tribunals. The study is premised on an assumption that a tribunal's de jure independence is positively correlated with its de facto independence. The assumption is not universally accepted by scholars. Moreover, there is no guarantee that a tribunal's de facto independence will be improved by a deliberate strategy of strengthening its legislative provisions. Nor is it certain that stronger provisions will enhance stakeholder and public perceptions of a tribunal's impartiality. The most that is claimed is that stronger provisions will tend to augment the ability of tribunals and members to withstand improper pressures from the executive. As legislation and other formal instruments are public and transparent, the effect of stronger safeguards will be apparent to stakeholders.

# APPENDICES

## Appendix A: Heads and Former Heads Interviewed for this Study

Name of interviewee	Capacity in which interviewed
Mr Matthew Carroll	President, Mental Health Review Board Victoria
Ms Belinda Cassidy	Principal Claims Assessor, Claims Assessment and Resolution Service, Motor Accidents Authority of NSW
The Hon Justice John Chaney	President, State Administrative Tribunal (WA)
The Hon Garry Downes AM QC	Former President, Administrative Appeals Tribunal (Cth)
Ms Linda Crebbin	General President, ACT Civil and Administrative Tribunal
Judge Bill Hastings	Immigration and Protection Tribunal (NZ)
Mr Michael Hawkins	President, Mental Health Review Board (WA)
Professor Dan Howard	President, Mental Health Review Tribunal (NSW)
Mr Doug Humphreys	President, Veteran Review Board (Cth)
Judge Greg Keating	President, Workers Compensation Commission (NSW)
The Hon Justice Duncan Kerr SC Chev LH	President, Administrative Appeals Tribunal
Ms Patricia McConnell	Chair, Weathertight Homes Tribunal (NZ)
Ms Kathleen McEvoy	Presiding member, Housing Appeals Panel (SA)
Mr Gary Mason	President, Premium Review Panel (SA)
The Hon Justice Iain Ross AO	Former President, Victorian Civil and Administrative Tribunal
Mr Malcolm Schyvens	President, Guardianship Tribunal (NSW)
Ms Anita Smith	President, Guardianship and Administration Board (Tas)
The Hon Justice Alan Wilson	President, Queensland Civil and Administrative Tribunal

## Appendix B: The Eight Areas for Tribunal Excellence

Extract from Council of Australasian Tribunals, *International Framework for Tribunal Excellence* (2012)

### 1. Independence

Independence is about the degree of separation from the executive. A tribunal's degree of independence will influence public perception about the extent of the tribunal's impartiality. This is particularly important in tribunals which deal with disputes involving the citizen and the State.

Impartiality is essential for the delivery of predictable, just decisions and the acceptance of those decisions by the public.

Independence measures	Rating					
	0	1	2	3	4	5
1. Is the tribunal established by statute?	No	Yes				
2. To what extent is the tribunal structurally (or institutionally) separate from the executive and legislative branches of the government?	No separation	Partial separation			Full separation	
3. To what extent is the process for the appointment/ reappointment of members fair and transparent?	Arbitrary and opaque	Completely fair and transparent				
4. To what extent is the tribunal functionally separate from the executive and legislative branches of the government?	No separation	Partial separation			Full separation	
5. To what extent does the tribunal control the expenditure of its allocated budget?	No control at all	Some control				Total control
6. To what extent does the tribunal enjoy adjudicatory or decisional independence? For example, can decisions of the tribunal be overruled by the executive?	No independence	Some independence			Full independence	
7. To what extent do members of the tribunal have security of tenure during the term of their appointment in terms of legislative protection against arbitrary suspension, transfer or removal from office?	No security No	Yes	Some security		Tenure	

## Independence measures

## Rating

9. To what extent do individual members of the Tribunal enjoy adjudicatory or decisional independence?

<b>0</b>	<b>1</b>	<b>2</b>	<b>3</b>	<b>4</b>	<b>5</b>
No independence		Some independence		Full independence	

(This question addresses the requirement that all members of a tribunal must be independent from one another and must be, and seen to be, free from any actual or apparent form of influence, pressure or duress from, or interference by, a fellow tribunal member, including the head of the tribunal. It reflects another aspect of adjudicatory independence – namely internally independent decision making.)

10. To what extent does the tribunal have administrative independence in terms of the following:

<b>0</b>	<b>1</b>	<b>2</b>	<b>3</b>	<b>4</b>	<b>5</b>
No independence		Some independence		Full independence	

- a. control over the buildings in which it presides and all necessary resources and facilities; and
- b. being provided with the means and resources, financial or otherwise, necessary for the proper discharge of its functions and duties.

