COUNCIL OF AUSTRALASIAN TRIBUNALS

Practice Manual for Tribunals

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Preface to the Fourth Edition

Public attention, both in the media and in law schools, regarding administrative law often focuses on the constitutionally entrenched supervisory jurisdiction of the Courts. That focus can distract from the day-to-day reality that the most frequently accessed methods of securing review of decisions of ministers, departments and government agencies are non-curial—through internal review, merits review, human rights bodies and the work of the Ombudsman.

Every year the vast majority of complaints about decisions made by government are dealt with by these important mechanisms. The right to merits review by an independent tribunal has become so well established over the past four decades at least in some areas of public administration that its existence and availability risks being taken for granted. However, access to merits review remains a creature of statute. It can be withdrawn.

In that regard it is important to recall just how fiercely merits review was resisted when it was first proposed. Sir Anthony Mason, later Chief Justice of the High Court in the first Whitmore Memorial Lecture recounted the level of resistance he witnessed at the Commonwealth level:

> Let there be no mistake about this. There was a very strong bureaucratic opposition to the Kerr Committee recommendations. The mandarins were irrevocably opposed to external review because it diminished their power. Even after the reforms were in place, Sir William Cole, Chairman of the Public Service Board, and Mr John Stone, Secretary of the Treasury, were implacable opponents of the reforms.

It would be foolish to suppose that such views, although one might hope now less common, would have no modern adherents. Those with responsibility for leadership in tribunals ought to proceed on the assumption that independent external review needs continually to promote its worth.

With such concerns in mind the Council of Australasian Tribunals (COAT) was established to:

- support the work of administrative and civil tribunals and promote excellence in administrative justice;
- provide a forum and act as a catalyst for discussion, education, research, policy development and law reform in the field of administrative justice;
- promote and encourage tribunals to develop best practice models and standards of behaviour and conduct;
- develop and provide training material to support tribunal members.

In 2006 in the preface to the first edition of the *COAT Practice Manual for Tribunals* (the Manual) the then Chair of COAT, the Hon Justice Garry Downes, wrote that the Manual would need to be a 'living resource' if it was to serve its purpose.

This, the fourth edition of the Manual, is the most recent concrete expression of His Honour's visionary leadership. It has been achieved under the skilful editorship of Mark Smyth, who also edited the 3rd edition. Mark Smyth is both a senior practicing lawyer and co-author, with Robin Creyke and John McMillan, of *Control of Government Action; Text Cases and Commentary*, Lexis Nexis 4th edn 2015. Professor Robin Creyke reviewed this edition. We thank Robin for her valuable contribution.

COAT is indebted to Mark and Robin. Their work has ensured that the Manual now is the living resource Downes J intended.

COAT's purpose in first publishing the Manual was to provide a readily accessible and reliable specialist resource capable of assisting members of civil and administrative tribunals undertake their challenging work. That remains the broadest expression of its purpose. I am confident that all tribunal members can find much in this edition that will be of use to them in that regard.

But COAT is also aware that not every Australasian tribunal has capacity to support routine in-house programs of professional learning and development. Previous editions of the Manual have been drawn on by many tribunals as essential induction and training materials. COAT is confident that this revised and updated 4th edition will continue to be useful for that purpose. Many new and existing members of tribunals working in high volume areas of decision making may well find the Manual an essential resource.

This edition of the Manual has a single editor but, as with previous editions, its content has necessarily drawn on the work of many dedicated contributors from across Commonwealth, state and New Zealand tribunals. COAT warmly acknowledges all of their intellectual contributions to the Manual. Without their input the Manual would not exist. Members are encouraged to consider how they might contribute to future editions.

Anne Britton has supervised the production of both the 3rd and 4th editions on behalf of the COAT Executive. Anne has charmed time-poor contributors, secured an excellent editor and successfully produced two editions of the Manual on a miniscule budget. In addition, she has used her experience as a senior tribunal member and knowledge of the law, to contribute to the oversight of each edition. I stand in awe!

There is no end point to learning how best to conduct a fair and efficient hearing in a tribunal. In time this 4th edition will need to be reviewed and replaced but until then I commend it to you as the next, energetic and vital, stage of the Manual's evolution as a living resource.

The Hon Duncan Kerr
Chair
Council of Australasian Tribunals
3 March 2017

About the Manual

Currency of information and updating

The Practice Manual for Tribunals was first issued in April 2006. The second edition was completed in February 2009. The third edition was completed in 2013. The fourth edition was completed in February 2017.

Information is provided on each page in relation to its currency. The date on which the page was issued or last updated is noted at the foot of each page.

Comments

The Practice Manual for Tribunals is designed to be a practical resource that assists tribunal members to undertake their duties. The Council would welcome feedback in relation to the form and content of the manual and, in particular, any suggestions for additional areas that should be covered in the manual.

Comments may be directed to the following email address: practicemanual@coat.gov.au

Chapter One: The Nature of Tribunals

1.1. Key points

Jurisdiction and powers:

- There is no single definition of the term 'tribunal' which can adequately describe the range of bodies to which the term is applied, and that can distinguish tribunals from courts and from the ordinary agencies of government.
- There is a functional distinction between courts and tribunals at the Commonwealth or federal level, where the Australian Constitution requires a separation of administrative as opposed to judicial powers.
- In the states and territories of Australia, and in New Zealand (which has a unitary system of government), the roles of courts and tribunals may be less easy to distinguish and may overlap. There is not the same strict separation of form and function.
- Most tribunals are established by statute. As creatures of statute, their powers are set out by statute and limited as such.

Nature and variety of tribunals:

- Tribunals may provide first– or second-tier merits review or may be charged with hearing civil claims. Tribunals exist in a broad range of subject areas.
- Tribunals are also diverse in the way they are constituted and operate. Tribunals operate with varying degrees of formality, specialisation and inquisitorial processes.

Role of tribunal members:

- While their professional backgrounds may be diverse, tribunal members all require a common set of core skills and abilities. The Administrative Review Council suggests that the following key competencies are essential or desirable for members of Australian administrative review tribunals:
  - understanding of merits review and its place in public administration
  - knowledge of administrative review principles
  - knowledge of principles underlying the review of administrative decisions

– analytical skills and communication skills
– personal skills and attributes (such as interpersonal skills and cultural awareness).

Appeals and judicial review:

- Many administrative tribunals are required to review decisions on the merits by way of a hearing de novo.
- There are different types of appeal. A right to appeal must be given by a statute, so the powers of the court or tribunal are defined by the statute.
- Apart from appeals under statute, a person affected by a decision of an administrative agency, court or tribunal may have a right to apply to a court for judicial review. The power of the courts to undertake judicial review derives from the common law and is generally laid down by statute in each jurisdiction. Judicial review is only available on a limited basis, confined to the established grounds of review.

1.2. Jurisdiction and powers

1.2.1. What is a tribunal?

There is no single definition of the term 'tribunal' which can adequately describe the range of bodies to which the term is applied, and that can distinguish tribunals from courts and from the ordinary agencies of government.

The legal meaning of the term 'tribunal' is broader than its use in ordinary or everyday speech. A court can be called a tribunal—and so can any official or body with power to make decisions affecting the rights and interests of individuals or corporations in accordance with procedures laid down by law. An example is the New South Wales Independent Pricing and Regulatory Tribunal (IPART). The term needs to be understood and applied in its particular context and setting. As Rees notes, 'the term "tribunal" usually provides more information about what a body is not, rather than what it is'.[1] However, the legal meaning of the word 'court' is more restricted. Courts are exclusively public bodies invested with state powers.

Pearson has identified the following common features of Australian tribunals.

- They are established by statute, with legal authority to make decisions.
- In exercising their function of reviewing administrative decisions, they are independent of the original decision-maker.

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1 N Rees, 'Procedure and evidence in "court substitute" tribunals' (2006) 28 *Australian Bar Review* 41 at 41.

- They are obliged to give reasons for their decision.
- They may be constituted by members with expertise in the matters coming before the particular tribunal.
- They are subject to supervisory or appellate powers of a court.
- Their procedures are intended to be less formal than those of the courts, with an emphasis on negotiated dispute resolution.[2]

Not all tribunals are established by government or will exhibit all of these features. Many tribunals arise in the private 'for profit' and the 'not for profit' sectors. Private sector tribunals can arise in various areas of endeavour. For example, sporting, religious, professional, industrial and cultural associations often establish tribunals to deal with complaints and disputes arising under their particular rules. These are often referred to as domestic tribunals.

Such 'domestic tribunals' differ from statutory tribunals in that they derive their powers from contract, rather than from legislation. That is, their authority comes from the members' agreement to abide by the association's rules. They must comply with the rules of the association, but are not subject to all of the general legal requirements that apply to government tribunals.

A discussion of courts and tribunals in Australia requires consideration of the federal context. Australia has nine separate parliaments, comprising:

- the Australian Parliament based in Canberra
- the six state parliaments for New South Wales, Victoria, Queensland, Western Australia, South Australia and Tasmania
- the territory parliaments of the Northern Territory and the Australian Capital Territory.

There is a functional distinction between courts and tribunals at the Commonwealth or federal level, where the *Australian Constitution* of 1901 requires a separation of administrative from judicial powers. At the federal level, only courts can exercise judicial powers under the Constitution (Chapter 3, ss 71–80). Section 71 provides that:

> The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction.

In the states and territories of Australia, and in New Zealand (which has a unitary system of government rather than a federation), the roles of courts and tribunals may be less easy

2 L Pearson, 'The Vision Splendid: Australian Tribunals in the 21st Century' (Paper presented at the ANU's Public Law in the Age of Statutes Conference, ANU, 24 October 2014).

to distinguish and may overlap. That is, there is not the same strict separation of form and function as there is at the federal level.[3]

Parliaments, as sovereign law making bodies, subject to the types of constitutional restrictions noted above, can choose to give a function to a tribunal rather than a court. It will usually be for one or more of the following reasons.

- *Limitations of judicial review.* Courts are tasked with judicial review or certain types of appeal from administrative decision-makers. Judicial review is, broadly speaking, concerned with the legality of a decision. Merits review tribunals, by contrast, 'stand in the shoes' of the original decision-maker and can therefore offer external review of an administrative decision on the basis of both the legality and the merits of the decision.[4]
- *Informality of process.* Tribunals are able to operate more flexibly and informally than courts. This makes them more accessible to parties, and saves costs by reducing the need for parties to have formal legal representation.
- *Specialist members.* Tribunals can be staffed with members with specialist skills and expertise in areas other than law, as well as those with legal qualifications. This makes tribunals an attractive forum for decision-making in specialised areas, such as planning and disability assessments.
- *Members on flexible terms*. From the government's point of view, the membership of tribunals is more flexible than for the courts. The government can appoint part-time members on fixed term contracts, whereas judges are appointed until a specified retirement age.

At the other end of the spectrum of powers, the functions of tribunals and administrative agencies overlap. Where the Parliament wants to provide for a body to make administrative decisions or to review decisions made by somebody else, it can give the function to a tribunal or to an administrative agency of government, such as a department of state. If it chooses to give it to a tribunal, the usual reason is that it wants the function carried out with some degree of independence from government agencies.[5]

Since there is no agreed definition of 'tribunal', it is necessary to specify to which categories of tribunals this Manual refers. This Manual is written for and about tribunals that are eligible

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3 Although state parliaments cannot confer powers on a State Supreme Court which would impermissibly undermine the institutional integrity of that Court: *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531; *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319; W Lacey, '*Kirk v Industrial Court of New South Wales*: Breathing Life into *Kable*' (2010) 34 *Melbourne University Law Review* 641.

4 See *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 4 ALD 139, 143; *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60, 68; Commonwealth, *Commonwealth Administrative Review Committee: Report,* Parl Paper No 144 (1971) (the Kerr Committee Report).

5 A more detailed discussion of the functional differences between merits review, primary decision-making and judicial review appears in: M Smyth, 'Inquisitorial Adjudication: The Duty to Inquire in Merits Review Tribunals' (2010) 34 *Melbourne University Law Review* 230; R Creyke, J McMillan and M Smyth, *Control of Government Action* (2015, LexisNexis) ch. 3; P Cane, *Administrative Tribunals and Adjudication* (Hart Publishing, 2009) ch. 5.

for membership of the Council of Australasian Tribunals (COAT). Under clause 2(1) of the *COAT Constitution*,[6] an 'eligible tribunal' is:

> any Commonwealth, State, Territory or New Zealand body whose primary function involves the determination of disputes, including administrative review, party/party disputes and disciplinary applications but which in carrying out this function is not acting as a court.

This definition *excludes* courts and bodies whose functions are primarily regulatory, advisory, policy making or investigatory such as IPART. It *includes* government tribunals that are part of a court, but which are not acting as a court when they determine disputes such as the Administrative Appeals Division of the Magistrates' Court in Tasmania. These tribunals, although part of a court, exercise mainly administrative powers.

1.2.2. Jurisdiction

There is an important difference between a tribunal's *jurisdiction* and its *powers*. The word *jurisdiction* has different meanings according to context.

- *Geographic territory*. It is used to refer to the territory within which a power extends. Because of Australia's federal structure of government, each state and territory and the Commonwealth is a separate *jurisdiction* in the territorial sense. New Zealand is one jurisdiction.
- *Subject matter. Jurisdiction* can describe, in a general way, the kinds of matters that a tribunal is authorised to decide. For example, the *taxation jurisdiction* of a tribunal can mean its powers to determine taxation matters. If a tribunal purports to determine a matter that it has no power to decide, it lacks jurisdiction and its decision, if challenged, may be invalidated.
- *Form of review. Jurisdiction* can refer to the form of decision-making, review or appeal that the tribunal is tasked with undertaking. For example, the *review jurisdiction* and the *original jurisdiction* of the Victorian Civil and Administrative Tribunal or the State Administrative Tribunal in Western Australia refer to different kinds of powers. (These 'hybrid' tribunals exercise 'review jurisdiction' when they review decisions made by another administrator or tribunal, and 'original jurisdiction' in all other matters.)

The scope of a power. A narrower meaning of *jurisdiction* refers to the scope of a particular power given to a tribunal. Whenever Parliament gives a power to a tribunal, it sets limits to the power. The limits may be express (i.e. in writing) or implied (as a result of, or flowing from, the written power). This may relate to the procedures for exercising power or to the type of orders the tribunal can make.

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6 <http://coat.gov.au/constitution> at 20 January 2013.

1.2.3. Powers

A tribunal's powers refer to the actions the tribunal can take and the decisions it can make within the scope of its jurisdiction. It is conventional to refer to a tribunal's powers to make a decision, rather than its power to take action, because actions are based upon decisions.

1.2.3.1. Sources of power

Most tribunals are established by statute. As creatures of statute, their powers are set out by statute and limited as such. More rarely, public sector tribunals may operate under non-statutory powers of government. For example, a Minister who has the function of reviewing government decisions may establish a tribunal to hear the applications and to make recommendations. The final decision is the Minister's and the tribunal in this instance is an advisory body.

While courts have some common law powers, statutory tribunals have only the powers that parliament has given them. A tribunal must be able to point to a legislative provision authorising any decision that it makes. The provision may be found in the tribunal's 'governing legislation'—the particular Act of parliament (and any rules or regulations made under it) that establishes the tribunal and sets out its general powers, membership and procedures.

Powers may also be given to the tribunal by another Act, called an 'enabling Act' or an 'empowering Act'. For example, the *Freedom of Information Act 1982* (Vic) gives the Victorian Civil and Administrative Tribunal power to review certain decisions of government agencies made under the Act.

Most powers are given expressly by legislation, but there may also be an 'incidental' or 'implied' power to do anything that is reasonably necessary to make the express power effective. For example, giving advice about how to appeal a decision may be reasonably incidental to a tribunal's statutory power to receive and determine appeals. The incidental power may be expressly given by the statute, or may be implied. For example, a merits review tribunal is inherently able to receive evidence up to the time its decision is published.

Not all tribunals are established by government. Private sector sporting, religious, professional, industrial and cultural associations often establish tribunals to deal with complaints and disputes arising under their rules. These 'domestic tribunals' differ from statutory tribunals in that they get their powers from contract rather than from legislation. That is, their authority comes from the members' agreement to abide by the association's rules. They must comply with the rules of the association, but are not subject to all of the general legal requirements that apply to government tribunals. Depending on the subject matter and nature of its decisions, there may be debate over whether such a tribunal exercises public or private power and is thus amenable to judicial review.[7]

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7 Justice Kyrou, 'Judicial Review of Decisions of Non-governmental Bodies Exercising Governmental Powers: Is Datafin Part of Australian Law?' (2012) 86 *Australian Law Journal* 20; J Boughey and G Weeks, ' "Officers of the Commonwealth" in the Private Sector: Can the High Court Review Outsourced Exercises of Power?' (2013) 36 *University of New South Wales Law Journal* 316; *Agricultural Societies Council of NSW v Christie* [2016] NSWCA 331.

1.2.3.2. Duties and discretionary powers

Some powers of a tribunal are duties, often indicated by words like 'the Tribunal shall (or must) [do something]'. Many powers given to tribunals are *discretionary.* That is, they require the tribunal to exercise judgment and/or to make a choice between different decision outcomes or ways of proceeding. A discretionary power is commonly indicated by the form of words: 'the Tribunal *may* [do something]'. Another type of discretion is a *discretionary judgment*, which may be required when the tribunal has to apply a statutory criterion or standard, for example, to determine whether a person is a 'fit and proper person' to hold an occupational licence, or a decision is 'fair and reasonable'.

The discretion given to tribunals is not boundless. The High Court of Australia has explained that:

- "[T]he extent of … discretionary power is to be ascertained by reference to the scope and purpose of the statutory enactment": *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342 at 368 (Mason J).
- The discretion conferred by statute is 'intended to be exercised according to the rules of reason and justice, not according to private opinion; according to law, and not humour': *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 at 189 (Kitto J).
- The requirement that officials exercising discretion comply with the canons of rationality means 'that their decisions must be reached by reasoning which is intelligible and reasonable and directed towards and related intelligibly to the purposes of the power. Those canons also attract requirements of impartiality and "a certain continuity and consistency in making decisions" ': *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 [25] (French CJ).

A tribunal which has a discretionary power, or is required to make a discretionary judgment, must:

- follow the required statutory process and afford the parties procedural fairness
- consider relevant criteria
- ignore any irrelevant considerations
- reach its decision following a reasoned and intelligible reasoning process.

Broadly speaking, there are three useful types of operating model for tribunals in this regard.

