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THE RISE AND RISE OF TRIBUNALS

*The emergence of the generalist administrative tribunal in Australia and New Zealand**

by

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Overview

Administrative tribunals, as arbiters or adjudicators of individual rights, tend to operate in some hazy air alongside the system of justice administered by traditional courts and the wider system of public administration that supports executive government. While not a recent phenomenon in either the Australian federation or in New Zealand, tribunals are currently undergoing a period of reassessment and renewal or reinvigoration in both Australia and New Zealand, and indeed in Britain, from whom we seem to have borrowed the tribunal idea in the first place.

***** Parts of this paper are based on a paper presented to the Australian Law Reform Agencies Conference 2004 (Wellington, New Zealand) Access to Justice: Rhetoric or Reality? See M L Barker and R L Simmonds "Delivery Administration Justice: The Role of Tribunals" available on the website of Law Reform Commission of Western Australia www.irc.justice.wa.gov.au

On the face of it, there appears to be an almost unparalleled recent interest in the work of tribunals in Australia and New Zealand, if one takes as a measure the recent establishment of the Council of Australasian Tribunals in 2002 and the level of interest in its work exhibited by tribunals in both countries, and then adds to that the legislative activity of Governments and reform agencies in our two countries over the past number of years. In this period the Victorian Civil and Administrative Tribunal (VCAT) has been established in Victoria; the Administrations Decisions Tribunal (ADT) has been set up in New South Wales; the Better Decisions Report of the Commonwealth's Administrative Review Council has led to a flurry of what one may assume is unfinished legislative business in the Australian Parliament; the New Zealand Law Commission in March 2004 published its Report 85, "Delivering Justice for All: A Vision for Courts and Tribunals" recommending a more unified tribunal system in that country; and the State Administrative Tribunal in Western Australia opened for business on 1 January this year.

One of the interesting public policy developments accompanying all this activity is an obvious trend favouring the establishment of the generalist or overarching tribunal that brings together in a single tribunal the functions of many smaller specialist administrative tribunals, whether they go by the names of Boards, Tribunals, Referees and the like, as well as the administrative review functions of a range of Courts and Ministers of Government.

The reason or reasons for this move to the generalist tribunal are, I would speculate, partly conceptual, the belief by all concerned that decision-making will be improved, and partly efficiency-related, both in the sense that decisions can be made more quickly and at a reduced cost if we take this way forward.

For my part, I think the first reason is well-based. I also expect more timely decision-making will follow from the adoption of this model of tribunal. However, I doubt that in most cases the generalist model will produce hard dollar savings for Governments, at least in the first instance, although I am confident it will quickly reduce delays and costs for the parties involved in Tribunal decision-making.

As the President of the latest generalist, overarching tribunal 'cab off the rank' in Australia – the Western Australia State Administrative Tribunal or SAT - I have to confess not only a professional interest in these recent administrative developments in law and policy, but also a deep fascination in what they mean or may mean. That, in the year 2002, prior to my appointment to my current judicial office, I chaired a Taskforce that recommended to the State Attorney General that Western Australia should establish such a generalist, overarching tribunal, I'm sure only goes to confirm the extent of my fascination with these questions!

My own sense is that this recent, renewed interest in the role and organisation of tribunals reflects a community acceptance of administrative tribunals, following a long probation period, and constitutes an acknowledgment of the legitimate and important part tribunals play, or potentially may play, in the good governance of society.

Citizens well understand that, in our system of government, public officials, whether Ministers of Government or office holders of one type or another, will often be entrusted by Parliament with the task of making primary decisions touching on their interests. However, as our system of government has evolved, citizens have also come to expect that they are entitled, as part of their birthright, to request an independent and impartial review of most, if not all such decisions that directly affect their personal, financial and proprietary interests, unless there are good reasons in public policy to the contrary.

Citizens also expect that, to the extent an error in the decision-making process in any case under review before a tribunal is revealed to involve a systemic error, the decision-maker will learn from its mistakes and correct its decision-making processes to avoid repeating its error in other cases.

To this extent, I believe citizens see tribunals as an important public policy tool designed not only to help secure their practical participation in public decision-making that affects them personally, but also to achieve some practical, independent overview of the broader system of public administration.

In modern Australia, the seeds of this expectation were planted with the development and growth of the Commonwealth Administrative Appeals Tribunal (AAT) from the mid-1970s. Since then it has been nurtured in the Australian States and Territories, leading ultimately to the establishment of the VCAT in Victoria, the ADT in New South Wales and, most recently, the SAT in Western Australia. The seeds are held in storage, but ready for sowing in fertile ground in the remaining Australian States and Territories and, I believe, in New Zealand!

The growth of Tribunals

Tribunals have long had a role in securing administrative justice for citizens and others affected by public decision-making. The overview role of tribunals in providing a check on systemic problems in public administration is perhaps a more recently articulated objective of the system of tribunals.

In the course of the 20th century in Britain and countries like Australia and New Zealand with British-derived systems of government and law, boards and tribunals flourished as part of the broader system of public administration.[1]

[1] See, for example, H W R Wade *Towards Administrative Justice*, represented (New York: William S Hein & Co, 1985) 14 - 16.

The reasons for the growth of administrative tribunals have been well documented by administrative lawyers. Often, the growth of tribunals has been attributed to the degree of regulation that arose under the classical 20th century "welfare state". If one uses the expression "welfare state" as a convenient way of referring to the increased degree of state regulation of economic and social activities in those countries during the course of the 20th century, then this seems self-evidently so.

While the tenets of the welfare state have been severely questioned and much of its apparatus dismantled in Australia and New Zealand over the past two decades, and much of the public sector has been “corporatised” or privatised in the process, the number and range of administrative tribunals remain largely undiminished. Indeed, in some respects they may have increased. Very few of the "old-style" administrative tribunals have fallen in the process and not a few new, independent offices have been created to regulate or re-regulate a wide range of market activity.[2]

Administrative tribunals flourished in the first part of the 20th century in Britain as an alternative means of according a public service or reviewing public decision-making. In Australia, a number of "Boards" were established on the British model to deliver public services or to regulate and supervise professions and occupations, but the growth of "tribunals" probably came later, once tribunals had been well established in Britain. By contrast, in Australia, at least until soon after the Second World War, Ministers of Government were often entrusted with the function of reviewing public decision-making within their ministerial portfolios.

[2] Industry regulators are a good example of new offices set up to regulate industry in Australia. Their decisions may attract both administrative and judicial review processes. See, for example: *Re Michael; Ex parte WMC Resources Ltd* [2003] WASCA 288, concerning judicial review of a decision of the Western Australian Independent Gas Pipelines Regulator under the *Gas Pipelines Access (Western Australia) Act 1988* (WA). The Act by s 50 establishes the Western Australian Gas Review Board as the body that may review decisions of the Regulator.

However, after the Second World War, administrative tribunals in Australia flourished in much the same way as they had in Britain prior to the war and continued to do so after the war. In some cases, these tribunals resembled courts. However, others were more policy-orientated and amenable to Ministerial direction. The distinction can perhaps be over-drawn.[3]

It is generally agreed that boards and tribunals flourished in an ad hoc fashion to deal with particular needs and demands. Once their advantages had been demonstrated in one area of public decision-making, their suitability in many others seems to have been assumed. Thus, the growth of boards and tribunals appears not to have occurred according to any great theory of public administration. Rather, what Professor de Smith said in the second edition of his famous treatise on administrative law in Britain in 1968, is probably true not only of the position in Britain at that time, but also in countries like Australia and New Zealand that followed the British tradition at that time and later:[4]

> "Tribunals have not been established in accordance with any preconceived grand design. They have been set up ad hoc to deal with particular classes of issues which it has been thought undesirable to confide either to the ordinary courts of law or to the organs of central or local government. A tribunal may be preferred to an ordinary court because its members will have (or will soon acquire) specialised knowledge of the subject-matter, because it will be more informal in its trappings and procedure, because it may be better at finding facts, applying flexible standards and exercising discretionary powers, and because it may be cheaper, more accessible and more expeditious than the High Court. Occasionally dissatisfaction with the over-technical and allegedly unsympathetic approach of the courts towards social welfare legislation has led to a transfer of their functions to special tribunals … though the superior courts retain an ultimate supervisory jurisdiction. There may be disadvantages in leaving powers of decision to ministers; the hearing officer does not normally decide, the decision is not always determined by the weight of the evidence adduced at the hearing, and justice is not manifestly seen to be done; in general, therefore, the government department is excluded from the process unless individual decisions have to be taken in the

[3] As to the distinction, see generally M Allars *Introduction to Australian Administrative Law* (New South Wales: Butterworths, 1990) 312 - 313.
[4] S A de Smith *Judicial Review of Administrative Action* 2nd ed (London: Stevens & Son Ltd, 1968) 14.

> light of considerations of national policy … or local and national policy … , or unless the maintenance of uniformity in decisions is thought to be of paramount importance, or unless departmental decision-making has given general satisfaction to those concerned."

Professor Wade, in the fourth edition of his well-known text "Administrative Law" published in 1977, highlighted as an important advantage of a special administrative tribunal its ability to deal with questions of commercial policy rather than of law, which were unsuitable for the ordinary courts. However, he provided additional reasons for the creation of tribunals in these terms:[5]

> "But the social legislation of the 20th century demanded tribunals for purely administrative reasons: they could offer speedier, cheaper and more accessible procedure, essential for the administration of welfare schemes involving large numbers of small claims. The process of the courts of law is elaborate, slow and costly. Its defects are those of its merits, for the object is to provide the highest standard of justice; generally speaking, the public wants the best possible article, and is prepared to pay for it. But in administrating social services the aim is different. The aim is not the best article at any price, but the best article that is consistent with efficient administration. Disputes must be disposed of quickly and cheaply, for the benefit of the public purse as well as for that of the claimant. The whole system is based on compromise, and it is from the dilemma of weighing quality against convenience that many of its problems arise."

Put more positively, in the hands of public policy makers, tribunals have proved to be a convenient public administration tool for dealing with areas of public decision-making where –

(1) the public has demanded ”administrative justice” in relation to a public decision affecting a person’s personal, financial or proprietary rights;

(2) public confidence in decision-making has required commercial, personal, or other matters of some technical complexity to be considered by an independent, and sometimes expert, panel of persons who are able to operate largely, if not entirely, free from the public policy direction of the Government of the day; and

(3) there has been a degree of public dissatisfaction with existing means of dispute resolution or decision-making for any one of a number of

[5] H W R Wade *Administrative Law* 4th ed (Oxford: Oxford University Press, 1977) 741.

reasons real or perceived, such as, they take too long, or are too costly for the ordinary participant, or are too formal or confusing for the ordinary participant, or produce unreliable decisions.

In short, an administrative tribunal, whether it was set up as a board to regulate a particular area of economic or social activity, or to supervise a particular profession or occupation, or as a tribunal to review the decisions of public officials, was seen to be more likely to provide administrative justice because it was freer of political direction than other public decision-makers, dedicated to a particular area of service delivery or regulation and so more likely to understand the intricacies of the area and to make better decisions, and likely to be quicker, cheaper and friendlier in its dealings with citizens and others affected by public decision-making.

The movement to reform review Tribunals

In Britain following the Second World War, intensive social legislation resulted in a greater emphasis on the operation of tribunals. However, complaints about the operation of tribunals led to the establishment of the Committee on Administrative Tribunals and Enquiries (the Franks Committee).

It is worth taking a moment to notice the circumstances in which the Franks Committee came to be established and what it finally recommended. The Committee was set up as a result of the *Crichel Down* case of 1954. As Professor Wade says,[6] that case really had nothing to do with tribunals and inquiries, but was a manifestation of public concern over the way in which government departments had handled a landowner's request (based on no legal right) to have land which had been compulsorily acquired returned after the war. This was a purely departmental matter. Today it would be the sort of maladministration that would be referred to an ombudsman, but at that time, that means of complaint and remedy was not available. The public outcry resulted in the establishment of the Committee.

[6] Ibid, 755.

The Franks Committee reported in 1957.[7] It acknowledged that tribunals should properly be regarded as part of the machinery of administration. However, it rejected a view that government must retain a close and continuing responsibility for tribunals. The Committee stated:[8]

> "We consider that tribunals should properly be regarded as machinery provided by Parliament for adjudication rather than as part of the machinery of administration. The essential point is that in all these cases Parliament has deliberately provided for a decision outside and independent of the Department concerned … and the intention of Parliament to provide for the independence of tribunals is clear and unmistakable."

The Franks Committee added that to make tribunals conform to the standard that Parliament had in mind, three fundamental objectives must be met: openness, fairness and impartiality:[9]

> "In the field of tribunals openness appears to us to require the publicity of proceedings and knowledge of the essential reasoning underlying the decisions; fairness to require the adoption of a clear procedure which enables parties to know their rights, to present their case fully and to know the case which they have to meet; and impartiality to require the freedom of tribunals from the influence, real or apparent, of Departments concerned with the subject-matter of their decisions."

The Franks Committee proposed that there should be a permanent Council on Tribunals in order to provide some standing machinery for the general supervision of tribunal organisation and procedure. It proposed it should consist of both legal and lay members, with lay members in the majority. Wade says that this particular recommendation manifested a spirit, which ran all through the report, "that tribunal reform is to be based on general public opinion, and was not a kind of lawyers' counter-revolution against modern methods of government and the welfare state".[10]

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[7] Cmnd. 218 (1957).
[8] Ibid, par 40.
[9] Ibid, par 42.
[10] H W R Wade *Administrative Law*, above n 5, 756.

