Overview

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Tribunals occupy an inherently ambiguous position in systems of law and administration. They may make binding determinations of rights and obligations, but they are not courts. They may settle disputes between citizen and citizen – and between citizen and state – but, ordinarily, they are not bound by the rules of evidence or by other procedural rules of court. They may, equally, make or re-make administrative decisions, but they are not – or not only – administrative bodies. The suggestion in this book (indeed, the assumption underlying the publication of the papers) is that, as time goes on, tribunals will become a more rather than less prominent feature of the administrative law landscape. The authors' insights, then, are timely.

Over a set of chapters which ranges over many jurisdictions and addresses topics as diverse as tribunals' reception of evidence, institutional and practical guarantees of tribunal members' independence, tribunal procedure and the arrangement of hierarchies and systems, several themes emerge. The first is that tribunals, in their many manifestations, serve – in pursuit of what several authors term 'administrative justice' – functions which are fundamentally distinguishable from either administrative decision makers or courts. The second is the concept of tribunal autonomy and the constant tension between a tribunal's independence and its accountability. The final theme explored by the papers is the structure of tribunal systems, and, broadly, a trend towards consolidation.

The functions served by administrative law tribunals have at least two aspects – adjudicative, as between parties; and normative, in the sense that independent oversight of administrative decision-making necessarily improves that process. Those functions are carried out in an environment that is neither administrative nor judicial, though aspects of both systems of decision-making flow into tribunal adjudication. It is equally important to keep in mind that tribunals' functions travel beyond the settling of minor disputes between citizens and government. As Lord Carnwarth notes, tribunal matters in the United Kingdom may be as complex as anything heard by the High Court, and often pertain to amounts of money of a similar magnitude. But an impartial and effective resolution of a dispute, evidently, will not always require an exercise of power conceptualised as constitutionally judicial.[1] At base, that is an element of what Michael Adler terms 'proportionate decision making' – the concept that modes of dispute resolution and remedies should be tailored to the nature of the complaint. As his chapter makes clear, tribunals must maintain a high standard of routine decision-making if

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1 As, for example, in *Sue v Hill* (1999) 199 CLR 462, 515 (Gaudron J).

they are to function efficiently. But integrity of routine decision-making need not translate to adherence to the judicial process as traditionally understood – that is, as a process of rendering binding determinations of rights, duties and obligations having ascertained the applicable rules and garnered relevant facts by the use of formal rules of evidence. Though the precepts of the rule of evidence are useful, as France Houle points out, they rarely apply to tribunals of their own force, and ought not to be brought to bear where a tribunal's procedures – indeed, its purpose – is quite different from that of a court.

But some rules, developed as general propositions and generally applied by courts, are so important that tribunals must apply them if they are to function at all. The example given by several contributors – Penny Letts in the United Kingdom and Ema Aitken in New Zealand in particular – is natural justice. At least in the United Kingdom, the source of tribunals' concern with natural justice is the criteria of 'openness, fairness and impartiality' in decision-making espoused by the Franks report. Those aims could not be achieved without the procedural and substantive guarantees inherent in natural justice – or, as the concept is often described in Australia, procedural fairness.[2] The aphorism that justice should not only be done but 'should manifestly and undoubtedly be seen to be done'[3] is as true for tribunals as it is for courts.

Independence – personally (of tribunal members), institutionally (of tribunals) and administratively (in terms of management) is discussed by several of the contributors. Philip Bryden, writing from a Canadian perspective, embraces a fourfold formulation. For tribunals to function effectively, he argues, four types of independence are necessary: adjudicative independence, institutional independence, administrative autonomy, and the ability for independent policy-making. In Canada as well as in Australia, there is a constitutional aspect to the independence debate – see, in Canada, *Bell Canada v Canadian Telephone Employees' Association*.[4] Gabriel Fleming picks up the independence theme from an Australian point of view. She points out, as the High Court has done on many occasions, that adjudicative independence is a key ingredient in the tribunal decision-making process.[5] Essential from an integrity and public confidence standpoint, institutional guarantees of absolute independence for tribunals sit ill with notions of accountability in a constitutional system which vests executive and judicial power exhaustively in two separate bodies. That exhaustive vesting means that tribunals cannot be judicial bodies;[6] as recent decisions of the High Court emphasise, the power they exercise is not judicial.[7] On a practical level,

2 *Kioa v West* (1985) 159 CLR 550, 583-584 (Mason J).

3 *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256, 259 (Hewart LCJ).

4 [2003] 1 SCR 884.

