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COMMENTARY

on

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

Paper presented by The Hon Justice Michael Barker, President, State Administrative Tribunal Western Australia



Introduction

It is highly unlikely that those who were responsible for the introduction of the Administrative Appeals Tribunal of the Commonwealth so many years ago had any inkling that the proliferation of tribunals that has occurred since then, would occur. The case for rationalisation that has taken place and that is taking place, is addressed in Justice Barker's comprehensive paper.

However, it is appropriate to note at the outset without dwelling on the point, that specialist tribunals take many forms and some may not sit comfortably within the precise framework that Justice Barker describes in his paper. While operating in an administrative law context some tribunals, such as the NSW Workers Compensation Commission, are large but still specialist tribunals that have emerged in response to the view of government that more effective management of disputed claims for personal injuries and the mechanisms for their resolution, are needed. However, the general dynamics of rationalisation and the same broad principles may well have application in terms of a more generalist approach, regardless of the jurisdictions

involved. There is little doubt in my mind that tribunals of this nature will flourish, and 'like tribunals' will come together in the form of larger organisations of wider application. Relevantly, Professor Robin Creyke, in conversation yesterday, observed that tribunals now comprise a very broad church.

Australia it seems, is a world leader in the 'tribunal movement', if I can call it that. Nevertheless, if high standards in performance and outcomes are to be maintained and enhanced, habitual reflection and continuous improvement are essential. Such an approach involves a consideration of a complex mixture of intellectual, legal, political, economic, administrative and social elements, in a context of different and often conflicting attitudes, perspectives and interests. Justice Barker has correctly stated that, "tribunals are currently undergoing a period of reassessment and renewal or reinvigoration". I think that this process will continue for some time yet. It is critical that this process includes an evaluation of the philosophical and practical considerations that legitimise and justify the existence of tribunals, so that basic assumptions and aspirations that underpin consolidation and other developments, can be validated, or modified if and as necessary. This is not an original thought but was raised in 1998 in the context of administrative law, as Justice Barker states at page 13 of his paper, by reference to the Kerr Committee Report:

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.

Tribunals have come a long way since the 1970s. The emergence of generalist administrative tribunals (amongst other initiatives), as a means of improving performance, efficiency and effectiveness, while still serving the interests of justice and the community, is yet another chapter in the development of tribunals. And the

emergence of the Council of Australasian Tribunals, as a professional and educative body for tribunals and their members, is a logical, necessary and inevitable step in this development. It is likely that these times and events will be regarded historically, not just as period of consolidation and rationalisation, but as something akin to a renaissance, just as the mid 1980s into the 1990s was a time of enlightenment and change, with new attitudes and directions emerging on many fronts, in judicial and courts administration in this country.

Professor Barry Mahoney, an eminent proponent of judicial administration and the involvement of judges and magistrates in all aspects of the work of the courts, once told me that while his country, the United States of America, had invented judicial administration, Australia had leapt ahead in the practical implementation of the concept. It seems to me that Australia is grasping the nettle once more and has found itself at the forefront of tribunal developments. It is a very exciting time that offers great opportunities. The vision, and the willingness of tribunal leadership to work together towards common goals (and there are many), in an appropriate relationship with Executive Government, have never been stronger and should produce excellent returns on the investment now being made, and that is to be made in the future.

Justice Barker's paper is comprehensive, detailed and lengthy. It is not appropriate for me to offer a detailed critique, particularly in light of Peter Johnston's paper, which he has just introduced to you. In the brief time available I will simply confine myself to a few pertinent observations, in a broader context. The history and growth of tribunals is outlined in Justice Barker's paper, which speaks for itself. It is interesting however, to note the words of Professor de Smith, at page 6 of Justice Barker's paper, when he said, "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.” While this is so, there is no doubt that the tensions in the relationship between the courts and governments in Australia, and the perception of Government at that time that the courts were not responsive to change, was a contributing factor to the genesis and growth of tribunals in this country. Significantly, the driving force of the reform that has taken place in courts and courts administration has largely come from within the courts themselves, and through organisations such as the Australian Institute of Judicial Administration and the NSW Judicial Commission. If the courts were thought to be unresponsive way back then, they certainly are not unresponsive now. Similarly, the AIJA and COAT, along with the tribunals themselves, are increasingly, playing a core role in co-ordinating and driving tribunal developments in Australia, today.

Public acceptance

Justice Barker has a sense that the 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 that tribunals play, or potentially may play, in the good governance of society. I think that as a general observation, this is correct. Some further observations flow from this proposition.