The immediate result of the Franks Committee Report was the enactment of *Tribunals and Enquiries Act 1958* (Eng). The Act provided for the Council on Tribunals.[11] The Council was established as a purely advisory body with general oversight over tribunals and enquiries. The great majority of then existing tribunals were brought within the purview of the Council. As Wade says, it was intended to be a watchdog and independent of ministerial control, but not to exercise executive functions; "it was designed to bark but not to bite".[12]

Reforms introduced by the 1958 Act included a requirement that no procedural rules or regulations for the listed tribunals could be made without consultation with the Council on Tribunals.[13]

Further, a right of appeal to the High Court on a point of law was given in the case of a number of specified tribunals.[14] This overcame the earlier difficulty that a right of appeal on questions of law existed in the case of some, but not all tribunals. Judicial control through the prerogative remedies of *certiorari* and *mandamus* was safeguarded.

Significantly, the 1958 Act gave a legal right to reasons for decision from any of the listed tribunals, provided they were requested on or before the giving of notification of the decision.[15]

However, the Act fell short of the Committee's recommendations in certain respects, the most notable divergence being the failure to provide for appeals on questions of fact and merits. The Committee had recommended a right of

[11] *Tribunals and Enquiries Act 1958* (Eng) s 1.
[12] H W R Wade *Administrative Law*, above n 5, 758.
[13] *Tribunals and Enquiries Act 1958* (Eng) s 8.
[14] *Tribunals and Inquiries Act 1958* (Eng) s 9.
[15] *Tribunals and Inquiries Act 1958* (Eng) s 12.

appeal on "fact, law and merits",[16] but the Act provided only a right of appeal on a question of law.[17]

The "new administrative law" in Australia

In Australia, the passage of the 1958 Act in Britain seems to have had no immediate effect so far as law reform was concerned. This may have been because at that time the difficulties perceived in England with the rapid growth of administrative tribunals during the post-war period had not yet become apparent, or as apparent, in Australia. I sense much the same can be said about the position in New Zealand.

However, the seemingly random creation of administrative tribunals and the fact that an uncoordinated and largely unsupervised adjudicatory tribunal system and bureaucracy operated within the greater system of public administration did not go unremarked in Australia during this same period. For example, in Western Australia, in 1964, a barrister, John Wickham,[18] proposed to the Law Society of Western Australia that the existing array of administrative tribunals was unsatisfactory.[19] He examined a number of existing boards and tribunals and concluded that the "Rule of No-Law" prevailed in them.[20] The influence of the Franks Committee Report was evident in the expression of his view.[21]

However, in Australia the policy considerations that informed the report of the Franks Committee came to the fore most significantly in the report to the Commonwealth Parliament that came to be known as the Kerr Committee

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[16] H W R Wade *Administrative Law*, above n 5, 760.
[17] *Tribunals and Inquiries Act 1958* (Eng) s 9.
[18] Later the Hon Justice Wickham of the Supreme Court of Western Australia
[19] J Wickham 'Power Without Discipline. The Rule of "No Law" in Western Australia' (1965-1966) 7 *UWALR* 88.
[20] Ibid.
[21] Ibid, 104 - 105.

Report.[22] This report was followed by the Bland Committee's Interim Report[23] and Final Report,[24] as well as the Ellicott Committee Report.[25]

The Kerr, Bland and Ellicott proposals are fundamental to an understanding of the wide-ranging reforms in Australia at both the Commonwealth and the State levels since the late 1960s. The reforms were primarily designed to achieve administrative justice for citizens and others affected by public decision-making. Those proposals have been discussed elsewhere in some detail and their significance noted.[26]

The Kerr Committee was instructed to look at two issues: how review of administrative decisions should be undertaken by a Commonwealth of Australia superior (or Federal) court; and the desirability of introducing legislation in Australia along the lines of the *Tribunals and Enquiries Act 1958* (Eng).

The vision of the Kerr Committee Report, as developed by the reports of the Bland and Ellicott Committees, contained five elements of a proposed new system of administrative law:

(1) a new Commonwealth superior court or administrative court to exercise judicial review jurisdiction in respect of Commonwealth decision-making;

(2) an Administrative Review Tribunal to undertake merits review of specified types of administrative decisions, of which a Judge should be the President;

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[22] *Commonwealth Administrative Review Committee Report* Parliamentary Paper No 144 (1971).
[23] *Interim Report of the Committee on Administrative Decisions* Parliamentary Paper No 53 (1973).
[24] *Final Report of the Committee on Administrative Decisions* Parliamentary Paper No 316 (1973).
[25] *Prerogative Writ Procedures: Report of the Committee of Review* Parliamentary Paper No 56 (1973).
[26] R Creyke & J McMillan 'Administrative Law Assumptions … Then and Now' in R Creyke & J McMillan (eds) *The Kerr Vision of Australian Administrative Law – At the Twenty-Five Year Mark* (Canberra: Centre for International and Public Law, 1998) 1 – 34; I Thynne & J Goldring *Accountability and Control: Government Officials and the Exercise of Power* (Sydney: Law Book Co Ltd, 1987) 110 - 118.

(3) a General Counsel for Grievance with the dual function of investigating complaints from the public of maladministration in government agencies as well as an activist role in proceedings on behalf of complainants in courts and tribunals and intervening in review proceedings of other bodies;

(4) an Administrative Review Council to perform a research, advisory and coordination function; and

(5) an Administrative Procedure Act to define the role of the court, the tribunal and general counsel and the administrative review council, and define the procedures and powers of those bodies by prescribing minimum procedural standards for Commonwealth administrative tribunals.

The Kerr Committee Report also suggested that citizens should have greater access to documents affecting them, although it did not expressly recommend freedom of information legislation.[27] This legislation came later.[28]

Professors Creyke and McMillan have observed that the breadth of vision of the Kerr Committee was not matched by any similar breadth of philosophy about the role of administrative law or the meaning of accountability, and there was no separate discussion by the Committee of why a new system of administrative law was needed or would be better.[29] However, as they indicate, the Kerr Committee referred many times in its reports to the "vast expansion in the range of regulated activity" in which "administrators have great power to affect the rights and liberties of citizens" and the "enormous mass of discretionary powers".[30] Professors Creyke and McMillan also point out that a related justification for administrative law reform, and the second

[27] I Thynne & J Goldring, op cit, 115.
[28] *Freedom of Information Act 1982* (Cth).
[29] R Creyke & J McMillan 'Administrative Law Assumptions … Then and Now', in above n 26, 5.
[30] Ibid, 6.

theme of the Kerr Report, was that new legal machinery was needed to correct error and impropriety in the administrative process.[31]

Professors Creyke and McMillan suggest that justifications for the Kerr Committee reforms did not include the role that review of decisions could play in improving administrative decision-making.[32] There was some recognition by the Committee that administrative review could stimulate greater decision-making administrative efficiency. However, this was seen as an incidental benefit.[33] Thus, Creyke and McMillan conclude that, in the eyes of the Kerr Committee:[34]

> "The central purpose of administrative law was to ensure justice for the individual in the face of an unjust or questionable decision."

However, the reports of the Kerr Committee and other Committees also reflect a concern about the inadequacy of existing accountability mechanisms to ensure justice for the individual in the exercise of the new expanse of discretionary power in administrative authority. In that regard, the Kerr Committee's criticism was principally directed at the narrow reliance then placed on Parliamentary and judicial review, and at the uncoordinated and incomplete framework of administrative tribunals. Reference was made to the impact of cost, official secrecy and privative clauses, which were seen as blocking effective access to administrative review.

In any event, out of the Kerr Committee Report and these other proposals, the "new administrative law" of the Commonwealth of Australia was introduced at the federal level of government during the mid-1970s and included:

(1) the *Administrative Decisions (Judicial Review) Act 1977*, which conferred a judicial review jurisdiction on the new Federal Court of Australia;

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[31] Ibid 7.
[32] Ibid.
[33] Ibid.
[34] Ibid.

(2) the *Administrative Appeals Tribunal Act 1975*, which constituted a single tribunal with three divisions to provide review of administrative decisions on their merits in specified areas;

(3) the *Ombudsman Act 1976*, which set up the ombudsman in a now familiar role, though not the role fully envisaged for the General Counsel for Grievances; and

(4) an Administrative Review Council, which was established by the *Administrative Appeals Tribunal Act 1975*.

However, an Administrative Procedure Act was not developed and has not been developed since.

In Australia it is generally accepted that the new administrative law introduced at the Commonwealth level has been a success. Such tinkering as there has been with the system has been around the edges. The main area of policy concern, which resulted in significant changes to the new administrative law, was that of migration. Administrative and judicial review in this area is now subject to a special regime.[35]

However, the manner in which merits review should be provided has been the subject of continuing discussion and debate since the establishment of the Administrative Appeals Tribunal, as the papers of the annual forum of the Australian Institute of Administrative Law (AIAL) attests.[36] In 1995, the Administrative Review Council published its report, "Better Decisions: Review

[35] Administrative review of migration decisions is conducted by the Migration Review Tribunal under the *Migration Review Act 1958* (Cth). Only certain decisions can be subject to review: s 338 *Migration Review Act 1958* (Cth). For a discussion of judicial review in relation to migration decisions see, for example: The Hon Justice Ronald Sackville 'Judicial Review of Migration Decisions: Institution in Peril?' (2000) 23(3) *UNSWLJ* 190.

[36] The papers can be found on the AIAL homepage: http://law.anu.edu.au/aial/Publications/PubQuartForum.html.

of Commonwealth Merits Review Tribunal"[37] which suggested a number of ways in which the system of merits review might be changed.

The Better Decisions Report emphasised that the principal objective of a merits review system should be to ensure that administrative decisions of government are correct or, if there is discretion, preferable. In pursuit of that objective, the report stated the system should be fair, accessible, timely and informal, and committed to ensuring that the effect of tribunal decisions is fed back into the government's decision-making processes.

The Better Decisions Report noted that there had been a growth of separate tribunals at the Commonwealth level and recommended that they, with the AAT, should be united into a new single body to be called the Administrative Review Tribunal (ART).

The Better Decisions Report proposed structuring the new tribunal to operate, where appropriate, as a two-tiered tribunal, hearing appeals from Commonwealth decision-makers at first instance and, subject to leave being granted, on a further review by a review panel if a more important issue of public importance or complex question of law were involved.

The Better Decisions Report saw an ART as providing the following benefits:

(1) the proposed structure would more effectively ensure the independence both actual and perceived of the merits review system;

(2) a unified tribunal would be able to provide a better programme of public education about a citizen's right of review;

(3) since an application could only progress to a second-tier review by leave, there would be a greater focus on achieving the correct and preferable decision at the earliest stage of review;

[37] A summary of the recommendations in the Better Decisions Report can be found in P Johnston 'Recent Developments Concerning Tribunals in Australia' (1996) 24 *FLR* 323.

(4) the quality of decision-making at first-tier review should improve because of the wider range of expertise available; and

(5) the tribunal could adapt its procedures to suit particular applicants with an emphasis on simplicity and informality.

Following the publication of the Better Decisions Report, the Commonwealth government introduced the *Administrative Review Tribunal Bill 2000 (Cth)* to establish the new body recommended by the Administrative Review Council. However, a number of the features of the Bill gave rise to trenchant criticism of its provisions because they were considered to depart from the proposals in Better Decision. The criticisms of the Bill included:

(1) the capacity of Government ministers to exercise undue influence over appointment of members, thus compromising the independence of the tribunal;

(2) the compromising of the independence of the tribunal by making its various divisions financially dependent on the relevant decision-making Commonwealth departments;

(3) the downgrading of the status of the President from judicial status and abolishing the requirement that the President be legally qualified;

(4) the subjecting of members to strict performance requirements under peril of removal, again potentially affecting their independence and impartiality;

(5) unduly restricting recourse to second-tier review;

(6) unduly restricting access to legal representation; and

(7) limiting first-tier appeals in some instances to quick single member appeals on the papers to avoid expense.

The Administrative Review Tribunal Bill 2000 has not been enacted. Its future is yet finally to be determined.

What is not in contention is that the new administrative law introduced at the Commonwealth level of government in Australia in the 1970s has slowly, but surely, influenced the development of administrative law in the Australian States and Territories and has also attracted interest elsewhere, including across the Tasman in New Zealand.

So far as the Commonwealth's example in setting up a generalist tribunal is concerned, in 1984 Victoria established a generalist Administrative Appeals Tribunal that brought together a number of existing appeal tribunals.[38] Then, in 1998 in Victoria a more significant reform was achieved when a wide range of appeal tribunals and other boards and tribunals was brought together in the form of the Victorian Civil and Administrative Tribunal.[39] In 1997, New South Wales established an Administrative Decision Tribunal.[40]

While some have argued against the trend towards the generalist Tribunal,[41] the generalist model has begun to achieve wider acceptance.[42]

In March 2004 the New Zealand Law Commission in its Report 85, "Delivering Justice For All: A Vision for New Zealand Courts and Tribunals", surveyed the state of New Zealand's tribunal system noting its lack of coherency in terms redolent of those previously used in Australian reports, and suggesting a more unified approach was required. The Commissioners observed:

> "1. During the past fifty years a large number of Tribunals have been created, with a wide variety of powers. Many of these Tribunals were set up in response to specific needs, and lack any coherent framework or settled pattern. Reaction to a new statutory scheme, or the emergence of a particular kind of dispute, has often been the establishment of a new Tribunal.

[38] *Administrative Appeals Tribunal Act 1984* (Vic).
[39] *Victorian Civil and Administrative Tribunal Act 1998* (Vic) as to the development of VCAT, see Justice Stuart Morris "The Emergence of Administration Tribunals in Victoria" (2004) 41 AIAL Forum 16.
[40] *Administrative Decision Tribunal Act 1997* (NSW).
[41] See N O'Neil, Presentation to 4th AIJA Tribunals Conference, Sydney, June 2001.
[42] See Justice Murray Kellam "Civil and Administrative Tribunals – Can Their Performance Be Improved?" (2001) 29 AIAL Forum 31; R Bacon "Tribunals in Australia – Recent Developments" (2000) 7(2) ***A J Admin L*** 69.

