

ADMINISTRATIVE TRIBUNALS IN AUSTRALIA – FUTURE DIRECTIONS

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The growth of the tribunal system in Australia over the past thirty years has thrown up a range of issues, to do with their constitution, membership, procedure, case management and funding. The answers to these questions have been shaped by a succession of independent inquiries and reports, by bodies such as the Administrative Review Council and the Australian Law Reform Commission.¹

One other pressure that has subtly shaped the Australian tribunal system but which has received less formal attention is judicial oversight of tribunal proceedings. This can occur in two ways: through an appeal process, usually on a question of law;² or through judicial review of a tribunal decision or proceeding.³ Judicial scrutiny through those processes has been as much about how tribunals should go about deciding issues, as it has been about the substantive rules of law being applied by tribunals.

This paper illustrates the impact that judicial oversight can have on the future direction of tribunals by looking at three recent decisions of the High Court of Australia. The thrust of the analysis is that the development of the tribunal system in Australia is unduly constrained by legal paradigms. This is not to diminish the importance of judicial oversight, which indubitably provides essential guidance to tribunals on numerous issues, and has instilled in Australian tribunals a respect for assiduous legal method.

Yet the picture is more complex. This was apparent in the formative years of the Administrative Appeals Tribunal. The Tribunal was at the centre of a debate about formality vs informality, and legal method vs executive method.⁴ To some extent that

¹ Eg, Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report No 39 (1995); and Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000).

² Eg, *Administrative Appeals Tribunals Act 1975* (Cth) s 44.

³ Eg, *Migration Act 1958* (Cth) Part 8, facilitating judicial review by the Federal Court of the Migration Review Tribunal and Refugee Review Tribunal. For an example of judicial review of AAT proceedings, see *Duncan v Fayle* [2004] FCA 723.

⁴ Eg G Osborne, 'Inquisitorial Procedure in the Administrative Appeals Tribunal - A Comparative Perspective' (1982) 13 *Fed L Rev* 150; M Allars, 'Neutrality, The Judicial Paradigm and Tribunal Procedure' (1991) 13 *Syd L Rev* 377; J Dwyer, 'Overcoming the Adversarial Bias in Tribunal Procedures' (1991) 20 *Fed L Rev* 252; W De Maria, 'The

debate originated within the Tribunal, as it shaped its own style and spelt out a philosophy of administrative adjudication. To some extent too there was prescription from above. A paradigm example was *Minister for Immigration and Ethnic Affairs v Pochi*,⁵ in which the Full Federal Court affirmed that the underlying themes of the principles of evidence should be observed by a tribunal to ensure fairness and administrative justice. That and other decisions fed into a widely held concern acknowledged by the Administrative Review Council in its *Better Decisions* report in 1995 that the AAT had become too court-like.⁶

How a tribunal responds to judicial oversight provides one perspective on the issue. Another perspective is the way that courts look at tribunals. Again, the picture is complex, and there are comments and examples that cover a spectrum from deference and respect to suspicion and disregard. A high water mark in Australian jurisprudence in differentiating courts from tribunals was the decision of the High Court in *Craig v South Australia*.⁷ The Court held that all errors of law by a tribunal go to jurisdiction, while there is a presumption that many categories of error by a court (including in that case a district court) occur within jurisdiction. The Court's justification for treating inferior courts and administrative tribunals differently was that courts are staffed by persons with formal legal qualifications and practical training and sit within a hierarchical judicial structure, while tribunals 'are commonly constituted, wholly or partly, by persons without formal legal qualifications or legal training'.

An implication of this view is that tribunals can be subject to a more intensive form of judicial oversight, with a predictable impact on the way the tribunal develops. This implication was made explicit by Kirby J in another case, stating that 'a special vigilance is required' in reviewing the decisions of 'non-court repositories of functions, powers and discretions'.⁸ The point was taken a step further by Kirby J in *NAIS*, examined later in this paper:

[T]he invalidating effect of delay in the provision of reasoned decisions will be more obvious in the case of administrative decision-makers, such as the Tribunal, than in the case of judges and courts. Typically, judges are required to decide more complex controversies. These often necessitate more detailed reasoning. They commonly oblige a lengthier time for reflection, analysis and exposition of the reasons. Moreover, judges are members of a trained profession to whom are conventionally ascribed capacities of analysis and discipline in decision-making superior to those possessed by, or expected of, most members constituting statutory tribunals.