- *Fully structured discretion*. Sometimes the Act itself sets out an exhaustive list of the relevant considerations. In this case the discretion is said to be 'fully structured'.
- *Partial discretion.* In some cases the Act provides a list of matters to be considered, leaving the tribunal free to consider other relevant matters. This is a 'partly structured' discretion.
- *Unstructured discretion.* The Act might specify no criteria at all. If the discretion is unstructured or partly structured this presents particular challenges for the tribunal. The

tribunal must identify the relevant criteria in a given case, by considering the purposes of the Act and the whole legislative scheme, and any lawful policies made by the administering agency or Minister.

See DJ Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (1986).

1.3. Commonwealth and state tribunals in Australia

The Australian Constitution incorporates the principle of separation of powers. Chapter I of the Constitution vests the legislative power of the Commonwealth in the Commonwealth Parliament, Chapter II establishes the Executive Government as the administrative or executive arm of the Commonwealth, and Chapter III vests the judicial power of the Commonwealth in the High Court of Australia and the federal court system.

The High Court strictly enforces the separation of judicial power from the other powers, and has spelled out two related consequences. The first is that only a court mentioned in Chapter III of the Constitution can exercise the judicial power of the Commonwealth. The second is that federal courts cannot exercise executive or administrative power. In *R v Kirby; Ex parte the Boilermakers' Society of Australia*[8] the High Court applied these principles to hold that a tribunal established to arbitrate industrial disputes could not fine a union that had breached its order. Imposing a fine is a judicial function, which could not be given to a non-judicial body or combined with non-judicial powers.

The strict separation of judicial power from non-judicial power has important implications for the structure of the Commonwealth administrative justice system. Courts can review an administrative decision to determine if it is lawful, since this is a judicial function. But if the Australian Parliament wants to empower somebody to review administrative decisions on the merits and re-exercise the powers of the original decision-maker, it cannot give the function to a court. Since the power is administrative in nature, it must be given to a tribunal, or to some other executive official or body.[9]

Another implication of the separation of powers is that a Commonwealth tribunal cannot exercise any powers that are judicial in nature. The authority to make a conclusive and enforceable determination of the rights and obligations of parties or the lawfulness of an action is a key attribute of judicial power. In *Brandy v Human Rights and Equal Opportunity Commission*[10] the High Court held that the power of the Commission to make an immediately enforceable anti-discrimination determination was an unconstitutional exercise of judicial power by a non-judicial body. It follows that a Commonwealth tribunal cannot be given

8 (1956) 94 CLR 254.
9 Commonwealth, *Commonwealth Administrative Review Committee: Report*, Parl Paper No 144 (1971).
10 (1995) 183 CLR 245.

powers to enforce its own determinations, for example, by imposing a fine or granting an injunction.

This limitation on the power of Commonwealth tribunals is not a problem for an administrative tribunal that reviews decisions of a government agency. The tribunal's governing Act usually states that the tribunal's decision substitutes for the decision under review. The administering agency is expected to give effect to the tribunal's decision as its own. There is no breach of the separation of powers because the tribunal's decision has the same legal effect as that of the agency.

A Commonwealth tribunal can be given a range of dispute resolution functions, such as mediation, conciliation and arbitration that do not involve an exercise of judicial power.

In the Australian states and territories and in New Zealand there is no strict constitutional separation of powers. Tribunals that are not part of the court system can be given judicial powers. For example, in an application for the sale or division of co-owned land or goods, VCAT has power to vary the property entitlements of the co-owners,[11] a function that is essentially judicial in nature. State and territory and New Zealand tribunals can also be given power to make binding adjudications of disputes between private parties, to enforce their own decisions, to grant 'judicial' remedies such as an injunction, and to award costs.

1.4. Nature and variety of tribunals—merits review and civil claims

1.4.1. Administrative tribunals

Administrative tribunals may be given various governmental functions, including making policy, monitoring compliance with regulatory standards, advising, conducting investigations and handling grievances. Membership of COAT is confined to tribunals that have a primary function of determining disputes, including administrative review, party/party disputes and disciplinary actions but which in carrying out this function are not acting as courts.[12] There are two main categories:

- *Administrative tribunals*: administrative or 'merits review' tribunals determine disputes between government and private persons or bodies arising under public law. For example, land use planning, land valuation and compensation, migration, deportation and refugee status, tax assessment, occupational and business licensing, liquor licensing, broadcasting regulation, freedom of information, allocation of mining rights, film and literature classification, prisoner parole, pensions and benefits and public housing.

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11 *Property Law Act 1958* (Vic) ss 228–30.

12 *COAT Constitution* Part 1 <http://www.coat.gov.au/about/constitution-and-memorandum-of-objects.html> at 2 January 2017.

Administrative tribunals are found at both the state and territory, and Commonwealth levels of government in Australia and in New Zealand. In Australia, the different range of subject matters dealt with by state and territory, and Commonwealth tribunals reflects the division of legislative power under the Australian Constitution.

- *Civil tribunals*: in the states and territories and in New Zealand, tribunals have taken over from the courts the determination of some 'civil' disputes arising under private law, in which the government is not necessarily a party. The classes of civil disputes determined by tribunals vary from one jurisdiction to another, but may include matters such as accident compensation, insurance, superannuation, consumer credit, building, mining activity, discrimination, strata title, retirement village, co-ownership, residential and retail tenancy disputes, and guardianship and mental health. Commonwealth tribunals cannot be given statutory power to make enforceable determinations of the rights and liabilities of the parties through an adjudicative process, due to the separation of powers as described above. This limits the scope for Commonwealth tribunals to determine civil disputes.

1.4.1.1. Primary decision-making and review

There is a functional distinction within administrative tribunals between those tribunals that make administrative decisions in the first instance (primary decisions) and those tribunals that review primary decisions made by others (review tribunals) (see Figure 1). Many occupational and business licensing tribunals make primary decisions, while the Administrative Appeals Tribunal solely exercises merits review. A tribunal may have both functions; that is, it may make primary decisions and also review its own decisions or those of another agency. Where the tribunal reviews its own decisions, the review function may be given to a higher 'tier' or level of the tribunal.

Within the category of review tribunals, there is a further distinction between tribunals which review decisions of a primary decision-maker (first-tier review tribunals) and those which review decisions of other review tribunals (second-tier review tribunals). For example, reviews of decisions of the Department of Human Services (Centrelink) relating to pensions and benefits are heard by the Social Services & Child Support Division of the Administrative Appeals Tribunal (first-tier review) and a further right of review lies to the Administrative Appeals Tribunal (second-tier review). The right to seek second review from the first tier may be as of right or it may be restricted, for example, to cases where the first-tier panel made an error of law.

1.4.1.2. De novo merits review tribunals

Review tribunals review administrative decisions 'on the merits'. Ordinarily, this may indicate that the tribunal is tasked with 'standing in the shoes' of the original agency decision-maker and considering afresh the merits of the matter in dispute rather than the lawfulness of the decision under review.

The scope of each tribunal's review function varies. The High Court has cautioned that the word "review" "has no settled pre-determined meaning; it takes its meaning from the context in which it appears": *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 261 (Mason CJ, Brennan and Toohey JJ).

The fullest type of merits review is by way of rehearing de novo, in which the tribunal rehears the matter afresh, is not confined to the evidence or other material that was before the primary decision-maker, and may consider new submissions and arguments. The parties will usually present their evidence and submissions again to the tribunal.

Whether a merits review is to be by way of rehearing de novo depends on the relevant statute. A common kind of legislative provision in tribunal legislation is one like s 43 of the *Administrative Appeals Tribunal Act 1975* (Cth), which gives a tribunal power to exercise all the powers and discretions of the primary decision-maker.[13] This provision has been interpreted[14] as indicating a legislative intention to provide for de novo merits review.[15] By contrast, a body such as the Superannuation Complaints Tribunal is restricted to deciding whether the decision of a trustee and/or insurer is 'fair and reasonable'.

If the tribunal is able to re-exercise the powers of the primary decision-maker, the question is what standards or criteria should guide its review. In an early decision on the interpretation of the *Administrative Appeals Tribunal Act 1975*, a majority of the Federal Court held that the Administrative Appeals Tribunal was required to consider the material before it and arrive at the 'correct or preferable decision'.[16] This standard has been widely applied to other Commonwealth, state and territory tribunals which undertake de novo merits review. Some tribunal legislation expresses the standard as the 'correct and preferable decision', but the meaning is the same. The tribunal must reach a decision that is legally and factually correct; but if more than one decision is lawfully open, it must reach the preferable decision.[17]

The idea that merits review is a re-exercise of the powers and discretions of the primary decision-maker has the following implications. There is no presumption that the decision under review is correct. The tribunal is reviewing the decision and not the primary decision-maker's reasons. It does not have to find some legal flaw or factual error in the primary decision in order to overturn it. It is enough that the tribunal concludes that another decision is preferable.[18]

By contrast, some tribunals are tasked by statute with a much more confined review task. For example, the National Energy Law and National Gas Law provide for a 'limited merits review regime' of the Australian Energy Regulator's distribution and pricing determinations.

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13 See also *Migration Act 1958* (Cth) ss 349(1), 415(1); *Veterans' Entitlements Act 1986* (Cth) s 139(3).

14 *Superannuation (Resolution of Complaints) Act 1993* (Cth) s 37.

15 *Re Greenham and Minister for the Capital Territory* (1979) 2 ALD 137; *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60 ('Drake No 1').

16 *Drake No 1* (1979) 2 ALD 60 at 68 (Bowen CJ and Deane J).

17 R Creyke, 'The Criteria and Standards for Merits Review by Administrative Tribunals' in R Creyke and J McMillan (eds), *Commonwealth Tribunals: The Ambit of Review* (1998, Centre for International and Public Law, ANU, Canberra) 13. See also the discussion of Kiefel J in *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 at [140].

18 P Cane, *Administrative Tribunals and Adjudication* (Hart Publishing, 2009) ch. 5.

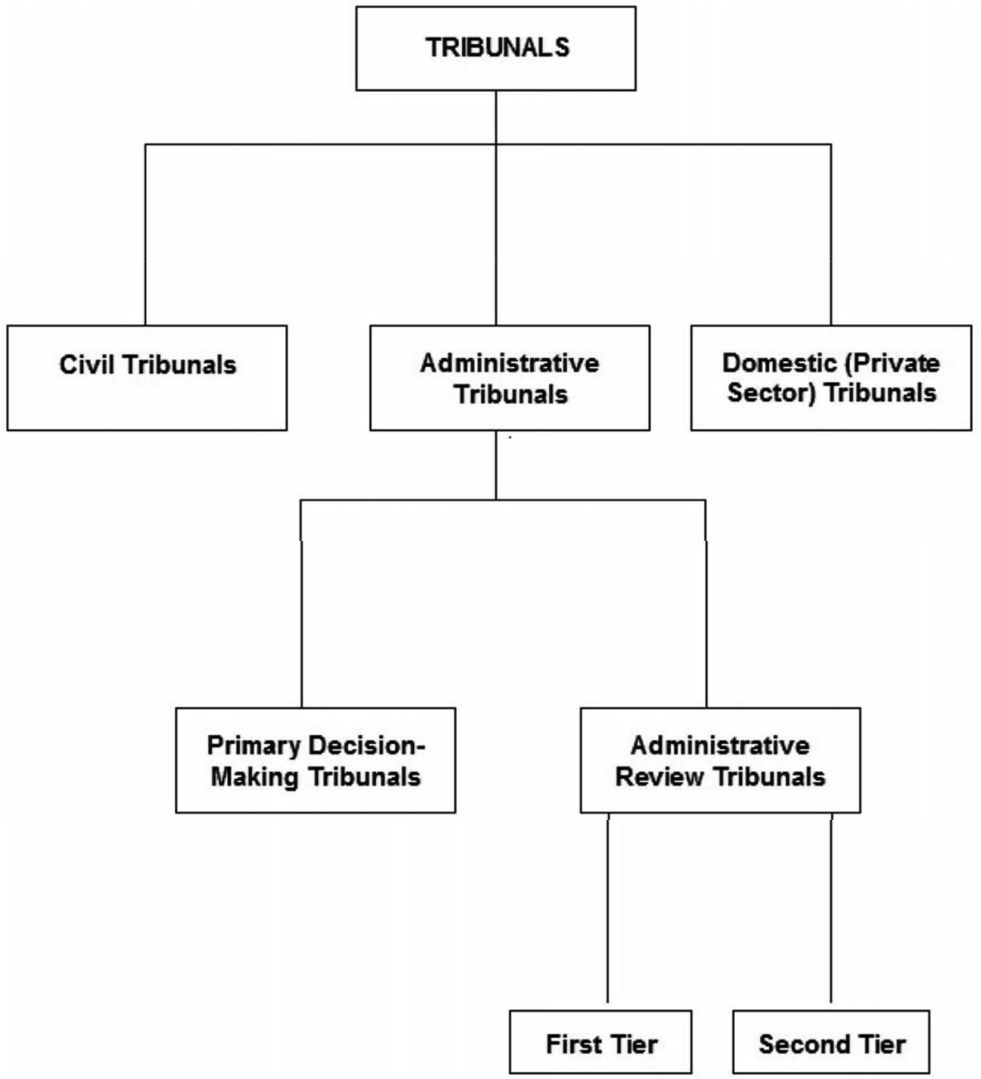

Figure 1. Categories of tribunals

Note: this diagram represents the conceptual relationship between categories of tribunals. It does not indicate any organisational hierarchy.

Under the limited merits review regime, the Australian Competition Tribunal may only set aside the AER's decision if one of four grounds of review are met and the Tribunal is satisfied that the AER's decision is not a "materially preferable decision" under the objectives of the legislation. Similarly the Superannuation Complaints Tribunal may change a decision under review only if it is unfair and unreasonable.[19]

19 *Superannuation (Resolution of Complaints) Act 1993* (Cth) s 37.

For a more detailed recent discussion of the nature and scope of merits review, see M Allars, 'The Nature of Merits Review: A Bold Vision Realised in the Administrative Appeals Tribunal' (2013) 41(2) *Federal Law Review* 197.

1.4.2. Tribunals hearing civil claims

There has been a strong recent trend towards amalgamated tribunals which hear both civil and administrative claims. Legislation establishing the amalgamated civil and administrative tribunals ('CATs'), 'super tribunals', or 'multi-jurisdiction tribunals' generally provides that the CATs are not required to comply with the rules of evidence, are empowered to inform themselves as they see fit and must operate quickly, cheaply and informally. The CATs are therefore designed as central, one-stop-shops for less formal and less expensive civil and administrative dispute resolution.

The CATs in the states and territories now include the ACT Civil and Administrative Tribunal (ACAT), the New South Wales Civil and Administrative Tribunal (NCAT), the Northern Territory Civil and Administrative Tribunal (NTCAT), the Queensland Civil and Administrative Tribunal (QCAT), the South Australian Civil and Administrative Tribunal (SACAT), the Victorian Civil and Administrative Tribunal (VCAT) and the Western Australian State Administrative Tribunal (SAT). Justice Bell, former President of VCAT, identified the following benefits of these amalgamated super tribunals in his report *One VCAT: President's Review of VCAT* (2009):

- improve access to justice
- achieve administrative efficiencies through the centralisation of registry functions
- introduce common procedures for all matters, but retain flexibility for specialised jurisdictions
- improvement of centralised IT systems and use of technology, and
- increase use and variety of alternative dispute resolution mechanisms within the tribunal apparatus.

1.4.3. Other types of tribunals

Disciplinary tribunals hear complaints or proceedings brought against practitioners of a particular profession, occupation or industry and exercise 'quasi-penal' powers,[20] for example, by suspending a right to practice, imposing conditions on practice, a fine or administering a reprimand.

The purpose of a disciplinary proceeding is to regulate an activity in the public interest, although the sanctions on the individual who has not met the profession's standards is a punishment for the wrongdoer. The tribunals may operate under statute, or as domestic

20 JRS Forbes, *Justice in Tribunals* (4th edn, 2014, Federation Press, Sydney).

tribunals exercising contractual powers to enforce the rules of an association. Some tribunals exercise both disciplinary powers and also licensing and regulatory powers in respect of a particular industry or profession.

Guardianship and administration tribunals and mental health review tribunals exercise a 'protective' jurisdiction. They are empowered to make orders to safeguard the interests of vulnerable persons in special need of the protection of the state.

1.4.4. Diversity of tribunals

Apart from the differences in their subject area and the powers and functions given to them, tribunals are diverse in the way they are constituted and operate.

- They may be constituted (for some or all matters) by a single member sitting alone, or by a multi-member panel.
- They may be constituted by 'lawyer-generalists', or by members with specialist skills and knowledge in the subject matter that the tribunal deals with. The 'lawyer-generalist' is more common in civil tribunals, and the non-legal specialist is more likely to be found in administrative tribunals, alongside those with legal qualifications.
- Their members may be full-time, part-time or mixed.
- There may be only one party to the proceedings (as in occupational and business licensing matters where the tribunal is the primary decision-maker) or there may be two or more parties. The latter is more common in civil disputes and in merits review applications.
- Matters may be dealt with at an oral hearing (which may be conducted in the presence of the parties or by video or phone conferencing), or determined 'on the papers' without an oral hearing.
- Tribunals that conduct oral hearings operate with varying degrees of formality, depending on the nature of the proceedings. For example, disciplinary proceedings involving serious allegations against a person are often heard in a more formal and adversarial or 'court-like' manner, while social security and guardianship matters are usually dealt with in a less formal manner.
- Tribunals that conduct oral hearings may operate in an adversarial manner closely resembling a court, or may make greater use of their inquisitorial powers. The extent to which this occurs is influenced by the tribunal's culture, the tribunal's statutory powers, whether legal representation is permitted and the availability of staffing and resources.[21]

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21 See generally: N Bedford and R Creyke, *Inquisitorial Processes in Australian Tribunals* (Australasian Institute of Judicial Administration, 2006); R Creyke, ' "Inquisitorial" Practice in Australian Tribunals' (2006) 57 *Admin Review* 17; J Dwyer, 'Fair Play the Inquisitorial Way: A Review of the Administrative Appeals Tribunal's Use of Inquisitorial Procedures' (1997) 5 *Australian Journal of Administrative Law* 5.

In interpreting what is said in this Manual, it is important to bear in mind the diversity of tribunals and to make allowances for the differences between tribunals.

1.5. Role of tribunal members—key competencies

One of the features that distinguish tribunals from courts is that their membership commonly includes persons with a wider range of qualifications and expertise than law—people such as valuers, psychologists, accountants, medical practitioners and planners. The diversity of membership broadens the skills and knowledge base of tribunals, enhancing their capacity to make decisions in specialised areas of administration.