2. The present diversity of Tribunals is much greater than it needs to be. The piecemeal way in which Tribunals have developed has led to an unnecessary 'jungle' of different jurisdictions, often with no clear entry point for the ordinary citizen, and wide variations in process for no principled reason.

3. While some Tribunals are well known, sit regularly and have experienced membership, others are little known, meeting infrequently and have occasional members who are not always well supported and have little opportunity to gain experience in their Tribunal role. This can raise concerns about standing, authority and confidence.

4. A number of Tribunals are housed and resourced by departments who are directly affected by their decisions. While historically this may be understandable, it throws their independence and neutrality into question. Tribunals, like courts, must both be independent, and be seen to be independent. The perception is as important as the reality."

In November 2004, Western Australia provided the most recent example of an Australasian public policy response to the inadequacies of our historic tribunal arrangements and the influence of the new administrative law in relation to the role of tribunals, with the enactment of the *State Administrative Tribunal Act 2004 (WA)* and related legislation.[43]

Options for change

No doubt, there are various ways one can deal with an existing system of tribunals that lacks cohesion. One means would be to require tribunals to follow common or basic administrative procedures designed to secure procedural fairness of an unvarying quality across the existing system of tribunals. The *United States Administrative Procedures Act* follows this approach, as did the 1958 Act in England with the establishment of the Council on Tribunals.

Another means would be to physically co-locate existing tribunals and to create a common registry and support staff. It would even be possible to go

[43] *State Administrative Tribunal Act 2004* (WA) and *State Administrative Tribunal (Conferral of Jurisdiction) Amendment and Repeal Act 2004* (WA).

so far as to appoint a common membership or common leadership of the tribunals.

A third means would be to bring together existing tribunals in a single organisation. The effective amalgamation of many tribunals in this way has occurred with the establishment of VCAT and now the SAT.

The question most often asked, or the potential obstacle most often suggested in relation to the realisation of this more comprehensive means of organisation, is whether the bringing together of tribunals with apparently disparate decision-making interests will achieve the broadly stated objects of the exercise and meet the public expectation of the system of tribunals. For example, it is often asked,[44] will not the new single tribunal simply be too big and too bureaucratic, and impose practices, and develop cultures, that are antithetical to good governance in many areas of decision-making brought into the new tribunal? Perhaps it was by reason of these concerns that a partial amalgamation approach has been adopted in some instances, for example with the creation of the Queensland Commercial and Consumer Tribunal on 1 July 2003, the New South Wales ADT in 1997 and the New South Wales Consumer, Trader and Tenancy Tribunal in February 2002.

In any event, these questions can now be addressed directly with the benefit not only of the many years of experience of the Commonwealth AAT, but also the more recent State-based experience of the VCAT, as supplemented by the very recent experience of the SAT. In my view, this experience tends to show that, rather than important tribunal features pertaining to tribunal culture, professionalism and skilled decision-making sinking in the bigger tribunal pool, they can, and will, swim strongly in it, provided certain conditions pertaining to tribunal management, resourcing and practice exist and continue to be encouraged.

[44] N O'Neil, above n 41.

It is, I think, fair to say that, both in the past and presently, some tribunals with discrete decision-making areas work well, and others work less well. The challenge is to make them all achieve best practice and to meet the expectations citizens have of the system of tribunals. The recent Australian experience with the generalist, overarching tribunal suggests, I think, that the community's expectations of tribunals are more likely to be met through this new type of tribunal than through maintenance of the older system of tribunals that currently exists in many parts of Australia and in New Zealand.

The Law Commissioners in New Zealand in their report "Delivering Justice of All", having reviewed tribunal developments in Australia and New Zealand, concluded that the benefits of "clustering tribunals" are no longer seriously debated. The Commissioners considered[45] that the approach should be to create fewer and stronger tribunals by amalgamating all groups and existing tribunals according to their functions. Indeed the Commissioners were attracted to the VCAT model, which they considered "both desirable and achievable in New Zealand"[46]. The Commissioners considered that earlier risks suggested in unifying tribunals, namely, achieving formal but no real unity, or forcing tribunals into one "inhospitable mould",[47] no longer seemed so acute. The Commissioners noted that the merging of tribunals is a large task, but in New Zealand's case it has the advantage of a number of models readily available, in particular the existing legislation setting up the VCAT and the (then proposed) Western Australian SAT.

The Commissioners went further to suggest that the nucleus of the unified framework in New Zealand should be those tribunals that resolve issues between citizens and the state.[48] Some, like the Taxation Review Authority, considered were very like courts, conducting hearings in which the contending

[45] Law Commission, Report 85 "Delivery Justice for All: A vision for New Zealand Courts and Tribunals", March 2004, 288.
[46] Ibid.
[47] Ibid.
[48] Ibid, 289.

parties appear, call and challenge evidence and make submissions. Others, like the Refugee Status Appeal Authority, they considered to be less formal, as they decide matters by enquiry. But all find facts, resolve issues of law, and make reasoned, binding decisions.

The Commissioners further noted[49] that other tribunals have a mix of functions, duties and powers, some adjudicative, some administrative, including those tribunals that are occupational and professional licensing, supervisory and disciplining authorities. The Commissioners considered that such tribunals should become part of the unified tribunal framework and retain their present mix of functions.

The Commission indeed surveyed the extremely wide variety of administrative tribunals in New Zealand. It must be noted, from an Australian perspective, that because New Zealand does not have a federal system of government with functions divided between federal and state governments, the range of tribunals in New Zealand includes all those typically found at both the Commonwealth and State levels of government in Australia.

One feature of a number of the New Zealand tribunals surveyed by the Commission in its report is the high policy function, which would not, on the face of it, make those tribunals amendable to inclusion in a unified structure. Others have very specific functions which would also be best left to operate on a stand-alone basis, as they have been in both Victoria and Western Australia. New Zealand also has an Environment Court, which affects the question of whether particular resource-related tribunals and decision-makers should be included in that Court or in a unified tribunal structure.

[49] Ibid, 290.

In the event, the New Zealand Law Commission recommended[50] that the following bodies should be excluded from a unified tribunal structure: the Waitangi Tribunal, the Securities Commission, the Commerce Commission, the Takeovers Panel, the Abortion Supervisor Committee, the Privacy Commission, the Employment Relations Authority, the Mental Health Review Tribunal, the New Zealand Parol Board, the Disputes Tribunal, and the Tenancy Tribunal.

The benefits foreseen by the New Zealand Law Commission may be thought to have been realised in the VCAT and SAT tribunal models. It may be useful then to have some regard to the context in which the SAT was eventually established in Western Australia and how the tribunal is now operating.

The administrative review reform process in Western Australian

The establishment of the State Administrative Tribunal in Western Australia may be traced directly to the Franks Committee Report and the expanded vision of those recommendations conveyed by the Kerr Report in Australia. However, what has been done in Western Australia goes further than the proposals for harmonisation between tribunals envisaged by the Franks Committee and the creation of a wider range of administrative review possibilities and accountability mechanisms envisaged by the Kerr Report.

In Western Australia, the State Administrative Tribunal is intended to have a jurisdiction that will result in it exercising an original decision-making function in a number of specialist decision-making areas and a review function in respect of a considerable range of public decisions within the State, as well as a disciplinary hearing function in place of a large number of existing vocational regulatory bodies.

[50] Ibid, 293.

The background to the establishment of the State Administrative Tribunal in Western Australia is not entirely dissimilar from the background to the Commonwealth's new administrative law. It has something approaching a 40-year history. This history may be instructive for other jurisdictions, as I sense the forces of reform and inertia are a little the same everywhere!

In the mid-1960s the Western Australian Law Society was urged to support the establishment of a general administrative tribunal.[51] Then, in the late 1970s, the Law Reform Commission of Western Australia (WALRC) received a reference from the Attorney-General to report on the review of administrative decisions. In 1982, the Commission recommended that an administrative appeals facility should be developed within the State's existing court system.[52] In all of this the influence of the Commonwealth's new administrative law was plainly evident.

In terms redolent of the observations of the Franks Committee and the Kerr Committee, the WALRC concluded that arrangements concerning administrative appeals in Western Australia at that time were the result of *ad hoc* legislation over a long period of time without an overall plan. There were then 257 administrative decisions subject to a statutory right of appeal to more than 43 different appellate bodies.

The 1982 WALRC Report identified three main defects in the system as it then operated in Western Australia:

(1) there was no consistent provision for the ultimate determination of questions of law by the Supreme Court;[53]

[51] See J Wickham 'Power Without Discipline. The Rule of "No Law" in Western Australia', above n 19, 104-105.
[52] Western Australian Law Reform Commission *Report on Review of Administrative Decisions: Appeals* Project No 26(I) (1982).
[53] Ibid, par 2.21.

(2) the arrangements incorporated inconsistencies and an unjustifiable variation in the rights of appeal from the decisions of bodies with similar responsibilities;[54] and

(3) there was no consistent or simple code of procedure for conducting appeals.[55]

The WALRC recognised the need for an administrative review system that:[56]

(1) exhibits characteristics of flexibility, expertise and a consistent approach to a wide range of appeals;

(2) employs lay members with special knowledge and skills to sit on the appeal panel;

(3) functions within a structure that precludes the growth of conflicting systems of jurisprudence; and

(4) impresses itself upon the community as a body that is impartial and independent of executive government.

The 1982 WALRC Report then lay on the shelf gathering dust for many years. However, in 1992 some of the dust was blown off the Report when the Royal Commission into Commercial Activities of Government and other matters recommended the establishment of a single, overarching administrative tribunal.[57]

That Royal Commission inquired into what was colloquially known as "WA Inc", that is to say, an apparent close relationship between government and the private sector, particularly during the 1980s. The Royal Commission made a number of recommendations designed to secure or improve "open government", as well as "accountability" and "integrity" in government. In this

[54] Ibid, par 2.20.
[55] Ibid, par 2.22.
[56] Ibid, pars 4.11 - 4.21.
[57] *Report of the Royal Commission into Commercial Activities of Government and other Matters* (1992), Part 2.

context, the Royal Commission expressed concern about the lack of an administrative appeals tribunal in Western Australia.

In advocating the setting up of such a tribunal, the Royal Commission suggested that the tribunal should be located outside the court system.[58] The Commissioners considered that the policy reasons that underlie the doctrine of "separation of powers" dictated this approach. A tribunal, they thought, would be better able to deal with policy-orientated review and decision-making than a court. Moreover, the authority of the court would not be compromised by its intrusion into matters of policy and administration.

The recommendation of the 1992 Royal Commission was reiterated in the Commission on Government Report No 4, July 1996[59] and the 1996 Report of Tribunals Review to the Attorney-General by Commissioner J Gotjamanos and Mr G Merton.[60]

The Commission on Government was set up as a result of the recommendation of the Royal Commission that such a body should provide further advice on measures designed to achieve open government, accountability and integrity in government in Western Australia. The Commission on Government confirmed that:[61]

> "A system of administrative review is required because there is a considerable volume of legislation affecting the community which vests discretionary powers in public officials. Many powers and duties exercisable by public officials under legislation are beyond challenge under existing laws, and there is no readily available system for citizens to obtain redress. Where appeal procedures do exist, a proliferation of tribunals present many and varied rights of appeal, inconsistency in rights of appeal from decisions of similar bodies and no consistency in procedural arrangements."

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[58] Ibid, par 3.5.
[59] *Commission on Government Report* No 4 (1996).
[60] *Report of Tribunals Review to the Attorney-General by Commissioner Gotjamanos and Mr G Merton* (1996) 41.
[61] Commission on Government Report, above n 57, par 6.1.4

The Commission on Government recommended the creation of a single tribunal to be known as the Administrative Review Tribunal, again standing apart from the court system.[62] However, unlike earlier reports which had envisaged that a generalist tribunal would assume the review functions of existing appellate tribunals and some courts and other public officials, the Commission on Government proposed that any person affected by an administrative decision should have the general right to seek review of that decision.[63]

However, the 1996 Review Report to the Attorney-General, while noting the *ad hoc* manner of creation of tribunals over many decades and the need to establish a generalist review body, did not adopt the Commission on Government's proposal that a general right to seek review in respect of all administrative decisions should be created.[64] Rather, it recommended the rationalisation of the present situation by the creation of a State Administrative Appeals Tribunal, which would assume the administrative appeal functions of various tribunals and some boards, courts and public officials.[65] It proposed that the presiding member have the status of a District Court Judge.[66]

The 1996 Review Report did not contemplate that the new tribunal should assume the functions of an original decision-making type or the disciplinary functions then exercised by a large number of vocational regulatory bodies. Indeed, the Report recommended that the jurisdiction of such bodies as the Equal Opportunity Tribunal, the Information Commissioner, the Guardianship and Administration Board and the Legal Practitioners Disciplinary Tribunal, as well as those bodies operating in the areas of workers' compensation and industrial relations, should remain separate and independent of the proposed tribunal.

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[62] Ibid, pars 7.1.4, 7.4.4.
[63] Ibid.
[64] above n 57, 41.
[65] Ibid, 41-43.
[66] Ibid.