11. Tenure (period of appointment)

<b>0</b>	<b>1</b>	<b>3</b>	<b>5</b>
<2 yr App.	>2 yr but <5yr App.	5 yr App.	> 5 yr App.

12. Overall perception of tribunal independence

0	1	2	3	4	5	6	7	8	9	10
None		—————→								Fully independent



**Appendix C: Comparative Tables of Provisions by Area**  
**Table C1: Administrative Independence**

TOPIC	AREA	<b>Stronger</b>	<b>TYPES OF PROVISIONS</b>	<b>Weaker</b>
Funding	Budget allocation and control	The tribunal is an independent statutory body with its own parliamentary appropriation and is responsible for its own budget and expenditure	<b>Intermediate (examples)</b> The tribunal is separately funded from an appropriation for a courts and tribunals service, jointly managed by the heads of the jurisdiction	The tribunal is funded from the budget of the portfolio department, which determines budget priorities, controls expenditures and can reallocate the tribunal's budget to other program areas
	Facilities and services	The tribunal controls its premises and in any given year has secure and sufficient funds to ensure provision of the resources, facilities and services it needs to perform its functions	A department (agency) provides accommodation, facilities management, security, IT, corporate, personnel management and other services on terms agreed between the President and the department	The tribunal occupies or sits in premises shared with or provided by a host agency whose decisions it reviews, and relies upon the host agency to provide facilities and services
	President	The President has statutory powers to manage and direct the tribunal's case management system, constitution of panels and chairs and general administration, and can delegate functions to the Registrar or other members	The President has the responsibility to manage caseload and tribunal administration but is unable to delegate management and administrative functions due to lack of senior or full time members	The President may have limited powers or time, and is dependent on the department or host agency to manage tribunal caseload, business and administration
	Staff	The tribunal is a statutory agency for purposes of managing its staff. Assistant Registrars and staff appointed by the Minister or department have the powers, functions and duties given by the Act or by the President	The department must provide registry facilities for the tribunal and any staff that may be necessary; and the officers act under the general direction of the head	The Act is silent as to the provision for staff of the tribunal.

**Table C2: Institutional Independence**

TOPIC	AREA	Stronger	Intermediate (examples)	Weaker
Process for appointment	Power to appoint	The Governor (General) in Council appoints on nomination of the Justice Minister	The Governor (General) in Council appoints on nomination of the portfolio Minister	The portfolio Minister appoints
	Recruitment strategy	The Minister and the President agree on the recruitment strategy	The Minister or department determines the recruitment strategy	The Minister and department identify suitable appointees and invite expressions of interest from them
	Advertising	Vacancies for new members are generally advertised publicly	Advertising is occasional or restricted, eg to professional publications	Professional, stakeholder or government bodies may be consulted or invited to nominate
	Diversity	Recruitment strategy is designed to attract a diverse field of suitable applicants including under-represented groups	Recruitment encourages diverse applicants but targets traditional sources	Diversity is considered at selection stage rather than in recruitment
	Assessment criteria	Competency-based assessment criteria are provided for applicants to address	Applicants address the statutory qualifications and general criteria	Apart from statutory qualifications, criteria are ad hoc, implicit, opaque.
	Assessment process	The President oversees the assessment process, constitutes the assessment panel and ensures the process complies with procedures required by the Minister	The department oversees the assessment process, constitutes the panel in consultation with the President and ensures compliance with government policies.	The assessment process and panel is managed by the department. A member of the Minister's office may be on the panel. The President is consulted about the tribunal's needs.
	Assessment	A panel assesses each applicant's relative suitability against competency-based criteria and evidence	A panel assesses each applicant's relative suitability based on general criteria determined by the panel	Candidates' suitability is not assessed relative to others, or is not assessed against explicit criteria, or is not based on best evidence