It is the nature of the work of most judges that it usually involves greater variety than is typically the case of administrative bodies, such as the Tribunal. A special danger of delay in the case of a tribunal, such as that in question here, is the risk of confusion between the facts of similar applications and elision between impressions about the reliability and

Administrative Appeals Tribunal in Review: On Remaining Seated During the Standing Ovation' in J McMillan (ed), *Administrative Law: Does the Public Benefit?* (1992, AIAL) 96; T Thawley, 'Adversarial and Inquisitorial Procedures in the Administrative Appeals Tribunal' (1966) 4 ALJ 61; three papers by Justice Nicholson, D Rowland and A O'Neill on 'Inquisitorial, Adversarial or Something Else' in L Pearson (ed), *Administrative Law: Setting the Pace or Being Left Behind?* (1997, AIAL).

⁵ (1980) 4 ALD 139.

⁶ *Better Decisions*, above n 1 at 3.20 – though the ARC thought the concern was exaggerated, eg, paras 3.20, 3.41.

⁷ (1995) 184 CLR 163.

⁸ *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 174 ALR 585 at [85].

truthfulness of witnesses in one case compared with another having common factual and legal features.

Those comments and rulings are an important part of the context in which the administrative tribunal system continues to develop.

JUDICIAL OVERSIGHT OF TRIBUNALS – THREE CASE STUDIES

Minister v Immigration and Multicultural Affairs v Bhardwaj⁹

The issue arising in this case was the vexing issue of whether a decision-maker either can or should take executive action to remake an earlier erroneous decision.

The decision-maker in point was the Immigration Review Tribunal. It was due to hear an appeal by Mr Bhardwaj against a decision by the Department of Immigration to cancel his student visa for non-attendance at classes. Late in the afternoon prior to the day set down for hearing the case, Mr Bhardwaj's agent sent a fax to the Tribunal seeking an adjournment because of his illness. The fax was not immediately brought to the attention of the Tribunal member, who proceeded to make a decision to affirm the cancellation of the visa. A couple of days later, after a further fax was received from the agent, the Tribunal became aware of its oversight and set down a date for a new hearing. At that hearing the Tribunal reversed the Department's cancellation decision and reinstated Mr Bhardwaj's student visa.

The Minister appealed to the Federal Court, and ultimately to the High Court. The Minister argued that the Tribunal had discharged its function upon making the first decision and lacked power or jurisdiction to revisit that decision – it was *functus officio*. What Mr Bhardwaj should have done instead, so the Minister's argument ran, was to appeal the Tribunal's decision to the Federal Court and have it set aside and the case remitted to the Tribunal for reconsideration.

The High Court by majority (6:1) dismissed the Minister's appeal. A theme common to the majority judgments was that the Tribunal had not discharged its statutory function of hearing and deciding Mr Bhardwaj's appeal in the manner required by the *Migration Act 1958* (Cth). All judges (some implicitly) drew attention to s 360 of the Act, which obliged the Tribunal to provide an applicant with an 'opportunity to appear before it to give evidence and present arguments'. Thus, as the various judgments concluded, the Tribunal 'did not conduct a review as required by the Act' (Gaudron & Gummow JJ;¹⁰ McHugh J agreeing); there was a 'non-fulfilment or non-performance of a condition precedent to regularity of adjudication' (Gleeson CJ at 13); 'the tribunal had not performed the duty imposed on it' (Hayne J¹¹); and there 'was a failure to exercise a jurisdiction which the Tribunal was bound to exercise' (Callinan J).¹²

What emerges from that summary is that the Tribunal had a capacity or power to revisit and vary an earlier purported decision.¹³ The Tribunal was not hindered, either

⁹ (2002) 209 CLR 597; 187 ALR 117.

¹⁰ At [43].

¹¹ At [155].

¹² At [153].