These reports were then followed by a further report of the WALRC in 1999 on the criminal and civil justice system in Western Australia.[67] This was a wide-ranging review, as the title suggests. It dealt with, amongst other things, the administrative system of boards and tribunals, noting that they had proliferated in recent years, but with a lack of uniformity and a confusing variety of both internal and operational procedures and appeal rights to courts.[68]

After considering the earlier reports, the WALRC adopted the 1996 Review Report recommendations that an administrative review body should be established amalgamating the review and appellate functions of existing tribunals and boards and a number of courts, apart from those dealing with industrial relations and workers compensation.[69] However, the Commission noted that developments in other States since the 1996 Review Report, particularly in Victoria and New South Wales, had seen the significant extension of the jurisdiction of administrative decision-making bodies. In light of those developments, the Commission recommended the establishment of a Western Australian Civil and Administrative Tribunal which would amalgamate the adjudicative and review functions of existing tribunals, boards and some courts and other entities, except in the areas of industrial relations and workers' compensation.[70]

Thus, the 1999 WALRC Report proposed that the proposed tribunal jurisdiction should extend beyond administrative review or appeals to include other adjudicative functions currently determined by tribunals, boards, other entities and lower civil courts, including the Small Claims Tribunal, the Commercial Tribunal, the residential tenancies jurisdiction of the Local Court

[67] Law Reform Commission of Western Australia *Review of the Criminal and Civil Justice System - Final Report* Project 92 (Perth, 1999).
[68] Ibid, par 33.9.
[69] Ibid, par 33.9.
[70] Ibid, Recommendation 371.

(now Magistrates Court) and the Small Disputes Division of the Local Court (now Magistrates Court).[71]

Unlike the 1996 Review Report, the WALRC expressly proposed that the jurisdiction of this tribunal should include the adjudicative functions of the Equal Opportunity Tribunal, Information Commissioner (freedom of information), Guardianship and Administration Board and Legal Practitioners Disciplinary Tribunal, as well as the assessor of criminal injuries compensation.[72]

Soon after the 1999 WALRC Report was published, a number of inquiries were held into certain State "fair trading" boards and committees. The first of these - the report of the Gunning Inquiry - was initiated as a result of the perceived regulatory failure of the Finance Brokers Supervisory Board.[73]

The Gunning Report noted that these boards were invested with a licensing and disciplinary function in respect of the industries that they regulated and with the more general duty to supervise their respective industries. Appeals against their decisions lay either to the Local Court or to the District Court.

The Gunning Report concluded that each of the boards had generally been effective and efficient in the execution of their licensing functions. However, the report identified a number of systemic problems that detracted from the effectiveness and efficiency of all the boards in the execution of their supervisory roles. These problems involved resourcing issues, natural justice concerns arising when the boards exercised both compliance and disciplinary functions, the part-time nature of the membership of the boards, perceptions of bias resulting from the involvement of industry participants in the

[71] Ibid, Recommendation 372.
[72] Ibid, Recommendation 373.
[73] *Report of the Gunning Committee of Inquiry into Fair Trading Boards and Committees* (2000) 5.

decision-making process and confusion as to roles, responsibilities and accountability.[74]

As a result, the Gunning Report recommended that the disciplinary aspect of occupational regulation within the fair trading portfolio should be separated from the licensing and compliance functions. The Gunning Report also recommended that a new and adequately resourced full-time disciplinary tribunal should be established to exercise the disciplinary functions exercised by Consumer Affairs boards and Committees.[75] The report considered this would ensure that the same procedural rules, rights of appeal and enforcement powers applied to all the occupations and would avoid the problem of multiplicity of proceedings.

The Temby Royal Commission into the operation of a number of these boards and Committees, particularly the Finance Brokers Supervisory Board, raised these same issues and concerns.[76]

If one failure was consistently noted in critiques of that system, it was its lack of coherency and uniformity, and in some cases the split personality of the body, as in the case of the registration boards. Underlying them was the belief that the establishment of a generalist tribunal would be more likely than the existing system of tribunals, to ensure the provision of administrative justice to citizens, over the longer haul, and to contribute meaningfully to the refinement of the broader system of public administration responsible for primary decision-making.

[74] Ibid, 412 - 417.
[75] Ibid, Recommendation 35.
[76] *Report of the Temby Royal Commission into the Finance Broking Industry* (2002).

The Taskforce Report on the establishment of a State Administrative Tribunal

In Western Australia in February 2001, the Gallop (Labor) government assumed office following a general election. In March 2001, the State Attorney-General, Mr Jim McGinty MLA, established a Taskforce to act on the recommendation in the 1999 WALRC Report and to develop a model of a civil and administrative tribunal for consideration by government.

The terms of reference of the Taskforce required the Taskforce to have regard to the recommendations of the various reports referred to above, as well as to the Victorian, New South Wales, Commonwealth and other relevant administrative review tribunal models. The report of the Taskforce was required to address:

(1) the scope or jurisdiction of the tribunal;

(2) the structure of the tribunal;

(3) the relationships between the tribunal, the courts and all boards and tribunals across government which are to remain separate from the tribunal; and

(4) any other matter the Taskforce considered relevant.

The Taskforce submitted its report on the establishment of a State Administrative Tribunal to the Attorney-General on 10 May 2002.[77]

The Taskforce was headed by a Queen's Counsel[78] and included a number of persons drawn from the State Solicitor's Office, academia, persons with experience of the operation of administrative tribunals, and the State Department of Justice.

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[77] *Western Australian Civil and Administrative Review Tribunal Taskforce Report on the Establishment of the State Administrative Tribunal* (2002). Available online at: http://www.health.wa.gov.au/mhareview/resources/documents/Taskforce_Report_on_the_Establishment_of_a_State_Admin_Tribunal.pdf.

[78] The author was Chair of the Taskforce.

The Taskforce identified the array of civil and administrative review functions performed by State administrative tribunals, courts, Ministers and other public officials. Virtually every existing right to seek review of an administrative decision in the State was identified.

First, the bodies to which an "appeal" could be lodged were identified. They included:

(1) appeals tribunals;

(2) the Supreme Court of Western Australia, District Court, Local Court and Courts of Petty Sessions;

(3) Ministers; and

(4) other public officials.

The Taskforce then identified the existing tribunals and boards that made primary administrative decisions of a personal, commercial or equal opportunity nature, save for those in the areas of workers' compensation, industrial relations and liquor licensing.

Finally, the Taskforce identified some 22 professional and occupational boards that performed a disciplinary or supervisory function.

The Taskforce then considered the recommendations of previous reports on administrative review reform in Western Australia and elsewhere in Australia, including the 1995 Better Decisions Report of the Commonwealth Administrative Review Council, as well as the terms of the *Administrative Decisions Tribunal Bill 2000* (Cth), even though the latter had not at that time, and has not since, been proceeded with.

The Taskforce also noted proposals in the United Kingdom to institute an administrative review tribunal, as proposed in the Leggatt Report in March 2001.[79]

The Taskforce considered that experience and practice at the Commonwealth level, as well as recent initiatives in Victoria and New South Wales strongly supported the streamlining of the civil and administrative review processes through the establishment of a single overarching tribunal.

The Taskforce considered the Victorian *Civil and Administrative Tribunals Act 1998* (Vic) provided an appropriate model for the development of a civil and administrative review tribunal for consideration by the Government of Western Australia, although the Taskforce found that the descriptor "civil and administrative review tribunal" was not particularly helpful and indeed likely to be confusing in the public arena, even if lawyers were able to appreciate the finer distinctions between "civil" and "administrative review" functions.

The Taskforce recommended that a new "State Administrative Tribunal" should be established to:

(1) assume the administrative review functions of the various appeals, tribunals and many of the court, ministerial and public officials appeals; and

(2) exercise the original jurisdiction of many of the existing original decision-making boards and tribunals as well as those of the professional and occupational boards in respect of disciplinary hearings.

[79] *Tribunals for Users: One System, One Service - Report of the Review of Tribunals by Sir Andrew Leggatt* (2001). Available online at: http://www.tribunals-review.org.uk/leggatthtm/leg-00.htm.

The Taskforce expressly recommended that the Guardianship and Administration Board and the Mental Health Review Board should be co-located with the new tribunal and have a common membership.

The Taskforce considered that reform in the manner proposed would address structural deficiencies in the existing *ad hoc* system, promote better decision-making and secure a number of significant benefits for citizens and public administration alike in the State. The Taskforce enumerated a number of benefits that it considered would flow from the establishment of the generalist tribunal it had in mind:

(1) citizens would gain access to a single one-stop tribunal in place of a variety of existing tribunals;

(2) as a result of access to a single tribunal, there would be an identifiable point of contact for all citizens in respect of most civil and administrative review decisions currently made by a plethora of boards, tribunals, courts, ministers and public officials;

(3) more information would be provided to citizens about the making of applications, about hearings and about the reasons for decisions;

(4) a more flexible and user-friendly system of decision-making would be developed;

(5) the SAT would have available to it a wide range of expert and experienced members (whether full-time, part-time or sessional) to serve on its various panels;

(6) the SAT would be able to keep the exercise of its operations under continuing review and adopt "best practice" in all of its functions;

(7) more effective and systematic recruitment and training of members of the tribunal would be a feature of the new system;

(8) the new tribunal would have the capacity to keep abreast of innovation and developments in comparable tribunals throughout Australia;

(9) new and improved information technology would be made available for the efficient handling without delay of applications to the tribunal;

(10) the existence of a single tribunal would ensure that original decision-making and administrative review decision-making is conducted on a more cost-effective basis than at present;

(11) Government and Parliament would be able to assign administrative review functions in respect of new and developing areas of government regulation directly to an existing and experienced tribunal rather than create a one-off *ad hoc* review body; and

(12) the tribunal would have the appropriate leadership, expertise, experience and independence from government to ensure the people of Western Australia could have the fullest confidence in the workings of the tribunal.

The Taskforce expressed the view that once a generalist tribunal was set up to deal with administrative decisions, the need to provide appeal or review rights in respect of various administrative decisions to courts would cease to be rational. This was because the court system was not the place for administrative decision-making to be reviewed on its merits. Courts were best equipped to deal with the declaration and enforcement of existing legal rights, not with formulation or application of government policy or the review of administrative decision-making on its merits.

Indeed, the Taskforce expressed the view that with the development of a generalist tribunal there could be very few compelling reasons why the existing array of administrative review appeals to courts, Ministers and public officials should not be assumed by the tribunal.

In relation to ministerial appeals, the Taskforce identified those which it considered should be converted into appeals to the tribunal. The Taskforce noted that many such appeals are often in the nature of internal reviews of

departmental decision-making and not truly independent and impartial appeals at all. It thought that many existing appeals, though not all, involved the assessment of factual or technical matters and matters otherwise suited to determination by a tribunal rather than through a departmental or political process.

Nonetheless, the Taskforce recognised that there was a range of government decision-making involving Ministerial appeals that required the exercise of political policy judgment by the Government of the day or that are otherwise unsuited to determination by a tribunal.

The Taskforce also recommended significant changes to the manner in which vocational disciplinary matters are dealt with in Western Australia.

The typical vocational board in Western Australia then followed what appeared to be a late 19th century British model of a vocational board. It both regulated and supervised persons in designated occupations.

For example, the Medical Board of Western Australia was established under the *Medical Act 1895* (WA), which Act has been amended infrequently in the 100 years and more since its enactment. Under the *Medical Act* the Medical Board was established. The Medical Board was responsible for the registration and general regulation of medical practitioners in Western Australia. It also had the power to set standards of professional practice. Additionally, it received and investigated complaints concerning practitioners' conduct. If it appeared to the Board that certain standards of conduct might have been breached, it could hold an inquiry. If, following inquiry, the Board found a practitioner guilty of breach of conduct, it could discipline the practitioner in one of a number of ways, including by cancelling the right of that practitioner to practise.

The Taskforce recommended that the nexus between the general regulatory functions of these boards and their disciplinary functions should be broken. This would mean the functions of the vocational boards would, generally speaking, be confined to licensing and general regulation, as well as receipt and investigation of complaints. If a board considered there were grounds to discipline a licensed person, it should, in effect, prosecute that complaint by way of application to the State Administrative Tribunal. The tribunal should hear and determine that application and, if the grounds of complaint were upheld, impose the appropriate penalty on the person affected.

The case for separating the supervisory or disciplinary function from the investigatory and complaint function was considered compelling. No longer would the vocational board that receives and investigates a complaint be the same as the board that hears and determines the complaint upon inquiry and imposes penalty.

Further, treating all boards in the same way would ensure a consistency of practices and procedures, and the application of comparable standards and penalties across vocational areas.

Moreover, and importantly, the break in the nexus would permit the vocational boards to better focus on their primary functions of regulation and complaint investigation.

The Taskforce also proposed that the functions of the Guardianship and Administration Board and the Mental Health Review Board be co-located with the new tribunal. This proposal was the cause of some controversy in those special decision-making areas. The question was whether the interests of vulnerable persons affected by the exercise of those functions would be best served by those administrative boards remaining separate from the proposed new tribunal or by their close alignment with the new tribunal.

On balance, the Taskforce expressed the belief that, in the medium and long term, the interests of vulnerable persons would best be served by the functions of those boards being exercised in close association with the tribunal. The Taskforce considered there were considerable advantages to be gained from an appropriate alignment of the two boards with the tribunal.[80] The Taskforce expressed the view that, to the extent that members of these boards had developed "therapeutic" skills important in those areas of jurisdiction, they would be of great benefit to the new tribunal.[81]

The Taskforce also considered that, by bringing together the two boards and aligning them with the new tribunal, neither board would operate in isolation, consistency of decision-making was more likely to be achieved and the flexible approach required in the exercise of the two jurisdictions would profit from the functions of both boards being operated alongside each other and alongside the new tribunal.[82]

The Taskforce also recommended that the new tribunal should take on some new and important areas of decision-making, including State revenue appeals. For example, it proposed that State revenue decisions made under the *Stamp Act 1921* (WA), *Payroll Tax Assessment Act* 1971 (WA) and *Debits Tax Assessment Act* 1990 (WA) should be reviewable by a judicial member of the tribunal.[83]

It also recommended that the tribunal should become a "compensation court" under the *Land Administration Act 1997* (WA), for the purpose of determining compensation claims following compulsory acquisition of land.[84]

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[80] *Western Australian Civil and Administrative Review Tribunal Taskforce Report on the Establishment of the State Administrative Tribunal*, above n 76, 80.
[81] Ibid, 81.
[82] Ibid, 84.
[83] Ibid, 95-96.
[84] Ibid, 87-88.