First, I think that there is these days, a public perception that if a difficulty of almost any kind arises, there is somewhere to go to obtain assistance, and that the dispute or difficulty can be mediated, conciliated or otherwise resolved within a reasonable time and at a modest or no cost.

Second, there is I think a public perception that the generally less formal procedures, less intimidating atmosphere and the greater empowerment of persons in terms of being able to participate more actively in proceedings, give tribunals the edge, when it comes to comparisons that are made with the court process. Not only does the public want “administrative justice”, as suggested by Justice Barker, parties to disputes of any kind also want to come away satisfied that they themselves have been heard, and arguably what is of equal importance, is that they have understood what has happened and why! Consistently, high satisfaction rates highlighted in most tribunal surveys, even amongst parties who have not been successful, demonstrate this point.

The third and very obvious point is that tribunals have given life in a robust way, to the concept of “access to justice”. Those of us who are old enough can cast our minds back two or three decades and reflect upon the limitations and frustrations confronting ordinary people who had no other option but to resort to the court system to resolve issues. Worse still, was the fact that there existed perhaps less awareness of basic rights, which meant that citizens were more long suffering and compliant, in terms of injustices that arose from administrative and other decisions that impacted on every day life. Many wrongs were simply not addressed at all. Not only is there now much more awareness, but there are many more decisions being made. Tribunals today promote proper and transparent decision-making and exert a good deal of normative influence in that process. Clearly, the emergence and growth of tribunals is a significant response to public demands for justice and accountability along with the emergence of organisations such as community justice centres, legal aid bodies and the office of ombudsman, to name a few.

The fourth point I make is that the growth and influence of tribunals is no accident. While the birth of tribunals was met with a good deal of scepticism and reservation in some quarters, imperatives other than a desire for greater access to justice and accountability underpinned this movement. Tribunals are just as much a response to hard-nosed political and financial considerations, which inevitably, and for better or worse, are two of the great drivers of change in modern society.

However, the strength of opinion about maladministration and flawed decision-making, and the dynamics involved in this are illustrated in Justice Barker's reflections on the Franks Committee in Britain, found at pages 8 –11 of his paper. As already noted, the tribunal concept has been refined and expanded to embrace and deal with all manner of disputes since that time. This is indicative of the broad church to which Professor Creyke refers. Significantly, many if not most tribunals now involve strong elements of what we know as ADR or alternative dispute resolution - or perhaps more relevantly, "appropriate dispute resolution".

The Rise and Rise of Tribunals

The pros and cons of the proposed (Commonwealth) Administrative Review Tribunal are succinctly summarised at pages 16 and 17 of Justice Barker's paper. Both the list of benefits proposed and criticisms made, provide interesting reading. As stated, the *Administrative Decisions Tribunal Bill 2000* has not been enacted. This subject requires no further elaboration.

What is of particular significance is Justice Barker's comment at page 17:

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.

A number of tribunals that emerged following the Commonwealth's "example" are identified in the paper, including the Victorian Civil and Administrative Tribunal and the New South Wales Administrative Decisions Tribunal, and more recently of course, the Western Australian State Administrative Tribunal. The current push to harness the proliferation of tribunals and place them within a coherent framework is a sensible rationalisation and is not only logical, but also financially and administratively responsible. A whole lot of duplication and "re-inventing the wheel" has been eliminated and the trend towards a never-ending range of specialised tribunals in response to specific demands has been arrested. An interesting comment extracted from report 85, *Delivering Justice for All*, published in March 2004 by the New Zealand Law Commission, is found at page 18 of Justice Barker's paper, and encapsulates the rationale for this approach. The capacity to enhance expertise and performance, and therefore to raise public confidence is an important issue, amongst other considerations that are included in the statement quoted.

However, further to an observation made at the outset, it is clear that the example set by the Commonwealth so long ago, has had a much wider and dynamic impact than was, and perhaps could have been, envisaged at the time. Justice Barker commends the developments in Western Australia as giving "Western Australians a contemporary, if not state-of-the-art suite of administrative laws designed to provide citizens with the means of obtaining administrative justice and enhance the State's system of public administration." The genie is well and truly out of the bottle and governments have for some time now, been venturing further afield, establishing tribunals in areas that hitherto, may have been considered as inappropriate. The NSW Workers Compensation Commission is a prime example. The former Compensation