1.5.1. Core skills and abilities—the ARC model

Defining the skills and knowledge expected of tribunal members is important for the recruitment, induction and training of members and for management of their performance and professional development.

While their professional backgrounds may be diverse, tribunal members all require a common set of core skills and abilities. The Administrative Review Council (ARC) suggests that the following key competencies are essential or desirable for members of Australian administrative review tribunals:[22]

- understanding of merits review and its place in public administration
- knowledge of administrative review principles (which includes a general knowledge of administrative law)
- knowledge of principles underlying the review of administrative decisions, including concepts of procedural fairness and knowledge of the rules of evidence (even though they do not formally apply in tribunals)
- analytical skills (including the capacity to interpret legislation and to analyse evidence)
- personal skills and attributes (such as interpersonal skills, gender and cultural awareness)
- communication skills (including ability to write reasons in a clear and concise fashion).

The Administrative Review Council has also published *A Guide to Standards of Conduct for Tribunal Members*. The Guide sets out seven principles of conduct and professional behaviour for tribunal members, which are: respect for the law; fairness; independence; respect for persons; diligence and efficiency; integrity; and accountability and transparency.[23]

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22 Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report No 39 <http://www.arc.ag.gov.au/Publications/Reports/Pages/Reportfiles/ReportNo39.aspx> at 2 January 2017.

23 Administrative Review Council, *A Guide to Standards of Conduct for Tribunal Members* (2009) <http://www.arc.ag.gov.au/Documents/GuidetoStdsofConduct-RevisedAug2009.pdf> at 2 January 2017.

1.5.2. Key competencies for tribunal adjudication: the COAT Framework

There is no definitive list of core skills and abilities required for members of all Australasian tribunals, or even for all adjudicative tribunals.

In 2013, COAT published its *Tribunal Competency Framework: Promoting Professional Excellence*.[24] The COAT Framework is intended to provide a guide to newly appointed and experienced members to the full range of critical abilities and qualities expected of them. The COAT Framework is divided into eight headline competencies, associated qualities and performance indicators as follows:

- *Knowledge and technical skills*: conscientious, commitment to high standards.
- *Fair treatment*: fairness, courtesy, tolerance and compassion.
- *Communication*: firmness without arrogance. Courtesy, patience, tolerance, fairness, sensitivity, compassion and self-discipline.
- *Conduct of hearings*: conducts hearings in a manner that establishes and maintains the independence and authority of the Tribunal and enables proper participation by all involved.
- *Dispute resolution*: decision-making and alternative dispute resolution.
- *Efficiency*: commitment to serving the public. Commitment to efficient administration and self-discipline.
- *Professionalism and integrity*: capacity to handle stress and the isolation of their role in making decisions. Sense of ethics, patience, honesty, tolerance, consideration for others and personal responsibility.
- *Leadership and management*: responsibility, imagination and commitment to efficient administration.

The COAT Framework recognises that members may play different roles on a tribunal panel. One member may have responsibility for chairing and writing the reasons for the decision, while another may be a specialist with expert knowledge of the subject area.

Another relevant source is the COAT International Framework for Tribunal Excellence (2014).

Many tribunal members also perform functions as 'third party neutral' in managing other dispute resolution processes such as mediation, conciliation and arbitration, which require additional skills (see Chapter Four).

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24 <http://www.coat.gov.au/images/downloads/TribunalCompetencyFramework.pdf > at 2 January 2017.

1.6. Appeals, judicial review and standards of review

1.6.1. Types of appeals

Many administrative tribunals are required to review decisions on the merits by way of a hearing de novo. This is a type of appeal in which the tribunal receives evidence afresh, is not confined to the evidence that was before the decision-maker, and must exercise its decision-making powers whether or not it finds an error in the decision under review.

There are different types of appeal.[25] These categories most commonly apply to courts, but variations may be found in tribunal statutes. A right to appeal must be given by a statute, so the powers of the court or tribunal are defined by the statute. For appeals other than merits review by de novo hearing, the powers of the court or tribunal are generally limited to the correction of errors. In the strictest type of appeal, the function of the court or tribunal is simply to determine whether the decision was correct on the evidence and the law as at the date of the decision. The court or tribunal does not receive new evidence, and must either affirm the decision or set it aside and substitute the decision that should have been made by the decision-maker in the first place.

Midway between the strict form of appeal and the appeal by way of hearing de novo is the appeal by way of rehearing. In this type of appeal, the court or tribunal usually re-assesses the evidence that was before the decision-maker, but can receive fresh evidence, and take account of a change in the law. Otherwise, it will set the decision aside only if it finds an error. Appeals to courts from decisions of tribunals are commonly of this type.

All the above appeals are 'external', in that the appeal lies from one decision-making body to another body, for example, from an agency to a tribunal, or from a tribunal to another tribunal or to a court. As an alternative to an appeal, a statute may give an agency, tribunal or court the power to rehear a matter that it has previously decided and to re-exercise its decision-making powers. (See Chapter Two.)

1.6.2. The nature and origins of judicial review

Quite apart from appeals under statute, a person affected by a decision of an administrative agency, court or tribunal may have a right to apply to a court for judicial review. The power of the courts to undertake judicial review derives from very old common law powers of

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25 The different kinds of statutory appeal are discussed in E Campbell, 'Principles of Evidence and Administrative Tribunals' in E Campbell and L Waller (eds), *Well and Truly Tried: Essays on Evidence in Honour of Sir Richard Eggleston* (1982, LBC, Melbourne) 36–87 and *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 202–3. However, it is important to remember that the key question is the language of the statute, rather than identifying a category of appeal in the abstract: *Kostas v HIA Insurance Services Pty Ltd* (2010) 241 CLR 390 at [89].

the English courts: as the judicial arm of the Crown, the courts exercised power to restrain unlawful actions by lower courts and officials purporting to act on behalf of the Crown. This power was called the 'supervisory jurisdiction'.

A court exercising supervisory jurisdiction can make various orders: it can quash a decision taken contrary to law; restrain a decision-maker from acting beyond their power; compel a decision-maker to carry out a duty in accordance with the law; or declare whether an action or proposed action is lawful or unlawful.

A person seeking judicial review of a decision cannot ask the court to examine the merits of the decision, but must show that the decision or the process leading to it was legally flawed. Only certain kinds of legal flaws are grounds for judicial review. A court might grant an order in an application for judicial review on grounds such as:

- the decision-maker had no power to embark on making the decision in the first place, and therefore no power to make the decision
- the decision-maker had power at the outset but made an error of law in the course of making the decision
- the decision-maker was disqualified from making the decision by reason of bias
- the decision-maker failed to give a fair hearing to persons with interests at stake.

The grounds for judicial review are too many to list here, but are discussed at length in general textbooks and commentaries on administrative law (see Textbooks and casebooks in the References section of this Manual). The key grounds of review are also set out in s 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 5 of the *Administrative Decisions (Judicial Review) Act 1989* (ACT), s 20 of the *Judicial Review Act 1991* (Qld), and s 17 of the *Judicial Review Act 2000* (Tas).

1.6.3. Judicial review and tribunals

Judgments given by courts in judicial review cases lay down principles that apply to administrators and adjudicators generally, including courts, tribunals and administrative agencies. These principles form part of administrative law and set the boundaries for lawful adjudication and administrative decision-making. If these principles are breached, or not observed by a tribunal, this can lead to a court setting aside the decision of the tribunal, or restraining it from proceeding with a given course of action. Where this happens, the court identifies the tribunal's error and usually refers the matter back to the tribunal to make a decision in accordance with the law.

Those adjudicative tribunals whose decisions directly affect the rights and interests of individuals are generally subject to judicial review, but this may be modified by legislation. Some parliaments have legislated to regulate, limit or extend the supervisory powers of their courts. More particularly, a statute that establishes a tribunal may restrict or exclude judicial review of the tribunal's decisions, or provide the alternative of an appeal to a court on a question of law. In New Zealand, the *New Zealand Bill of Rights Act 1990* (NZ) s 27(2)

protects the right of people affected by a determination of a tribunal to apply for judicial review of the determination. This right is subject to 'such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society', in accordance with s 5 of the Act.

In judicial review, courts will review the legality of a decision but not its merits. If the tribunal has breached no legal requirement, a court will not set its decision aside simply because the court thinks another decision is preferable, or that it would have weighed the evidence or the policy considerations differently. This limitation on the scope of judicial review derives from the principle of separation of powers. When it reviews the legality of a tribunal decision, a court is acting judicially. If, on the other hand, the court were to review the tribunal's decision on the merits and substitute its own decision, it would be re-exercising the administrative power of the tribunal.

These limits to judicial review are observed even by courts in the states and territories, and in New Zealand where there is no constitutional requirement for the separation of powers.

These limits to judicial review highlight the importance of merits review tribunals in providing a form of external, independent adjudication on the merits to individuals who feel aggrieved by an administrative decision. This vision of tribunals at the heart of the system of administrative justice is a key tenet of the 'New Administrative Law' in Australia.[26]

References

Legislation

Administrative Appeals Tribunal Act 1975 (Cth)
Administrative Decisions (Judicial Review) Act 1977 (Cth)
Administrative Decisions (Judicial Review) Act 1989 (ACT)
Australian Constitution
Judicial Review Act 1991 (Qld)
Judicial Review Act 2000 (Tas)
Freedom of Information Act 1982 (Vic)
Migration Act 1958 (Cth)
New Zealand Bill of Rights Act 1990 (NZ)
Property Law Act 1958 (Vic)
Social Security (Administration) Act 1999 (Cth)
Superannuation (Resolution of Complaints) Act 1993 (Cth)
Veterans' Entitlements Act 1986 (Cth)

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26 R Creyke, 'Tribunal Reform: A Commentary' in S Kneebone (ed.), *Administrative Law and the Rule of Law: Still Part of the Same Package?* (Australasian Institute of Administrative Law, 1999) 359; R Creyke 'Integrity in Tribunals' (2013) 32 *Queensland University of Technology Law Journal* 45; Justice M D Kirby, 'Towards the New Federal Administrative Law' (1981) 40 *Australian Journal of Public Administration* 116.

Case law

Agricultural Societies Council of NSW v Christie [2016] NSWCA 331

Brandy v Human Rights and Equal Opportunity Commission (1995) 183 CLR 245

Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission (2000) 203 CLR 194

Drake v Minister for Immigration and Ethnic Affairs (1979) 2 ALD 60 ('Drake No 1')

FAI Insurances Ltd v Winneke (1982) 151 CLR 342

International Finance Trust Co Ltd v New South Wales Crime Commission (2009) 240 CLR 319

Kirk v Industrial Court of New South Wales (2010) 239 CLR 531

Kostas v HIA Insurance Services Pty Ltd (2010) 241 CLR 390

Minister for Immigration and Citizenship v Li (2013) 249 CLR 332

Minister for Immigration and Ethnic Affairs v Pochi (1980) 4 ALD 139

Re Greenham and Minister for the Capital Territory (1979) 2 ALD 137

R v Anderson; Ex parte Ipec-Air Pty Ltd (1965) 113 CLR 177

R v Kirby; Ex parte the Boilermakers' Society of Australia (1956) 94 CLR 254

Shi v Migration Agents Registration Authority (2008) 235 CLR 286

Government papers and reports

Administrative Review Council, *A Guide to Standards of Conduct for Tribunal Members* (2009) <http://www.arc.ag.gov.au/Documents/GuidetoStdsofConduct-RevisedAug2009.pdf> at 2 January 2017

Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report No. 39 <http://www.arc.ag.gov.au/Publications/Reports/Pages/Reportfiles/ReportNo39.aspx> at 2 January 2017

Justice K Bell, *One VCAT: President's Review of VCAT* (2009)

Commonwealth, *Commonwealth Administrative Review Committee: Report*, Parliamentary Paper No 144 (1971)

Council of Australasian Tribunals, *International Standards for Tribunal Excellence* (2014)

Council of Australasian Tribunals, *Tribunal Competency Framework: Promoting Professional Excellence*: <http://www.coat.gov.au/images/downloads/TribunalCompetencyFramework.pdf > at 2 January 2017

Books

N Bedford and R Creyke, *Inquisitorial Processes in Australian Tribunals* (Australasian Institute of Judicial Administration, 2006)

T Blackshield and G Williams, *Australian Constitutional Law and Theory* (2nd edn, 1998, Federation Press, Sydney)

P Cane, *Administrative Tribunals and Adjudication* (2009, Hart Publishing)

R Creyke, J McMillan and M Smyth, *Control of Government Action* (2015, LexisNexis)

JRS Forbes, *Justice in Tribunals* (4th edn, 2014, Federation Press, Sydney)

DJ Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (1986)

Journal articles and book chapters

M Allars, 'The Nature of Merits Review: A Bold Vision Realised in the Administrative Appeals Tribunal' (2013) 41(2) *Federal Law Review* 197

J Boughey and G Weeks, ' "Officers of the Commonwealth" in the Private Sector: Can the High Court Review Outsourced Exercises of Power?' (2013) 36 *University of New South Wales Law Journal* 316

E Campbell, 'Appeals to Courts from Administrative Decisions: Restrictions on Further Review' (1997) 4 *Australian Journal of Administrative Law* 164

E Campbell, 'Principles of Evidence and Administrative Tribunals' in E Campbell and L Waller (eds), *Well and Truly Tried: Essays on Evidence in Honour of Sir Richard Eggleston* (1982, LBC, Melbourne)

R Creyke, ' "Inquisitorial" Practice in Australian Tribunals' (2006) 57 *Admin Review* 17

R Creyke, 'Integrity in Tribunals' (2013) 32 *Queensland University of Technology Law Journal* 45

R Creyke, 'The Criteria and Standards for Merits Review by Administrative Tribunals' in R Creyke and J McMillan (eds), *Commonwealth Tribunals: The Ambit of Review* (1998, Centre for International and Public Law, ANU, Canberra)

R Creyke, 'Tribunal Reform: A Commentary' in S Kneebone (ed.), *Administrative Law and the Rule of Law: Still Part of the Same Package?* (Australian Institute of Administrative Law, 1999)

J Dwyer, 'Fair Play the Inquisitorial Way: A Review of the Administrative Appeals Tribunal's Use of Inquisitorial Procedures' (1997) 5 *Australian Journal of Administrative Law* 5

M D Kirby, 'Towards the New Federal Administrative Law' (1981) 40 *Australian Journal of Public Administration* 116

E Kyrou, 'Judicial Review of Decisions of Non-governmental Bodies Exercising Governmental Powers: Is Datafin Part of Australian Law?' (2012) 86 *Australian Law Journal* 20

W Lacey, '*Kirk v Industrial Court of New South Wales*: Breathing Life into *Kable*' (2010) 34 *Melbourne University Law Review* 641

L Pearson, 'The Vision Splendid: Australian Tribunals in the 21st Century' (Paper presented at ANU: Public Law in the Age of Statutes Conference, ANU, 24 October 2014)

N Rees, 'Procedure and evidence in "court substitute" tribunals' (2006) 28 *Australian Bar Review* 41

M Smyth, 'Inquisitorial Adjudication: The Duty to Inquire in Merits Review Tribunals' (2010) 34 *Melbourne University Law Review* 230

Other

COAT Constitution <http://coat.gov.au/about/constitution-and-memorandum-of-objects.html> at 19 February 2017

Chapter Two: The Legal Framework

2.1. Key issues

Sources of law:

- Tribunals are usually established by statute and operate in a legal framework which includes legislation made by Parliament, delegated legislation made by the executive and the common law made by judges.
- There are more than 30,000 pieces of delegated legislation which tribunals may have to apply. Delegated legislation must be authorised by the main enactment, by being within its scope and proportionate to the statutory purpose of the delegation.

Interpreting legislation:

- All tribunals interpret legislation to ascertain the extent of their jurisdiction and powers.
- A tribunal is bound to follow a court's ruling on the meaning of a statute.
- Statutory provisions are to be interpreted in the context of the Act as a whole and given the meaning that would best achieve the purpose or object of the Act.
- In interpreting statutory provisions, if there is an ambiguity not able to be answered by the words themselves, it is permissible to consider certain extrinsic materials, such as the statute's explanatory memorandum.
- Legal presumptions developed under the common law should be used to interpret legislation, including that statutes do not operate retrospectively, do not interfere with basic human rights and do not violate rules of international law.

Precedent and *res judicata*:

- Tribunals are bound by case law handed down by the courts.
- No formal doctrine of precedent applies to decisions of tribunals, however, previous tribunal decisions may be persuasive.
- There is conflicting judicial and tribunal authority as to whether *res judicata* (cause of action estoppel) and issue estoppel apply to a decision of a tribunal.

- In practice, tribunals have the power to control their own proceedings. Even if *res judicata* and issue estoppel do not formally apply, a tribunal should generally not allow issues already decided by it to be re-opened without good reason.

Remaking decisions:

- Once a tribunal has handed down its final decision, the doctrine of *functus officio* applies.
- The tribunal therefore generally has no power to remake its decision unless that power can be found in the statute or the decision reached was a 'nullity' because it was tainted by jurisdictional error.

2.2. Sources of law

As we noted in Chapter One, generally tribunals are established by parliaments under statutes or Acts of Parliament. Their source of power is therefore statutory. Tribunals established under statute and exercising statutory powers operate within a framework of laws that derive principally from legislation, and also from common law.

Legislation is a term that includes:

- laws made by Parliament called 'statutes', 'Acts' or 'enactments'
- laws made by someone to whom Parliament has delegated legislative powers, usually the relevant Minister. This kind of law is called 'subordinate' or 'delegated' legislation.

The term 'common law' is complex because it has at least three distinct meanings, depending on context.

Common law as a source of law: Common law refers to the body of law that has its roots in ancient custom and is embodied in the judicial rulings made by judges. It is judge-made law, as opposed to laws made by Parliament and its delegates, such as Ministers.

Common law as a national system of law: The term common law refers to the system of laws which applies in the United Kingdom and in former colonies such as Australia. In this context it covers not just the legal principles developed by courts and tribunals but also the countries' legislation and includes the conventional method of legal reasoning that characterises the Anglo–Australian and Anglo–New Zealand legal systems based on precedent. In essence, the methodology is that like cases are decided alike, and depends on a hierarchy of courts where lower courts follow the rulings of higher courts in prior cases. In the Australian system the High Court sits at the apex of the court system.

Common law as opposed to equity: A third use of common law within Anglo–Australian systems is to distinguish it from equity. The courts of equity developed in England in the 1500s as a corrective to the strictures of the common law courts. The courts of equity were

more flexible, and the two systems operated in parallel until they were fused or joined in the nineteenth century.

While tribunals derive their powers from statute, common law principles and methods are, however, relevant to tribunals in several different ways.

