

Council of Australasian Tribunals Conference

Access to Justice, Administrative Tribunals and the Rule of Law

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Introduction

For a long time in Australia most decision-making bodies in the genus known as ‘tribunals’ have provided frontline service in the delivery of accessible administrative justice to people from all walks of life and from across the socio-economic spectrum. They have developed their own bodies of practice and precedent. The judicial review of their decisions has led to growth in the principles of public law applicable to diverse areas of official decision-making. In the primary function of many tribunals, providing merits review and in the jurisprudential consequences of that function, they have become very significant elements of the societal infrastructure that we call ‘the rule of law’.

Through those processes of administrative and judicial review we can claim to provide a measure of equality before the law. But equality before the law does not guarantee equal justice which is a rather larger concept. Equal justice is an ideal which is never fully attained even in the best organised of societies. The greater the distance between that ideal and the reality, the greater the risk that is posed to public confidence in the rule of law and the democratic institutions that sustain it. Today I want to say a few things about the nature of our system of tribunals which are notable for their diversity, their place in the delivery of administrative justice and the pressing challenges of access to justice for a range of groups in our society that may interact with the tribunal and the court system generally. I speak in part through the prism of my own experiences.

The varieties of tribunal experiences

My earliest tribunal experience was as a legal member of the Social Security Appeals Tribunal (SSAT) in the late 1970s. That was a non-statutory body set up by the Department of Social Services to provide an inexpensive review of departmental benefit decisions.

It consisted of a legal member sitting with a social welfare or medically qualified member depending on the nature of the case. An assigned departmental officer also sat as part of that tribunal. Its function was recommendatory. It had no determinative power. It could not overturn a departmental decision or substitute another for it. It conducted its reviews, for the most part, on the papers with occasional oral and telephone hearings.

The applicants for review were, for the most part, unrepresented although sometimes a community legal service lawyer would appear. Although its functions were only recommendatory and one of its members was an officer of the department, there was a culture of independence informing the processes of the SSAT. Its non-departmental members did not depend on it for a living. The sitting fees were too modest for that. Mr Patrick Lanigan, who was the Secretary of the Department of Social Services at about the time the SSAT was established, took some credit for such an economic review system. Fred Chaney, when he was Minister for Social Services, was surprised by the number of highly qualified people who offered their services as members of the SSAT.

Typically the cases before the SSAT involved the application of statutory criteria of entitlements to benefits. The statutory formula ‘living on a bona fide domestic basis as man and wife’ was frequently debated. It marked the difference between two people in a relationship entitling them to only the married benefit rate, and two people treated as independent of each other and each entitled to the single rate.

My recollections of that Tribunal were pleasant — particularly my memories of the people with whom I sat and with whom I plumbed the mysteries of domestic relationships and tried to determine whether claimants for unemployment benefit had moved to areas better known for their surfing attractions than for the prospects they offered of gainful employment.

Later the SSAT became a statutory body operating as a first-tier element in the Commonwealth administrative law package of the 1970s. It is now assimilated into the

Administrative Appeals Tribunal (AAT) as part of the movement at both Federal and State levels towards the integration of specialist into generalist tribunals.

At the State level, I served for a time as Deputy Chair and later Chair of the Town Planning Appeals Tribunal, a much more formidable body than the SSAT with the powers of the Supreme Court. It had a jurisdiction which ranged from the sublime to the ridiculous. One case on which I sat involved an appeal concerning a proposed coastal subdivision. It raised difficult and fascinating questions, in connection with the requisite setback, of the geological history of the dunal zone fringing Cockburn Sound. There was even evidence from a physicist about radioactive isotope dating of in earth gases and their isotopes in the old dunal formations in that zone.

An example of the ridiculous was an argument about a sign on the front of a most unprepossessing building in North Perth which had two or three rows of undistinguished aluminium windows and a door set in the front that could have been based on a plan drawn by a child. Nevertheless, a planning officer solemnly told me that the proposed sign would disrupt the ‘banded hierarchy’ of the windows and otherwise impair the ‘frontality’ of the building.

The Town Planning Appeal Tribunal, as was then the case and still is with many such bodies, consisted of a legally qualified member sitting with a business person and a person with experience in town planning matters. It had statutory backing but like other specialist tribunals in Western Australia was eventually subsumed into the State Administrative Tribunal (SAT). At the time that I was Deputy Chairman of the Town Planning Appeal Tribunal, the Chairman was David Malcolm QC, later to become Chief Justice of Western Australia. As Deputy Chair I replaced Daryl Williams QC who later became Commonwealth Attorney-General.