TOPIC	AREA	TYPES OF PROVISIONS		
		Stronger	Intermediate (examples)	Weaker
	Recommendations	The President recommends suitable candidates or a shortlist to the Minister based on the panel's assessment	The President makes recommendations to the Minister based on the panel's assessment and the President's evaluation	Recommendations are made through the department
	Consultation about nominations	The Minister must consult the President about proposed nominations	The Minister must consult another Minister or another office on nominations	Consultations are determined by Cabinet procedures
	Departure from recommendations	The Minister must notify the Prime Minister if nominating a person who has not been recommended by panel	The Minister may be required to justify the appointment process to Cabinet	No explanation is required
Terms and conditions	Member's usual term of appointment	More than 5 years, with eligibility for reappointment. Terms for classes of member are standard.	3 to 4 year term, with eligibility for reappointment	Less than 3 years, OR not standardised for classes of member
	Tenure expectation	Appointee has limited term but as a serving judicial officer concurrently enjoys secure tenure during good behaviour	No security of tenure but a practice of multiple terms for certain classes of member has created career members	There is no expectation of multiple terms
	Security of remuneration during term	Rates for classes of member are determined and published by a statutory tribunal, reviewed at regular intervals, and cannot be reduced during term	Rates are determined by the Governor or Minister for classes of member and specified in the instrument of appointment. Rates may be increased during the term	A member is entitled to such remuneration as the Minister or the Governor determines from time to time in respect of the member. Rate reviews are infrequent, unprincipled and opaque
	Conditions of appointment	A member holds office on the conditions stated in the Act	A member holds office on the statutory conditions and any conditions (not inconsistent with the Act) as decided by the Governor or the Minister and stated in the appointment	A member holds office on such terms and conditions as are provided for by the Act or otherwise as determined by the Minister in writing



TOPIC	AREA	TYPES OF PROVISIONS		
		Stronger	Intermediate (examples)	Weaker
Re-appointment	Re-appointment process	The Minister agrees to nominate incumbents if the President or a panel so recommends based on assessment of their performance under a competency framework endorsed by the membership	Incumbents are re-appointed for one or more terms without externally competitive process, based on the President's report on their performance and the needs of the tribunal	Incumbents can apply for new term in competition with external applicants and are assessed under the same process and criteria
	Notification of decisions to re-appoint or not to re-appoint	Procedures require the Minister to notify incumbents in writing, not less than 4 months before expiry of term, whether they are to be reappointed, not reappointed, or whether it is intended to test the field by advertising	There is no express requirement as to timing of notification, but the practice is to notify incumbents well before expiry of term whether they are to be reappointed or not	There are no procedures specifying timelines for notification. Notification may be before or even after expiry of the term.
Promotion	Promotion process	Governor may on the recommendation of the Minister and the President appoint a current member to a higher office for the balance of the term	A member can apply for a new term of appointment to a higher office on expiry of current term. The tribunal has internal procedures to facilitate career progression	Re-appointment for new term at higher class is possible but there are no procedures to facilitate promotion
Temporary and acting appointments	Acting appointments	Acting appointments are limited to 6 months if made by Governor, or 3 months if made by a Minister. Consecutive acting appointments cannot exceed the time limits in total	An acting or temporary appointment is limited to 12 months	Acting and temporary appointments are not subject to any time limit on duration
Appointment of Registrar	Power to appoint	The Registrar is appointed by the Governor on the nomination of the President	The Registrar is appointed by the Minister	The Registrar is appointed and employed by the head of the portfolio department

TOPIC	AREA	TYPES OF PROVISIONS		
		Stronger	Intermediate (examples)	Weaker
Termination of office	Resignation	A member can resign only by notice given to and accepted by the Governor	A member can resign unilaterally by notice to the Governor	A member can resign unilaterally by notice to the Minister
	Vacation of office	The office is deemed vacant upon death, resignation, removal, or loss of a qualification for office	The office is deemed vacant on grounds that are matters of public record, such as insolvency or conviction for serious offence	The office is deemed vacant on grounds that are disputable, such as incapacity or external employment
	Process to remove a member from office	The Governor may remove a member: on an address from both Houses of Parliament OR on the Minister's recommendation following processes of suspension, investigation, report, provision of natural justice and consultation with the President	The Governor or the Minister may remove a member, if satisfied that grounds exist, without any express statutory requirements as to the process	The Minister may remove a member from office at any time, without any express statutory requirements as to the grounds or the process
	Grounds for removal	Proved misbehaviour or incapacity (same as for Judiciary)	Broader grounds eg neglect of duty, or misconduct proved to the satisfaction of the Governor	Vague grounds, eg, carelessness, incompetence, inefficiency, failure or incapacity to carry out duties satisfactorily; breach of code or performance agreement
	Suspension	The Governor may suspend a member for proved misbehaviour or incapacity and must report to Parliament. The suspension lifts if Parliament fails to pass a removal motion within 15 sitting days	Governor may remove member on the Minister's recommendation, OR the President may suspend a member if grounds of removal may exist, and must initiate processes of investigation, report, hearing, leading either to removal process or lifting of the suspension	Governor or Minister may suspend a member on same grounds as for removal. There is no time limit on suspension and no provision for a process following suspension

