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TENSIONS IN THE OBLIGATIONS OF TRIBUNAL MEMBERS

The tensions in obligations of members to their tribunals: expectations of economy and timeliness, procedural efficiency and prompt decision-making, and the duty to provide a fair hearing and give properly considered reasons

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Procedural fairness v speed: a dichotomy?

The topic focuses, implicitly and directly, upon a dichotomy which now confronts almost every Australian tribunal member: your primary obligations to provide a fair hearing and a considered, reasoned decision – but to do that, in every case and without exception promptly, economically, and efficiently.

A ‘dichotomy’ means, for our purposes, a *sharp or paradoxical contrast*.¹ It might, otherwise, be called a dilemma. In any event, the particular pressure which arises for tribunal members comes about because the first tranche of obligations – giving the parties a fair hearing and a properly considered and reasoned decision – are influenced, and affected and constrained, here, by the second tranche: to always do so quickly, and economically. There is an inescapable tension between the two.

Those terms – dichotomy, and dilemma – are apt for several other reasons, one of which is that the mandate you work under distinguishes you from your counterparts in the judiciary who, as we will see, are not subject to the same tensions. Certainly, the judges are not without constraints and pressures

¹ New Shorter Oxford Dictionary

operating upon the way they do their work but those constraints are, it seems to me, far less onerous and imperative than those which operate upon you. There is also, therefore, a perceptible and immediate *dichotomy* between the way judges do their work, and the way you must do yours.

The nature of this tension, this overarching pressure upon you as a tribunal member, is in fact best illustrated through a reference to, and comparison with, the courts.

That comparative exercise is unsurprising; for most tribunals the courts are the ever-present elephant in the room – if only because they are, of course, the other large institution which occupies the same legal decision-making territory as your tribunal; and, of course, they occasionally remark upon (and mark) your work.

What we will see from that comparison is that, while the courts have changed dramatically within the past 40 years (coincidentally, the period which has seen the rise and rise of tribunals) they still operate in a way which leaves them free of the most onerous and imperative of the statutory exhortations and imprecations which dictate how you, as tribunal members, must do your work.

Change in the courts

The courts have, in the past few decades, changed from places where parties dictated the pace and efficiency of litigation to ones where they are expected to act promptly, and are more effectively corralled by modern case-management techniques

This emphasis on speed and the efficiency in decision-making bodies within the justice system reflects a sea change in the way the judicial arm of our Westminster model of government, and society, now seek to address the individual citizen's right to have access to, and to make use of, state-provided dispute resolution.

Two factors have propelled that change: the growth in individual rights, and increasing pressure from the Executive and Parliament upon courts to be 'productive' in the sense that more services are to be provided to more citizens, but at lesser cost to society. Both factors are usually categorised in very general terms as 'access to justice'. A classic example, affecting the courts, is class actions.

As the governments which grant these rights have properly recognised, the possession of them is valueless if the means of vindication and adjudication are not also made available through access to courts (or, increasingly, tribunals).

The second factor – demands, by government, for greater efficiency in the courts – has been tacitly enforced by reduced funding and resources, and introducing mechanisms for measuring judicial efficiency and publicising it, like the inclusion of court clearance rates in ROGS.

Courts have, in response, adapted by moving from a system which ensured a litigant's substantive rights were always paramount, and could not usually be defeated by procedural steps, to one which places a heavy emphasis upon efficient case management, accompanied by serious sanctions for parties who breach procedural guidelines.

This change has occurred within the lifetime of many of us. When I began legal practice it was almost unheard of for a party to litigation to be penalised by, say, having their action struck out unless they actually disappeared. Certainly, there was no serious thought of any sanction for tardiness except, perhaps, the occasional order for what were called 'costs in the cause' – in truth, a very mild (and usually ineffectual) slap on the wrist.

The difference between those days, and now, in the world of the courts is between Lord Bowen's statement in 1883 that '*Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy*'² and Lord Woolf's observation in 1999 that courts could not, *and would not*, tolerate non-compliance with time limits for procedural steps.³

In just over a century the dispute resolution system provided by courts has moved from one in which the parties dictated the pace, with virtually no interference, to one where courts have overarching powers to manage their lists and will use that power where a party is acting a way which involves the inefficient use of a public resource – judges and courtrooms, and court staff; and, furthermore, are expected to exercise those powers vigorously and effectively.

This approach has been given the highest imprimatur in the High Court's decision in *Aon v ANU*⁴. But before we talk about that case it is worth diverting to the death throes, as it were, of the old system and what happened in an English case usually called *BCCI – Three Rivers*⁵, which plagued the UK justice system around the turn of the millennium.