Implementation of the proposal concerning compensation claims would result in the new tribunal providing an "one-stop shop" for most land development and resource allocation appeals in Western Australia.

However, the Taskforce suggested[85] that the functions of the Assessor of Criminal Injuries Compensation, the Information Commissioner, the Small Claims Tribunal, and the Small Debts Division of the Local Court dealing with residential tenancies, should all remain separate.

The Taskforce recognised that small claims and residential tenancies matters might be characterised as amenable to a tribunal-like setting rather than a court-like setting. However, the Taskforce expressed the view that, unlike the other tribunals and tribunals whose functions were considered appropriate for inclusion in the tribunal, small debts, residential tenancies and small claims disputes, were better dealt with in a court-like setting - though a modified one - because they involved the enforcement of existing rights between private parties.

In Western Australia, small debts and residential tenancy disputes are currently dealt with in a division of the Magistrates Court (until recently called the Local Court) which has gained considerable experience in resolving them and which utilises informal means of dispute resolution. Moreover, they often arise in country and regional areas where Magistrates are already resident. In those circumstances, the Taskforce considered that, on balance, and unlike the position with the Victorian Civil and Administrative Tribunal, such matters should remain in the Magistrates Court system.

The Taskforce emphasised that the entitlement of persons to seek review of decisions should be based on the prior right of a person to obtain reasons for

[85] Ibid, 121-124.

the making of a decision by a public official that affects their interests. It recommended that a right to reasons should be included in the legislation setting up the tribunal.

So far as the structure of the new tribunal and the powers, practice and procedure of the new tribunal were concerned, the Taskforce had considerable regard to the model represented by the Victorian Civil and Administrative Review Tribunal (VCAT).

The Taskforce recommended that the new tribunal should have senior judicial leadership, with the President being a Supreme Court Judge and two Deputy Presidents being District Court Judges. The tribunal should otherwise be composed of senior members and members who are both full-time (or part-time) and sessional and having legal and other special qualifications or experience.

The membership of the tribunal would, therefore, be constituted of persons with judicial experience, general legal experience and special qualifications and experience relevant to the various areas of jurisdiction of the tribunal.

The Taskforce recommendation concerning judicial leadership was based on three main considerations:

(1) that the head of the tribunal should have the requisite status and respect to deal with Government, Parliament and other bodies on matters affecting the tribunal in a way that ensures the independence of the tribunal;[86]

(2) that it is of the utmost importance that persons of high legal calibre and with the skills appropriate to the functions of the tribunal, including

[86] Ibid, 132-133.

administrative skills, be attracted to the positions. Permanency of appointment is a critical issue in that regard; and[87]

(3) that the tribunal would have a significant jurisdiction in many important fields of administrative decision-making in the State and, at times, would be required to determine difficult questions of law and fact. The availability of judicial members of high judicial competence would go a considerable way to reducing the prospects of further appeals on issues of law.[88] Additionally, having a President who is a Justice of the Supreme Court would assist in maintaining respect and harmonious relations between the tribunal and the Supreme, District and Magistrates' courts.[89]

The experience in like tribunals throughout Australia suggests that judicial leadership helps to ensure public confidence in the integrity, independence and impartiality of such a tribunal. Judicial leadership demonstrably removes the potential for government influence over such a tribunal and ensures that the tribunal is possessed of the highest levels of administrative and legal expertise.

The question whether such a tribunal should be led by Judges and supported by lawyers is not new. The Franks Committee in its original report placed considerable emphasis on the involvement of lay members of the Council on Tribunals. On the other hand, the Kerr Committee had no hesitation in recommending that a Judge should head the new Commonwealth review tribunal.[90] More recently, the Better Decisions Report suggested that it is not necessary for members of the tribunal, other than the President, to have formal legal qualifications.[91]

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[87] Ibid, 133.
[88] Ibid, 133.
[89] Ibid.
[90] *Commonwealth Administrative Review Committee Report*, above n 22.
[91] See Administrative Review Council *Report to the Minister for Justice - Better Decisions: Review of Commonwealth Merits Review Tribunals* Report No 39 (1995) pars 3.36 - 3.38.

In a blistering attack on the Better Decisions proposal, the Hon Sir Anthony Mason AC KBE, Chief Justice of Australia between 1987-1995, stated:[92]

> "That proposal is nothing short of a passport to disaster. The existing 'relatively high success rate of appeals' from the AAT to the Federal Court [footnote omitted] to which the report refers with some misgivings might escalate dramatically.
>
> I do not see how the appellate work of the ART [Administrative Review Tribunal] can be undertaken by members who do not possess competent legal skills. Members who lack such skills will be at a disadvantage in dealing with members who possess such skills and in dealing with lawyers' arguments. The skills of a lawyer are required not only for the resolution of legal questions but also for analysis of the facts and in applying the law to the facts. To suggest that members can rely on legal advice from tribunal staff [footnote omitted] is to elevate the staff into a more influential position than is desirable. If this proposal is implemented, our system of merits review, at the highest level of review especially, would descend into a sub-standard system, manned by non-lawyers and lawyers, some of whom may be travelling steerage class.
>
> If the proposal was simply intended to enable some exceptional appointment of non-lawyers to be made or some non-lawyers to be appointed in particular areas where legal knowledge is unimportant, there might be more to be said for it. But the report does not say that. No doubt the proposal is partly motivated by a desire to avoid legalistic approaches in the hope that non-lawyers will produce worthwhile results. The work is complex and difficult. The tribunal member who lacks legal qualifications is unlikely to have the experience and the independence to overrule the administrator. It is to be hoped that this is not a reason for the proposal. … ART members must be capable of distinguishing error of law from merits review and, as we know only too well, judges have difficulty in unravelling review on the merits from judicial review. Unfortunately, a reduction in the quality and skills of members is likely to result in confusion and inefficiency."

In Sir Anthony's view, the proposal set out in the Better Decisions Report is explicable only by reference to a lack of enthusiasm for lawyers and participation by lawyers in the ART. Sir Anthony observed that:[93]

> "The remedy is to seek *better qualified* lawyers, not *unqualified lawyers*." [Emphasis in original]

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[92] The Hon Sir Anthony Mason AC KBE 'Reflections on the Development of Australia Administrative Law' in R Creyke & J McMillan (eds) *The Kerr Vision of Australian Administrative Law – At the Twenty-Five Year Mark* (Canberra: Centre for International and Public Law, 1998) 125 - 126.
[93] Ibid, 126.

So far as the practice and procedure of the new tribunal was concerned, the Taskforce recommended that the tribunal should:

(1) exist for the benefit of the people of the State and should be structured and operated so as to advance at every turn the interests of those who use it;

(2) give people the right to be informed of decisions behind administrative decisions that affect them;

(3) have the primary obligation to ensure consideration without delay of civil and administrative matters or review of administrative decisions so that the correct or preferable decision is made in every case; and

(4) have the primary objective to act fairly according to the substantial merits of the case in all proceedings.

So far as the practice and procedure of the proposed tribunal were concerned, the Taskforce recommended that the tribunal should adopt practices and procedures that were suited to the particular requirements of the tribunal. It stated that it would be appropriate for the tribunal to place a considerable emphasis on mediation and conciliation and other forms of alternative dispute resolution, as well as to progress applications speedily to formal resolution in the event that alternative dispute resolution should prove unsuccessful.

The Taskforce also emphasised that the proposed tribunal should, as far as possible, be a no-cost jurisdiction, save in some existing areas (for example, disciplinary proceedings) where a person may be properly required to meet the expenses of the applicant.

The Taskforce emphasised that, at all times, the focus of the tribunal should be on the fair but speedy resolution of applications.

The Taskforce recommended that, like similar tribunals, the new tribunal:

(1) should be bound by the rules of natural justice and procedural fairness;

(2) should be unfettered by the rules of evidence or any practices or procedure applicable to courts of record, only adopting such rules, practices or procedures in individual cases when the tribunal sees fit to do so;

(3) inform itself on any matter as it sees fit;

(4) conduct and determine each proceeding with as little formality and technicality and with such promptness and alacrity as the requirements of the legislation, or any other relevant legislation, and of proper consideration of the matters before it would permit;

(5) be able to admit into evidence the contents of any document, despite non-compliance with any time limit or other requirement specified in the rules in relation to that document or service of it; and

(6) be able to regulate its own practice.

The Taskforce emphasised that the new tribunal should conduct its proceedings with as little formality as possible and that it should not be strictly bound by the rules of evidence. This did not mean, however, that the tribunal should consider itself free to dispense arbitrarily with legal forms and disregard normal evidentiary standards. Rather, the intention was that the tribunal should be free to vary and adjust its procedures according to the circumstances of the case.

For example, on the one hand, in a disciplinary proceeding, where the factual and legal issues may be complex and the potential outcome serious, and each party is legally represented, court-like processes may well be appropriate. In such circumstances, the rules of evidence developed in court decision-making contexts over many centuries and designed to prevent any information being received in a hearing save for the very “best evidence”, will usually provide the best way to determine central issues of a factual nature. On the other hand, where a matter is of a different nature, perhaps a

guardianship or administration application, where the parties are self-represented, the application of the rules of evidence would ordinarily be considered unnecessary. In those cases, an important consideration would be that a party should feel confident and comfortable in putting his or her side and not feel frustrated by being entangled in legal forms. In short, the Taskforce considered the new tribunal should not adopt a "one-size fits all" approach to decision-making, but do what fairness and commonsense requires in each case.

In this context, to the extent appropriate, the tribunal should adopt an inquisitorial approach and be flexible and interventionist in the conduct of its inquiry as appropriate. The Taskforce emphasised that the expression "inquisitorial" might be misunderstood on occasions. What it should mean in relation to the new tribunal is that the new tribunal should be able to take the initiative and assist persons to define the issues and, where appropriate, assist the person by asking relevant questions or seeking relevant documents or information of its own initiative.

The SAT

The Parliament of Western Australia enacted the legislation to establish the SAT in November 2004. The Bills, presented to the Parliament more than a year earlier in 2003, largely accepted the recommendations of the Taskforce Report and the vision for a generalist tribunal laid out in it. However, the Bill departed from the Taskforce's recommendations in some significant respects:

(1) first, the Government decided to vest the functions of both the Guardianship and Administration Board and the Mental Health Review Board in the Tribunal, rather than adopt the co-location model suggested by the Taskforce; although this departure did not greatly affect the substance of the Taskforce's recommendation; and

(2) The Government decided not to transfer to the Tribunal the Ministerial appeal functions under Part 4 of the Environmental Protection Act that were concerned in the main with pollution licensing decisions.

Further amendments to the SAT legislation were accepted by the Government in the legislative process following the publication of the report of the Legislation Committee of the Legislative Council on the legislation in late 2004. Important late changes accepted by the Government included:

(1) removal of the proposal to vest the functions of the Mental Health Review Board in the Tribunal. However, the Committee finally did not reject the vesting of the functions of the Guardianship and Administration Board in the Tribunal;

(2) removal of the proposal that the functions of the Racing Penalty Appeals Tribunal be transferred to the Tribunal; and

(3) inclusion in the legislation of the right of an applicant in a "minor proceeding" to elect: (a) that the parties not be represented legally; (b) that the application be dealt with on the documents; and (c) that there be no right of appeal from the decision made. A "minor proceeding" was defined as one, very generally speaking, in which a matter in issue has a monetary value of $7,500.00 or less.

The Bill, amended in this way, was duly enacted and the Tribunal commenced on 1 January 2005. All functions were transferred to it on that day, save for those under the *Guardianship and Administration Act*, which were transferred on 24 January 2005. The Mental Health Review Board was then physically co-located with the Tribunal and has since been administratively supported by the Tribunal

Let me immediately say a little more about exactly what it is that the Western Australian SAT now does. When I do so, you will appreciate, from what I have already said, that the SAT is not altogether unlike VCAT, and only a little like the New South Wales ADT. You will also appreciate that the SAT owes much to the original conception of the AAT, though its work areas - the Acts under which it exercises jurisdiction - are quite different. If you are from New

Zealand, you will appreciate that the SAT has realised much of the potential that the New Zealand Law Commissioners have seen in a "unified Tribunal framework" for New Zealand, in place of a "jungle" of different jurisdictions, as the Commissioners called it in their 2004 report “Delivering Justice for All: A Vision for New Zealand Courts and Tribunals”.[94]

The SAT legislation is in two parts:

(1) the *State Administrative Tribunal Act 2004* (WA), which establishes the Tribunal; and

(2) the *State Administrative Tribunal (Conferral Jurisdiction) Act* 2004 (WA), which confers jurisdiction on the Tribunal under some 137 Acts of Parliament.

Key features or outcomes of the SAT legislative package are that:

(1) very few administrative review and original decision-making functions exercised by former adjudicators now remain outside the purview of the SAT. As a result the "jungle" of tribunals, as the New Zealander Law Commissioners called it, has been considerably thinned;

(2) the SAT has senior judicial leadership. The President is a Judge of the Supreme Court of Western Australia. Two District Court Judges are Deputy Presidents;

(3) the SAT is supported by a number of full time non-judicial members with experience relevant to the Tribunal’s main work areas. There are presently 13 full time non-judicial members. Four are Senior Members and the remaining nine are Members. One of the Senior Members is also President of the Mental Health Review Board, which is physically co-located with the Tribunal and supported administratively by the Tribunal. Each of the Senior Members has legal qualifications. Two have extensive experience outside the practice of law. Six of the nine Members have legal qualifications and three do not. Two of the

[94] Law Commission, above n 45.

