

# Tribunals as the Generic Face of Justice: a challenge for the 21<sup>st</sup> Century

*“In Australian law...merits review by tribunals is considered to be categorically different from judicial review by courts, at least in procedural and remedial terms. Whereas the characteristic merits review remedy is to vary a decision or make a substitute decision, the characteristic judicial review remedy is to set the decision aside and remit it for reconsideration.” Peter Cane, ‘Judicial Review in the Age of Tribunals’ [2009] *Public Law* 479 at 494-5.*

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# The Theme

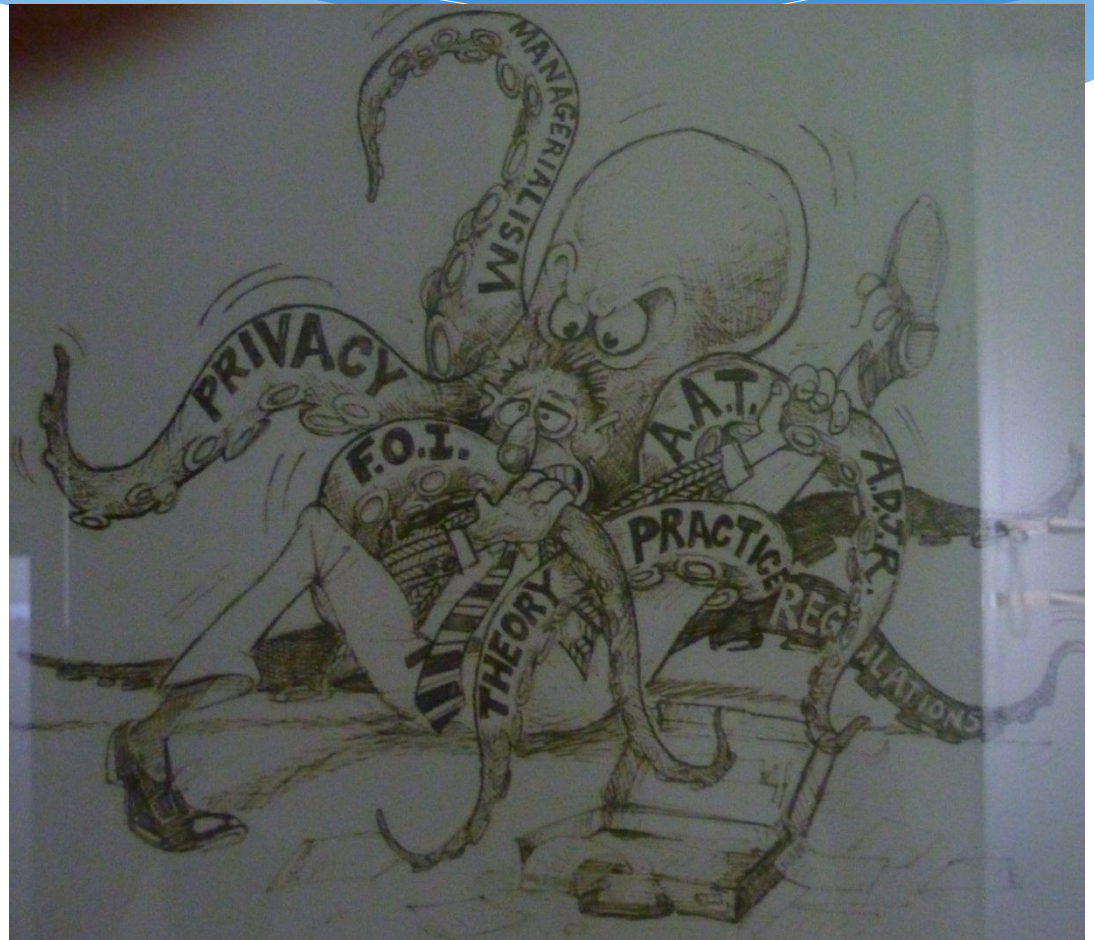
- Tribunals must **identify** and **publicise** their distinctive **nature**.



- Tribunals' **inquisitorial** mode of operations should “*distinguish them from adversarial proceedings*” and characterise their statutory functions.
  - *SZGUR v Minister for Immigration and Citizenship* [2011] HCA 1 at [23]

# The Vision

- 1971 Kerr Committee Report – birth of the Australian Tribunal regime
- Federal:
  - AAT and specialist tribunals
- State:
  - State and territory tribunals
  - Civil and Administrative Tribunals (Super 'CATS')



# The AAT Model

- *....when there is **vested** in the administration a vast range of **powers** and **discretions**, the exercise of which may detrimentally affect the citizen in his **person, rights or property**, justice to the individual may require that he should have more **adequate opportunities of challenging** the decision against him. (Kerr Report at [11])*

# Features of the AAT Template

- Impartial, external statutory decision making body
- Review all aspects of a decision made by government



Image source:

<http://www.smc.edu/HumanResources/PersonnelCommission/Pages/What-is-the-Merit-System.aspx>

# Features of the AAT Template

## Flexible Modes of Operation

- Rules of evidence do not apply
- The Tribunal *'shall inform itself as to the issues involved in such manner as it thinks fit, but procedures should be adopted to ensure that all material facts and matters of expert opinion are brought to the attention of the parties...'*  
Kerr Committee Report at [332]