¹³ Kirby J in dissent held that in this case at least the issue was to be resolved by reference to the provisions of the Act and not by applying any general theory of nullification of invalid administrative acts. It was inconsistent with the statutory scheme that decisions of the Migration Review Tribunal were to be treated as provisional or to allow the Tribunal to exercise a residual power to revoke an earlier decision that formally complied with the provisions of the Act. A decision of the Tribunal could only be set

by the Act or by general principle, in choosing to revisit the issue it had to decide, by providing a hearing to the applicant and making a fresh decision. At most, some judges adverted to circumstances that might lead to a different analysis. Gleeson CJ noted that the answer could be different, depending upon ‘the legislation under which a decision-maker is acting, ... the nature of the power that is being exercised [or] the error that has been made’.¹⁴ He gave as an example that not every breach of natural justice would entitle a tribunal to treat its decision as legally ineffective and to consider afresh the matter that was originally before it.¹⁵ Equally, Hayne J noted that this case concerned only two parties, Mr Bhardwaj and the Minister, and that no question arose as to the rights or duties of other persons who may have relied upon the Tribunal’s decision.

Some judges went further and based their decision on a wider principle, that the Tribunal had not only a *power* but a *duty* or responsibility to revisit the issue in the way that it had. A common theme in this reasoning was that the Tribunal’s decision involved a jurisdictional error, and consequently had no legal effect. The Tribunal had therefore failed to discharge its statutory duty as required by the Act. Gaudron & Gummow JJ observed that ‘A decision that involves jurisdictional error is a decision that lacks legal foundation and is properly regarded, in law, as no decision at all ... the duty to make a decision remains unperformed’.¹⁶ Hayne J, after noting that the decision involved a jurisdictional error and had no relevant legal consequence, observed that not only ‘was there no bar to the tribunal completing its task [by considering the issue afresh], it was duty bound to do so’.¹⁷

Three comments can be made at this point about the judgments in *Bhardwaj*. The first is that the judgments have little to say about administrative tribunals in the context of the problem being addressed by the court.¹⁸ The issue was principally addressed as a question of statutory construction concerning the powers and functions of the Migration Review Tribunal. To approach the problem in that way is orthodox and understandable, but not entirely satisfactory. Each tribunal is different, but the core powers and function are mostly the same. The features of the Migration Review Tribunal relied upon by the Court in *Bhardwaj* – its statutory responsibility to resolve an appeal after conducting a hearing at which the applicant has an opportunity to present argument and evidence – are commonplace.

Consequently, the decision in *Bhardwaj* inescapably broaches tribunal-type issues on which generic principles or guidance will be required. This leads to the second comment on *Bhardwaj*: to the extent that it provides general guidance it is not especially helpful. A principle that seems to be endorsed by a majority¹⁹ is that a jurisdictional error by a tribunal constituted in this fashion results in its statutory task being unperformed and without legal consequence, giving rise to both a capacity and a duty in the tribunal to remedy that defect. One difficulty in applying that principle is that the concept of jurisdictional error can be elusive. There has recently emerged an extensive Australian jurisprudence on this issue, and it is a fair summation to say that many Australian lawyers who are across that jurisprudence comment (often with

aside by an appeal to the Federal Court as provided for in the Act, or by the High Court under Constitution s 75(v).

¹⁴ At [6]

¹⁵ At [13].

¹⁶ At [51], [53].

¹⁷ At [155].

¹⁸ There is perhaps more of an attempt to grapple with larger issues in the judgments of the Full Federal Court: *Minister for Immigration and Multicultural Affairs v Bhardwaj* [1999] FCA 1806.

¹⁹ Gaudron, Gummow, McHugh & Hayne JJ.

mirth) that they are better informed but no wiser. Tribunals are left in a more troubling position. When should they re-hear a matter that was earlier decided? What errors will trigger a review? Does the elapse of time extinguish the capacity or obligation to re-hear? Should the tribunal re-hear only when requested by one of the parties or of its own motion upon being apprised of an error? What if third party rights spring from the defective decision? Can parts of an earlier hearing be accepted as authoritative and not re-opened?

It is not for a court in an individual case such as *Bhardwaj* to provide an answer to all those questions. Nor are they easy to answer with a single theory.²⁰ But their existence cannot be ignored. One response, which is discussed later in this paper, would be to provide a tribunal with room to fashion its own code of practice for dealing with those issues. This is to recognise that every review agency needs some space to develop its own rules for dealing with the special problems it faces. Not every question can be answered by statutory construction of the legislation establishing the tribunal.