The trial court had decided that the plaintiffs had no realistic prospect of establishing that Bank of England officials knowingly acted unlawfully with the intention of damaging them (or reasonable foresight of any loss or damage), and therefore gave summary judgment in favour of the Bank. That decision was affirmed by the Court of Appeal but overturned by the House of Lords, in which the majority disregarded an important principle of modern case

² *Clarepede & Co v Commercial Union Association* (1883) 32 WR 262, 262.

³ *Biguzzi v Rank Leisure plc* [1999] 4 All ER 934, 940.

⁴ *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175.

⁵ *Three Rivers District Council and others v Bank of England (No 3)* [2001] 2 All ER 513

management: that of balancing 'pure' justice, of the traditional kind, against limited court and litigant resources.

In effect what happened was that the lower courts identified the case as futile (that is, that the plaintiffs had no realistic prospects of success) and removed it from their lists, but the highest court clung tenaciously to the old dispensation and said, in effect, that even parties with very poor cases were still entitled to their day in court – and, of course, the chance to clog up lists and delay other more meritorious cases.

Sadly – and very expensively – the trial court, the Court of Appeal (and the dissenting judges in the House of Lords) were proved right. When the trial eventually commenced it proved a futile exercise, and collapsed on day 256. The costs to the defendants alone were thought to be in the region of 80 million pounds. The cost in terms of judicial time and resources was incalculable.⁶

Courts become more like tribunals

This sea change in the way the courts go about their work involves something more than just a shifting of the goalposts. As Les Arthur, a New Zealand legal academic, has pointed out⁷ intrusive modern case management techniques and their rigorous application by the courts reflect a new view about the fundamental purpose of a civil trial: that, while the parties themselves are ultimately and primarily concerned with winning their litigation, the justice system itself views the overall purpose of a trial now as one which seeks to arrive at a *just* decision at a reasonable cost to the parties (and society), within a reasonable time.

As Arthur points out this involves, in a sense, a change in the way our adversarial system defines 'justice'. The change is from a definition which depends solely upon the decision of a court after the parties have used the adversarial system to exhaustion (i.e., 'justice' is measured by reference to the 'winning' outcome) to one which focuses more heavily on what he calls *justice on the merits*, which is the product of the cooperative ethic imposed by case management and associated modern court rules with their much greater emphasis on cooperation, candidness and respect for the truth.

In other words, the focus has shifted from a system in which there is scope for a stronger or richer party (unfettered by effective control by the courts of the conduct of proceedings) to intimidate or browbeat a weaker or poorer party to produce a resolution of the case which may be, as Lord Woolf noted, either

⁶ Adrian Zuckerman, 'Court adjudication of civil disputes: A public service to be delivered with proportion resources, within a reasonable time and at reasonable cost' (Speech delivered at the University of Melbourne, 21 September 2006).

⁷ Les Arthur, 'Does case management undermine the rule of law in the pursuit of access to justice?' (2011) 20 *JJA* 240.

unfair or achieved at a grossly disproportionate cost, or after unreasonable delay.

That new approach has, as mentioned earlier, the highest approval in Australia in the High Court's decision in *Aon v ANU*. The decision there was made within the ambit of modern court procedure rules like r 5 of the Queensland UCPR which emphasise the overriding principle of achieving a just, timely and cost effective resolution of proceedings. The case involved a very late request to adjourn an imminent long trial, without an adequate explanation. As the High Court observed, to allow the adjournment would '... *undermine confidence in the administration of justice*'.⁸

It is now appreciated that '*the courts are concerned not only with justice between the parties... but also with the public interest in the proper and efficient use of public resources*'.⁹

Tribunals came into being coincidentally with this sea change in the courts. Virtually without exception, the legislation which created them and governs how they operate reflects these new imperatives in the business of dispute resolution.

The AAT webpage speaks of Australia's premier tribunal as one which aims to provide a review process which is accessible, fair, just, economical, informal, and quick; and which, in its form and process, is '*proportionate to the importance and complexity of the matter*'...

These words and phrases echo, and resonate with, Les Arthur's thesis: that the business of publicly funded adjudicative bodies now aims, as it always has, to a *just* decision but, also, one which is achieved at reasonable cost and without unnecessary delay.

The (continuing) difference between judges and tribunal members

It is not adventurous to suggest that the majority of you work under legislation which speaks in similar words, and phrases; you have to be good, and fair, and just, and right and correct, and you have to be those things in an efficient way in terms of time and cost.