## Specialist Members

- Not confined to judges or registrars who are lawyers
- *'...decisions should not be reviewed by judges who have had absolutely no experience in the field of public administration'*.  
Professor Whitmore (1972)

# Features of the AAT Template

## Accessibility

- Tribunal members can travel to regional areas to provide review
  - *'Easy access to review in a geographical sense'*. Taylor (1979)
  - Depends on appropriate volume of work arising out of area

## Efficiency

- Cheaper means of access to justice
- One tribunal with jurisdiction across government – lower application costs



Image source:  
<http://www.maiassistance.com/aboutus.html>

# Features of the AAT Template

## Normative Impact

- *'If as a result citizens look more critically at and have the right to challenge administrative decisions, this should **stimulate administrative efficiency**'* Kerr Report at [364]
- \* *'Obtaining justice by the review of decisions finds its ultimate **justification** by **improvement** in primary **decision-making.**'* Taylor (1979)



# The Vision: In Summary

- A body with the same powers as the decision maker within government
- Government-wide jurisdiction
- Expert and independent members
- To work quickly, informally, efficiently and cheaply
- With procedures attuned to the administrative process
- Free of adversarial restrictions
- Emphasis on the hearing as the vehicle for dispute resolution

# Developments since 1981

## Proliferation of the general jurisdiction model

- Success of the model demonstrated by replication, e.g. Tribunals Service in England and Wales;
- Flexibility indicated by adaptation of AAT template to CATS model;
- Potential for nationwide system of CATS to emerge.

## Flexibility

*‘The AAT Act contemplates that, generally, the framework will remain **consistent** regardless of the type of decision under review...[however] The framework has sufficient flexibility to **adapt its procedures** to the needs of the **class of case...**’* RE LJXW and Australian Federal Police [2011] AATA 187.

# Developments since 1981

## Creeping Legalism

- \* *'...counsel prefer to play **adversarial tactics.** This means that the basic **objectives** of the Tribunal are...being **subverted** to some degree by the legal profession...The result is **inevitable** – extended hearings, delays and much higher costs...'*  
Whitmore (1981)



# Developments since 1981

## Solution to ‘Creeping Legalism’?

- Recommendation to the VCAT review:
  - *‘much stronger rules against legal representation in the Tribunal’*
- QCAT – person may only be represented by a legal practitioner with leave. Most litigated procedural provision in QCAT Act 2009

## Prehearing Dispute resolution

- Preliminary conferences – used to encourage parties to exchange written statements and to confer with a view to settlement prior to a hearing.
- **Conciliation, mediation, case appraisal, neutral evaluations**
- Enjoined by Model Litigant Principles under *Legal Services Directions 2005* (Cth)

# Back to the future

*How should tribunals be presenting themselves? What is it that makes them distinctive?*

## Merits

*'The Tribunal[s]... role is the more comprehensive one of deciding what **ought** to have been the **correct or preferable** decision. ...in this respect at least, review by the tribunal can be a more **potent force** in support of good administration than the exercise of judicial review by the courts.'*

- *Re Russell and Conservator of Flora and Fauna (1996) 42 ALD 441 at 446*

## Diversity of Membership

Moorhead study (UK):

- Found lower rate of satisfaction with courts than with Tribunals in 2000 – 2008 because respondents felt judges were out of '**touch with ordinary people's lives**'
- Moorhead, Sefton and Scanlan, 'Just satisfaction? What drives public and participant satisfaction with courts and tribunals: a review of recent evidence,' *UK Ministry of Justice Research Series 5/08 (2008)* 9-10

# Back to the future

*How should tribunals be presenting themselves? What is it that makes them distinctive?*

## Flexibility of process

- Distinguishes tribunals from courts – not bound by formal processes
- Encompasses use of a range of dispute resolution tools – process models other than formal hearing
- Moorhead study found parties are satisfied if they feel they have had a fair hearing, even if they did not achieve the outcome they wanted.



# Back to the future

*How should tribunals be presenting themselves? What is it that makes them distinctive?*

## Accessibility

- Involves:
  - Visibility and availability of tribunal premises or locations of hearings
  - Customer service elements
  - Ability of the tribunal to accommodate a range of applicants
  - IT developments

## Cost Effectiveness

\* Figures from 2010/11 Annual reports:

Tribunal	Cost (\$) per matter
VCAT	\$440
QCAT	\$685
SAT	\$3, 244
VRB	\$1, 544
SSAT	\$2,239
AAT	\$15, 754 (\$3,362 w/o hearing)

# Conclusion

- It is time for tribunals to ‘*carve out a philosophy of their own existence.*’ McMillan (1998)
- It is of paramount importance that the distinctive features of tribunals are understood and protected
- ‘*Only so will tribunals acquire a **collective standing** to match that of the court system and a collective power to **fulfil the needs of users** in the way it was originally intended*’. Leggatt report (2001)



# Conclusion

There needs to be a *'renewed sense amongst tribunals and their staff that they are there to **do different things** from the courts, and in different ways, but **with equal independence.*** In many respects, it is a more difficult task.' Leggat report (2001)