**Table C3: Adjudicative Independence**

TOPIC	AREA	TYPES OF PROVISIONS		
		Stronger	Intermediate (examples)	Weaker
Judicial review for lawfulness and natural justice	Judicial review and appeals	There is provision for judicial review of tribunal decisions by a superior court; OR an appeal lies to a court on a question of law	There is provision for review on the merits by an appeal division constituted with judicial officers, or by a higher tribunal whose decisions are subject to judicial review	Judicial review is restricted by a privative clause and there is no provision for appeal to a higher tribunal with judicial officers
Members' duties	Duty to decide impartially	The statute states that the tribunal must act independently and is not subject to direction or control by anybody, including by any Minister	There are indirect statutory references to independence, eg, the Minister must consider an appointee's ability to adjudicate objectively and independently	The legislation makes no direct or indirect reference to independence
	Oath of office	Before taking office, a member must take an oath or give an undertaking in a prescribed form to faithfully and impartially adjudicate	The Minister may require presidential members to take an oath of office OR Tribunal members take a voluntary oath	There is no requirement for an oath of office and no oath is taken voluntarily
	Code of conduct	Members must comply with a code of conduct made by the President in consultation with tribunal members, staff and others about what the code should contain	The statute provides that the President may prescribe a code of conduct for members OR The members have agreed to adopt a code of conduct	There is no legislative provision for a code of conduct; and no code has been voluntarily adopted by the members

TOPIC	AREA	Stronger	TYPES OF PROVISIONS	Weaker
	Disclosure and disqualification	Statute provides that a member must not, without the consent of all parties, take part in a proceeding in which the member has an interest, and must disclose the interest to the President who may direct the member not to take part.	The member is under a statutory duty to disclose the interest to the parties and to the panel chair, before the member decides whether to disqualify himself or herself	No express provision. Disclosure and disqualification are regulated by the requirements of natural justice and any applicable code of conduct
	Duty of confidentiality	A member is under a statutory duty not to disclose information obtained in performing tribunal functions, except with the consent of the person to whom the information relates, or for other specified ground or reasonable excuse and cannot be compelled to disclose the information	Oath of office includes undertaking not to disclose evidence brought before the tribunal except for the purposes of the Act	No express statutory duty of confidentiality
	Performance appraisal	The member participates in periodic appraisal against an individually negotiated competency-based performance plan for development and training purposes	The President or delegate reviews a member's performance against a competency framework to inform an appointment or promotion decision	Members must enter into performance agreements which unilaterally prescribe productivity and performance targets and measures. Failure to comply may lead to non-reappointment or removal
Restrictions on members	External employment	A member must not take other paid employment without the President's consent	Full time or presidential members require Minister's consent to undertake other paid employment	No statutory restriction on external paid employment

TOPIC	AREA	<b>Stronger</b>	<b>Intermediate (examples)</b>	<b>Weaker</b>
	Representing a party	A member must not represent a party in any proceeding before the tribunal, list or division	Representation may be restricted by the tribunal's code of conduct	No express restrictions
Immunities and protections	Immunity provision	A member has the same protection and immunity as a Supreme court judge has in performance of a judge's functions	A member is not personally liable for acts or omissions done in good faith in the intended performance of tribunal functions; and cannot be compelled to testify or produce documents relating to tribunal proceedings except in the circumstances specified in the Act	No statutory immunity for members. Immunity depends on the common law
Efficacy or power	Ministerial policy directions	The tribunal is free to apply or depart from government policy when reviewing a decision in accordance with the common law	The tribunal must apply a lawful statement of policy that has been certified by the Minister but exercises an independent discretion as required by common law	The Minister can give a written direction that is binding upon the tribunal to the extent that it is lawful
	Executive over-ruling of tribunal	The statute expressly states that no Minister or executive official or body can overrule or alter a decision of the tribunal in respect of a matter	No executive body or Minister has power to revoke, overrule or alter a decision made or affirmed by the tribunal	Statute allows the Minister or agency to revoke or terminate a decision or order of the tribunal, or to alter its operation or effect



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