That universal legislative imperative is at the core of one facet of the dichotomy I am talking about.

The changes in court processes and the way the judges go about their work has largely been self-imposed, and self-generated; and, even where those changes have been written down they have not been installed in legislation, passed by parliaments. Rather, the judges themselves have introduced them

⁸ *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175, 195 per French CJ.

⁹ *Ibid* 189.

by their own practice directions or, in some cases, by encouraging or consenting to changes to subordinate legislation, like rules of court.

While many courts have developed protocols dictating desirable time limits for the judges to deliver their decisions, so far as I know no state constitution, no legislation, mandates those time limits. The judges remain free to approach each decision, each of their judgments, as an exercise in perfection, and to take so long as they wish to produce a judgment which is as complete, as comprehensive and as detailed as they wish.

In this new dispensation within the courts, it is only the *parties* who are directed to be quick and efficient. The judges themselves are under no legislative imperative to that end.

While most judges now work very hard to get their judgments out within the stipulated periods they have agreed on – usually, three months from hearing – it is in the hearing process, in particular, that the way they manage things remains unfettered by the sorts of statutory imprecations which operate upon each of you. They can simply sit and let the hearing unfold before them, silent as the Sphinx if they wish, and permitting every gully to be run up, every stone picked up and turned over and examined and discussed, every nuance of the case canvassed and minutely explored.

That is not, it seems to me, a luxury which is permitted tribunal members in the face of their governing legislation.

The extra statutory burden on tribunal members

QCAT's first Deputy President Judge Fleur Kingham coined the phrase '*Actively Fair*' to describe how our new Tribunal planned, from its inception, to go about its work. It was a phrase which stuck. It nicely encapsulated what the legislature plainly intended to enshrine, for Queenslanders, in the QCAT Act¹⁰: the provision of dispute resolution services to the citizens of Queensland that were just, and fair – but also, and equally, accessible and speedy and economical.

The need to balance these things is vivid in the Queensland legislation – as it is, almost certainly, in the legislation governing the work of every Australian tribunal, commission or non-court adjudicative body. QCAT, the Queensland parliament said, must deal with matters in a way that is '*accessible, fair, just, economical, informal and quick*'¹¹. It must ensure proceedings are '*conducted in an informal way that minimises costs to the parties, and is as quick as is consistent with achieving justice*'¹². It is not bound by the rules of evidence or the practices or procedures of courts,¹³ and must act with as little formality

¹⁰ Queensland Civil and Administrative Tribunal Act 2009 (Qld).

¹¹ QCAT Act s 3(b).

¹² Ibid s 4(c).

¹³ Ibid s 28(3)(b).

and technicality and with as much speed as it can;¹⁴ and, it can do *'whatever is necessary for the speedy and fair conduct of the proceeding'*.¹⁵ Parties themselves are required to act quickly,¹⁶ and are subject to sanctions and penalties if they do not.¹⁷

It must meet these obligations while also discharging an additional burden which is not imposed upon courts: fulfilling an overarching responsibility to ensure that parties understand what is going on – *'that each party understands... the practices and procedures of the tribunal... and the nature of assertions made in the proceeding and the legal implications of the assertion... (and) any decision of the tribunal'*¹⁸.

But this emphasis on expedition in the legislation does not allow QCAT to pursue speedy resolution at all costs. In all proceedings it must *'act fairly and according to the substantial merits of the case'*¹⁹ and *'observe the rules of natural justice'*²⁰.

How do tribunal members meet these demands?

The intrinsic tension between the two statutory imprecations to tribunal members – to provide justice and fairness, *plus* expedition – can be easily illustrated with a question: *Will all hearings be fair, and will all decisions be fully and properly considered and reasoned, if they must always be made as quickly and as inexpensively as possible?*

The answer must, of course, be a resounding 'no'. You and I are, ultimately, quite smart animals who have got up onto two legs and shed some body hair. But we are not gods, and the business of balancing justice, and speed, is never going to be easy. It is a tacit acknowledgment of our human frailty that the judges have put the burdens of ensuring speed on the parties, and not, largely, upon themselves. They know – as we do – that justice is a precious and important thing but, also, often difficult to discern or identify, and haste can be inimical to its attainment.

I had the advantage, in QCAT, of sitting on its internal appeals tribunal – something which some, but not all, of the CATs have. On those rare occasions when error on the part of a member below was discerned in the appeal process, it was compelling how often the transcript suggested that the mistake was the product of some kind of pressure which was apparently operating on that member.