A third comment on *Bhardwaj* is that courts are treated differently to tribunals. Hayne J was the only judge who explicitly dealt with this difference, but only to dismiss its relevance. He observed that 'there is no useful analogy to be drawn'²¹ because of the difference between judicial orders and administrative acts and decisions. Judicial orders of superior courts of record are valid till set aside on appeal, even if made in excess of jurisdiction. Administrative acts are presumed to be valid, but only in the absence of any challenge to their validity, and that challenge can be made either directly by judicial review or incidentally by way of collateral challenge in some other proceeding.

To draw attention to this discussion by Hayne J is not to argue that tribunals should be treated the same as courts. It is rather to observe that nor should tribunals necessarily be treated the same as all other administrative decision-makers. Many of the considerations that have led to the development of a special jurisprudence on the validity and review of court decisions – such as the need for finality and an ordered process to raise questions of validity – can equally apply to tribunals. What a special jurisprudence about tribunals would say, and how it should be developed, is a challenge that is yet to be taken up.

***Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*²²**

How should an administrative tribunal respond if it receives unsourced, prejudicial information that it does not propose to take into account?

The *Migration Act 1958* (Cth) provided that the Department of Immigration was to forward to the Refugee Review Tribunal all documents held by the Department that were relevant to the review of a decision to refuse a protection visa. Among the documents forwarded to the Tribunal in this case was an unsolicited letter alleging that the applicant worked for the government of Eritrea and had been accused of killing a political opponent. The letter was authored but requested confidentiality. The Tribunal did not disclose the existence or contents of the letter to the applicant during

²⁰ Statutory guidance may also have a role to play – eg, see *Administrative Appeals Tribunal Act 1975* (Cth) s 43AA(1), providing that the AAT may correct 'an obvious error in the text of the decision or in a written statement of reasons for the decision'.

²¹ At [151]

²² (2005) 222 ALR 411.

the proceedings, but made reference to it in the reasons for decision affirming the denial of a protection visa. The Tribunal noted:

The writer of that letter makes clear that the material therein is provided confidentially. The Tribunal has been unable to test the claims made in the letter and, accordingly, gives it no weight. The Tribunal has decided this matter solely for reasons outlined above.

The High Court held unanimously²³ that the Tribunal had denied procedural fairness to the applicant and that its decision should be set aside. The guiding principle was that procedural fairness requires that a person be given an opportunity *during the hearing of a case* 'to deal with adverse information that is credible, relevant and significant to the decision to be made'.²⁴ The letter in this case could not be dismissed by the Tribunal as not relevant, not credible, nor of little significance to the decision, because it contained allegations about political involvement in Eritrea that bore upon whether the applicant had a well-founded fear of persecution for a Convention reason. He should at least have been told the substance of the allegations in the letter. It was not to the point that the Tribunal concluded in its reasons that it gave no weight to those allegations and decided the case on other grounds. The doctrine of procedural fairness is about the procedure to be followed before a final decision is reached.

The decision in *VEAL* sits comfortably with traditional legal notions of how the doctrine of natural justice applies in a formal adjudicative setting. It is unquestionable that a court hearing a matter would disclose to the parties all information that it received bearing upon the case. Indeed, the idea that a court would receive and not disclose a 'dob-in' letter of this kind offends the notion of open and impartial justice.

But the same cannot necessarily be said of administrative decision-making that is equally subject to an obligation to accord procedural fairness. It is a common occurrence in administrative decision-making that information of widely differing probative value is obtained purposely and unintentionally from an assortment of sources. To disclose the substance of that information because of its possible rather than actual relevance can sometimes undermine rather than uphold fairness. To give but one example, if an applicant being interviewed for promotion or appointment is told of all the prejudicial remarks made confidentially about him or her by referees or others, the strong likelihood is that the person will be inflamed or feel ambushed. Probably too the process will become extended and more complex as the person insists upon their right to counter every perceived slur made against them. In short, procedural fairness in an administrative setting must be combined with discretion and good sense.

Where does a tribunal sit between those ends of the judicial and administrative spectrum? *VEAL* does not provide a satisfactory answer. The Court addressed its discussion to the requirements of procedural fairness applying to administrative

²³ Gleeson CJ, Gummow, Kirby, Hayne & Heydon JJ.