Court no longer exists and disputed workers compensation claims, other than common law claims, are brought to the Commission for resolution. Arbitrators, for the most part legally qualified, are required to attempt settlement at every stage of the process. If an initial telephone conference does not achieve this, the matter is set down for conciliation and if necessary, arbitration (by the same Arbitrator). Parties, although invariably accompanied by lawyers, are encouraged to participate fully in the proceedings. Settlement rates are quite high, but of course, some disputes proceed to a formal determination. The three Presidential members determine appeals from the decisions of Arbitrators and this takes the form of a review for error of law, fact or discretion. I cautiously predict that disputes of this and of a similar nature, formerly regarded as falling squarely within the province of the courts, will find their way in due course, into overarching and coherent tribunal frameworks, which significantly, will operate within an administrative law context, as indeed does the Commission. There is no reason why other groups of like jurisdictions will not emerge in this fashion. The concept of generalist tribunals is well established, and it seems that it has application to jurisdictions in addition to those that deliver justice in a strictly public administration or related context.

These are surely interesting times in which we live.

WA State Administrative Tribunal

Justice Barker observes at page 23 that 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 the wider range of administrative review possibilities and accountability mechanisms envisaged by the Kerr Report. The intention is 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 range of public decisions within the State, as well as a disciplinary hearing function in the place of a large number of existing vocational regulatory bodies. The background and history to the establishment of the State Administrative Tribunal is found at pages 23 to 44 of Justice Barker's paper.

From a reading of the paper, it is clear that the SAT is the culmination of a rather exhaustive examination of a range of relevant reports and other materials, available both in Australia and elsewhere. Significantly, attention has been given to the structure of the organisation and its administration. There is always the danger that these aspects will be regarded as secondary in an exercise such as this, but the "engine room" and its robust operation is invariably a critical success factor. Furthermore, the impressive array of benefits set out at pages 33 and 34, and in more detail at pages 53 to 68 in Justice Barker's paper, will be a sound basis for the post-implementation review that I assume, will take place at some time in the not-too-distant future.

The judicial leadership issue is settled and is discussed in the paper. Tribunals of this nature generally have judicial leadership, but a number of tribunals of various and different kinds, do not.

Justice Barker observes that the SAT is not altogether unlike VCAT but not all that much like the NSW ADT. The emphasis has been placed upon achieving a unified system as far as possible rather than a collection of different jurisdictions. This act of integration rather than aggregation or amalgamation may prove to be a critical success factor, particularly, but not solely, in terms of simplicity, efficiency including avoidance of duplication, and the all-important consideration of keeping overheads within reasonable bounds. However, as Peter Johnston points out, there are other implications of no little complexity that will need to be kept in view. The

approach taken is likely to aid as Justice Barker suggests, in the development of common procedures and decision-making practices that result in principles and policies that extend across and influence all areas of decision-making. In particular, it should contribute to the development of an internal decision-making culture aimed at the efficient and effective administration of justice and the refinement of good public administration. I agree that the inculcation of a healthy and appropriate organisational culture ought to be assisted by this integrated focus, and should produce a degree of flexibility, a team spirit and common goals, rather than a loose collection of jurisdictions under the same roof, each serving only its own particular interests within a different cultural context. However, if enduring integration is to be achieved in reality, it cannot be taken for granted and must be sensitively managed in order to avert the risk of fragmentation, or even disintegration over the long term.

The key features or outcomes of the SAT legislative package are outlined at pages 47 – 48 of Justice Barker’s paper, and importantly, as I have said, the details for assessing performance against perceived benefits, are at pages 53 to 68. This is a comprehensive list of outcomes to which the SAT aspires. How to measure them accurately and then how to assess them meaningfully, will require some careful thought. This task is yet to be confronted.

The SAT has been carefully planned and implemented. It has been given every chance of success. We look forward to a further report from Justice Barker in due course, to learn how aspiration, through inspiration, determination and perspiration, has materialised as actualisation.

In conclusion, I do apologise to Peter Johnston for failing to comment upon his paper today. I did not have a copy in my possession until quite late, and simply ran out of time. However, I must say that I enjoyed reading it this morning and

appreciated Peter's thoughtful exposition and treatment of a number of key issues. I noted his comments concerning the schizophrenic nature of the SAT, which in a broader sense than he perhaps intended, brings to mind the tensions and dynamics that need to be kept in view and managed in larger generalist tribunals. His description in a sense, also goes to the heart of some of the comments I have made today, and indeed, highlights the fundamental systems principle that "the whole is greater than [and different to] the sum of the parts." For that reason alone, and aside from the forensic aspects, the integrated model that has been embraced, while perhaps more difficult to install initially, is likely to be a positive factor in the SAT meeting its objectives over time.

I will leave it there. Thankyou.

**Gary Byron
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(NSW) Workers Compensation Commission**

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