- The rules and principles which determine whether an administrative power has been lawfully exercised by an executive agency or tribunal are largely of common law origin in that they have been developed over time by courts and tribunals in the UK and Australia. These include the principles of judicial review discussed in Chapter One at 1.6.3.
- When they interpret their governing legislation, tribunals and executive agencies use the common law principles of statutory interpretation that have been developed by judges.
- Only courts can rule authoritatively on the interpretation of a particular statute or provision. Once a court has declared what the statute means, lower courts and tribunals are bound by the ruling in accordance with the common law rules of precedent.

2.3. Legislation and delegated legislation

2.3.1. Statutes

2.3.1.1. What laws can Parliament make?

The Australian system of government involves a formal tripartite separation of powers between the legislature, the executive and the judiciary. Under this system, it is assumed that the legislature makes legislation, the executive administers and is bound by legislation, and the judiciary resolves disputes regarding the interpretation and application of legislation.

Australia and New Zealand adopted the principle of parliamentary sovereignty from the United Kingdom. This means that, subject to any constitutional restrictions, Parliament may make any law it thinks fit. The usual formula in the various constitutions allows them to make laws for the peace, order and good government of the people within their jurisdiction. The judiciary (the courts) and the executive government must give effect to a constitutionally valid statute even if it offends many people's conceptions of common sense, or appears contrary to human rights, or notions of justice. The *New Zealand Bill of Rights Act 1990*, *Human Rights Act 2004* (ACT) and Victoria's *Charter of Human Rights and Responsibilities Act 2006* establishes a system for reporting on whether Bills comply with the rights and freedoms affirmed in the Act, but do not limit the sovereignty of Parliament. A less demanding practice has been adopted for legislation made by the Australian Parliament. The Joint Parliamentary Committee on Human Rights assesses proposed legislation for compliance with the rights in seven international conventions and reports to the Parliament.

Australia has a federal system of government in which each state and the Commonwealth has its own legislature. The *Australian Constitution* limits the subjects on which the Commonwealth is empowered to make laws. This is the section 51 list of powers. A Commonwealth law purported to be made in breach of the limits in s 51 is unconstitutional, and there have been many High Court cases related to s 51 legislative subject matter.

States have their own constitutions which, as noted above, usually provide that the State Parliament has the power to make laws for the peace, order and good government of the state.

Another kind of constitutional issue arises where a state statute conflicts with a Commonwealth statute on a matter in which the states and Commonwealth have concurrent legislative powers. Section 109 of the Australian Constitution provides that in such cases the Commonwealth law prevails, to the extent of the inconsistency.

A further limitation on parliamentary power is related to laws that seek to be retrospective or to bind future Parliaments.

Retrospective law is that made by a Parliament that is operative before its date of creation. This means that a person's rights and liabilities may be affected in a fundamental way, for what they did or did not do on date X may have been legal, but a law made at a later date may have made their so acting illegal. Parliaments rarely make retrospective law for it is often practically unpopular (and inevitably controversial) but they do have the theoretical power to do so as sovereign bodies. Laws can be retrospective so long as Parliament makes its intention clear and unambiguous.[1] (There is a common law presumption against retrospectivity—see this Chapter at 2.4.4. below). Parliaments can make laws that operate into the future, subject to a future Parliament repealing them. A Parliament today cannot usually lock in a law to make it impregnable to change as this would be in contravention of the form of the constitution under which the Parliament operates. Constitutions themselves are usually subject to special rules about how they can be changed (for example the *Australian Constitution* can only be changed by a referendum requiring a majority of votes nationally as well as a majority of the states), but usual laws can be changed by majority vote in Parliament.

2.3.1.2. When does an Act change the law?

A Bill becomes an Act when it is passed by the Parliament and assented to by the Crown's representative ('Royal Assent'). At that stage it is said to be 'passed' or 'enacted'. However, it does not change the law until it 'commences', or comes into force.

Tribunals often need to establish when a particular Act or part of an Act commenced, so they can ascertain which law applies. The commencement date (or dates) may be set out in the Act itself, or be fixed by later proclamation. Otherwise, all jurisdictions have a default

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1 In *Maxwell v Murphy* (1957) 96 CLR 261 at 267, Dixon CJ summarised the general approach taken by courts: The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events.

provision specifying that Acts commence on the date of Royal Assent or a specified period after. See, for example, *Acts Interpretation Act 1901* (Cth), Part 3.[2]

Usually a statute operates prospectively, that is, it comes into effect (or commences) from a date later than the date on which the statute receives Royal Assent. But Parliament may decide to give a statute an effect that is both *retrospective and prospective*, by specifying that the statute commences from a date earlier than the date of Royal Assent. As noted above, retrospectivity is rare and (usually) controversial.

2.3.1.3. When does an Act cease to be the law?

Once commenced, a statute (or Act) continues to have effect until it expires, is amended or is repealed. Expiry occurs where a section in a statute (a 'sunset clause') states that the statute, or part of it, ceases to have effect on a certain date.

A statute may be amended by another statute, which repeals parts of it, inserts new words or provisions into it, or 'omits' (deletes) words or provisions. The amending provisions become part of the original statute (called 'the principal Act'), and the two Acts are read as one statute. Where an amending Act has been passed, it is necessary to check that the whole Act or particular provisions of it have commenced.

A statute, or part of it, may be repealed expressly, as where a later statute says: 'The *Firearms Act 1958* is hereby repealed'. In rare cases, a statute may be repealed by implication rather than by express words, where a later statute is passed that is inconsistent with it. This may occur due to inadvertence, where the inconsistency was not considered at the time the later statute was passed. Usually the implied repeal affects only so much of the earlier Act as is inconsistent with the later Act.

2.3.2. Subordinate or delegated legislation

2.3.2.1. Delegation of law-making power

Notwithstanding the formal separation of powers, much legislation is made not by Parliament itself but by executive bodies to whom Parliament has delegated its law-making authority. The most common and substantial forms of delegated legislation are *regulations*, which usually provide the detail for a legislative scheme. There are other names for delegated legislation including:

- statutory rules
- disallowable instruments
- ordinances
- local laws and
- proclamations.

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2 See also C Cook et al *Laying Down the Law* (9th edn, 2015, LexisNexis) 9.9–9.20.

The labels are assigned to particular instruments for reasons of convention, and do not usefully distinguish them. It is more convenient to use generic terms such as *subordinate instruments* or *legislative instruments* as a catch-all. The term 'legislative instrument' has been adopted by the Commonwealth following the introduction in 2005 of the Federal Register of Legislative Instruments.

While the doctrine of separation of powers holds that law-making is a function of the legislature, parliamentary time is too scarce for legislators to make all the necessary laws. Delegation of law-making power to the executive is a practical necessity for efficient government, and is not considered to offend the constitutional separation of the powers of the Commonwealth.[3] There are currently estimated to be more than 30,000 Commonwealth legislative instruments in force. Commonly, the law-making power is delegated to:

- the Governor-in-Council (or the Governor-General in Council, in the case of Commonwealth and New Zealand Acts)
- a minister of the Crown
- a local authority, or
- some other statutory body.

There are provisions for the most important types of subordinate instrument to be scrutinised by parliamentary committees in accordance with general standards, for example, the Commonwealth's Senate Standing Committee on Regulations and Ordinances.

Parliament may pass a resolution to 'disallow' a subordinate instrument, which has the effect of repealing it.

Each subordinate instrument is made under power delegated by a specific Act, called the 'parent' or 'empowering' Act. Its title usually incorporates the title of the parent Act, which simplifies the task of searching for it.

For example, regulations made under the *Residential Tenancies Act 1986* (NZ) may be called the *Residential Tenancies Regulations*. If there is more than one set of regulations, they will usually have a more specific title added in brackets, for example, the *Residential Tenancies (Caravan Parks) Regulations.* A set of regulations will include an *authorising provision* which identifies the provision of the parent Act under which they are made, for example, 'These Regulations are made under s 140 of the *Residential Tenancies Act 1986*'.

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3 See *Victorian Stevedoring and Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73; Administrative Review Council, *Rule Making by Commonwealth Agencies*, Report No 35 (1992) [1.6].

2.3.2.2. Validity of subordinate legislation

Subordinate legislation is valid only if it is duly authorised by an empowering Act. Courts can review an exercise of delegated law-making power by the executive in much the same way as they can review an exercise of administrative power (see Chapter One at 1.6.2).

A court may declare a subordinate instrument wholly or partly invalid on specified grounds.[4] It may be found to be *ultra vires* (beyond power) because, for example:

- it goes beyond the terms and scope of the law-making power delegated by the parent Act
- it is unreasonable, irrational[5] or disproportionate to the statutory purpose of the delegation[6] it is inconsistent with the parent Act or another Act.

The process for determining validity of subordinate legislation is one of statutory construction and generally involves three steps:

- to determine the meaning of the words used in the parent Act to describe the subordinate legislation which the authority is authorised to make
- to determine the meaning of the subordinate legislation and
- to decide whether the subordinate legislation made by the authority complies with the description in the parent Act.[7]

Where only a provision or part of the instrument is *ultra vires*, it may in some cases be possible to sever (disregard) the offending part without affecting the legal effect of the rest.

If severance is not possible such that the document loses its meaning or cannot be read without the severed section, the whole instrument is invalid.

For example, assume that s 15 of the *Fisheries Act* gives the Governor-in-Council power to make regulations to regulate the taking of shellfish in Lobster Bay. Regulations are made under s 15 which set up a permit system to regulate the taking of shellfish in Lobster Bay and Stingray Bay. The regulations are invalid insofar as they purport to apply to Stingray Bay. Severance is possible, so the regulations are valid insofar as they apply to Lobster Bay.

The validity of a subordinate instrument is a question of law, so only a court can rule upon it authoritatively. However, tribunals are entitled to 'decide' questions of law for the purpose of guiding themselves to a legally correct decision in proceedings before them.[8] In the example above, if the tribunal was asked to review a decision under the Fisheries Regulations to refuse

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4 For a comprehensive discussion of how the courts apply the grounds, see DC Pearce and S Argument, *Delegated Legislation in Australia* (4th edn, 2012, LexisNexis Butterworths, Sydney) chs 12–17; R Creyke, J McMillan and M Smyth, *Control of Government Action* (4th edition, 2015, LexisNexis, Sydney) chs 6 and 8; and PA Joseph, *Constitutional and Administrative Law in New Zealand* (3rd edn, 2001, Thomson, Wellington) ch. 24.

5 *Minister for Primary Industries and Energy v Austral Fisheries Pty Ltd* (1993) 40 FCR 381.

6 V*anstone v Clark* (2005) 147 FCR 299; *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1.

7 *McEldowney v Forde* [1971] AC 632, 658 (Lord Diplock).

8 AN Hall, 'Judicial Power, the Duality of Functions and the Administrative Appeals Tribunal' (1994) 22 *Federal Law Review* 13, 45–48; *Re Adams and the Tax Agents' Board* (1976) 1 ALD 251 at 257 (Brennan J).

a permit to take abalone in Stingray Bay, the tribunal may make its decision on the basis that the regulations are invalid insofar as they purport to apply to Stingray Bay. Alternatively, the tribunal may refer the question of law to a court, if the tribunal's governing statute provides for it. This is rare.

Tribunals have taken different approaches to entertaining challenges to the *constitutional* validity of a statute or subordinate instrument (see this Chapter at 2.3.1). One approach is to assume, without expressly deciding, that statutes and their subordinate instruments are constitutionally valid.[9] The Administrative Appeals Tribunal has adopted the following approach:

(a) the tribunal should approach matters on the assumption that the relevant legislation is constitutionally valid;

(b) the tribunal is empowered to consider the constitutional validity of legislation in order to determine whether or not it has jurisdiction to review the reviewable decision, and if it considers that the legislation is unconstitutional, it should decline to exercise the jurisdiction purportedly conferred on it by that legislation;

(c) the tribunal can form an opinion on whether legislation can apply within constitutional limits to particular persons or in particular circumstances, and can act on that opinion in determining applications for review of administrative decisions;

(d) however, the tribunal does not have jurisdiction to reach a conclusion having legal effect that legislation is unconstitutional, and such a decision can only be made by a court exercising judicial power;

(e) the tribunal should nevertheless proceed with caution where such issues arise; and

(f) the tribunal should give consideration to referring a question of law to the Federal Court (*Re Walsh and Commissioner of Taxation* (2012) 130 ALD 200 at [19] per Deputy President Jarvis).

2.3.2.3. When does a subordinate instrument cease operation?

There are various ways that a subordinate instrument may cease operation.

- It may be expressly repealed or revoked, or disallowed by a resolution of Parliament.
- A subordinate instrument is deemed to be repealed when its empowering Act is repealed, unless the repealing Act provides that the instrument is to remain in force.
- An instrument may be repealed (in whole or in part) by implication, where a later statute or subordinate instrument makes provisions that are inconsistent with it and the two cannot be reconciled.

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9 *Re Zimmax Trading Co Pty Ltd and Collector of Customs* (NSW) (1979) 2 ALD 120 at 126 (AAT).

In some jurisdictions there is provision for certain categories of subordinate instrument to expire on a specified date, or on the expiry of a specified period that runs from when they are made. This is known as a 'sunset clause'.

2.4. Statutory interpretation

2.4.1. The role of tribunals in interpreting statutes

All tribunals interpret legislation to ascertain the extent of their jurisdiction and powers. It is likely that in most of their decisions tribunals have to refer to a statute or subordinate instrument. Because of the pace of legislative change, tribunals are regularly in the position of having to interpret legislation that has not yet been considered by a court.

Administering agencies commonly provide their staff or the public with summaries or statements of what the agency takes the legislation to mean. Tribunals are not bound to follow the agency interpretation if it is incorrect. It is the legislation, not the agency's interpretation, which is authoritative.

While tribunals and administering agencies interpret legislation in order to implement it, only a court can authoritatively determine the meaning of legislation. Once a court has interpreted a statute, it has been 'judicially considered' and must thereafter be read in the light of what the court has said about its meaning.

A tribunal is bound to follow a court's ruling on the meaning of a statute. If a court has based its decision upon its interpretation of the statute, and if the decisions of that particular court are binding upon the tribunal in accordance with the rules of precedent, the tribunal must interpret the provision in the same way. Difficulties still arise if there are inconsistent decisions on the rules by superior courts. In these circumstances the courts have developed rules of precedence to assist lower courts and tribunals.[10]

Until a court has authoritatively ruled on the meaning of a statute or provision, there may be no 'right answer' to the question of how it should be interpreted. The principles of statutory interpretation are to be applied with close attention to context. The tribunal's task is to arrive at the preferable interpretation and to demonstrate why it should be preferred.

A tribunal's interpretation does not establish a binding precedent. Other tribunal members and the administering agency are not bound to follow it if they think it is incorrect.

However, different interpretations can lead to inconsistent decisions—an outcome which conflicts with the public expectation that like cases will be decided alike. Many tribunals have established informal processes to foster collegial discussion and to promote consistent interpretation.

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10 C Cook et al *Laying Down the Law* (9th edn, 2015, LexisNexis) ch. 7.

2.4.2. General approaches to interpretation

The principles of statutory interpretation were mainly developed by judges in the course of deciding court cases. In addition, each territorial jurisdiction in Australia has passed an Interpretation Act, which sets out principles to be applied in the interpretation of its statutes and subordinate legislation. The Interpretation Acts are therefore a roadmap and set of rules as to how legislation within a jurisdiction is to be interpreted.

Traditionally, there were two main approaches to interpreting statutes adopted by the courts, the literal and the purposive approach. The literal approach focuses on the lexical and grammatical meaning of words, phrases and provisions. The purposive approach interprets the words of the statute in the light of its purpose or objects.

The Interpretation Acts of each Australian jurisdiction now provide in general terms that:

> [i]n interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.[11]

The New Zealand provision requires the meaning of an Act to be 'ascertained from its text and in the light of its purpose'.[12] The 'purpose' that is relevant is the intention of Parliament in passing the Act. This is assessed objectively, not by considering what individual legislators may have subjectively intended. Express indications of purpose may be found in the 'objects' or 'purposes' clause, which is usually included in the opening sections of the more recent statutes. Commonly the objects clause states *what* the Act is doing rather than explaining *why.* It is often necessary to infer the purpose by considering the Act as a whole and by analysing the legislative scheme to see what effect it was intended to have.[13]

2.4.3. Use of extrinsic materials

In interpreting statutory provisions, if there is an ambiguity not able to be answered by the words themselves, it is permissible to consider certain, usually parliamentary, documents outside the statute itself, called 'extrinsic materials'. These include:

- the speech made by the Minister when the Act (then a Bill) received its second reading in Parliament
- the Explanatory Memorandum that was circulated with the Bill after its introduction into Parliament

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11 Commonwealth: s 15AA of the *Acts Interpretation Act 1901* New South Wales: s 33 of the *Interpretation Act 1987* Victoria: s 35(a) of the *Interpretation of Legislation Act 1984* Queensland: s 14A of the *Acts Interpretation Act 1954* Tasmania: s 8A of the *Acts Interpretation Act 1931* South Australia: s 22 of the *Acts Interpretation Act 1915* Western Australia: s 18 of the *Interpretation Act 1984* Australian Capital Territory: s 139 of the *Legislation Act 2001* Northern Territory: s 62A *Interpretation Act 1978.*

12 New Zealand: s 5(1) of the *Interpretation Act 1999*.

13 See the approach to interpretation set out in M Kirby, 'Statutory Interpretation: The Meaning of Meaning' (2011) 35 *Melbourne University Law Review* 113.

- reports of committees whose recommendations the Bill was intended to implement.

The extrinsic materials that may be consulted do not include legislative summaries of the Act prepared *after* it was passed.

The Interpretation Act for each jurisdiction, except South Australia, sets out the ways that the material can be used in interpreting statutes. Extrinsic materials are most often used to identify the problem that the statute was intended to address, or to confirm that the ordinary or literal meaning of the words is the intended meaning. In some circumstances they can also be used to resolve difficulties in interpreting a provision. The Interpretation Act provisions of the jurisdictions are not uniform as to the ways in which the materials can be used to resolve difficulties.[14] In some jurisdictions, extrinsic materials can be used to prefer one interpretation to another in resolving an ambiguity. The following points are worth noting.

- Extrinsic materials are at best an aid to interpretation, and must not be used to support an interpretation that is not open on the words of the Act.
- Tribunal members may examine extrinsic materials on their own initiative, but they are under no duty to do so, and are not obliged to adopt the interpretation of the Act suggested by the materials.[15]
- It is worth checking whether the provision in question was in the Bill when it was introduced in the Parliament, or whether it was inserted as a 'House amendment' during the debates or inserted by a later statute. If it was not in the Bill as introduced, extrinsic materials prepared before the amendment may be of little use in interpreting it.