²⁴ At [15]; the principle applied by the Court was taken from the judgment of Brennan J in *Kioa v West* (1985) 159 CLR 550 at 629. The Migration Act specified a statutory code of procedure to be followed by the Tribunal (eg s 424A, requiring the Tribunal to inform an applicant only of information that the Tribunal considered was a reason for affirming the decision under review). However, the Court had earlier decided in *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 that the statutory code was not exhaustive and was supplemented by the common law requirements of procedural fairness.

decision-makers,²⁵ and acknowledged that special considerations can apply in that setting (for example, the public interest in maintaining the confidentiality of sources²⁶). But in other respects the Court framed a model of procedural fairness that was suited to a process of decision-making that is formal and ordered. Thus, the Court spoke of how procedural fairness applied to the Tribunal 'in the course of conducting its review'; it noted that 'principles of procedural fairness focus upon procedures rather than outcomes'; they 'govern what a decision-maker must do *in the course of* deciding how the particular power given to the decision-maker is to be exercised'; and '[t]hey are applied to the processes by which a decision will be reached'.²⁷

The point of this discussion is that the doctrine of procedural fairness has to take account of the variety of different settings in which decisions are made and disputes are resolved. There are bedrock principles, but no single code of procedure or wisdom that should be universally applied. Within reason, those who administer a particular body or program should have some latitude to shape the code of fairness that will govern their proceedings. The concept of procedural fairness that is appropriate to a curial setting is not necessarily as suited to an administrative tribunal, and nor should all tribunals be treated the same. For example, some tribunals principally decide 'on the papers', and will frequently receive departmental files containing 'dob-in' letters that are often best ignored rather than made a focus of the proceedings (for example, the Social Security Appeals Tribunal).

Our experience with administrative tribunals is sufficiently advanced for the jurisprudence to acknowledge the role that each tribunal must play in fashioning a code of practice and fairness that draws from its experience and that is related to the character of the tribunal. It could be said that the Tribunal in *VEAL* sought to do just that, in providing a hearing to the applicant and drawing attention in its reasons to a prejudicial document that the Tribunal chose to ignore. The disinclination of the Court to give that leeway to the Tribunal was starkly captured in the concluding sentence of the judgment: 'Although it may be accepted that the Tribunal sought to act fairly, the procedure it in fact adopted was not fair'.²⁸

NAIS v Minister for Immigration and Multicultural and Indigenous Affairs²⁹

This case dealt with an old problem in a new setting: can inordinate delay by an administrative tribunal in reaching a decision of itself be a ground for setting that decision aside? There are reported instances in which court decisions have been set aside on the basis of excessive delay.³⁰ The same principles had not hitherto been applied in Australia to an administrative tribunal.

In *NAIS* the High Court by majority (4:2) held that a decision of the Refugee Review Tribunal should be quashed on the basis that an unexplained delay by the Tribunal in reaching a decision gave rise to procedural unfairness and jurisdictional error. There was a delay of more than five years between the application for review being lodged with the Tribunal and a decision being given. Oral evidence was given by the applicants on two occasions; the Tribunal's decision was given thirteen months after

²⁵ For example, at [25].

²⁶ At [29].

²⁷ At [14] and [16] (emphasis in judgment).

²⁸ At [29].

²⁹ [2005] HCA 77.

³⁰ Eg *Monie v Commonwealth* [2005] NSWCA 25; see also *Expectation Pty Ltd v PRD Realty Pty Ltd* (2004) 140 FCR 17, and *Hadid v Redpath* (2001) 35 MVR 152.

the second hearing, and nine months after receiving final written submissions. The Tribunal did not explain or justify its delay, or point to steps that had been taken to ameliorate its effect (for example, re-listening to the tape of evidence). Another aspect of the process to which the Court drew attention was that the Tribunal's decision to affirm the denial of a protection visa was rested partly on its impressions of the credibility of the applicants based on their demeanour. Four and a half years elapsed between the Tribunal's decision and the earlier hearing at which their demeanour was observed.