¹⁴ Ibid s 28(3)(d).

¹⁵ Ibid s 62(1).

¹⁶ Ibid s 45.

¹⁷ See e.g. dismissing, striking out or deciding if party causing disadvantage (s 48); and costs against party in interests of justice (s 102).

¹⁸ Ibid s 29(1)(a)(i) and (ii).

¹⁹ QCAT Act s 28(2).

²⁰ Ibid s 28(3)(a).

It came in many forms – long lists, and long days; poorly-prepared parties, or lawyers; inadequate files, registry problems; language difficulties; bad behaviour; all the myriad things life throws up to thwart order, and calm. And the world of the tribunal member is, generally speaking, relentless, and unremitting, and unforgiving.

How did that pressure manifest in the poor, set-upon tribunal member? As impatience, apparent short temper or exasperation, poorly written or expressed rulings or decisions – in short, poor work. At worst, as we have seen from time to time, it can lead to plagiarism or judgments which lack proper logic, or form.

You have no choice, as tribunal members appointed to work under these statutory constraints and exhortations, but to strive to meet them. Legislation is absolute, and unforgiving. You do not have the opportunity or the avenue to drop Parliament a note to the effect that your conduct at a hearing was a little lethargic, or your decision less than quick, or not your best work, because your child was ill and you had little sleep; or, you had five cases listed before you that day and the first one took over four hours.

So, the next facet of the dichotomy is the heavy demands placed upon you and the difficulty of always meeting them. How do you achieve a fair balance of the precise, but often competing, requirements of both justice, and expedition? There is, of course, no magic wand or template. I can only offer what some years as a tribunal member, and some chances for reflection, suggest.

Some matters of principle

We might start with some general principles, the things which should underpin how we do what we do.

The first is that justice and fairness must be paramount. A fair hearing, and properly reasoned decisions, are our *raison d'être*. If they are sacrificed or subsumed to speed or economy, we all suffer. Our society aspires to be a just one, and no-one can gainsay that that is right, and good. Substituting speed for justice, as an operative principle, is inconceivable.

The second is that perfect justice is, by definition, unattainable. We call the place where it may exist 'heaven'. We live everyday with minor and major injustices – it's called 'politics'. We have to accept compromise, sometimes even of our most strongly held beliefs and principles, for the sake of social harmony.

The third is that expedition and efficiency and economy are not uncomfortable bed-fellows with justice. Justice delayed, as the old saw has it, is justice denied. Giving our fellow-citizens, and governments, prompt determinations of their disagreements mitigates, and helps to defuse opportunities for, the growth of resentment and ill-feeling, and grudges and blood feuds and all the

colourful things our history contains. It stops hard problems, the kind that can eat away at a largely benign, functioning society, from piling up.

Justice is, then, good, and speed and efficiency are good. The challenge is to find a path which properly balances them and ensures, critically, that fair hearings and reasoned decisions are not diminished or under-valued in that balancing exercise.

Effectively merging the demands of procedural fairness, and efficiency

There are, I think, several things you can do to achieve that. They rest on the notion that the imperative upon you to be quick and economical can be applied in different ways, and to different degrees, at different points in your tribunal's determinative process; and, in a way which promotes efficiency while not detracting from the calibre of final hearings and, at best, enhancing them.

Most tribunals already have one great strength within their processes, generally unavailable to courts: the use of pre-hearing procedures to identify issues and frame them and, also, to frame the form of the ultimate hearing so it can proceed in the most efficient way. Most of you work in a system which involves a mandatory 'compulsory conference' procedure, between filing and adjudication. VCAT, I understand, christened them 'CoCos' and the word was certainly embraced in QCAT, as was their utility and value in almost every jurisdiction.

Properly used they are a hydra-headed amalgam of ADR process, neutral evaluation, case appraisal, directions hearing, and educational exercise. An intelligent and quick-witted presiding member uses them to work out what the critical issues are, and how those issues might best – and, both fairly and efficiently – be prepared for a final hearing. They worked and, I am sure, continue to work brilliantly at QCAT. I recall telling a fellow judge on my court what we were doing with them in QCAT; as she pointed out, they are precisely what the courts lack – something in the nature, she said, of a 'sorter-out' judge who makes sure matters don't take a minute more of ultimate court time than is necessary.