As a Federal Court Judge, I served *persona designata* as a Presidential Member of the AAT — exercising, of course, an executive and not a judicial function. This was so, even when three serving Federal Judges sat, as required by the legislation, to determine an appeal by the Liberal Party of Western Australia against the registration of a rival political party under the name ‘Liberals for Forests’. It was perhaps the most unusual example of a non-judicial body, sitting as a tribunal, and composed entirely of judges.

The AAT then as it is now, was, as Sir Gerard Brennan, I think, once described it, part of the continuum of executive decision-making. Not surprisingly however it was not unusual to hear non-lawyers who had appeared in the AAT and other like bodies refer to the members before whom they appeared as the judge or judges regardless of whether they held judicial office. For many, if not most people, public adjudicatory tribunals are a species of court.

Towards the end of my time as a Federal Court Judge, I served as Deputy President of the Australian Competition Tribunal (ACT), and for one short month as its President before my appointment to the High Court. In one major contested case on which I sat with an economist and a businessman, the ACT had to determine whether an ethical code adopted by the pharmaceutical industry through Medicines Australia offered sufficient public benefit to outweigh any anti-competitive detriment. The case included consideration of the conditions which might be attached to authorisation of the proposed code under the Australian Competition and Consumer Law to enhance the public benefit deriving from the code. The principal condition in dispute required Medicines Australia to provide six-monthly reports on benefits provided to the medical profession by pharmaceutical companies by way of such things as conference travel, accommodation, hospitality and gifts. The authorisation so conditioned was upheld.

The SSAT in its later statutory form, and the AAT were closest to adjudicative bodies in the sense that they were concerned with determination of existing rights, entitlements and liabilities albeit their decisions were substitutive and not dependent upon the demonstration of legal or factual error by primary decision-makers.

The Town Planning Appeals Tribunal and the ACT had functions extending well beyond the traditional concepts of adjudication. Cases before the Town Planning Appeals Tribunal were, for the most part, concerned with approvals or authorisations rather than determination of existing rights. The ACT was also involved with essentially evaluative exercises when determining not whether a party was entitled to an authorisation, but whether a party should be granted an authorisation. Other categories of decision by the ACT raised evaluative rather than rights determinative questions.

Definitional challenges

What these examples from my own tribunal experience illustrates is that the term ‘tribunal’ covers a variety of institutions and functions some of which resemble those of

traditional courts and others not. To generalise about tribunals in the context of access to justice and the rule of law is therefore no trivial task.

That variety is partly, but not completely, reflected in the Constitution of the Council of Australasian Tribunals which defines the word ‘tribunal’ in the following terms:

Tribunal means 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.¹

There are many bodies bearing the title ‘tribunal’ which might not fall within the definition of that term in your Constitution. Some tribunals at State level may be exercising judicial power. In such cases the question arises — if such a body is not a court, is it ‘acting as a court’ within the meaning of the definition in your Constitution? The recent judgment of the High Court in *Burns v Corbett*² may be on point. If a tribunal which is a member of the Council ceases to be a tribunal within the definition then it may be expelled from the Council by the Executive Committee. Happily, cl 13(2) provides a measure of procedural fairness for the potential expellee which is to be provided with a reasonable opportunity to make submissions to the Executive Committee in relation to their proposed expulsion. If a debate about membership were to arise between tribunals the Constitution, in cl 12, provides for the referral of disputes generally to community justice centres for mediation and ultimately for arbitration under the *Commercial Arbitration Act 2010* (Cth).

The National Native Title Tribunal experience

I wonder, in that connection, how the National Native Title Tribunal (NNTT) might fare. It was set up under the *Native Title Act 1993* (Cth) to provide an institutional mechanism for receiving, registering and mediating native title determinations and compensation applications. It also had a function of arbitrating on the proposed grant of mining and other interests affecting native title where a registered claim had been lodged or a determination made.

¹ Constitution of the Council of Australasian Tribunals s 4.
² (2018) 353 ALR 386.