Members with legal qualifications have first degrees and experience outside the practice of law and in work areas of relevance to the Tribunal's busiest areas of jurisdiction;

(4) the SAT has more than 100 Sessional Members who have qualifications and experience in different work areas relevant to the Tribunal's extensive jurisdiction;

(5) the SAT exercises both original decision-making and review jurisdiction;

(6) the SAT only has that original decision-making jurisdiction that is conferred upon it by an enabling Act. Thus, one must look to each enabling Act to identify: (a) the particular decision the Tribunal may make: (b) the category of persons who may apply to the Tribunal for the making of that decision; and (c) the decision-making criteria relevant to the decision-making process;

(7) the SAT only has that review jurisdiction that is conferred upon it by an enabling Act. Thus, one must look to each enabling Act to identify: (a) the range of government decisions susceptible to review; (b) the category of persons who may seek review; and (c) the decision-making criteria relevant to the review process. Thus, the SAT is not set up to review any administrative decision that aggrieves a person; its powers to do so are directly referable to the review functions conferred on it by the *Conferral of Jurisdiction Act*;

(8) the SAT Act states a number of principles and powers relevant to the exercise of jurisdiction by the Tribunal that apply generally, unless inconsistent with the provision of an enabling Act;

(9) the SAT, by a judicial member, has the power to issue interim injunctions and to make a declaration in relation to applications in which it is properly apprised of jurisdiction; and

(10) decisions of the SAT are open to appeal to a single judge or the Court of Appeal of the Supreme Court of Western Australia, depending on whether a judicial member made the decision under appeal, although – with some important exceptions – an appeal may only be made on a

question of law and not a question of fact or a mixed question of law and fact.

The areas of decision-making, both original and review, brought together in the SAT are for practical purpose organised within four “Streams” of decision-making: Human Rights; Development and Resources; Commercial and Civil; and Vocational Regulation.

The Human Rights stream covers decision-making arising under the Acts of Parliament listed in the schedule to this paper. The busiest work areas by number and volume of applications are those relating to guardianship and administration of the affairs of vulnerable people, equal opportunity proceedings and then appeals against decisions of the Mental Health Review Board.

The Development and Resources Stream covers decision-making arising under the Acts of Parliament listed in the schedule. The busiest work areas are those relating to the development of land; followed by those relating to fisheries, land valuation and compensation claims for compulsory acquisition of land.

The Commercial and Civil stream comprehends all other matters, apart from Vocational Regulation, falling within the Tribunal’s jurisdiction. The long lists of Acts that may produce decision-making in this Stream are listed in the schedule. The busiest work areas involve strata title dispute resolution, retirement villages dispute resolution, state revenue reviews and retail tenancy applications. Many of the Acts listed have historically produced little decision-making of the type now vested in the Tribunal.

The Vocational Regulation stream deals with applications by vocational regulatory bodies for disciplinary findings arising under some 37 regulated

areas listed in the schedule. Person's affected by registration decisions under these Acts can also apply to the Tribunal for review of a registration decision of a vocational regulatory body. This stream produces a good deal of work within the Tribunal.

Looked at in a more conceptual way, the decision-making for which the Tribunal is now responsible in Western Australia may be said to fall within three discernible categories. The first category is that of original decision-making whereby, historically, courts, or other public bodies as manifestations of the executive arm of Government, have granted individuals certain rights and entitlements upon application. Examples include, on the one hand, the power the SAT now has to make guardianship and administration orders in relation to persons who historically fell within the *parens patriae* jurisdiction of the Supreme Court of Western Australia (and may still do, as that jurisdiction has not been removed by the SAT legislation) and more recently the jurisdiction of the Guardianship and Administration Board of Western Australia under the *Guardianship and Administration Act 1990* (WA). And, on the other hand, the function of the Tribunal to hear and determine a disciplinary complaint made to the Tribunal by a vocational regulatory body, such as the Medical Board of Western Australia, under a vocational Act.

The second category is that area of review decision-making where, for some years past, members of the Executive Government or specialist tribunals, and in some instances, courts, have exercised the function of reviewing decisions made by public officials to ensure that individuals are accorded a measure "administrative justice" in matters that affect their personal, financial or proprietary interests. Examples within this category include the power the SAT now has to deal with land development appeals, land valuations appeals, appeals against the registration decisions of vocational regulatory bodies, reviews of decisions made by the Commissioner of State Revenue, review of the exercise of building controls by local government and the power to

determine objections to proposed decisions of the State government's fisheries agency, to provide but a few.

The third category is that which might be called the dispute resolution function. Here I mean to refer to the function that a court, tribunal or other public official previously had to act as an arbiter of disputes arising in certain areas of commercial and everyday life between citizens, or between citizens and corporations and not involving the grant of some authorisation or the review of a decision made by a public official, that now inheres in the SAT. Examples falling in this category include the function the SAT now has to resolve disputes relating to the exercise of claimed rights under strata titles (community titles), or between residents of a retirement village, or between a person who claims that their rights under the *Equal Opportunity Act 1984* (WA) have been infringed by another as a result of which they are entitled, amongst other things, to compensation as against that other person, as well as claims for compensation by persons whose land has been acquired compulsorily by a public authority. In these examples the person who claims some remedy is usually seeking to enforce a right available to them under the general law, for example under the law of contract accorded them by statute. In these cases, the Tribunal exercises a function not unlike that exercised by a traditional court.

Tribunals have been given these various tasks over the course of the 20th century, as we saw earlier, as the result of governmental and Parliamentary responses to particular needs. Consequently, tribunals have tended to develop to this point in a piecemeal fashion, without any real system or coordination or coherency. The promise of the State Administrative Tribunal is that tribunal decision-making will, during the 21st century, develop in a systematic, coordinated and coherent way.

To that end, the SAT is intended to be a generalist, unified tribunal, not a mere amalgamation of former adjudicators. The SAT is intended to develop

common procedures and decision-making practices that result in principles and policies having influence across areas of decision-making, as well as developing an internal decision-making culture in which members are encouraged to see themselves not only as according administrative justice to citizens of the State, but also as contributing to the refinement of good public administration in the State.

As noted earlier, some areas of public decision-making have not been included in the Tribunal's working areas. For example, the systems of dispute resolution relating to industrial relations, workers' compensation, liquor licensing and residential tenancies have not been transferred to the Tribunal. I think it may be said that the nature and/or volume of disputes resolved in each of these areas was thought effectively to preclude the realisation of a generalist tribunal with the attributes or realising the ambitions I have outlined. Most of these areas produce such a high volume of work that members of the SAT appointed to deal with such disputes would be dedicated to no task other than resolving disputes in these respective areas. Additionally, most seem not to involve the application of decision-making skills closely related to those required in other SAT work areas. Taken in the whole, any public policy gains that might conceivably have been produced by amalgamating existing decision-makers in these areas would be outweighed by the sheer scale of the amalgamation involved, the administrative machinery required to operate the overarching tribunal and the degree of distinction involved between these areas of decision-making and those that now fall within the SAT's jurisdiction.

That said, the line between admission and exclusion of the functions of an administrative tribunal to or from a generalist tribunal may often be fine and more dependant on a pragmatic assessment of what best serves the public interest than what best fits some general theory of public administration.

Of the areas identified, that of liquor licensing arguably would be the one area where these points of difference would be least valid. However, this is an

area of decision-making that, in Western Australia, and one suspects in most jurisdictions, has been the subject of differing public policy approaches over many years. It seems sensible not to bring such an area into a generalist tribunal like SAT until such time as the regulatory approach is settled and the way forward is finally clear.

Review of freedom of information decisions made by public officials was also left outside the SAT. This was because an Information Commissioner deals with the existing system of review under the *Freedom of Information Act*. At material times in Western Australia, the Government proposed the amalgamation of the office of the Ombudsman and the Information Commissioner. Appeals against a decision of the Information Commissioner go to the Supreme Court. While the Taskforce report recommended that henceforth they should go to the SAT, the Government decided to leave the FOI system of review untouched by the SAT reforms. This was I think largely because the only ground for review is on a question of law, and the Supreme Court was seen as the appropriate forum for such discrete, non-factual issues to be pursued.

As noted, the work areas that have been transferred to the SAT are organised in four “Streams”. The beauty of the effective amalgamation of these work areas is that many related areas, related either by subject matter or decision-making processes or criteria, regardless of whether they involve original decision-making, review or dispute resolution of a type traditionally engaged in by a court, have been aligned in the interests of more expert and consistent decision-making and general convenience to the public. The work of the Development and Resources Stream is a good case in point. Its work areas are similar to the work done by the New South Wales Land and Environment Court and similar land and resources courts in Queensland and South Australia. The experience of members in dealing with vulnerable people under the *Guardianship and Administration Act* is also relevant to the Tribunal’s role in determining appeal under the *Mental Health Act*.

SAT's performance against perceived benefits

Now that the SAT has been established, and even though it is only into its sixth month of operation, it may be of interest to others if I were to provide some account of the performance of the Tribunal to date against the enumerated benefits that the Taskforce considered would flow from the establishment of the Tribunal. I will provide comment in relation to each of the perceived benefits listed by the Taskforce.

(1) *Citizens would gain access to a single one-stop tribunal in place of variety of existing tribunals*.

This benefit has already been achieved. The Tribunal now operates in the place of a number of former appeals tribunals and boards, which have been wholly replaced by the Tribunal, and has assumed the vocational regulatory functions of some 37 vocational regulatory bodies. Additionally it has assumed the administrative review functions formerly exercised in a number of instances by the Supreme Court of Western Australia, District Court of Western Australia and the Magistrates Court.

The only adjudicators that formerly existed and were affected by the Taskforce's recommendations and continue to exist after the SAT reforms are the Mental Health Review Board, which is now located and administratively supported by the SAT, and the Racing Penalty Appeals Tribunal.

As explained earlier, the SAT reforms were not intended to affect and do not affect administrative decision making structures and adjudicators in the areas of industrial relations, workers compensation and liquor licensing. Nor do they affect the functions of the Assessor of Criminal Injuries Compensation, the Information Commissioner, the Ombudsman, the residential tenancy jurisdiction of the Magistrates Court or the Small Claims Tribunal.

(2) *As a result of access to a single tribunal, there would be an identifiable point of contact for all citizens in respect of most civil and administrative review decisions currently made by a range of boards, tribunals, courts, ministers and public officials*.

This perceived benefit has already been provided to a significant extent. The SAT has it's own website www.sat.justice.wa.gov.au (or simply Google "State Administrative Tribunal"). A publicity programme, both through the Department of Premier and Cabinet and decision makers, including local governments, and industry associations, has widely publicised the creation of the new tribunal. The Tribunal's activities with key stakeholders will continue to develop this benefit.

(3) *More information would be provided to citizens about the making of applications, about hearings and about the reasons for decisions.*

The SAT has undertaken a very active programme to inform citizens about its website at www.sat.justice.wa.gov.au and through the availability of the SAT Wizard. The SAT Wizard contains relevant information about every type of application that can be made to the Tribunal under some 137 Acts of Parliaments. Additionally, it permits persons to access the Internet and create their own tailor-made application on-line in relation to the particular matter that affects them.

Having created their application on the SAT Wizard, the person may print it out and either file the application personally at the offices of the Tribunal at 12 St Georges Terrace, Perth, or post it to the Tribunal, or, with the approval of the Executive Officer of the Tribunal, fax or email the application to the Tribunal. During the course of this year the Tribunal also plans to offer persons the opportunity to lodge their applications electronically on-line.

The SAT website and hard copy documentation provides details about the practices and procedures of the Tribunal. The Tribunal publishes full information, save where confidentiality is required in relation to guardianship and administrative applications and mental heath appeals, about the daily hearings of the Tribunal.

The SAT website also contains a decisions database where all reasons for decision published by the Tribunal are contained. Reasons for decision are also published on the AustlII website. The Tribunal also plans during this year to publish on the website final orders in many matters in respect of which reasons for decision may not have been published because they were made as a result of mediation, a compulsory conference or by consent.

The publication of information about administrative review and original decision-making in the Tribunal, as well as reasons for decision, is a considerable step forward in open and accountable decision-making in the tribunal system in Western Australia. The decisions of most, if not all former adjudicators were not widely published and were not available on any website, although they were occasionally referred to in the publications of professional and industry organisations. In the case of vocational regulatory bodies reasons for decisions were not easily obtainable.

In the case of most former adjudicators, daily hearings lists were not published in the local “The West Australian” newspaper, as they now Hearing Lists are also posted daily on the website of the Tribunal.

The hearings of the Tribunal, save in mental health appeals and in any other case where the Tribunal exercises its power to make the hearing private, are open to the public.

(4) *A more flexible and user-friendly system of decision-making would be developed.*

The mantra of the President of the Tribunal is that, "The SAT is a tribunal, not a court". The President also constantly reminds members, staff and all who deal with the Tribunal, that most parties to Tribunal proceedings are self-represented.

As noted earlier, the SAT operates in an entirely open and accountable fashion. It decisions are published for all to see. Most of its hearings are open to the public, unless the Tribunal orders otherwise. The daily hearing list of the Tribunal is published on the Tribunal's website and in the "The West Australian" newspaper.

The Tribunal has also created the SAT Wizard, referred to earlier, available on-line to assist in the easy preparation of an application. The Wizard has been commented upon favourably by many who have used it. During the course of this year the SAT Wizard will hopefully be made even more user friendly.