2.4.4. The role of legal presumptions

Courts apply a variety of principles and presumptions when interpreting statutes. Some of these relate to the meaning of words and phrases. For example, expressions used in a subordinate instrument are presumed to have the same meaning as in the parent Act, unless the contrary intention appears.[16] Another set of legal assumptions gives protection to human rights and other values recognised by the common law. These presumptions apply unless the Parliament overturns them in a given case. The *New Zealand Bill of Rights Act 1990* affirms certain rights and freedoms. It provides that where another Act can be given a meaning that is consistent with the rights and freedoms affirmed in the *Bill of Rights Act*, that meaning must be preferred. Victoria and the ACT have similar legislation in s 32(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and s 30 *Human Rights Act 2004* (ACT). These statutes give courts and tribunals a strong mandate to interpret legislation in ways that preserve the rights and freedoms that Parliament has affirmed, so far as is possible.[17]

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14 See DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (8th edn, 2014, LexisNexis, Sydney) ch. 3.

15 *R v Bolton: Ex parte Beane* (1987) 162 CLR 514 at 517–18 (Mason CJ, Wilson, Deane and Dawson JJ).

16 Pearce and Geddes, above n 12, [6.3] at n 3 lists the Interpretation Act provisions of each jurisdiction. These provisions give statutory force to a common law rule of interpretation.

17 See Pearce and Geddes, above n 12, at [5.2] onwards and [5.3743].

Nevertheless, these Acts follow a dialogue model, so that legislation affecting the specified rights is not directly invalidated but, if the legislation cannot be construed in accordance with the rights and freedoms affirmed, a court may issue a declaration of incompatibility with the rights.[18] Even without similar legislation, courts and tribunals in other Australian jurisdictions read statutes with the presumption that Parliament did not mean to restrict fundamental rights and liberties, such as freedom of movement, access to the courts, the right to privacy, the right to procedural fairness, and the right of one in possession of premises to prevent the entry of others. Courts also presume that Parliament did not intend to interfere with legal professional privilege, the privilege against self-incrimination, enforcement of contract rights or vested property rights without compensation. The presumptions will be rebutted only if the statute gives 'a clear expression of an unmistakable and unambiguous intention' to the contrary.[19] Usually the contrary intention requires express words, but may be implied if the statute would otherwise be inoperative or meaningless.[20] For example, in *Coco v The Queen*,[21] the High Court of Australia held that a warrant issued under a statutory provision that authorised police 'to use a listening device' did not authorise police to make a clandestine entry onto private premises to install the device. The court was not prepared to imply from the statute authority for conduct that would otherwise be a trespass. There were no express words to extend the authority so far, and there was no necessity to imply it in order to give effect to the statute.[22]

Apart from presumptions of non-interference with common law values, a number of other rebuttable presumptions are used in the interpretation of statutes. Some of the other main common law presumptions of interpretation are:

- statutes do not operate retrospectively
- Parliament does not interfere with basic human rights
- re-enactment of a provision or word amounts to approval of a previous judicial interpretation of the word or provision
- legislation does not bind the Crown
- penal i.e. criminal provisions are strictly construed
- removal of property rights is subject to compensation
- legislation does not have effect beyond its jurisdictional territory
- legislation is presumed not to violate rules of international law and treaty obligations.

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18 ibid., C Evans and S Evans, *Australian Bills of Rights: The Law of the Victorian Charter and ACT Human Rights Act* (2008, LexisNexis, Melbourne); *Momcilovic v The Queen* (2011) 245 CLR 1.

19 *Coco v The Queen* (1994) 179 CLR 427 at 435 (Mason CJ, Brennan, Gaudron and McHugh JJ).

20 ibid.

21 ibid.

22 See also *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J).

See Justice J Spigelman AC, 'Principle of Legality and the Clear Statement Principle' (2005) 79 *Australian Law Journal* 769.

2.4.5. A method for interpreting a statute

In interpreting a provision of a statute or subordinate legislation that has not been authoritatively interpreted by a court, it is suggested that tribunal members proceed as follows.

1. Start by reading the relevant legislation closely, to grasp the whole scheme of the Act and the context of the provision.
2. Check the definition section or relevant sections of the Act, and the jurisdiction's Interpretation legislation, to see whether a special meaning has been given to particular words.
3. Ascertain the literal meaning of the words, using English and/or technical dictionaries, if necessary.
4. Identify the purposes of the Act, the way in which the Act seeks to promote them, and how the provision in question fits into the overall scheme of the Act.
5. Formulate alternative interpretations which may be open on the wording.
6. Test the alternative meanings to see which best fits the context and purposes of the statute, taking into account any relevant legal presumptions and extrinsic materials.
7. Justify the preferred interpretation and apply it.

The same principles and methods of statutory interpretation apply both to Acts and subordinate instruments.

2.5. Case law and res judicata

Common law for the purposes of this discussion is the law developed by judges in the course of deciding cases that come before them for adjudication. Rulings of judges in decided cases, or precedents, are authoritative sources of law in accordance with the following rules.

2.5.1. Rules of precedent

Courts are arranged in hierarchies, to provide a structure for appeals and to reserve more complex or important cases for more senior judges. Each jurisdiction—New Zealand, the Commonwealth and each state and territory—has its own hierarchy of courts. The High Court of Australia stands at the apex of all the Australian hierarchies and the Supreme Court of New Zealand at the apex of the New Zealand court hierarchy. The rulings of a court are binding upon courts that are lower in the same hierarchy of courts.

Usually, tribunals are not part of the court hierarchy. A tribunal is, however, bound by the rulings of:

- a court to which the tribunal's decision may be appealed on a question of law
- a court which is empowered to review decisions of the tribunal in accordance with the common law process of judicial review (see Chapter One at 1.6.3)
- any court which stands above those courts in the judicial hierarchy.

Tribunals are not bound by propositions of law laid down in the decisions of another tribunal which was not exercising judicial power. For consistency, however, tribunal members follow decisions of an appeal panel of the tribunal. A more complex position arises for tribunals which exercise judicial power (such as certain divisions of the amalgamated civil and administrative tribunals in the Australian states and territories). Regardless of whether they are formally binding, tribunal decisions may be 'persuasive'. It is highly desirable that tribunals maintain, so far as possible, consistency of decision-making within a tribunal. This can be achieved by applying a prior tribunal decision where convinced of its value on the basis of a thorough consideration of the factors set out in this Chapter at 2.5.2. The reasons for this approach have been summarised as follows:

> 60 The Tribunal is not bound by precedent or the doctrine of *stare decisis* in the strict sense in relation to being formally bound by earlier decisions of the Tribunal. However, for a number of reasons, I consider the Tribunal should ordinarily follow decisions of the Appeal Panel and decisions of the Tribunal as constituted by the President or the Deputy Presidents.
>
> 61 The reasons why these decisions should be followed is because they are authoritative and they go some way to seeking to ensure consistency in the Tribunal's decision-making ...
>
> 63 The Tribunal should only refuse to follow a decision of the Appeal Panel or the Tribunal as constituted by the President or the Deputy Presidents if it concludes that the previous decision is clearly wrong. (Judicial Member M A Robinson, *Rittau v Commissioner of Police, New South Wales Police Service* [2000] NSWADT 186).

Common law method draws a distinction between the *ratio decidendi* (reason for deciding) and *obiter dicta* (things said by the way). Only the former is capable of binding courts and tribunals lower in the hierarchy. The *ratio decidendi* is any proposition of law expressly or impliedly used to reach the final decision, or to decide any issue that is a step towards the final decision. Any other statements of legal principle are *obiter dicta* and are not binding.

For example, assume that a judge says:

> The documents in question were brought into existence for the purpose of being presented to Cabinet, and are therefore exempt from disclosure under the Freedom of Information Act. It would be otherwise if they were brought into being for a departmental purpose, and it was subsequently decided to present them to Cabinet, but that is not the case here.

In this example, the statement in the first sentence is *ratio decidendi* and the statement in the second sentence is *obiter dicta* because it deals with a factual situation that is different from the facts in the actual case.

The rules of precedent have a more limited application to rulings on the meaning of particular legislation. A ruling of a court on the meaning of a legislative provision does not bind a tribunal which is interpreting a different statute, even if the same word or phrase is used.[23]

2.5.2. Assessing the value of a non-binding precedent

Even if a ruling in a prior decision is not binding because:

- it is obiter dicta
- it interprets a different statute
- it is from a tribunal, a lower court in the same hierarchy, or a court in the hierarchy of another jurisdiction

it may still be persuasive, provided that it does not conflict with another precedent that is binding. A number of factors affect a tribunal's assessment of how persuasive a precedent is, including:

- the quality of the reasoning and analysis to be found in it
- the extent to which it takes account of relevant precedents and related principles of law
- the standing of the court or tribunal which handed down the decision
- whether other courts or tribunals have applied it
- where the precedent relates to the interpretation of a different statute—the similarity of that statute to the one being interpreted in terms of its subject matter, purpose and language.

It is good practice to refer to any relevant precedent that is known to the tribunal, whether binding or not, and to discuss whether it should be followed.

2.5.3. The principle of *res judicata*

2.5.3.1. *Res judicata* in court proceedings

It may be argued in tribunal proceedings that a party should not be allowed to re-open a decision or issue determined in an earlier proceeding on the ground that it is *res judicata*, or that the party is 'estopped' from re-litigating the issue. These are concepts developed by the courts to bring finality to legal proceedings, in order to prevent the waste of public resources and the use of the courts to harass other parties.

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23 See Pearce and Geddes, above n 12, [1.7];. C Cook et al *Laying Down the Law* (9th edn, LexisNexis, 2015) Ch 6.

Res judicata may be pleaded as a defence to a lawsuit. It prevents a party from re-litigating a suit (or 'cause of action') that has been determined by a court in an earlier, completed proceeding between the same parties. This is also called *cause of action estoppel* (estoppel means that a party is legally precluded or disqualified from advancing a particular claim or argument). For example, A sues B for negligently causing damage to A's car. A's claim is dismissed by the court. Later, A brings against B another suit which is essentially the same as the earlier one. B can plead *res judicata*.

Related to *res judicata* is a broader principle of issue estoppel, under which parties are precluded from challenging a finding on an issue of fact or law decided by a court in an earlier proceeding between them. For example, assume that in maintenance proceedings brought by Y against X, a court finds that X is the father of Y's child. When X later applies to the court for a contact order, Y opposes the application and argues that X should not have contact because he is not the father. Y will be estopped from disputing the finding of paternity made in the earlier proceedings between the parties.

Australian authorities usually reserve the term *res judicata* to mean cause of action estoppel, and treat issue estoppel as a separate, although related, principle.[24] Sometimes, though, *res judicata* is used to mean issue estoppel, which can lead to confusion.

There has been much controversy as to whether these principles should extend to tribunal decisions, so as to preclude a party re-opening a decision or a finding by the tribunal in an earlier completed proceeding.

2.5.3.2. Do *res judicata* and issue estoppel apply in tribunal proceedings?

There is a conflict of authority as to whether *res judicata* (cause of action estoppel) and issue estoppel apply to a decision of an administrative tribunal. A number of commentators have argued there are conceptual difficulties in applying these principles of litigation to merits review tribunals such as the Administrative Appeals Tribunal (AAT).[25] In *Administration of Papua and New Guinea v Daera Guba*,[26] the High Court of Australia applied *res judicata* to prevent re-litigation of a land title claim that had been adjudicated by the Land Board. Although the Land Board was not a court, it had power to decide finally a dispute between parties as to their existing legal rights to a parcel of land—a function that was essentially judicial in nature. In *Bogaards v McMahon*,[27] Pincus J purported to apply the reasoning in *Daera Guba* to the AAT, holding that it was a 'judicial tribunal' for purposes of the application of the doctrine of *res judicata.* The decision has been applied by the AAT in later cases.[28] However, other AAT and Federal Court decisions have held that *res judicata*

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24 The distinction is explained in *Blair v Curran* (1939) 62 CLR 464 at 532 (Dixon J).

25 A N Hall, *'Res Judicata* and the Administrative Appeals Tribunal' (1994) 2 *Aust J Admin Law* 22, and n 2; McEvoy strongly agrees: T J F McEvoy, *'Res Judicata*, Issue Estoppel and the Commonwealth Administrative Appeals Tribunal: A Square Peg into a Round Hole?' (1996) 4 *Aust J Admin Law* 37, 38.

26 (1973) 130 CLR 353.

27 (1988) 15 ALD 313.

28 *Re Hospital Benefit Fund (WA) Inc* and *Department of Health, Housing & Community Services* (1992) 28 ALD 25, [15].

does not apply in the AAT.[29] Pearce has concluded 'it appears that the view rejecting the applicability of estoppel and *res judicata* is that which the Tribunal will follow.'[30] Having considered these authorities, Weinberg J reached the contrary decision in relation to the Victorian Civil and Administrative Tribunal (VCAT). If a cause of action estoppel can arise out of a 'final decision' made by a 'judicial tribunal', and if for this purpose a body can be a 'judicial tribunal' even though it is not a court of law in any strict sense, there seems no reason why a decision by VCAT, at least in the exercise of its original jurisdiction, should not be capable of giving rise to such an estoppel. And applying the reasoning, but not the conclusion, of Wilcox J in *Comcare*, *Australia v Grimes* (1994) 50 FCR 60 there is equally no reason why an issue estoppel cannot arise out of a finding by VCAT in the exercise of that jurisdiction.

Arguably, this creates a disconformity between the availability of issue estoppel in relation to AAT proceedings, at the federal level, and VCAT proceedings, at the state level. At some point, that apparent disconformity may have to be addressed by the High Court. For present purposes, however, it is sufficient to say that the weight of recent authority suggests that issue estoppel can arise out of decisions made by administrative tribunals and, in particular, bodies such as VCAT.[31]

2.5.3.3. Operation of issue estoppel in tribunal proceedings

Most of the cases on issue estoppel in tribunal decision-making have arisen in relation to the AAT. Some authorities have regarded it as settled that a decision of the AAT will give rise to issue estoppel in a subsequent proceeding before the Tribunal,[32] but there is conflicting Federal Court authority.[33] In a High Court case involving a state industrial tribunal, the High Court unanimously accepted a submission by the parties that the doctrine of issue estoppel extends to the decision of any tribunal which has jurisdiction to decide finally a question arising between parties.[34] It is the finality of the decision, not whether the tribunal is 'judicial' in nature, that determines whether a decision can give rise to an issue estoppel.[35]

A decision is 'final' for the purpose of the doctrine even if can be reconsidered or appealed. It is not necessary that the statute should state that the tribunal's decision is final and

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29 The authorities against it include *Comcare Australia v Grimes* (1994) 50 FCR 60; *Minister for Immigration and Ethnic Affairs v Daniele* (1981) 5 ALD 135; *Commonwealth v Sciacca* (1988) 17 FCR 476; and *Re Jebb and Repatriation Commission* (2005) 86 ALD 182.

30 D Pearce, *Administrative Appeals Tribunal* (4th edn, 2015, LexisNexis) 329.

31 *Morris v Riverwild Management Pty Ltd* [2011] VSCA 283. See also *Steak Plains Olive Farm Pty Ltd v Australian Executor Trustees Limited* [2015] NSWSC 289 at [35].

32 E.g. *Bogaards v McMahon* (1988) 15 ALD 313 (Pincus J); *Re Hospital Benefit Fund (WA) Inc and Dept of Health, Housing and Community Services (No 1)* (1992) 28 ALD 25 at 29–30 (AAT); *Re Simcock & Repatriation Commission* (1993) 29 ALD 881 (AAT).

33 *Minister for Immigration & Ethnic Affairs v Daniele* (1981) 5 ALD 135 at 139; *Commonwealth v Sciacca* (1988) 17 FCR 476 at 480; *Midland Metals Overseas Ltd v Comptroller-General of Customs* (1991) 30 FCR 87 at 96–97; *Comcare Australia v Grimes* (1994) 50 FCR 60 at 64.

34 *Kuligowski v Metrobus* (2004) 220 CLR 363.

35 ibid. 373–74.

conclusive. It is enough that the decision is completely effective unless and until it is revoked or amended, and that it is 'final and conclusive on the merits'.[36]

In administrative decision-making it is often necessary to make an assessment of factual circumstances at the date of application, and the circumstances may have altered since a previous application was determined. For example, an injury previously found not to be incapacitating may have worsened so that the person has become incapacitated. Or a document to which an applicant had been refused access on the basis of confidentiality might cease to be exempt from disclosure under freedom of information because the agency has since disclosed its content to her.[37]

For issue estoppel to apply, the question to be decided must be identical to the question that was decided in earlier proceedings. It is necessary to scrutinise the content of the previous finding to determine if the issue is indeed the same. For example, in *Kuligowski v Metrobus*, the issue in the later proceedings was whether the appellant had suffered an ankle injury at work which rendered him susceptible to further injury.[38] In the earlier proceeding, the tribunal had found that he was no longer incapacitated by the ankle injury at the time. There was no issue estoppel because the issues were not the same.[39]

2.5.3.4. The tribunal's power to control its own proceedings

The AAT has recognised that it does not need to resort to the principles of *res judicata* or issue estoppel to promote finality of its decisions and prevent abuse of process. The Tribunal can decline to revisit its findings, or decline to hear evidence afresh, by fully exercising its statutory powers to determine its own proceedings.[40] (Many other tribunals have similar powers.) In *Re Quinn and Australian Postal Corporation,*[41] the AAT suggested that this power enabled it to determine whether to allow re-opening of an issue that had been decided in earlier proceedings between the parties. Where a party seeks to re-open an issue of fact that has already been determined by the Tribunal in an earlier proceeding between the same parties, the Tribunal is required to consider whether to allow the matter to be re-opened and whether to receive evidence afresh.[42] In deciding how to proceed, it will need to consider 'all relevant circumstances', including the requirements of procedural fairness.[43]

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36 ibid. 374–75, 376, 377.
37 *Re B and Medical Board* (ACT) (1995) 39 ALD 748.
38 (2004) 220 CLR 363.
39 See also *Director of Housing v Andrew* [2009] VSC 441 for a similar approach.
40 *Re Mulheron and Australian Telecommunications Corporation* (1991) 23 ALD 309; *Re Quinn and Australian Postal Corporation* (1992) 15 AAR 519.
41 (1992) 15 AAR 519.
42 *Blackman v Commissioner of Taxation* (1993) 43 FCR 449; *Re Matusko and Australian Postal Corporation* (1995) 21 AAR 9.
43 *Morales v Minister for Immigration and Multicultural Affairs* (1998) 82 FCR 374.