As President of the NNTT in 1994, I came to the view quite early that its very designation as a ‘tribunal’ obscured its central function, which was mediation. In that respect the Second Reading Speech of the Native Title Bill 1993 (Cth) was somewhat misleading when it described as a key aspect of the Act ‘rigorous, specialised and accessible tribunal and court processes for determining claims to native title’.³

In the course of my term as President, I proposed to Government that the term ‘tribunal’ be dropped and perhaps the term ‘mediation service’ substituted. This proposal was opposed on the ground that it amounted to a down-grading of the body’s status. That opposition was itself an interesting indication of the status attaching to the word ‘tribunal’. Similar arguments were deployed against my proposal that the President of the NNTT should not have to be a serving judge. In the event, that qualification was dispensed with and Graeme Neate was able to succeed me as President. What was interesting was that in the political sphere the concept of a ‘tribunal’ as an adjudicative body with powers of determination was appropriated to underpin the authority and status of the NNTT essentially not an adjudicative body. Semantic niceties are of no avail against political imperatives when it comes to the designation of public bodies.

The constitutional dimension

The legal position is complicated by the constitutional question — whether an adjudicative tribunal is an arm of the executive or an element of the judicial branch of government or some hybrid of both? And on what basis do non-judicial tribunals claim independence from the executive government? Uninformed commentators have sometimes claimed that Ministers criticising tribunal decisions are somehow breaching a separation of powers principle. If, however, the tribunal is in truth an executive body, part of the executive branch of government, the critical Minister can hardly be criticised on that account. Indeed, ministerial comments critical of courts which do not constitute an interference with their functions, do not breach that doctrine.

In any event, separation of powers is a doctrine which is an emanation of the *Constitution*. It is generally regarded as a matter of convention in the States and Territories

³ Commonwealth, *Parliamentary Debates*, House of Representatives, 16 November 1993, 2877 (Paul Keating).

to some degree supported by the principles developed by the High Court in *Kable v Director of Public Prosecutions (NSW)*⁴ and the line of cases following on from it.

Characterisation

The term ‘tribunal’ has a long history going back to the Roman office of Tribune and descriptive in late Middle English of the raised platform provided for a magistrate’s seat — an etymology which suggests it is directed to bodies which are mostly adjudicative in character. That said, depending on the constitutional framework in which they exist, they may be characterised as exercising judicial power or executive power or they may be bodies in which those elements are mixed.

In some jurisdictions the characterisation would be of no significance. In the Australian federation, it does matter. Constitutional characterisation of a tribunal and its power was considered in *Burns v Corbett*.

That particular case involved a complaint by a resident of New South Wales against a resident of Victoria initially lodged with the Administrative Decisions Tribunal (ADT) and then, through an administrative appeals process, dealt with by the Civil and Administrative Appeals Tribunal of NSW (NCAT), which replaced the ADT. It was accepted by all parties in the Court of Appeal of New South Wales that NCAT was not ‘a court of the State’ of New South Wales for the purposes of Ch III of the *Constitution* and therefore not a court upon which federal jurisdiction could be conferred. It was, however, purporting to exercise State judicial power. Section 75(iv) of the *Constitution* identifies as one of the heads of federal jurisdiction matters between residents of different States. There were two primary questions before the High Court designated the ‘implication’ question and the ‘inconsistency’ question respectively. The implication question was whether, by implication from Ch III, State legislatures were not empowered to authorise a State tribunal that is not a court to exercise State judicial power in respect of a matter which is the subject matter of federal jurisdiction. The inconsistency question was whether ss 38 and 39 of the *Judiciary Act 1903* (Cth), which legislatively invests State courts with federal jurisdiction, was inconsistent with the investing of federal jurisdiction by State law.

Chief Justice Kiefel and Justices Bell and Keane in a joint judgment held that under Ch III adjudicative authority in respect of matters listed in ss 75 and 76 was to be exercised

⁴ (1996) 189 CLR 51.

only by ‘courts’ an appeal from which to the High Court was guaranteed by s 73 of the *Constitution*. In so doing, they accepted what had been said in *K-Generation Pty Ltd v Liquor Licensing Court*⁵ that consistently with Ch III State legislatures could confer judicial powers on a body that is not a ‘court of a State’ and non-judicial powers on a body that is ‘a court of a State’. They could not, consistently with Ch III confer on an executive agency of the State adjudicative authority in respect of any matter listed in ss 75 or 76 of the *Constitution*.