Gleeson CJ held that in these circumstances 'it should be inferred that there was a real and substantial risk that the Tribunal's capacity to assess the appellants was impaired. That being so, the appellants did not have a fair hearing of their claims by the Tribunal.'³¹ Callinan and Heydon JJ in a joint judgment similarly concluded that 'it is not possible to say that the Tribunal's decision, depending so much as it did, on the credibility of the appellants who gave oral evidence, was made fairly'.³² Their Honours went further in concluding that it could be inferred from the delay in the absence of evidence to the contrary that the Tribunal had deprived itself of its capacity to analyse the oral evidence of the applicants. This inference was not displaced by the fact of the opportunity available to the Tribunal to consult contemporaneous notes and tape recordings of the proceedings. Kirby J similarly based his decision on the presumptive effect of excessive delay: the Tribunal's decision 'was presumptively flawed by jurisdictional error' because the delay 'rendered suspect the reasons, findings and references to the evidence contained in the Tribunal's 'decision' [which] was not reached by a process that was procedurally fair and just'.³³

The main point of difference in the dissenting judgments of Gummow and Hayne JJ was their view that there was no demonstrated error by the Tribunal. After noting that the delay was lengthy, Gummow J concluded that it could not necessarily be inferred that the Tribunal was unable to fulfil its review function or be fair to the applicants. He disagreed also with the analysis of other judges that the applicants' demeanour had played such a key role in the Tribunal's decision. Hayne J observed that it was not possible to say from an analysis of the Tribunal's reasons – the only evidence available to the Court – that the Tribunal had failed to undertake a fair assessment of the applicants' evidence.

Caution is needed in drawing too much from *NAIS* about judicial review of administrative tribunals. After all, the principle that excessive delay can invalidate a decision applies equally to courts. Nevertheless, the application of that principle to tribunals throws up special issues that bear noting. Moreover, the principle is capable of being applied to administrative decision-making generally – though Callinan and Heydon JJ noted that the case before them 'was a very exceptional case'.³⁴

On one view *NAIS* need never pose difficulty for any tribunal that has an effective management system in place and can dispose of cases efficiently. However, that is possibly a bigger challenge for some tribunals than for courts, because the annual caseload of tribunals is typically in the thousands, and in some cases the tens of thousands. The inquisitorial role of many tribunals is relevant too, as the process of inquisition can make it harder to map out or keep a tight rein on the course of proceedings.

³¹ At [10].

³² At [168].

³³ At [102].

³⁴ At [174].

Bhardwaj and *NAIS* in combination pose a novel managerial challenge. If excessive delay can be a jurisdictional error, and if a jurisdictional error robs a proceeding of any legal effect, should a case be re-listed or re-assigned to another member when the delay becomes inordinate? After all, *Bhardwaj* suggests there is a duty upon a tribunal to correct a jurisdictional error and to discharge properly its statutory task.

Finally, the preparedness of the majority in *NAIS* to infer or presume unfairness from the way a case has been handled by a tribunal needs watching too. Tribunals are different to courts in many ways – how they are organised, their membership, rules of conduct, and their interaction with the parties, government agencies, and the public generally. It is theoretically possible that an inference of unfairness can be drawn from any aspect of the tribunal's work. A tribunal must be mindful of the risk that a court will have a different expectation of how fairness should be manifested in the operation of the tribunal.

JUDICIAL OVERSIGHT OF TRIBUNALS – BROADER ISSUES

The cases just discussed are in one sense unexceptional. They illustrate in the same fashion as countless other cases the application to tribunals of the principles of judicial review of executive action. Tribunals are constituted by and apply legislation, and it is axiomatic that they must act according to law. In a system of separation of powers it is for the judiciary to decide whether the other branches of government are legally compliant. Nor, it would be said, is judicial review an imposition on tribunals, even when that review is rigorous and exacting. The role of tribunals is to ensure that there is individualised justice, which is possible only if tribunal proceedings conform to a high standard of procedural fairness and display professional expertise.

No-one can sensibly disagree with those propositions. Yet, standing alone, they provide a narrow frame of reference for evaluating how tribunals fit within the framework of government. This argument will be developed in three ways, pointing to the dangers of judicialising the tribunal system, of lawyerising tribunal processes, and of impeding evolution in the system of oversight and accountability of government action.

The following discussion of those three points will draw not only from the earlier discussion of three High Court cases, but also from the author's experience as Commonwealth Ombudsman. The relevance of that experience is that the Ombudsman, like courts and tribunals, is an oversight agency which ensures that government acts lawfully and fairly.³⁵ The Ombudsman's caseload, of up to 20,000 complaints each year, provides a unique opportunity to pursue that rule of law objective across the full spectrum of government activity. Though the Ombudsman's ultimate remedy is limited to making a recommendation or report, that limitation is more important symbolically than practically. It is rare for a government agency to reject an Ombudsman recommendation. For many people, the Ombudsman is their principal external avenue for achieving administrative justice.