In *Re Matusko and Australian Postal Corporation*,[44] the AAT said that it would not generally allow issues already decided by the Tribunal to be re-opened without good reason. It summarised the authorities as follows:

> The Tribunal should use its flexible procedures to allow further consideration of issues where there is a reason to do so, for instance:
>
> (i) where there is a different decision
>
> (ii) where there is a clear legislative intent
>
> (iii) where the reconsideration decision is not final
>
> (iv) where there has been a change in circumstances or fresh evidence or
>
> (v) where justice to the parties requires a departure from the general rule.[45]

For tribunals which have statutory power to control their own proceedings, the approach adopted in *Re Matusko* is preferable to relying on *res judicata* and issue estoppel, which are of uncertain application to tribunals. The practical effect was summarised recently by former AAT President Justice Downes:

> although no *res judicata* or other estoppel and no formal doctrine of precedent exists in administrative law, members of the Administrative Appeals Tribunal will follow earlier decisions of the Tribunal unless they are satisfied that the earlier decision is manifestly wrong. This is particularly so when the same issue arises in proceedings between the same parties.
>
> *Effectively there is a res judicata* in the Administrative Appeals Tribunal as well as issue estoppel.[46]

2.6. Doctrine of functus officio

For a variety of reasons, a tribunal may wish to revoke or vary its own decision. This might arise because the tribunal realises that it has made an error, or because an application has been made to the tribunal to set aside a decision it has made and to rehear the matter. The question arises as to whether the tribunal has discharged its function of deciding a matter and is *functus officio.* The expression *functus officio* means that the tribunal has exhausted its power in relation to the matter and cannot reconsider its decision. Whether a tribunal that

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44 (1995) 21 AAR 9.

45 ibid [33].

46 Justice G Downes, 'Structure, Power and Duties of the Administrative Appeals Tribunal of Australia' (<http://www.aat.gov.au/about-the-aat/engagement/speeches-and-papers/the-honourable-justice-garry-downes-am-former-pre/structure-power-and-duties-of-the-administrative>)

has made a decision is *functus officio* depends on the terms of the statute under which the tribunal acts, and on whether the decision is a valid exercise of the tribunal's power.[47]

Where tribunal members are asked to set aside or revoke their own decisions, or are considering doing so of their own motion, it would be wise to consult the tribunal head. To revoke and remake a decision where there is no power to do so would be to commit a jurisdictional error. The tribunal will need to consider the following questions, to determine whether it has the power to re-open its decision.[48]

1. Has the decision been made or 'perfected'? Generally, a decision will be perfected once the tribunal has reached a conclusion on the matter and has communicated it publicly or to the parties in a way that indicates that it is final.[49] Until the decision has been perfected, it is merely provisional and the tribunal can reconsider it. For example, in *Minister for Immigration and Citizenship v SZQOY* (2012) 206 FCR 25, the Court held that the Tribunal could revise a decision which had been sent to the Registry but not yet communicated to the parties. Justice Logan reasoned at [40] that 'It is only when the decision of the [Tribunal] as constituted by the particular member has either been pronounced orally or, if given in writing, sent to the applicant and to the Secretary in accordance with the notification obligation that the core function of review is complete. Before then, the member is entitled to have second (or more) thoughts perhaps on the basis of further reflection on all of the material hitherto to hand, perhaps stimulated by further material'.

   Is the decision invalid because it is affected by a jurisdictional error, such as failure to comply with statutory procedures? If so, grounds exist for a supervising court to set the decision aside (see Chapter One at 1.6.2 and 1.6.3). In *Minister for Immigration and Ethnic Affairs v Bhardwaj*,[50] justices of the High Court of Australia held that a decision affected by a jurisdictional error is regarded in law as no decision at all; the tribunal has not validly exercised its power to decide, and is not *functus officio*. The tribunal does not have the final say on whether it has made a jurisdictional error, but if it has done so, it may be entitled to correct its error without waiting for a reviewing court to set the decision aside.[51] However, a finding of jurisdictional error cannot always be

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47 *Kabourakis v Medical Practitioners Board of Victoria* (2006) 25 VAR 449; *Jayasinghe v Minister for Immigration and Ethnic Affairs* (1997) 48 ALD 265, 274 (Goldberg J); R Creyke, J McMillan and M Smyth, *Control of Government Action* (4th edn, 2015, LexisNexis, Sydney) 1021–24.

48 R Orr and R Briese, 'Don't Think Twice? Can Administrative Decision Makers Change Their Minds?' (2002) 35 *AIAL Forum* 11–43.

49 *Semunigus v Minister for Immigration and Multicultural Affairs* (2000) FCR 533; *X v Minister for Immigration and Multicultural Affairs* (2002) 67 ALD 355 at 361; *Singh v Minister for Immigration and Multicultural Affairs* (2001) 109 FCR 18. See also *Minister for Immigration and Citizenship v SZRNY* (2013) 214 FCR 374.

50 (2002) 209 CLR 597.

51 ibid 612–17 (Gummow and Gaudron JJ), 618 (McHugh J), 638–40 (Hayne J); *Comptroller-General of Customs v Kawasaki Motors Pty Ltd (G405 of 1991)* (1991) 103 ALR 661. However, Justice Downes has stated that: 'except in the clearest case, the making of a second decision by a tribunal will only lead to uncertainty of result. This is, at the least, a sound reason for a tribunal to act with extreme caution before reconsidering a matter which has already been decided …': *Re Michael and Secretary, Department of Employment, Science and Training* (2006) 90 ALD 457, 460–61.

predicted with confidence, and hence it may be prudent for the tribunal to wait for a court to determine whether the decision was invalid. New Zealand tribunals have stronger cause to await a ruling from a supervisory court. The decision in *Bhardwaj* has not been considered by New Zealand courts, and is based on a conception of invalidity that is inconsistent with the New Zealand authorities.[52]

2 What is the relevant statutory power? Is there an express or implied statutory power to revoke or vary the decision? Even after a decision has been perfected, a tribunal may exercise any statutory power to alter or re-open its decision, such as a power to reinstate a dismissed application, or a 'slip rule' that empowers it to correct clerical errors or accidental omissions from its decision or statement of reasons. In exercising these powers, the tribunal will need to observe the requirements of procedural fairness (see Chapter Three).

Are there other statutory indications either for or against an implied power to vary or revoke? For example, if there is a right to appeal the tribunal's decision to a second-tier merits review tribunal, this may indicate that the tribunal cannot reconsider its own decision.[53] The contrary is indicated if the statute says that the tribunal's decision is 'final'. It may also be relevant to consider the nature of the power, and the consequences a power to re-open tribunal decisions might have for third parties and for the operation of the statutory scheme.

References

Legislation

Acts Interpretation Act 1901 (Cth)
Acts Interpretation Act 1954 (Qld)
Acts Interpretation Act 1931 (Tas)
Acts Interpretation Act 1915 (SA)
Australian Constitution
Charter of Rights and Responsibilities Act 2006 (Vic)
Human Rights Act 2004 (ACT)
Human Rights Act 1987 (NSW)
Interpretation Act 1984 (WA)
Interpretation Act 1999 (NZ)
Interpretation of Legislation Act 1984 (Vic)

52 *Martin v Ryan* [1990] 2 NZLR 209; see generally, Joseph, above n 1, 771–76.

53 *Sloane v Minister for Immigration, Local Government and Multicultural Affairs* (1992) 37 FCR 429. See also *Minister for Immigration and Multicultural and Indigenous Affairs v Watson* (2005) 145 FCR 542; *VQAR v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 900.

Legislation Act 2001 (ACT)
New Zealand Bill of Rights Act 1990 (NZ)

Case law

Administration of Papua and New Guinea v Daera Guba (1973) 130 CLR 353
Attorney-General (SA) v Corporation of the City of Adelaide (2013) 249 CLR 1
Blackman v Commissioner of Taxation (1993) 43 FCR 449
Blair v Curran (1939) 62 CLR 464
Bogaards v McMahon (1988) 15 ALD 313
Cachia v Isaacs (1985) 3 NSWLR 366
Coco v The Queen (1994) 179 CLR 427
Comcare Australia v Grimes (1994) 50 FCR 60
Commonwealth v Sciacca (1988) 17 FCR 476
Comptroller-General of Customs v Kawasaki Motors Pty Ltd (G405 of 1991) (1991) 103 ALR 661
Corporation of the City of Adelaide v Corneloup (2011) 110 SASR 334
Director of Housing v Andrew [2009] VSC 441
Kabourakis v Medical Practitioners Board of Victoria (2006) 25 VAR 449
Kuligowski v Metrobus (2004) 220 CLR 363
Jayasinghe v Minister for Immigration and Ethnic Affairs (1997) 48 ALD 265
Martin v Ryan [1990] 2 NZLR 209
Maxwell v Murphy (1957) 96 CLR 261
McEldowney v Forde [1971] AC 632
Midland Metals Overseas Ltd v Comptroller-General of Customs (1991) 30 FCR 87
Minister for Immigration and Citizenship v SZRNY (2013) 214 FCR 374
Minister for Immigration and Citizenship v SZQOY (2012) 206 FCR 25
Minister for Immigration and Ethnic Affairs v Bhardwaj (2002) 209 CLR 597
Minister for Immigration and Ethnic Affairs v Daniele (1981) 5 ALD 135
Minister for Primary Industries and Energy v Austral Fisheries Pty Ltd (1993) 40 FCR 381
Momcilovic v The Queen (2011) 245 CLR 1
Morales v Minister for Immigration and Multicultural Affairs (1988) 82 FCR 374
Morris v Riverwild Management Pty Ltd [2011] VSCA 283
Minister for Immigration and Multicultural and Indigenous Affairs v Watson (2005) 145 FCR 542
Potter v Minahan (1908) 7 CLR 277
R v Bolton; Ex parte Beane (1987) 162 CLR 514
Re Adams and the Tax Agents' Board (1976) 1 ALD 251
Re B and Medical Board (ACT) (1995) 39 ALD 748
Re Hospital Benefit Fund (WA) Inc and Department of Health, Housing and Community Services (No 1) (1992) 28 ALD 25
Re Jebb and Repatriation Commission (2005) 86 ALD 182
Re Matusko and Australian Postal Corporation (1995) 21 AAR 9
Re Michael and Secretary, Department of Employment, Science and Training (2006) 90 ALD 457

Re Mulheron and Australian Telecommunications Corporation (1991) 23 ALD 309

Re Quinn and Australian Postal Corporation (1992) 15 AAR 519

Re Simcock & Repatriation Commission (1993) 29 ALD 881

Re Walsh and Commissioner of Taxation (2012) 130 ALD 200

Re Zimmax Trading Co Pty Ltd and Collector of Customs (NSW) (1979) 2 ALD 120

Rittau v Commissioner of Police, NSW Police Service [2000] NSWADT 186

Semunigus v Minister for Immigration and Multicultural Affairs (2000) FCR 533

Singh v Minister for Immigration and Multicultural Affairs (2001) 109 FCR 18

Sloane v Minister for Immigration, Local Government and Multicultural Affairs (1992) 37 FCR 429

Steak Plains Olive Farm Pty Ltd v Australian Executor Trustees Limited [2015] NSWSC 289

Vanstone v Clark (2005) 147 FCR 299

Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan (1931) 46 CLR 73

VQAR v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCA 900

X v Minister for Immigration and Multicultural Affairs (2002) 67 ALD 355

Books

C Cook, R Creyke, RS Geddes, D Hamer, and T Taylor, *Laying Down the Law* (9th edn, 2015, LexisNexis, Sydney)

R Creyke, J McMillan and M Smyth, *Control of Government Action* (4th edn, 2015, LexisNexis, Sydney)

C Evans and S Evans, *Australian Bills of Rights: The Law of the Victorian Charter and ACT Human Rights Act* (2008, LexisNexis, Melbourne)

PA Joseph, *Constitutional and Administrative Law in New Zealand* (3rd edn, 2001, Thomson, Wellington)

DC Pearce, *Administrative Appeals Tribunal* (4th edn, 2015, LexisNexis, Sydney)

DC Pearce and S Argument, *Delegated Legislation in Australia* (4th edn, 2012, LexisNexis, Sydney)

DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (8th edn, 2014, LexisNexis, Sydney)

Journal articles and reports

Administrative Review Council, *Rule Making by Commonwealth Agencies*, Report No 35 (1992)

AN Hall, 'Judicial Power, the Duality of Functions and the Administrative Appeals Tribunal' (1994) 22 *Federal Law Review* 13

AN Hall, 'Res Judicata and the Administrative Appeals Tribunal' (1994) 2 *Australian Journal of Administrative Law* 22

Justice G Downes, 'Structure, Power and Duties of the Administrative Appeals Tribunal of Australia' (<http://www.aat.gov.au/about-the-aat/engagement/speeches-and-papers/the-honourable-justice-garry-downes-am-former-pre/structure-power-and-duties-of-the-administrative>)

Michael Kirby, 'Statutory Interpretation: The Meaning of Meaning' (2011) 35 *Melbourne University Law Review* 113

TJF McEvoy, 'Res Judicata, Issue Estoppel and the Commonwealth Administrative Appeals Tribunal: A Square Peg into a Round Hole?' (1996) 4 *Australian Journal of Administrative Law* 37

R Orr and R Briese, 'Don't Think Twice? Can Administrative Decision Makers Change Their Minds?' (2002) 35 *AIAL Forum* 11

Justice J Spigelman AC, 'Principle of Legality and the Clear Statement Principle' (2005) 79 *Australian Law Journal* 769

Chapter Three: Procedural Fairness

3.1. Key issues

Procedural fairness:

- Members are obliged to afford the parties procedural fairness or natural justice.
- Procedural fairness requires that a tribunal:
  - give the parties a fair hearing
  - be free from actual or apprehended bias.
- The obligation for members to do so arises from common law or will be implied into any statute. Express language of the statute is required to oust the obligation.
- A breach of procedural fairness will ordinarily invalidate the decision of a tribunal.

Fair hearing rule:

- A tribunal is under a duty of procedural fairness where it is empowered to make a decision that will affect the rights, interests or legitimate expectations of a person or corporation.
- The requirements of the hearing rule vary according to the terms of the statute, the nature of the interests at stake and the circumstances of the decision. Generally it requires:
  - notice of the date and place of the proceeding, the case against the individual and disclosure of all information that is 'credible, relevant and significant' to the decision
  - a reasonable time to prepare the case
  - an adequate opportunity for the parties to put their case and test the case against them. This need not be in a formal hearing and may be possible through written submissions.

Bias rule:

- The tribunal must be free from bias, whether actual or apprehended.
- Actual bias arises when it has been established that a decision-maker's mind is so closed to persuasion that contrary argument on an issue is ineffectual.[1]

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1 *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507.

- The test of apprehended bias is whether a fair minded lay observer might reasonably apprehend that the decision-maker might not bring an impartial and unprejudiced mind to the resolution of the issues.
- Bias may be inferred from a member's behaviour, statements, personal interests and past or present associations, or from the way the decision-making process is structured.
- Where a member perceives a logical connection between such an interest or association and the merits of the decision, they should disclose the interest to the parties.
- The parties may waive the right to object to the decision-maker proceeding to hear and determine the case.
- Following hearing the views of the parties, it is ultimately the member's decision whether to disqualify themselves from hearing the matter.

3.2. Procedural fairness

3.2.1. What is procedural fairness?

In determining disputes, tribunals are under a duty to comply with the legal requirements of procedural fairness. *Procedural fairness*, or the duty to act fairly, is synonymous with *natural justice* (the traditional term preferred in New Zealand). Australian law now prefers the term *procedural fairness* because it 'more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case'.[2]

The High Court has described the ancient origins of procedural fairness which has long been 'the law of many civilized societies':

> That no man is to be judged unheard was a precept known to the Greeks, inscribed in ancient times upon images in places where justice was administered, proclaimed in Seneca's Medea, enshrined in the scriptures, mentioned by St Augustine, embodied in Germanic as well as African proverbs, ascribed in the Year Books to the law of nature, asserted by Coke to be a principle of divine justice, and traced by an eighteenth-century judge to the events in the Garden of Eden. (*Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1 at [140] per Callinan J).

The duty to act fairly applies to courts, administrative agencies and tribunals (both civil and administrative) which are empowered to determine matters affecting the rights, interests, or legitimate expectations of persons. Procedural fairness is a flexible doctrine whose specific requirements vary according to the nature of the decision and other circumstances.

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2 *Kioa v West* (1985) 159 CLR 550 at 585 (Mason J); *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476, 489 (Gleeson CJ).

In general, the more serious the decision and its consequences, the higher the standard of procedure required.

There are two rules of procedural fairness.

- *The hearing rule*: a person or body having power to decide a matter must give the affected persons an opportunity to state their case.
- *The bias rule*: the decision-maker must not be actually biased or must be impartial and have no personal stake or interest in the matter to be decided.

3.2.2. What are the justifications for the rules?

Commentators generally distinguish two kinds of justifications for the rules of procedural fairness: ethical and instrumental.[3]

Ethical justifications include human rights, the recognition of human dignity and personal autonomy by showing respect for persons affected by government decisions, and the promotion of democratic principles by enabling people to participate in decision-making processes that affect them.

Instrumental justifications emphasise the practical benefits flowing from fair procedures:

- by allowing affected persons to have a say in the decision-making process, procedural fairness can be expected to produce more informed and considered (and therefore better) decisions
- the opportunity to participate and the impartiality of the adjudicator promote acceptance of the decisions by affected persons and is likely to reduce enforcement costs.

Fair procedures and impartial decision-making enhance public confidence in tribunals, enabling them to command the public support and resources needed for the performance of their functions. Of course, how demanding the standard of fairness is in a given case will depend on the statutory and decision-making context.

3.2.3. What is the source of the duty?

The rules of procedural fairness arise from common law.[4] The High Court has unanimously accepted the principle that 'when a statute confers power to destroy, defeat or prejudice a

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3 Chief Justice R French, 'Procedural Fairness — Indispensable to Justice?' (Sir Anthony Mason Lecture, Melbourne, 7 October 2010) <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj07oct10.pdf> at January 2017; M Aronson, M Groves and G Weeks, *Judicial Review of Administrative Action* (6th edn, 2017, Thomson Reuters, Sydney) 376–78 and n 64.