The importance in this context of the distinction between courts and administrative tribunals was highlighted in the second-last paragraph of the joint judgment where their Honours said:

The decision in the *Boilermakers’ Case* established that the adjudicative authority of the Commonwealth was exercisable only by the courts of the federal Judicature; that being so, it became of vital importance to observe the difference between such courts and administrative tribunals for the purposes of Ch III.⁶

The question whether Ch III withdrew from State parliaments the power to confer adjudicative authority in respect of the matters listed in ss 75 and 76 upon agencies of the State other than its courts, could not be answered by denying the well-established distinction between courts and administrative tribunals in relation to the federal judicature. Nor could it be answered by asserting that s 77(ii) of the *Constitution* was to be understood as if, in referring to the courts of a State, it was also referring to agencies of the executive government or other agencies not recognisable as courts, as that term is used in Ch III. Justice Gageler came to the same conclusion albeit for slightly different reasons as was ** in the joint judgment.⁷

The decision of the majority in *Burns v Corbett* illustrates the importance in the Australian setting of the characterisation of tribunals set up by Commonwealth law, as courts or executive agencies. Their characterisation at State level has constitutional significance in three ways:

⁵ (2009) 237 CLR 501.

⁶ Ibid [63].

⁷ Ibid [119].

1. By reason of *Burns v Corbett* – where a State tribunal which is not a court is exercising State judicial power, that power does not extend to matters which are the subject of federal jurisdiction.
2. If a State tribunal is exercising administrative decision making functions with respect to an issue between, for example, the residents of different States, the same limitation would not apply.
3. If the State tribunal is a court of the State, then it attracts the limitations on the functions that can be conferred upon it and upon its members by reason of decisions following *Kable* such as *International Finance Trust*,⁸ *Totani*⁹ and *Wainohu*.¹⁰

The societal importance of the distinction

In other countries, the distinction between courts and tribunals may not be so clear cut or significant – however the distinction drawn under our *Constitution* may not make a great deal of difference when it comes to considering access to justice and the rule of law. It can reasonably be said that access to a tribunal which can review adverse decisions about entitlements, is access to justice irrespective of whether the tribunal is administrative or judicial in character and whether review is on the merits or confined to jurisdictional error.

In *R (UNISON) v Lord Chancellor (Equality and Human Rights Commission and Another Intervening)*¹¹, the United Kingdom Supreme Court considered the lawfulness of an order that provided that claims in Employment Tribunals and appeals to the Employment Appeal Tribunal in the United Kingdom could only be commenced and continued on payment of fees subject to a discretionary remission provision. The Employment Appeal Tribunal is given statutory status as a superior court of record. The objectives of the fees were said to be to transfer the cost burden from taxpayers to users of the tribunals to deter unmeritorious claims and to encourage earlier settlement. A union sought judicial review of the decision to introduce fees. The union was unsuccessful at first instance and in the Court of Appeal but did succeed in the Supreme Court. The Supreme Court held that the right of access to justice was inherent in the rule of law and ensured that rights created by parliament and interpreted by courts and tribunals were applied and enforced. The right was to be

⁸ *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319.

⁹ *South Australia v Totani* (2010) 242 CLR 1.

¹⁰ *Wainohu v New South Wales* (2011) 243 CLR 181.

¹¹ [2017] UKSC 51; (2017) WLR 409.

understood in a broad social context as establishing principles of general importance and resolving questions of genuine uncertainty in interpreting legislation. The value to society of such access extended to the knowledge that rights would be enforced and that remedies existed where obligations were not met. In particular, the possibility of claims being brought by employees whose rights were infringed had to exist if employment relationships were to be based on respect for such rights. The Court held that the fees order was unlawful under both domestic and European Union law because it prevented access to justice.

Lord Reed, who delivered the principal judgment with which five of the other Justices agreed, described the employment tribunals as:

intended to provide a forum for the enforcement of employment rights by employees and workers, including the low paid, those who have recently lost their jobs, and those who are vulnerable to long term unemployment. They are designed to deal with issues which are often of modest financial value, or of no financial value at all, but are nonetheless of social importance. Their procedural rules, which include short limitation periods and generous rights of audience, reflect that intention.¹²

Unlike claims in the ordinary courts, claims in employment tribunals had previously been able to be presented without payment of any fee. The absence of fees was said to have rendered employment tribunals successful. In discussing the concepts of access to justice and the rule of law in his judgment, Lord Reed did not draw a sharp distinction between courts and tribunals. He began his discussion by observing that ‘[t]he constitutional right of access to the courts is inherent in the rule of law.’¹³ In the reasons which followed there was reference to ‘courts and tribunals’ and courts almost interchangeably. Statutory provisions themselves may assist that elision. As I noted earlier, the Employment Appeal Tribunal is described as a superior court of record.