They sit comfortably, as a process, within the pantheon of the legislation you operate under: they provide an effective, informal, process for getting to the heart of a matter, in which the parties have a say; they focus on both justice (the real issues) and expedition (how can a fair hearing be achieved in an efficient, effective way?). But, vitally, they do not detract from notions of fairness and justice – the process gives parties an arena, and a voice, and a chance to help frame the shape of their final hearing.

They have, I think, another benefit: again, used effectively, they serve to diminish the risk that a final hearing will be rushed or inefficient, because it is tainted with a lack of procedural fairness; or that reasons will be inadequate, because the preliminary conference has gone much of the way to framing the

shape of that hearing and identifying the issues which the decision must address.

In short, they are an invaluable tool for those tribunals which have embraced their effective use. They can take a myriad forms, from early telephone contact and discussion to a full-blown ADR process; their value is enhanced when they are used, intelligently and in a focussed way, for particular jurisdictions.

Finally, they seem to me to be a brilliant fit with the terms of the legislation we are discussing. They satisfy the imperatives for speed and economy but at an event which is not, itself, a final hearing and, in that way, bestow two blessings: by helping the tribunal meet the imperatives, while reducing the need to do so at the final hearing when, as we must acknowledge, procedural fairness must take precedence over expedition.

The second proposal concerns the way you conduct yourselves in hearings, and the way you write your decisions. The two are, you might agree, powerfully interlinked. If you have kept the hearing focussed on the issues, and ensured the parties address them, how much easier is the business of framing your decision? Your job is to ensure that, before the hearing commences, you know *what the question is that you have to answer*; and then, in the hearing itself, to ensure that you keep the parties on a path that is devoted to that exercise.

The third concerns your decisions, and their form and content. The legislation we are talking about does more, I think, than encourage you to be quick; it permits you to depart from the way judges write their judgments. Judges write for pretty grand purposes – for precedent and *stare decisis*, for history, for posterity, for society, for parliament, for other parties, and for each other.

There will be cases where some or other of those things may operate upon you (you may be hearing the first case on a novel point in a new jurisdiction) but they will be very rare. Most of the work you do occurs in areas where the legal principles are settled and you are engaged on the business of measuring a factual scenario against them. That can be challenging, and may sometimes require some fancy footwork, but in most cases it will not.

You are not required, in those circumstances, to engage in lengthy restatements of settled principles; you need do no more than use them as a touchstone in terms, sufficient to show you know them, and are correctly applying them. You remain, of course, under an overarching obligation to expose your reasoning.

But, there is a difference between a judgment in the High Court, and one of yours. The High Court is responsible for telling Australians what the law is and, for that purpose, the judges usually strive to expose each facet, every aspect, of the process of reasoning which has led them to a particular conclusion. That is not your purpose; yours is to give justice in the microcosm of each particular case you determine. I do not use that word to diminish what

you do; judges and tribunal members at all levels except the High Court and state appeal courts do this every day. The point is to provide reasons which tell the *parties* what they need to know, as succinctly and efficiently as you can; not to write a magnum opus on each case.

Let's summarise: you are exhorted, by your governing legislation, to be both just and efficient. You can, I have suggested, do both by using the statutory tools you have available to you to ensure that the processes where fairness and justice are paramount – the final hearing, and your reasons – occur in circumstances which have already, before the hearing starts, been clarified and illuminated by adequate and effective pre-hearing processes; and, by your own close focus, in preparation for the hearing, upon the critical issues.

These can be institutional, organisational issues as well as individual ones. Effective tribunals never cease to engage in appropriate (but not obsessional) self-examination. Work which helps their members enter hearings confident that the issues have already been identified, and that the parties understand what is required of them to address those issues, is by definition invaluable. Critically, it can mean that the statutory exhortations we are trying to weigh and balance are not mis-applied or distorted by members rushing through hearings or to decisions because speed has assumed too large a part in the equation.

In short, make sure your tribunal uses pre-hearing processes well; and, if it doesn't, lobby for change or ponder how it might do those things better. For yourself, spend some time before each hearing identifying the issues – the precise question you have to answer – and work to ensure your hearing is efficient in addressing that question. And keep your decisions concise, and focussed.

It seems to me that an approach on these lines meets the statutory imperatives in two ways: it pays proper obeisance to the requirement that you and your tribunal be as quick and effective as you can, but reduces the risk that an undue focus upon speed detracts from a fair hearing, and a considered decision. It makes use, as it were, of 'back-end work' to satisfy those imperatives, rather than leaving the entire burden on you as you confront the case in the hearing room. In the result your tribunal, and you individually, use all the tools available to you to achieve speed and economy at hearings, without diminishing the quality of those hearings, or your decisions.