Judicialisation of the tribunal system

Courts enjoy considerable leeway in crafting the rules to govern their own proceedings and in shaping their model of procedural fairness. Many courts have the

³⁵ This argument is developed in J McMillan, 'The Ombudsman and the Rule of Law' (2005) 44 *AIAL Forum* 1.

legal authority to make their own Rules of Court;³⁶ legal error by a court is presumed to be an error within jurisdiction that can be set aside only by appeal;³⁷ and the principles of appellate review are generally typified by restraint in finding error.

Without rousing a debate about constitutional and other differences between courts and tribunals, it can be said that a tribunal should have room to move within its statutory framework to develop a system of adjudication that is adapted and responsive to the work of the tribunal and its experience. Tribunal statutes commonly declare that 'the procedure of the tribunal is within the discretion of the tribunal' and that 'proceedings shall be conducted with as little formality and technicality, and with as much expedition' as circumstances warrant.³⁸ The import of that direction, which has not been fully respected, is that a tribunal is to have a large measure of control in deciding the rules to be followed on a great range of general and specific procedural issues – including the adaptation of natural justice requirements to the tribunal, the format of reasons statements, the reliance on translators, the adjournment of proceedings, examination and cross-examination of witnesses, and the format of notices.

The trend in Australian law has been to treat issues of that kind as legal questions on which a review court can over time provide detailed instruction to the tribunal. The three cases earlier discussed illustrate that trend. The consequence has been to impose a legal straightjacket on tribunals and to make them excessively concerned with the possibility of judicial review and to orient their proceedings accordingly. This is noticeable in tribunal reasons statements that are prepared on the assumption that the primary audience for the reasons is an appellate court and not necessarily the parties before the tribunal.

If I can here relate my experience as Ombudsman, it is that the Ombudsman has blessedly been free of intensive judicial review. There have been occasional rulings (more in the early years) that would have hampered the evolution of the Ombudsman as an effective oversight agency had the rulings become orthodoxy.³⁹ However, judicial oversight has been exceptional, and Ombudsman offices in Australia have enjoyed considerable leeway in developing a method and procedures that are effective in securing administrative justice for those who complain against government.

Lawyerising tribunal processes

A possible lesson that one can draw from the three cases earlier discussed is that it helps to be a lawyer if one is a member of a tribunal. The doctrine of procedural fairness is decidedly a legal doctrine that can touch and potentially invalidate many aspects of a tribunal's processes. Knowing whether a jurisdictional error has occurred and the implications which thereby arise is a conundrum that only a lawyer could unravel. These examples can be replicated by reference to trends in judicial review generally: for example, a dominant theme in judicial review of tribunal

³⁶ Eg, *Federal Court of Australia Act 1976* (Cth) s 59; *Federal Magistrates Act 1999* (Cth) 81.

³⁷ Eg, *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369 at 389-391; *Craig v South Australia* (1995) 184 CLR 163.

³⁸ Eg, *Administrative Appeals Tribunal Act 1975* (Cth) s 33.

³⁹ Eg, *Glenister v Dillon* [1976] VR 550, reading narrowly the Ombudsman's power to examine 'administrative' acts; *City of Salisbury v Biganovsky* (1990) 54 SASR 117, distinguishing matters of policy and administration; and *Chairperson, Aboriginal and Torres Strait Islander Commission v Commonwealth Ombudsman* (1995) 134 ALR 238, reading narrowly the Ombudsman's power to make a 'finding'.

decisions is that error of law can be found in the way that a tribunal has dealt with an issue in its statement of reasons.⁴⁰ Legal training can reduce the risk of that occurring.