Importantly, adjudicative bodies determining rights and liabilities, whether courts or administrative tribunals are not mere providers of publicly funded dispute resolution services. They exercise constitutional functions, albeit it may be in different ways. When NCAT was launched on 29 January 2014, its Founding President the Hon Justice Robertson Wright, made a point similar to that made by Lord Reed in *UNISON* in rejecting attempts to

¹² Ibid [8].
¹³ Ibid [66].

assimilate NCAT to the paradigm of a business supplying a product, namely tribunal services. The parties to proceedings before NCAT could not be thought of as consumers of tribunal services who have the right to accept or reject those services. He went on to say:

Parties before NCAT are participating in the processes of government. The parties are bound by the decisions of NCAT. In these circumstances it is natural and fitting that NCAT bears corresponding responsibilities as an instrument of government. The Tribunal has the primary responsibility of ensuring that its decisions are just, in the sense of being in accordance with law, and also prompt, accessible and affordable.¹⁴

He added that to justify the confidence of citizens in the instruments of government, NCAT should be appropriately open and accountable in its operations. Those things could have been said of NCAT whether it was a court or an administrative body. Assuming, as was common ground in *Burns v Corbett* that NCAT is not a court of the State of New South Wales, the question arises whether that makes any difference to the role it or any other tribunal plays in providing access to justice and maintaining the rule of law.

Tribunals and independence

Tribunals may not be courts and therefore not covered by the constitutional guarantees applicable to federal courts and, by implication, to State and Territory courts. By operation of those implications, the Supreme Courts of the States cannot be abolished and their supervisory jurisdiction in relation to decisions of officers of the State cannot be removed. Neither the courts of the States or the Territories nor those of the Commonwealth are subject to executive direction and neither they nor their judges can have functions conferred on them which are incompatible with their institutional integrity as courts.

Administrative tribunals exercising administrative functions have no such protections – although there may be a question whether they can be given State judicial power subject to executive branch controls. What protection is there then for the institutional and decisional independence of such bodies? It may be a protection written into a statute. More likely it will be a protection derived from the political costs of any attempted interference with a tribunal's decision-making process.

¹⁴ The Hon Justice Robertson Wright, Speech delivered at the Launch of the Civil and Administrative Tribunal of New South Wales, 29 January 2014 (footnote omitted).

It has been suggested that executive tribunals may constitute a ‘fourth branch’ of government. That suggestion, however, would need to find some constitutional footing to be plausible and none is immediately apparent.

The greatest protection for non-judicial tribunals must be public confidence in their independence, impartiality, fairness, efficiency and competence – the essential elements of administrative justice. That public confidence is dependent upon another factor and that is their accessibility – that is the availability of access to justice through the tribunal system.

Access to justice in this setting may have many elements. They include the following:

1. Awareness among relevant sections of the community of the existence and functions of tribunals and the kinds of problems which they are created to resolve.
2. Confidence among relevant members of the community that the tribunals are approachable and user-friendly.
3. Communication strategies adopted by tribunals designed to inform the community of the above.
4. Linkages between tribunals and community organisations which may serve as informal and non-threatening channels of information unrelated to potential matters which might arise before the tribunal.
5. The existence of accessible intermediaries who can provide basic advice and information to people who have a difficulty or issue which may be amenable to resolution by a tribunal.
6. All of the above in a way that is calibrated to respond to diversity in socio-economic status, educational attainment, occupation, cultural background and particular barriers faced by particular groups of persons in accessing tribunal processes.
7. Hearing and decision-making processes that are so far as possible, intelligible to non-lawyers.

The Law Council of Australia in its Justice Project, which is nearing completion, has focussed upon a number of groups in our society for whom access to justice is difficult. They include:

Aboriginal and Torres Strait Islander People

Children and Young People

People suffering under disabilities

Homeless people

LGBTI people

Older persons

People experiencing economic disadvantage

People experiencing family violence

Prisoners

Recent arrivals

Asylum seekers

Regional, remote and rural Australians

Trafficked and exploited people

Economic Disadvantaged

In addition, there is a considerable segment of our society, sometimes called ‘the missing middle’ for whom access to justice comes at a burdensome economic price.

It is to be hoped that the Law Council Report, which follows a massive literature review and community consultations, will provide a platform for informed and persuasive advocacy on the measures that must be taken to meet the challenges of access to justice which include, most importantly, administrative justice.

If that access is not available it has implications for the entrenchment of inequality and alienation and with that a risk to social cohesion and trust in democratic institutions.

It is an important feature of the Law Council approach that it cannot be reduced to a series of requisitions directed to the Executive Government and to the legislature. Access to

justice requires proactive responses from all involved in the justice system — not least and perhaps most importantly, the tribunals which can offer so much more in terms of the resolution of disputes and the delivery of administrative justice in their adjudicative roles as well as in quasi regulatory roles — than the courts.