4 *Cooper v Board of Works for the Wandsworth District* (1863) 143 ER 414, 417–20; *Ridge v Baldwin* [1964] AC 40; *Kioa v West* (1985) 159 CLR 550, 582–84 (Mason J). An alternative view is that the duty is implied by statute: *Kioa v West* (1985) 159 CLR 550, 610–11 (Brennan J). The extensive academic debate between these two views is of little practical import and as the High Court noted in *Plaintiff S10/2011 v Minister for Immigration and Citizenship* 246 CLR 636 at [97]: 'a debate whether procedural fairness is to be identified as a common law duty or as an implication from statute proceeds upon a false dichotomy and is unproductive'.

person's rights, interests or legitimate expectations, principles of natural justice generally regulate the exercise of that power': *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 at 352.

Some tribunal statutes include a provision such as 'the tribunal is bound by the rules of natural justice except to the extent that the Act, or other Acts conferring jurisdiction on the tribunal, authorise a departure from the rules'. This provision simply states the common law, which applies even if the tribunal's governing legislation is silent on the matter. In each case, the tribunal will be under a common law obligation to observe procedural fairness, subject to any modifications made by the Act.

In Chapter Two at 2.4.4, it was said that courts apply certain value-based presumptions when interpreting statutes. Parliament is presumed not to intend to interfere with certain rights and principles, such as freedom of movement. The presumption can be displaced only by clear words or necessary implication. One of the common law presumptions relating to values is that when parliament creates a statutory power to make decisions that affect the rights, interests or the legitimate expectations of individuals, it intends that the power should be exercised in accordance with the requirements of procedural fairness.[5]

This common law presumption is given statutory force in New Zealand. The *New Zealand Bill of Rights Act 1990*, s 27(1) affirms the right to procedural fairness:

> Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations or interests protected or recognised by law.

Section 6 of the Act provides:

> Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

3.2.4. What are the consequences of breach?

A tribunal which fails to comply with the legal requirements of procedural fairness commits a legal error, which invalidates its decision and also provides grounds for judicial review (see Chapter One at 1.6.3). Invalidity will ordinarily arise whether or not the breach of procedural fairness affected the outcome of the decision.[6]

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5 *Annetts v McCann* (1990) 170 CLR 596 at 598–600 (Mason CJ, Deane and McHugh JJ); *Jarratt v Commissioner of Police* (NSW) (2005) 224 CLR 44, 55–57.

6 The High Court is increasingly expressing scepticism about the value of the concept of legitimate expectation in the context of breaches of natural justice: *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1; *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at [30], [61].

If a court finds that the tribunal has breached procedural fairness in reaching its decision, the court will usually quash the decision and remit the matter to the tribunal for re-determination.

Generally, an application for judicial review may be made as soon as the requirements of procedural fairness are breached; an affected party does not have to wait until the tribunal has made its final decision. In this situation, the court may restrain the tribunal from continuing to breach procedural fairness.[7]

3.2.5. How does procedural fairness relate to conduct standards?

When considering what procedural fairness requires, it is relevant to consider what more may be required by any codes of conduct, the tribunal's Client Service Charter (if any) and ethical guides applicable to the tribunal and its members. The nature and sources of the various conduct standards relevant to tribunals and their members are discussed in Chapter Nine at 9.3.1. Codes of conduct may be prescribed by legislation, or incorporated into the members' terms of appointment or performance plan. The more usual approach in Australia and New Zealand is to develop guides: advisory statements that indicate the standards of behaviour that are expected or advised in particular situations. Some tribunals have developed their own guides.

Other tribunals may use as a reference point the Administrative Review Council's *A Guide to Standards of Conduct for Tribunal Members* (*Standards Guide for Tribunal Members*).[8] (The status of this document is discussed in Chapter Nine at 9.3.1). On some matters, the *Standards Guide for Tribunal Members* elaborates upon the common law requirements of procedural fairness by providing more specific guidance on standards of procedure or conduct for particular situations. In other areas, it may propose more exacting standards of conduct than the law requires, particularly in relation to disclosure of a possible conflict of interest.

3.3. The hearing rule

To apply the hearing rule to a tribunal proceeding requires consideration of three questions.

1. Is the nature of the power one to which the hearing rule applies at common law? (the *implication* question).
2. Is the common law rule excluded or modified by statute? (the *exclusion* question).
3. If the rules apply, what sort of procedures do they require in the particular case? (the *content* question).

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7 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 116–17. But see *Ucar v Nylex Industrial Products Pty Ltd* (2007) 17 VR 492, 519.

8 Administrative Review Council, *A Guide to Standards of Conduct for Tribunal Members* (2001) <http://www.arc.ag.gov.au/Documents/GuidetoStdsofConduct-RevisedAug2009.pdf> at January 2017.

3.3.1. Implication: when does the rule apply?

The common law rules of procedural fairness originally applied to judicial bodies, but were progressively extended to agencies and tribunals that exercise administrative power.

A tribunal (whether civil or administrative) is under a duty of procedural fairness when it is empowered to make a decision that will affect the rights, interests or legitimate expectations of a person or corporation.[9] This is not confined to legal rights but includes a range of interests such as status, property rights, livelihood, reputation and legitimate or reasonable expectations of obtaining or retaining a benefit.[10] It follows that a tribunal may in certain circumstances owe a duty of procedural fairness not only to the parties to the proceedings, but also to any other person whose rights, interests or legitimate expectations may be adversely affected by the tribunal's decision. For example, if the tribunal is proposing to make a finding that may damage the reputation of a party or other person, ordinarily it should consider notifying the person and give the person an opportunity to respond. A legitimate expectation of procedural fairness can arise from:

- a promise or undertaking given by government to the particular individual, or to the public more generally in a document such as a policy statement or international convention[11] an established practice[12] an existing right, which an individual has been led to expect will continue or be renewed.[13]

3.3.2. Exclusion: when is the rule excluded or modified by statute?

Parliament can exclude or modify the rules of procedural fairness in relation to the exercise of particular powers, and can do so by express words or by necessary implication.[14]

An example of *express* partial exclusion is a statute that provides that a party is not entitled to be legally represented at a disciplinary hearing (assuming that the common law rules would provide otherwise in the circumstances).

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9 *Kioa v West* (1985) 159 CLR 550 at 584 (Mason J). An expansive interpretation of a legitimate expectation can be found in *Annetts v McCann* (1990) 170 CLR 596, 599 (Mason CJ, Deane and McHugh JJ). In that case, parents of two boys found dead in the outback were held to have a legitimate expectation that they would be heard in opposition to any potential adverse finding in relation to themselves and the deceased in the coronial inquiry into their sons' deaths (once they had been granted representation at the inquiry). But for a contrary, more current, view see n 5.

10 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564.

11 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273*; C Inc v Australian Crime Commission* (2008) 106 ALD 453 but see *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, 12 (Gleeson CJ), 27–28 (McHugh and Gummow JJ), 38 (Hayne J), 47 (Callinan J) and *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 290 ALR 616 at [65] for a more cautious approach to legitimate expectation.

12 See generally *Attorney-General (NSW) v Quin* (1990) 170 CLR 1.

13 *Haoucher v Minister for Immigration and Ethnic Affairs (1990) 169 CLR 648; FAI Insurance Ltd v Winneke* (1982) 151 CLR 342.

14 This appears to be the position in New Zealand as well, but this has been questioned: *Fraser v State Services Commission* [1984] 1 NZLR 116 (CA) at 121 (Cooke J); PA Joseph, *Constitutional and Administrative Law in New Zealand* (2nd edn, 2001, Brookers, Wellington) [23.3.2].

The common law requirements may be excluded or modified *by implication* where they are inconsistent with the particular procedures required by the Act, or with the operation of the overall legislative scheme. For example, where a statute provides that an official holds office 'at pleasure' (that is, without notice or cause), this impliedly excludes any right to receive natural justice or prior notice before dismissal.[15] Where a decision must be made urgently or with elements of secrecy, certain procedural fairness obligations may also be reduced.[16]

For a statute to have the effect of excluding or modifying the rules of procedural fairness, that intention must be clearly manifested. As was noted by the High Court in *Commissioner of Police v Tanos* (1958) 98 CLR 383 at 396, an intention to exclude procedural fairness 'is not to be assumed, nor is it to be spelled out from indirect reference, uncertain inferences or equivocal considerations'.[17] The following provisions commonly found in tribunal legislation do not exclude procedural fairness (although the provisions may be relevant in determining what procedures are required in the circumstances):

- a provision that directs the tribunal 'to proceed with as little formality and technicality and with as much expedition as the requirements of the relevant legislation and proper consideration of matters permit'
- a provision stating that the tribunal may determine its own procedure, and may inform itself as it thinks fit, without being bound by the rules of evidence.

3.3.2.1. Is it enough to follow the statutory procedures?

It is uncommon to find a tribunal statute that expressly excludes the common law rules of procedural fairness.[18] It is more common that the rules are excluded partially and by implication. Generally, a statute will prescribe procedures for the tribunal to follow. If the procedures are comprehensive, they may be taken to operate as a *procedural code* that impliedly excludes the common law requirements. In other cases, there may be room for the common law requirements to fill gaps and to operate alongside the statutory procedures.

The trend of recent authority is against reading statutory procedures as exhaustive or as impliedly excluding the common law requirements.[19] In *Annetts v McCann*,[20] the High Court

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15 *Marine Hull & Liability Insurance Pty Ltd v Hurford* (1985) 10 FCR 234, 240–42; *Re Hatfield and Comcare* [2010] AATA 848; *Leghaei v Director-General of Security* (2007) 241 ALR 141; *Jaffarie v Director General of Security* (2014) 226 FCR 505.

16 *Coutts v Commonwealth* (1985) 157 CLR 91; *Stewart v Ronalds* (2009) 76 NSWLR 99. But see also *Commissioner of Police for NSW v Jarratt* (2003) 59 NSWLR 87.

17 See also *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 271 (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

18 For a list of Commonwealth Acts which expressly exclude decisions from review for breach of natural justice, including by tribunals, see Australian Law Reform Commission *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (2016) ALRC 129, ch. 14.

19 See especially *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57.

20 (1990) 170 CLR 596.

of Australia said that the common law rules will apply unless the Act shows an intention to exclude them.[21] The court will not easily be persuaded to find such an intention.

The fact that some of the statutory procedures conform to the common law requirements will not be taken to show that parliament intended to exclude the other requirements.[22] Aronson et al observe that:

> The exhaustive code argument faces an increasingly uphill battle and is regularly rejected by the courts.[23]

This means that it may not be enough in all cases for tribunals to follow the procedures set out in their governing legislation and in their Client Service Charter (if they have one). The common law may require higher procedural standards, depending upon the nature of the issues, the seriousness of the consequences of an adverse decision and other relevant circumstances. Tribunals should therefore consider whether in all the circumstances, procedural fairness demands *more* than compliance with the statutory procedures.

For example, the common law may require the tribunal to give the parties an opportunity to make submissions on material obtained by the tribunal through its own inquiries (such as online searches) or through the expertise of members, even though the statutory procedures are silent about it.[24]

In *Uelese v Minister for Immigration & Border Protection* (2015) 256 CLR 203, the High Court held that the statutory procedure, which mandated that the tribunal must not have regard to any information presented orally during the hearing unless it had been provided in a written statement to the Minister in advance, did not preclude the tribunal from considering information adduced during cross-examination. Failure to consider this material, or to adjourn the hearing so that the applicant could give the required statement to the minister, was a denial of procedural fairness.

3.3.3. Content: what procedures does the rule require?

Apart from the scope of any statutory exclusion of the hearing rule, the main issue for tribunals is the *content* of the rule; what specific procedures will satisfy the requirement to give a fair hearing in the circumstances? Content issues arise throughout the hearing process, and relate to matters such as:

- giving reasonable notice of a hearing and of what is in issue
- giving parties adequate time to prepare for a hearing (see Chapter Five at 5.5.7 dealing with requests for adjournment)

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21 ibid. 598 (Mason CJ, Deane and McHugh JJ).
22 ibid. 598–600.
23 Aronson, Groves, and Weeks above n 2, 465.
24 See *Australian Associated Motor Insurers Ltd v Motor Accidents Authority of NSW* (2010) 56 MVR 108; *Weinstein v Medical Practitioners Board of Victoria* (2008) 21 VR 29.

- deciding what form of hearing to give—oral or written submissions
- disclosing material obtained from another party or source (see this Chapter at 3.5.2 and Chapter Five at 5.2.2 and 5.7.5)
- giving parties an adequate opportunity to answer the case that is put against them (see this Chapter at 3.5.2)
- ensuring that decisions are based on relevant and logically probative information (*probative* information is that which tends logically to prove that which it asserts) (see Chapter Five at 5.7)
- deciding whether to allow a party to be represented (see Chapter Five at 5.5.3)[25]
- deciding whether to permit cross-examination of witnesses (see Chapter Five at 5.6.2).

Several key components of the hearing rule can be identified from the case law:[26]

- a person whose interests may be affected by a decision of the tribunal should be provided with notice of the date and place of the proceeding, what will happen during the proceeding, what can happen as a result of the proceeding and the source of the tribunal's power
- a person must be informed of the nature of the case sought to be raised against them with sufficient particularity to enable them to know the case to be met or all information that is 'credible, relevant and significant'.[27] The person must be allowed a reasonable time to obtain and present supporting material and to prepare their case a person must be given an adequate opportunity to put evidence and reasoned arguments before the tribunal in an attempt to seek a favourable outcome. They must also be given an adequate opportunity to test the case that is being raised against them and to proffer material designed to contradict that case. This does not imply that an oral hearing is required in all cases. In some circumstances, the opportunity to make submissions in writing or by telephone may satisfy the common law requirements
- if an oral hearing is conducted by one tribunal member then, ordinarily, procedural fairness may require that the parties be notified and given an opportunity to make submissions if a second, different tribunal member is to decide their case: *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at [33]–[48] a person must be informed of any adverse conclusion which has been arrived at which was not obvious on the material before it and a tribunal should not make an adverse finding about a person's credit without ensuring that the person is aware that their

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25 *Cains v Jenkins* (1979) 28 ALR 219; *WABZ v Minister for Immigration and Multicultural Affairs* (2004) 134 FCR 271.

26 *Russell v Duke of Norfolk* [1949] 1 AER 109, 118; *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576; *Park v Minister for Fair Trading* [2000] NSWCA 96 at [58]; *Seiffert v Prisoners Review Board* [2011] WASCA 148.

27 *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88. However, as noted above, there are exceptional cases in which the confidentiality and sensitivity of underlying source material have justified its non-disclosure to an affected party. See for example: *Tucker v Minister for Immigration and Citizenship* [2011] FCAFC 16 and *Jaffarie v Director General of Security* (2014) 226 FCR 505.

credit is in issue. At the same time, 'a decision-maker is not obliged to expose their mental processes or provisional views to comment before making the decision in question'.[28]

Caution should be exercised in treating prior judicial decisions on the hearing rule as precedents. The rule cannot be reduced to a code of legal rules for categories of decisions. Its content is variable and requires particularised assessment. The specific requirements of the rule depend on the legislative provisions, the nature of the decision to be made, the subject matter of the case and all the circumstances.

Some examples of the application of the hearing rule are discussed in this Chapter at 3.5 and in Chapter Five.

Further recent useful discussions of the content of the hearing rule in tribunals include:

- Justice G Garde, 'Ensuring Procedural Fairness — Tribunals to Courts' (22 April 2016, COAT Victoria Chapter Conference) <http://www.coat.gov.au/publications.html> at January 2017.
- J Longo, 'Affording Procedural Fairness: Culture and Interpreters in Tribunal Hearings' (22 April 2016, COAT Victoria Chapter Conference) <http://www.coat.gov.au/publications.html> at January 2017.
- M Groves and G Weeks (eds) *Legitimate Expectations in the Common Law World* (Hart Publishing, 2017).

3.4. The bias rule

A central requirement of administrative justice is that the decision-maker should be impartial and disinterested, so that they are open to persuasion and able to judge the case on its merits. Freedom from bias is also necessary to maintain public confidence in the tribunal and acceptance of its decisions: 'justice should not only be done, but should manifestly and undoubtedly be seen to be done'.[29]

The Administrative Review Council's *Standards Guide for Tribunal Members* recognises freedom from bias as an ethical as well as a legal obligation: 'A tribunal member should act in an impartial manner in the performance of their tribunal decision-making responsibilities, so that their actions do not give rise to an apprehension of bias, or actual bias'.[30]

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28 *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576, 591. See also *Coutts v Close* [2014] FCA 19, where the Court held at [114] that ordinarily 'procedural fairness does not require that a decision make adopt an "open file" policy which would have the effect of disclosing every submission or piece of evidence to an affected party.'

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

30 Administrative Review Council, above n 4, 12.

3.4.1. Bias—actual and apprehended

Bias means a predisposition to approach the issues in the case otherwise than with an impartial and unprejudiced mind.[31] The presence of bias may be inferred from a member's behaviour, statements, personal interests and past or present associations, or from the way the decision-making process is structured. Examples of behaviour suggestive of bias are outlined in Chapter Five at 5.4.3. Findings of actual bias are rare because of difficulties establishing the member's settled view on an issue.

Bias exists if the decision-maker is actually biased, or if an observer might reasonably apprehend that the decision-maker is biased (*apprehended* or *apparent bias*). Actual bias can be inferred from statements or conduct, and need not be deliberate, conscious or malicious.[32] The test for apprehended bias is whether a fair-minded lay observer might reasonably apprehend that the decision-maker might not bring an impartial and unprejudiced mind to the resolution of the issues.[33] An earlier formulation of the test was whether 'one of the parties or a fair-minded observer might entertain a reasonable apprehension of bias or pre-judgment'.[34] The reference to the perspective of a party disappears in the more recent formulations.[35] The omission is not material, since the appearance of bias is assessed objectively from the perspective of 'a fair-minded person, be that person a party or merely a member of the public'.[36] The fair-minded lay observer is generally attributed with knowledge of the facts, substantive law and procedure and even common aspects of legal culture.[37] Notwithstanding this attribution of knowledge, the standard for bias must be formulated by reference to the reaction of lay persons or the 'ordinary reasonable citizen on the Emu Plains omnibus'.[38] The vast majority of challenges to courts and tribunals under the bias rule allege apparent bias rather than actual bias, since the former is easier to prove and less pejorative. Either actual or apprehended bias will disqualify a member from constituting the tribunal unless the member discloses the relevant facts and circumstances to the parties and they waive their right to object. If the tribunal sits as a panel, the bias of a single member will disqualify the panel.[39] One biased member can influence the tribunal's decision, and leads to a reasonable apprehension that the panel is biased.

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31 *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 352.

32 *Sun Zhan Qui v Minister for Immigration and Ethnic Affairs* (1997) 81 FCR 71 at 135–36 (North J).