The Tribunal accepts applications made to it in various ways. An applicant may file an application at the Tribunal's offices at 12 St Georges Terrace, Perth personally, or post the application to the Tribunal. Applications may also be lodged by fax or email with the prior approval of the Executive Officer. Some, but not all, applications attract the payment of a fee on lodgement and that fee must accompany the application.

The Tribunal has adopted an extremely flexible approach in respect of the service of applications on interested parties. An applicant, may, except in some cases such as those arising under the Guardianship and Administration Act, cause a copy of the application to be given to the other parties affected

immediately after sending it to the Tribunal. The applicant is not required to await a sealed or official copy of the application from the Tribunal before serving a copy of it on the other parties.

Most applications when received by the Tribunal are immediately listed for a directions hearing within 14 - 21 days. If a party has not been served, this soon becomes apparent at the directions hearing. Some applications that are considered amenable to a decision on the documents are decided in that way without a formal hearing.

Direction hearings are typically held before one of the Judicial or Senior members of the Tribunal. The Tribunal's philosophy is that early assessment of an application by the most experienced members of the Tribunal will enable the Tribunal to more quickly identify the real issues in any application and the most appropriate way forward. This is particularly so in a decision-making forum where so many parties are self-represented. Representation by lawyers and other agents is more the exception than the rule in the Tribunal.

The Tribunal places a strong emphasis on alternative forms of decision making to those of a formal hearing and encourages all parties, in all streams, to consider whether mediation of an application or the use of a compulsory conference, prior to a formal hearing, might assist either in finally resolving the application or at least in narrowing the issues in contention.

Already the use of mediation and compulsory conferences has produced significant outcomes for parties, in all streams. In the Human Rights stream, equal opportunity applications have been successfully mediated, notwithstanding that those matters have been through a form of mediation in the Equal Opportunity Commission prior to being referred to the Tribunal. The Tribunal also considers that complex guardianship or administration matters are suitable for mediation or compulsory conferences.

In the Development and Resources stream many development applications are resolved through the use of mediation. Small scale development applications, called “Class 1” applications in the Tribunal, are typically dealt with at a directions hearing which is part mediation, part compulsory conference and part informal hearing. More than 65 per cent of such applications are resolved at the first directions hearing or soon afterwards in that way. More complex development applications, called “Class 2”, have also been referred to mediation with success. Approximately 40 per cent of all Class 2 applications have been referred to mediation and nearly 70 per cent of those have been successfully resolved at mediation.

In the Commercial and Civil stream a wide range of matters has been resolved at mediation, including State Revenue objections, and Strata Title disputes. Additionally, many strata title disputes are amenable to decisions being made on the documents, because a precise question of law rather than fact is often involved in construing the terms of a strata company’s by-laws.

In the Vocational Regulation stream a number of applications by vocational regulatory bodies have been referred to mediation or compulsory conference with success. Consent orders have been proposed as a result of these alternative means of decision-making. The Tribunal is extremely conscious of the public interest element in vocational decision-making and will not make any order that is proposed as a result of mediation or compulsory conference unless it is fully satisfied that the order is appropriate. If necessary the Tribunal will suggest alternative orders should be made. All orders arising out of mediation and compulsory conferences are part of the public record and are published. They will soon be available on the SAT website with their own database.

With the changed system of vocational regulation in Western Australia, whereby vocational regulatory bodies now only exercise registration and

complaint investigation functions, and no longer hear and determine disciplinary complaints, all disciplinary matters must, with some very few exceptions, be referred to the Tribunal. The few exceptions relate to the Medical Board, the Nurses Board, the Legal Practitioners Complaints Committee and the Psychologists Registration Board all of which are able to cause minor disciplinary matters to be dealt with by a professional standards committee, if the affected person agrees.

The use of mediation and compulsory conferences in relation to minor disciplinary complaints referred by all other bodies has the real potential to provide a more informal means of decision-making in relation to matters about which there may, in the end, be no real factual dispute and questions of penalty loom larger than those of guilt. Rather than subject all disciplinary complaints to a formal hearing process, with the attendant delay and expense, parties on all sides are finding the alternative means of decision-making an appropriate one in a number of cases.

At a directions hearing, if it is appropriate to list an application for a final hearing, whether or not the matter is also to be referred to mediation or a compulsory conference, the presiding member will immediately fix the final hearing date on the Tribunal's computer system, without further ado. Thus there are no delays in fixing hearing dates as are sometimes found in other listing procedures in courts and tribunals. No protracted liaison between the parties or their representatives and staff members of the Tribunal is necessary to fix a hearing date. Parties and their representatives are expected to be armed with their available and unavailable dates when they attend a directions hearing.

The main exception to the directions hearing procedure just outlined is in relation to the listing and hearing of guardianship and administration applications. These applications are listed soon after receipt by the Tribunal for a final hearing in nearly all cases, within six to eights weeks. Because the

nature of these applications requires additional support by the Tribunal in terms of ensuring that all relevant medical and other reports relevant to a proposed represented person's capacity are available to the Tribunal, and a directions hearing would serve no practical purpose in most cases in this regard, these applications are usually fixed within the six to eight week period. In the Tribunal, well in excess of 80 per cent of guardianship and administration applications are in fact finalised within six weeks of the date of filing of the application.

The Tribunal also encourages the use of telephone and video conferencing facilities by parties and witnesses in proceedings. Usually the Tribunal expects that the parties within the metropolitan region of Perth will physically attend a directions hearing and subsequent hearings unless there are good reasons which prevent them from doing so. However, with the approval of the Tribunal parties may in such circumstances attend by telephone or video conferencing. Also, the presiding member may indicate that at a later directions hearing the parties may attend by telephone.

The use of telephone and video conferencing in other tribunals is widespread and has also been well received in the State Administrative Tribunal. Indeed I imagine that within a relatively short period of time parties using the Tribunal will come to expect that there will be even more widespread use of the telephone and video conferencing facilities in Tribunal proceedings.

The Tribunal is also responsible for issuing the orders it makes, whether at a directions hearing, final hearing or when a decision has been made on the papers. The parties are not expected to lodge draft orders for finalising by the Tribunal. When an order is made the Tribunal member or a decision support officer enters the terms of the order on the Tribunal's computer system and generates a hard copy of the order which is then immediately posted to the parties or, if they have provided an email address for service, emailed to

them. Orders are usually sent to the parties within two days of the order being made.

The parties may indeed provide an email address for service. The Tribunal has encouraged all public decision-makers whose decisions may be reviewed in the Tribunal to enter their email address for service on a register for such purposes. The Tribunal's rules permit a party to give a copy of an application to a decision-maker by email if the decision-maker's email address for service appears on the register.

The Tribunal strongly believes that modern technology should be availed of in the operation of the Tribunal and in communications between parties wherever possible.

The flexibility of the Tribunal may also be found in the manner in which the Tribunal may be constituted and the manner in which it is able to deal with questions of law that may arise from time to time. The persons familiar with the operation of the Tribunal's and their "merits review" functions often refer to "first tier" and "second tier" decision-making. As noted earlier, the Administrative Review Council in its "Better Decisions" report suggested that a new administrative review tribunal should conduct "first tier" review and "second tier" review, the latter being with leave.

The SAT may be constituted as the President determines. It may be comprised of between one and five members depending on the particular circumstances and the satisfaction of the President. However, when dealing with vocational regulation matters the Tribunal must be constituted of three persons (four in the case of matters arising out of the Medical Act). Whether a tribunal is constituted of one or more members depends on the legal or factual complexity of a particular application.

In many cases a Tribunal may be constituted of one member. Where that person is a "legally qualified member" as that expression is defined in the *State Administrative Tribunal Act*, that person can determine a question of law arising in the proceedings. If no sitting member is a legally qualified member the presiding member or single member must refer the question of law to the President pursuant to s 59(8) of the Act.

There are however some exceptions to the referral requirement in relation to the question of law. The *Town Planning and Development Act* 1928, which is an enabling Act, on its proper construction permits a non-legally qualified member of the Tribunal to determine a question of law. That enabling Act however provides a person with the right to seek further review on the question of law by the President.

Additionally, insofar as all matters both factual and questions of law are concerned, the *Guardianship and Administration Act* also permits a person aggrieved by a decision of a single member to seek review of a "full Tribunal", which means a tribunal constituted by one of the judicial members and two other members of the Tribunal.

Additionally, the *State Administrative Tribunal Act* s 12(8) permits the President to alter who is to constitute the Tribunal for the purpose of dealing with a matter, or anything relating to a matter, and the Tribunal has constituted after the alteration can have regard to any record of the proceeding of the Tribunal in relation to the matter before the alteration or any evidence taken in the proceeding before the alteration. In this way the Tribunal can be altered to meet changing circumstances in relation to any application.

Nothing in the *State Administrative Tribunal Act* dictates how the final hearings of applications should be conducted. Nor is there any relevant provision in any enabling Act, which lays down the practice and procedure of

the Tribunal. What the Act does do however is set main objectives for the Tribunal which provides some signposts as to the practice and procedure the Tribunal should adopt. Section 9 of the *State Administrative Tribunal Act* specifies the following main objectives –

(a) to achieve the resolutions of questions, complaints or disputes, and make or review decisions, fairly and according to the substantial merits of the case;

(b) to act as speedily and with as little formality and technicality as is practicable, and minimise the costs to the parties; and

(c) to make appropriate use of the knowledge and experience of Tribunal members.

Part 4 of the *State Administrative Tribunal Act* otherwise deals with the Tribunal's procedures. As is commonly the case with administrative tribunals, the Tribunal is bound by the rules of natural justice except to the extent that the Act and/or enabling Act authorises departure from the rules. Otherwise the *Evidence Act 1906* (WA) does not apply to the Tribunals proceedings and the Tribunal is not bound by the rules of evidence and is required to act "according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms". The Tribunal may inform itself of any matter as it sees fit.

The Tribunal is subject to a number of requirements to ensure that the parties are treated fairly and that natural justice is provided in a practical sense. *The State Administrative Tribunal Act* s 32(6) requires the Tribunal to take measures that are reasonably practicable to ensure that the parties before it understands the nature of the assertions made in a proceeding and the legal implication of those assertions; but also to explain to the parties, if requested to do so, any aspect of the procedure of the Tribunal or any decision or ruling made by the Tribunal that relates to the proceeding; and to ensure that the parties have the opportunity to call evidence to examine witnesses and otherwise to be heard.

In the Tribunal, the vast majority of parties are self-represented. In matters arising in the Human Rights stream, very few parties affected by decision making under the *Guardianship and Administration Act* are legally represented. Many more are represented, however in relation to equal opportunity matters. In the Development and Resources stream, the vast majority of applicants in Class 1 (less complex) matters are self-represented, while planning officers often represent local governments. In Class 2 development matters all parties tend more often to be represented and legally represented. In other development and resource matters such as fisheries, the relevant decision-makers tend to be legally represented while many of the applicants do not. In the Commercial and Civil stream, especially in strata title matters, many applicants are again self-represented while strata management interests are often represented by an agent. In State Revenue matters the decision-maker is nearly always legally represented and the applicant is often legally represented. In the Vocational Regulation stream the vocational regulatory body is usually legally represented while the affected parties are often, but not always, legally represented.

Under the *State Administrative Tribunal Act* s 39 there is some restriction on the right of a party to be represented by a person other than a legal practitioner, although the Tribunal has the power to give leave to any person to represent another. There are not many circumstances where a person would not be entitled to be represented.

Final hearings are conducted according to the practice and procedure that is most appropriate to the decision to be made. For example, applications under the *Guardianship and Administration Act* have historically been dealt with in a highly informal way. This reflects the fact that not many persons interested in such proceedings and who become the parties are legally represented. They are often persons quite unfamiliar with formal decision-making processes and the nature of the decision-making. Whether a person is in need of a guardian

or administrator, involves a consideration of sensitive and very often confidential matters. The application of "therapeutic" jurisprudence has for some years has been a feature of the decision-making processes of the former Guardianship and Administration Board and continues to be a feature of decision-making in that area in the new Tribunal. Members of the Tribunal mainly need decision-making skills related to putting parties at ease, properly identifying matters to be determined on any application and ensuring that all relevant information is tabled and properly tested at a hearing with the full involvement of the interested persons. Rarely in these proceedings is a person who provides information to the Tribunal required to give sworn testimony. Rarely is an interested person invited to "cross examine" another. The process in these hearings is, in a real sense, more inquisitorial than it is adversarial. The Tribunal member needs to be satisfied that the criteria for the appointment of a guardian or an administrator of a person have been fully met.

By contrast, the manner in which the Tribunal proceeds in determining an application made by a vocational regulatory body where alligations of professional misconduct have been made, is often more adversarial than inquisitorial. In these cases, the parties are usually legally represented and the allegations of misconduct are significant. The outcome of a Tribunal decision in these types of matters may be the cancellation or suspension of the persons right to practice in a particular profession. In that sense the *Briginshaw*[95] standard is adapted. It requires the Tribunal to be well satisfied that a case has been made out. Often in such cases, questions of credibility will be central to the Tribunal's decision making and it becomes appropriate to take the sworn testimony of witnesses. Nonetheless, the therapeutic decision-making skills that are extremely important in the area of guardianship and administration, are not irrelevant in such hearings. The physical contexts in which a hearing of a Vocational Regulation matters occurs can still be important. The relevant informality of the hearing room can ensure that to be appropriate extent proceedings are not entirely adversarial. In that regard, the

[95] ***Briginshaw v Briginshaw*** (1938) 60 CLR 336.

Tribunal has established a standard policy that in no proceedings in the Tribunal is it necessary for persons to stand upon the entry of members into the hearing room. Additionally, all proceedings are conducted with the parties and their representatives, if any, seated at hearing room tables. These simple changes from the way a typical court hearing would proceed, can produce some remarkable differences in the general atmosphere in the hearing room and the manner in which the hearing is conducted.