5 See *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 382-383 (Kirby J).

6 See *R v Kirby; Ex parte Boilermakers Society of Australia* (1956) 94 CLR 254.

7 *Visnic v Australian Securities and Investments Commission* (2007) 234 ALR 413; *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* (2007) 234 ALR 618.

though, it can hardly be said that bodies such as the Administrative Appeals Tribunal act as genuinely executive agencies. Though persuasive answers to this riddle of taxonomy have been advanced – the 'integrity branch of government' chiefly among them[8] – uncertainty remains.

The final theme to which I advert is the trend observed and explained by the contributors to this book toward the integration of tribunal bodies. In the United Kingdom, the *Tribunals, Courts and Enforcement Act 2007* (UK) establishes, relevantly, a two-tier and largely integrated system of tribunal adjudication. As Nick Wikeley points out, the existence of the appeal tier may require re-consideration of the relationship between tribunals and the courts, as well as establishing another free-standing dispute resolution structure. In New Zealand, Patricia McConnell explains that 'a more integrated tribunal framework' is the aim of the tribunal reform program currently underway – a reaction, it is clear, to the disparate and somewhat *ad hoc* tribunals system currently in place. Australia, though, 'has developed a federal system of administrative law that is comprehensive and integrated'.[9] That is so mainly because of the work of the Kerr Committee,[10] the report of which has clearly influenced the more recent Leggatt Report in the United Kingdom. The Kerr Committee delivered up not only the Administrative Appeals Tribunal, but the *Ombudsman Act 1976* (Cth), the *Federal Court of Australia Act 1976* (Cth), the *Administrative Decisions (Judicial Review) Act 1977* (Cth), the *Freedom of Information Act 1982* (Cth), as well as s 39B of the *Judiciary Act 1903* (Cth), a parallel investment of much of what had been the High Court's federal civil jurisdiction in the Federal Court, designed as an integrated and national package.[11] So it is not difficult to make good the proposition that Australia's system of administrative law is integrated.

In Canada, Heather MacNaughton writes, continuing public confidence in tribunals will depend upon appropriate resourcing, sufficient legislative foundation, and an institutional structure which will allow

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8 An integrity arm of government was first mentioned by a pre-eminent Canadian administrative lawyer, Professor David Mullan. See DJ Mullan, 'Administrative Tribunals: Their Evolution in Canada from 1945 to 1984' in I Bernier and A Lajoie (eds) *Regulation, Crown Corporations and Administrative Tribunals* (University of Toronto Press, Toronto, 1985), 155. See also B Ackerman, 'The New Separation of Powers' (2000) 113 *Harvard Law Review* 633, 693-696; J McMillan, 'The Ombudsman and the Rule of Law' (2005) 44 *AIAL Forum* 1; The Hon J Spigelman, 'The Integrity Branch of Government' (2004) 2 *AIAL National Lecture Series* 5; The Hon JJ Spigelman 'Judicial Review and the Integrity Branch of Government' address to the *World Jurists Association Congress*, Shanghai, 8 September 2005; JJ Spigelman, 'The Integrity Branch of Government' (2004) 78 *Australian Law Journal* 724.

9 A Robertson, 'Monitoring Developments in Administrative Law: The Role of the Australian Administrative Review Council' in M Harris and M Partington (eds), *Administrative Justice in the 21st Century* (Hart Publishing, Oxford, 1999), 491.

10 See A Mason, 'Administrative Law Reform: The Vision and the Reality' (2001) 8 *Australian Journal of Administrative Law* 135.

11 See *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (1999) 168 ALR 407, 410 (McHugh J).

tribunals to function in a broader system of administrative decision making. At the same time, although slow to accept the concept of integration for fear of losing the benefit of specialist expertise in tribunals, moves towards integration, spearheaded by Quebec, have begun to influence other Provinces in Canada. In some senses, then, Australia's tribunals can be offered as exemplars of effective administrative adjudicative bodies.

By recent amendment to its constitutive Act, the Administrative Appeals Tribunal (AAT) in Australia, like other tribunals, is required to 'pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick'.[12] Such a statutory expression is not, presumably, to be taken as suggesting that the AAT has ever done otherwise. But as John McMillan emphasises, the AAT has struggled, throughout its life, to find a balance between formality and efficiency, and to settle its own methodology on the legal-executive continuum.

To end where I began, that is a challenge which tribunals will have to keep meeting. They will have to remain places which provide an efficient (and often expert) determination of complaints about government action; they must offer methods of dispute resolution which are cheap, quick, and impartial; and they must continue to fulfil a role of principled – but not specifically legal – oversight of executive action. This is their continuing task and *Tribunals in the Common Law World* chronicles the contemporary responses, across four common law countries, to the challenges which that task entails.

12 *Administrative Appeals Tribunal Act 1975* (Cth), s 2A.