This creates an implicit pressure on governments primarily to appoint lawyers to tribunals. Members with legal qualifications now pre-dominate in most Australian tribunals, and this trend has intensified over time. The steady pressure to maintain this dominion was colourfully captured a decade earlier in Australia in the reaction that greeted a comment by the Administrative Review Council in the *Better Decisions* report that AAT members need legal awareness, but not necessarily formal legal qualifications.⁴¹ The ARC opinion provoked a sharp response from senior legal figures. Robert Todd, a former Deputy President, defended the critical role that lawyers had played in the development of the AAT, and ridiculed the proposed reliance on 'barefoot lawyers'.⁴² Sir Gerard Brennan cautioned that unless the AAT can maintain its reputation for assiduous application of the legal method its authority will quickly be lost.⁴³ Sir Anthony Mason, warning of a 'passport to disaster', foreshadowed that a sub-standard tribunal system may have the unintended consequence of generating judicial merits review.⁴⁴

While the importance of legal skills in tribunal work is undoubted, the utility of merit review by administrative tribunals can be hampered if too much emphasis is given to legal skills. The very notion of merit review, of gauging what is the correct and preferable decision, presupposes that a broad range of disciplinary skills can be called upon and contribute to the prudent development of principles for good decision-making. I draw again from my own experience as Ombudsman. My office has made a studious attempt to ensure that the staff (now numbering over 140) includes a blend of people with differing backgrounds, from areas as diverse as law, government, community organisation, teaching and nursing. My experience is that this blend of experience and wisdom among the staff is a great strength and enriches the work of the office in all its dimensions.

Evolution in government oversight and accountability

A strong theme in the judgments earlier discussed is that tribunals form part of the executive branch of government, which is subject to judicial oversight along customary lines. This approach is strongly rooted in the separation of powers, which is both a constitutional and an historical imperative.

Is it now time to rethink this orthodoxy? Over the last two decades there has been a transformation of the system of government oversight and accountability. The development of the administrative tribunal system is one part of that change. Tribunals now play a central role in adjudicating the diverse claims that people have against government – to social welfare support, information disclosure, heritage protection, customs classification, customs entry, taxation assessment, and

⁴⁰ Eg, see J McMillan, 'Federal Court v Minister for Immigration' (1999) 22 *AIAL Forum* 1.

⁴¹ ARC, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report No 39 (1995) at para 4.14.

⁴² R K Todd, 'The Structure of the Commonwealth Merits Review Tribunal System' (1995) 7 *AIAL Forum* 33.

⁴³ Sir Gerard Brennan, 'Twentieth Anniversary of the AAT: Opening Address' in J McMillan (ed), *The AAT – Twenty Years Forward* (1998) at 14-15

⁴⁴ Sir Anthony Mason, 'Reflections on the Development of Australian Administrative Law' in R Creyke and J McMillan (eds), *The Kerr Vision of Australian Administrative Law - At the Twenty-Five Year Mark* (1998, CIPL).

occupational certification. The range and number of cases decided annually by tribunals is greater than that of courts.

Numerous other oversight agencies play a compatible role in holding government to account. There is now an elaborate oversight framework of ombudsmen, independent crime commissions, privacy commissioners, information commissioners, human rights and anti-discrimination commissioners, and inspectors-general. The function they discharge embraces legal compliance, good decision-making, improved public administration, and institutional integrity. They are the frontline of administrative justice to which people largely turn when they have a dispute against government.

My view is that academic teaching and legal thinking has not grasped the significance of this transformation in government. The three-way separation of powers is never questioned as the premise for understanding and defining institutional relationships within government. And yet it is increasingly misleading to classify tribunals, ombudsmen and the various commissioners and inspectors-general as executive agencies: their independence, oversight role and impact on government differentiate them from other agencies in the executive branch.

An alternative, proposed both by Chief Justice Spigelman of the NSW Supreme Court⁴⁵ and by this writer,⁴⁶ is to recognise that by constitutional evolution we now have a fourth branch of government, that could variously be titled the integrity or oversight branch of government. There are various ways short of formal constitutional amendment of acknowledging this change. There is scope for doing so in the statutory provisions applying to these bodies on parliamentary oversight, annual reporting, and appointment and removal of statutory office holders. The terminology and classifications that are used in describing government can also accommodate a fresh approach in doing so. The theoretical models from which courts work when reviewing tribunals could be influenced in the same way.

⁴⁵ The Hon JJ Spigelman, 'The Integrity Branch of Government', *AIAL National Lecture Series on Administrative Law No 2* (2004).

⁴⁶ J McMillan, 'The Ombudsman and the Rule of Law' (2005) 44 *AIAL Forum* 1