The general practice and procedure of the Tribunal is to ensure that in review matters decision-makers file all documents upon which they have relied in making a decision and which are relevant to the proceeding well in advance of the hearing. Similarly applicants and other interested parties are required to file all their relevant documents well in advance of the final hearing. At a final hearing these documents will then be received into evidence usually without any debate as to their authenticity or their relevance, such matters being left to be debated, if necessary, at a later time in the hearing. Witness statements of witnesses proposed to be called are also usually filed in advance of a final hearing. Witness statements are usually received into evidence again without debate and in many cases the witnesses are not required for further cross-examination or questioning. The Tribunal has adopted as a very common practice, a requirement for parties in matters going to a final hearing to file Statement of Issues, Facts and Contentions whereby any facts in issue can be agreed prior to the final hearing and particular issues and contentions of the parties are clearly defined before a final hearing.

It follows from all this that the Tribunal adopts a particular way of conducting hearings and preparing for hearings that suits the particular type of application before the Tribunal. It is not a case of “one size fits all”. Some applications may go to a final hearing very quickly with very little documentation because the provision of detailed documentation would run counter to the main objectives of the Tribunal. In other cases, however, the main objectives of the Tribunal will be met by requiring the parties to provide the Tribunal with

appropriate documentation which narrow the issues and enable the Tribunal to make a timely and reliable decision.

There is no doubt that any Tribunal, including SAT, must constantly review its practice and procedure to ensure that its main objectives are being met. Before long SAT will seek to provide feedback from users of the Tribunals on the effectiveness of its hearing processes and practices and procedures.

Members of the Tribunal primarily work in particular streams. However nothing in the *State Administrative Act* requires a member to be assigned to any particular stream, or "division" as in the case of VCAT. The President of the Tribunal strongly believes that members if a generalist tribunal should have the capacity to work across streams. That does not mean each member should have the skills and experience to work in each area of decision-making within the Tribunal, but should be capable of working in more than one area. Already this objective is being achieved. Members working, for example, in the Human Rights stream also sit in the Vocational Regulation stream. Members in the Development Resources stream and the Civil and Commercial stream often work across streams. Additionally, most full-time members of the Tribunal are accredited mediators and are developing the capacity to mediate matters or control compulsory conference regardless of the stream in which that matter has arisen.

In these ways, SAT will develop a common culture in the decision-making skills and experience, and the experience built up in some areas of decision-making can be tested and applied in other areas. By this process "best practice" will be established and continually reviewed over time within the Tribunal.

The opportunity for this type of cross-fertilisation in decision-making is most likely to be obtained with a generalist tribunal.

(5) *The SAT would have available to it a wide range of expert and experienced members (whether full-time, part-time or sessional) to serve on its various panels*.

The Tribunal has realised this benefit from the outset. As noted earlier, the Tribunal has three judicial members, four full-time Senior members and nine full-time members. It has no part-time members as such, but has about 100 Sessional members.

The nature of the full-time members has been referred to earlier. The Sessional members have qualification and experience in the areas in which the Tribunal is called upon to make decisions. Many of the Sessional members are persons who are registered in one or other of the vocational regulatory areas in which the Tribunal may be called upon to make decisions. Other Sessional members have particular expertise or experience in relation to the busiest areas of decision-making in the Tribunal, including guardianship and administration, mental health review, town planning and development issues and land valuation.

In this way the Tribunal is able to deal with the more frequent, less unusual variety of cases through its full-time membership. When unusual matters arise in respect of which the Tribunal's full-time expertise needs to be supplemented, the Tribunal is able to call upon a Sessional member expert or experienced member in that field.

(6) *The SAT will be able to keep the exercise of its operations under continuing review and adopt "best practice" in all of its functions*.

This benefit is also being realised. The concern of the Taskforce, I believe, was that many of the former adjudicators were small organisations or organisations constituted or supported by part-time or sessional members who were not in any practical sense able to keep the administration of the organisation, let alone the public administration of the State, under any proper review.

By contrast, the Tribunal with a full-time membership of 16 members, an executive officer, some 60 or so staff, and a total budget in the order of $11 million, expects to adopt “best practice” in all areas of its operation.

At the level of tribunal practice and procedure, a full-time membership of 16 members enables the Tribunal to continually review the practice in each stream, compare and contrast the practices across streams, and systematically keep the performance of decision-makers under review.

In this way the varying practises of former decision-makers have been standardised, where appropriate, and the best practices adopted. Dialogue between members operating in different work areas ensures that the best practices in one area of decision-making influences the practices in others.

The question of best practice is addressed in the Tribunal through regular member seminars, through more intensive member education and training conferences, and through committees established by the President in all areas of the Tribunal’s operations, including technology, stakeholder relations and practice and procedure.

(7) *More effective and systematic recruitment and training of members of the Tribunal will be a feature of the new system.*

This benefit is also being realised. It is an issue close to the heart of many tribunal members throughout Australia. Some of the means of realisation of the training objectives have been referred to in dealing with the last preceding item.

Recruitment of members of the Tribunal followed a systematic advertising, assessment and interview process. The President with two other persons outside the public sector, constituted a selection panel and interviewed a number of persons short listed from the many who had expressed interest in appointment in the initial full-time, part-time and sessional tribunal member positions. The President made recommendations to the Attorney General concerning the appointments of the members of the Tribunal.

The full-time members of the Tribunal underwent an induction programme soon after commencing with the Tribunal in January 2005. The Tribunal's first more intensive conference for full-time members will be held on two days in late July 2005. Members contribute to regular Tribunal lunchtime seminars on matters of general and stream interest within the Tribunal.

This all occurs in the context of The *State Administrative Tribunal Act,* s 143, which expressly provides that the judicial members are responsible for directing the education, training and professional development of the Tribunal members and that the Minister is to ensure that appropriate provision is made for this to occur. This provision may well be unique in Australia!

In any event, the question of effective education, training and professional development of members of the Tribunal is taken extremely seriously by the President and other judicial members. If a Tribunal such as the State Administrative Tribunal is to realise the expectations of the citizens of Western Australia, its members need to be well-trained from the outset and continually in order to do and continue to do their job in the professional manner.

One of the significant changes to the tribunal system in Western Australia has been the introduction of a tribunal with a significant contingent of full-time members. This addresses limitations of the former adjudicators which were, for the most part, reliant on part-time or sessional members who are primarily busy professionals in their own areas of activity who occasionally were able to offer their decision-making services to the Tribunal.

A full-time membership also ensures a membership which is impartial and independent of interest groups, and is seen to be so.

(8) *The new Tribunal would have the capacity to keep abreast of innovations and developments in comparable tribunals throughout Australia*.

It follows from all that has been said that the SAT has the capacity to keep abreast of innovation and developments throughout Australia, and indeed New Zealand. It also has the intention to do so.

The SAT is a member of the Council of Australasian Tribunals (COAT). What is happening around Australia is of immense interest to the SAT.

Innovation and developments occur not only in areas of technology but also in areas of practice and procedure and decision-making processes. The work of COAT is the development of a Members' Handbook or Manual, a prospect of primary interest to the SAT.

(9) *New and improved information technology would be made available for the efficient handling without delay of applications to the Tribunal*.

This benefit has already been realised and will continued to be advanced in the new Tribunal.

As noted earlier, when an application is received in the Tribunal it is immediately entered on the Tribunal's computer system. The computer system immediately generates a notice of directions hearing or a notice of hearing in guardianship and administration matters. When decisions are made at directions hearings or at final hearings the terms of the order are entered on the computer system and hard copy orders are generated and sent to the parties. At a directions hearing the presiding member also immediately lists the application for a hearing, in most cases, on the computer system. The presiding member can interrogate the computer system to ascertain whether on a particular day, a particular room or a particular member is available and then book them to deal with that application on that day. The entry on the computer system of a hearing date for a particular matter in the name of a particular member automatically populates the electronic diary of the member concerned.

The Tribunal plans to introduce on-line lodgement of applications during the course of this year, a process which should make the application process quicker and cheaper for applicants.

The Tribunal recognises that the Tribunal's processes may never be "paper-less" but considers that much can be done to make application lodgement processes and subsequent practice and procedures in the Tribunal easier to achieve, cheaper and more effective through the use of information technology.

(10) *The existence of a single Tribunal would ensure that original decision-making and administrative review decision-making is conducted on a more cost effective basis than at present.*

The measurement of the realisation of this benefit is probably some time off in the State Administrative Tribunal, with only some five months experience behind us. However, some observations are appropriate.

First, there is no doubt that the establishment of a single and generalist tribunal like the SAT costs money. It would be incorrect to suggest that the establishment of such a Tribunal in Western Australia could be funded out of the financial allocations previously made for the former judicators. The scale of the tribunal exceeds the sum of the former adjudicators' operations.

However, I have little doubt that the establishment of a single tribunal will ensure that, not only from a governmental point of view, but also, and perhaps more importantly, from a party point of view, decision-making in the Tribunal will be more cost effective than it was in the past because of the increased use of information technology, improved processes and more timely decision-making, especially by full-time members.

Simple things like permitting a party in a remote location to participate in the Tribunal by lodging applications by post, fax or email, by serving applications by post, fax or email, by participating in hearings by telephone or video conferencing and the like, will make party participation much more cost effective than it has been in the past.

(11) *Government and Parliament would be able to assign administrative review functions in respect of new and developing areas of government regulations directly to an existing and experienced tribunal rather than create a one-off ad hoc review body*.

This benefit has also been realised. Since 1 January 2005 a number of government proposals have emanated for the Tribunal to exercise review functions in new and developing areas of regulation.

It was always clear that the existence of a general tribunal like the SAT would mean that government would not need to "reinvent the wheel" by setting up a new board or tribunal each time a significant new area of regulation arose.

In a practical sense, the Tribunal provides a State infrastructure in which original and reviewed decision-making can be conducted. The Tribunal has the premises, the members and the staff who increasingly will be experienced in areas of decision-making that keep on arising with every new instance of regulation in the State.

However, it is also clear that as the Parliament confers new jurisdiction on the Tribunal from time to time, it will be important for the Parliament to fund the additional resources required, in terms of premises, members and staff, to enable the Tribunal to meet its mandate of making decisions in a timely and cost effective manner.

(12) *The Tribunal would have the appropriate leadership, expertise, experience and independence from the Government to ensure that people of Western Australia can have the fullest confidence in the workings of the Tribunal*.

This benefit is also being realised. The structure of the SAT is as recommended by the Taskforce with Judicial Members, Senior Members (with both legal and other qualifications) and other full-time Members (with both legal and other qualifications), as well as an impressive array of the Sessional

members with qualification and experience in the many work areas of the Tribunal. Of course it will be the actual performance of the Tribunal over time that will enable the people of the State to make their own judgement about the extent of their confidence in the workings of the Tribunal. From a structural point of view, however, and from an operational point of view, the Tribunal is already demonstrating its skills in its work areas and in illustrating its capacities as an impartial and independent decision-maker.

The extent to which the Tribunal takes the process of being open and accountable to the people of Western Australia has been revealed in what has been said earlier about the realisation of the other benefits of the Tribunal identified in the Taskforce report. Any member of the Western Australia public can simply go to the Tribunal's website at www.sat.justice.wa.gov.au to find out exactly what the Tribunal is doing and has done and to read its decisions, as well as to find out exactly who the members of the Tribunal are, how to make an application, and gain assistance in the making of an application.

One particular benefit that the Taskforce did not explicitly state in it's report, is the capacity of a generalist Tribunal like the SAT to provide an account of any systemic failure in the public administration in the areas of decision making that fall within the Tribunal's jurisdiction. However, I think it is implicit in the recommendations of the Taskforce that the new generalist tribunal should form an overview function in respect of the performance of the primary decision-makers whose decisions the Tribunal is call upon to review. This is indeed a very important function of a generalist tribunal, as it will always find itself in the privileged position, from a public administration point of view, of gaining something of an overview of the way in which legislation is administered in the State, at least in relation to those matters that come before the Tribunal.

In this regard, the Tribunal has already seen, and is likely to keep seeing, instances of decision-making that the Tribunal not only considers has resulted

in administrative injustice, but also suggest a particular systemic approach to decision-making that should be reconsidered by the primary decision maker.

In other instances, the Tribunal also finds itself, and will continue to find itself, in a position to comment more generally about the terms of particular pieces of legislation that cause difficulty or otherwise seem to reflect an unfortunate policy outcome from a citizen's point of view, perhaps one not intended by the Parliament when the Act in question was enacted.

The SAT will report to Parliament on all these issues of public administration.

Indeed by *State Administrative Tribunal Act 2004* s 150, the President is required each year in the Tribunal's annual report to include details of –

(1) the number, nature, and outcome, of matters that have come before the Tribunal;

(2) the number and nature of matters that are outstanding;

(3) any trends or special problems that may have emerged;

(4) the level of compliance by decision-makers with requirements to:

  (a) notify persons of reviewable decisions and their right to seek review; and

  (b) provide written reasons for reviewable decisions when requested to do so.

The annual report will therefore report on matters that arise in the performance of the SAT function as an overviewer of those areas of public administration falling within its purview.

Conclusion

The experience of bodies such as the Victorian Civil and Administrative Tribunal and the Western Australian State Administrative Tribunal, to this point, suggests that the community's interest in having administrative tribunals:

(1) achieving the resolution of questions, complaints or disputes, and the making or reviewing of decisions fairly and according to the substantial merits of the case;

(2) acting as speedily and with as little formality and technicality as is practicable and minimising costs to the parties; and

(3) making appropriate use of the knowledge and experience of tribunal members,

is most likely to be achieved in a unified tribunal structure such as that which the generalist, overarching administrative tribunal provides.