33 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 344–45 (Gleeson CJ, McHugh, Gummow and Hayne JJ).

34 *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 at 294; *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248 at 258–63.

35 *Webb v R* (1994) 181 CLR 41at 67–68 (Deane J); *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 344–45 (Gleeson CJ, McHugh, Gummow and Hayne JJ).

36 *Cheatle v Davey* (1989) 18 ALD 481 at 486 (Von Doussa J).

37 See the extensive discussion in M Groves, 'The Imaginary Observer of the Bias Rule' (2012) 19 *Australian Journal of Administrative Law* 188.

38 *S & M Motor Repairs Pty Ltd v Caltex Oil* (Australia) Pty Ltd (1988) 12 NSWLR 358 at 375–76.

39 *Builders Registration Board of Qld v Rauber* (1983) 47 ALR 55 at 64 (Wilson and Dawson JJ).

3.4.2. Disqualifying circumstances

In *Webb v R*,[40] Deane J identified four main categories of cases where a decision-maker is disqualified by reason of the appearance of bias:

- disqualifying interest, where the decision-maker has a pecuniary or other personal interest in the decision outcome. This is also referred to as having a conflict of interest
- disqualifying conduct, where the decision-maker's conduct in the course of the proceedings or outside the hearing gives rise to an apprehension of having prejudged the issue to be decided
- disqualifying association, where the appearance of bias arises from the decision-maker's association or relationship with a person interested in the proceedings
- disqualification by extraneous information, where the decision-maker has knowledge of some damaging information obtained outside the proceedings.

Each of these categories is discussed below. There may, of course, be other types of cases in which an apprehension of bias may arise.

3.4.3. Operation of the bias rule

The bias rule works like the hearing rule of procedural fairness in that:

- it is a common law presumption that can only be displaced by clear indication of legislative intention that it should not apply, or that its operation should be modified
- the application of the rule in particular situations is highly flexible, to allow for the variety of circumstances in which it is applied.

There are three recognised exceptions to the rule that a tribunal member (or other decision-maker) is disqualified for actual or apprehended bias. These are *statutory exceptions*, *waiver* and *necessity*.

3.4.3.1. Statutory exceptions

A statute may expressly or impliedly authorise a decision-maker to determine a matter despite circumstances that might otherwise give rise to apprehended bias. For example, a marketing board which had made a loan to a producer was not disqualified from determining the producer's zone of operation, since the Act conferred both functions on the board.[41]

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40 (1994) 181 CLR 41 at 74–75.

41 *Jeffs v NZ Dairy Production Marketing Board* [1967] 1 AC 551.

3.4.3.2. Waiver

There is no disqualification where disclosure of the interest is made, and the parties waive the right to object to the decision-maker proceeding to hear and determine the case (see this Chapter at 3.4.8).

3.4.3.3. Necessity

The bias rule is subject to a principle of necessity, which recognises that in some cases a tribunal or member must be allowed to proceed despite an appearance of bias, if the tribunal would otherwise be unable to perform its statutory function.[42] If the tribunal could not find enough members to constitute a panel, a member who would otherwise be disqualified for bias may take part in the decision. This might occur, for example, where all the members available have received and read an email message from party A that makes prejudicial statements about party B, and party B does not waive objection. It might also occur in a small jurisdiction with fewer members.[43]

3.4.4. Conflict of interest

3.4.4.1. Automatic disqualification or presumptive bias rule

In New Zealand, and in Australia until 2000, cases of direct pecuniary (financial) interest in the subject matter of the proceedings have been treated differently from other causes of bias. They were subject to a separate rule which in New Zealand is called *presumptive bias,* and in Australia is called *automatic disqualification*. Its effect is that a decision-maker (judge, tribunal member or administrator) who has a direct pecuniary interest in the matter to be decided is disqualified, provided that the interest is not too trivial or remote.[44]

The existence of a pecuniary interest raises an irrebuttable presumption of bias—hence the term *presumptive bias*. Disqualification is automatic in the sense that it is not necessary to enquire whether the decision-maker was in fact influenced by the interest, or whether a fair-minded observer would reasonably suspect bias. The rule was intended to provide clear guidance to decision-makers about when they should withdraw from a proceeding. In fact the rule became more anomalous and unworkable as a result of social and economic change. For example, it has become much more common for decision-makers to have small shareholdings in a number of large companies, through diversified share portfolios or pooled investment and superannuation funds – see *Kirby v Centro Properties Ltd (No 2)* (2008) 172 FCR 376.

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42 *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 at 88 (Mason CJ and Brennan J).

43 *Sanders v Snell* (No 2) (2003) 130 FCR 149.

44 *Dimes v Proprietors of Grand Junction Canal Pty* (1852) 10 ER 301; *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142 (NZCA).

In *Ebner v Official Trustee in Bankruptcy*,[45] the High Court of Australia overruled a long line of authorities, holding that there was no longer any rule that a decision-maker is automatically disqualified by reason of a pecuniary interest in the outcome of the proceedings. No free-standing rule of automatic disqualification for pecuniary interest or any other cause now applies in Australia.

3.4.4.2. Analysing a case of potential conflict of interest or association

A tribunal member may have a conflict of interest by reason of a pecuniary or proprietary interest in the outcome of the litigation, or an association with a party, witness, representative or other person concerned in the proceedings. The majority judgment in *Ebner* provided a three-step method that can be used to analyse whether a tribunal member is disqualified by reason of a conflict of interest or association.[46]

1. Specify the interest. For example, the tribunal member owns shares in a company that is a party to the proceedings.
2. Spell out a logical connection between the interest and the anticipated breach of the member's duty to decide the case on its merits. For example, the connection might be that if the applicant company wins the case, the value of the member's shareholding in the company will rise, and this result might predispose the member to decide the case in favour of the applicant.
3. Apply the test for apprehended bias. Having regard to the interest and the connection, would a fair-minded observer reasonably apprehend that the member might not decide the case impartially? This requires an assessment of whether there is a realistic possibility that the outcome of the case would affect the value of the member's shareholding.[47]

As an example of this analysis, in *Clenae Pty Ltd v Australian and New Zealand Banking Group Pty Ltd,*[48] a trial judge inherited a parcel of 2400 shares in the ANZ Bank after reserving judgment in a case in which the ANZ Bank was a party. It was conceded (correctly, in the view of the majority of the High Court) that the outcome of the litigation would not have affected the value of the judge's shares in a bank that was a party, so the interest did not disqualify him.[49]

Notwithstanding the abandonment of the automatic disqualification rule in Australia, a majority of the High Court of Australia in *Ebner* said that pecuniary and proprietary interests continue to be of particular significance, because they are more concrete and identifiable,

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45 (2000) 205 CLR 337.

46 ibid. 345, 350 (Gleeson CJ, McHugh, Gummow and Hayne JJ). Their Honours indicated that the test applies to associations as well as interests.

47 ibid.

48 (2000) 205 CLR 337.

49 ibid 347. (The *Clenae* appeal was heard together with *Ebner.*)

and are perceived to have a more insidious effect on impartiality.[50] A *direct* pecuniary or proprietary interest in the outcome of the case will normally be disqualifying unless the interest is insubstantial.[51]

3.4.4.3. Scope of the presumptive bias rule in New Zealand

In New Zealand, the presumptive bias rule continues to apply in cases of direct pecuniary interest and certain situations of *indirect* pecuniary interest, such as where the decision-maker stands to obtain a potential benefit or liability from the proceedings.[52] An example of *indirect* pecuniary interest is where the member's spouse or child has a financial interest in the outcome of the proceedings.

English authority raises the possibility that the presumptive bias rule may also extend to a case where the decision-maker has a direct *non-pecuniary* interest in the outcome. In *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet (No 2)*,[53] the House of Lords held that a judge was disqualified from hearing a case on the basis that he was a member of an organisation that was involved in the work of a party to the case.

This decision has blurred the boundaries of the rule, and the scope of the extension that it has introduced is presently unclear.[54]

3.4.5. Bias by conduct or prejudgment

Tribunal members may, by their words or conduct in tribunal processes or their activities outside the tribunal, engender a reasonable apprehension that they have prejudged an issue to be adjudicated, and are not open to persuasion.

3.4.5.1. Expression of provisional views

It is helpful to the parties if, in the course of the hearing, the tribunal discloses a provisional view on an issue or directs the attention of the parties to weaknesses in their case.[55] This promotes the purpose of the hearing rule by alerting the parties to what the tribunal is thinking, and giving them an opportunity to persuade the tribunal to take another view. Care should, however, be taken when expressing a provisional view, or exposing weaknesses in a party's case, that the tribunal does not give the impression of having made up its mind before the hearing has finished. To avoid the appearance of prejudgment, the Workers Compensation Commission (NSW) suggests that an appropriate mode of expression is as follows: 'My provisional view, subject to what any of the parties may say, is that …'.[56]

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50 ibid. 351.
51 ibid. 358. Compare this to *Smits v Roach* (2006) 227 CLR 423, where the judge's brother had the direct financial interest.
52 *Calvert & Co v Dunedin City Council* [1993] 2 NZLR 460.
53 [2000] 1 AC 119.
54 Joseph, above n 7, [23.5.2(2)].
55 *Vakauta v Kelly* (1989) 167 CLR 568 at 571–72 (Brennan, Deane and Gaudron JJ).
56 Workers Compensation Commission (NSW), *Arbitrators Manual* (2002) 45.

3.4.5.2. Preconceived views about witnesses

Tribunal members who see the same expert witnesses appearing before them in different proceedings inevitably form views about the witnesses' expertise and impartiality. For example, a member may have the opinion that a medical expert who is regularly called by an insurance company in workers compensation cases invariably underestimates the worker's impairment. The member may have rejected the witness's evidence in previous cases. Provided that the member does not make comments indicating prejudgment, the member is not disqualified from hearing a matter in which the witness is called.[57] This may be contrasted with a situation where a member has in a previous case made findings against the credit or truthfulness of a non-expert witness who is called to give evidence in the current proceedings, and the credit of the witness is a live issue. In this situation there is a reasonable apprehension of bias.[58] In this situation the tribunal member should not sit.[59]

3.4.5.3. Conduct in the hearing

A reasonable apprehension of bias may arise from hostility, sarcasm or aggression shown by a tribunal member towards a party, or the representative or witness for a party, in the course of the hearing.[60] Examples of behaviour suggestive of bias are outlined in Chapter Five at 5.4.3. A tribunal may need to test the evidence by questioning witnesses and directing their attention to any inconsistencies in the evidence. Where a party is self-represented, care should be taken to ensure that this is not done in a manner that intimidates or overbears the witness. For example, constant interruptions, expressions of disbelief or aggressive questioning by the tribunal might give rise to a reasonable apprehension that the tribunal has taken sides or has prejudged the issue.[61] This type of conduct may also breach the hearing rule, if it has the effect of denying a party a fair hearing. Flippant remarks in poor taste made by a member about the subject matter of the proceedings can also give rise to apprehended bias. For example, it was alleged that a member hearing a civil claim for defective construction of a fence had publicly referred to it as 'the case of the shonky fence'. Byrne J found that the allegation was unfounded, but if it had occurred it would meet the test for bias.[62]

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57 *Vakauta v Kelly* (1989) 167 CLR 568 at 571–72 (Brennan, Deane and Gaudron JJ); *Johnson v Johnson* (2000) 201 CLR 488.

58 ibid.; *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 at 300.

59 Council of Chief Justices of Australia, *Guide to Judicial Conduct* (2nd edn rev'd., 2007, AIJA Inc, Victoria) [3.3.4 (i)] <http://www.aija.org.au/online/GuidetoJudicialConduct(2ndEd).pdf> at January 2017.

60 See *Johnson v Johnson* (2000) 201 CLR 488; *Vakauta v Kelly* (1989) 167 CLR 568; *Livesey v New South Wales Bar Association* (1983) 151 CLR 288.

61 *Re Refugee Review Tribunal; Ex parte H* (2001) 179 ALR 425 at 435; Administrative Review Council, above n 6, 35–36.

62 *Keirl v Kelson* (2004) 21 VAR 422, [12] (Byrne J). Further recent examples are *B v DPP* [2014] NSWCA 232 and *SZRUI v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCAFC 80, where it was accepted that 'the exchanges that occurred went well beyond a mere expression of reservation … the exchanges exposed the Tribunal member expressing a concluded view before the entirety of the hearing had even concluded that she "[did not] believe any of that" '.

3.4.6. Bias by association

Tribunal members commonly have personal or professional relationships with persons who are interested or involved in the proceedings as witness, party or representative. The relationship may be unknown to the parties. This raises the question whether the member should disclose it to the parties.

Not all prior associations will give rise to a reasonable apprehension of bias. Much depends upon the nature, duration and closeness of the relationship. What must be assessed is the capacity of the relationship to influence the outcome.[63]

- Relationships based on kinship, direct friendship and friendship with family members require close consideration. The Council of Chief Justices' *Guide to Judicial Conduct* classifies familial relationships as first, second and third degree according to the closeness of the kinship.[64] Other personal relationships can also be assessed by analogy with the degrees of kinship. Where the relationship to a party or the spouse or domestic partner of a party is in the first degree (parent, child, sibling, spouse or domestic partner), the *Guide to Judicial Conduct* says that a judge should not sit.

- Relatives in the second degree are grandparents, grandchildren, in-laws of the first degree, aunts, uncles, nephews and nieces. Where a judge has a relationship in the first or second degree with counsel or solicitor representing a party, or the spouse or domestic partner of such counsel or solicitor, the judge should not sit unless the matter is uncontested or of a minor procedural nature, or the principle of necessity applies.

A particular issue for tribunals can arise where a legal representative appears in proceedings in front of a member with whom they have previously sat on the tribunal. In the UK, the House of Lords has found that this practice may give rise to apprehended bias.[65] The *Guide to Judicial Conduct* provides a number of specific guidelines for particular categories of familial, personal, professional and business relationships with parties, witnesses or representatives or their spouses or domestic partners.[66] The guidelines take account of settled rules of common law and practice. Although they were written for judicial officers, they may also provide guidance to tribunal members. They are considered further in Chapter Nine at 9.3.3. The following guidelines are worth noting here.[67]

- Personal friendship with a party is a compelling reason for disqualification, but mere acquaintance is not. The judge must consider whether to disqualify themselves or to disclose the relationship to the parties and invite submissions.

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63 *Aussie Airlines Pty Ltd v Australian Airlines Pty Ltd* (1996) 65 FCR 215 at 226.
64 Council of Chief Justices of Australia, above n 40, 12–14 (see ch. Nine at 9.3.3).
65 *Lawal v Northern Spirit Ltd* [2004] 1 All ER 187, [21]–[23].
66 ibid. 11–12.
67 ibid.

- Past professional association with a party as client does not require disqualification unless the association relates to the subject matter of the proceedings.[68] Applying this in a tribunal example, a member of a planning tribunal may have previously advised a developer who is one of the parties in proceedings before the tribunal. If the matter on which the advice was given is unrelated to the matter presently before the tribunal, the member can sit.
- A judge who has a current or recent business association with a party usually should not sit, but a current or recent business association with a witness will not necessarily be grounds for disqualification. All the circumstances should be considered and, in the latter case, the relationship should ordinarily be disclosed.
- Friendship or past professional association with counsel or a solicitor for the parties is not generally a sufficient reason for disqualification.[69]
- The fact that a witness is personally known to the judge is not a ground for disqualification unless the credibility of the witness is likely to be in issue, but the relationship should nevertheless be disclosed to the parties.
- The fact that the tribunal member or decision-maker communicates with third parties during the hearing about matters arising in the case could, depending on the facts, also give rise to an apprehension of bias. An unsuccessful claim of bias was made against Commissioner Ipp, who communicated with the NSW Government about legal matters generally relating to a current ICAC inquiry before him: *Duncan v Ipp* (2013) 304 ALR 359.

The ARC's *A Guide to Standards of Conduct for Tribunal Members* focuses on perceptions of bias that may arise from a tribunal member's private and professional life and associations. This Guide is considered further in Chapter Nine at 9.3.2. It advises as follows:

- members should have regard to the potential impact of activities, interests and associations in their private life on the impartial and efficient performance of their tribunal responsibilities[70]
- members who have other professional and business activities should ensure that people from whom they accept work in their private practice do not appear in matters before them[71]
- members should avoid involvement in partisan political activity that might adversely affect perceptions of their impartiality[72]

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68 *S & M Motor Repairs v Caltex Oil* (1988) 12 NSWLR 358; *British American Tobacco Australia Ltd v Gordon* [2007] NSWSC 109; *Murlan Consulting Pty Ltd v Ku-Ring-Gai Municipal Council* [2008] NSWLEC 318, [42] (Pain J); *Precision Fabrication Pty Ltd v Roadcon Pty Ltd* (1991) 104 FLR 260, 264.

69 *Morton v The Transport Appeal Boards* [2007] NSWSC 888; *Taylor v Lawrence* [2003] QB 528.

70 Administrative Review Council, above n 4, 42.

71 ibid 43.

72 ibid 44.

- members may participate as members, donors and supporters in community and professional organisations, and may contribute to public debates, but should consider the potential for those associations and activities (and those of their family members) to give rise to apprehensions of bias in matters coming before the tribunal.[73]

3.4.7. Bias by extraneous communication

Once the hearing is pending there should be no communication between a tribunal member allocated to hear a case and a party, representative or adviser to a party or a witness for a party in the absence of the other parties, except with their prior knowledge and consent.[74]

Particular care must be taken when attending a 'view' that the member does not travel with one of the parties, their witness or representatives. Any communication between a member and a witness or party in the absence of other parties may give rise to a reasonable apprehension of bias, even if the content is unrelated to the case.[75] For example, a reviewing court said that if a member of a civil tribunal were found to have held a five-minute conversation with the applicants and their spouses in the waiting room in the absence of the respondents before the hearing commenced, the court would set aside the decision of the member and remit the matter to be reheard by a differently constituted panel of the tribunal with a 'stern rebuke' to the member.[76] Even travelling in a lift with a party, witness or legal representative for one party only should be avoided. Private discussions between a member and a witness should be avoided altogether.[77] A disqualifying communication may occur involuntarily so far as the member is concerned, as, for example, where the member receives a phone call at home from one of the parties or a party's representative.[78] The irregularity of the communication gives rise to a reasonable apprehension that matters relating to the case were discussed.[79]

A useful guide to chambers communications is set out in the Federal Court's recent *Guide to Communications with Chambers Staff* <http://www.fedcourt.gov.au/going-to-court/chambers-staff> at January 2017.

3.4.8. Bias by previous involvement in the same proceedings

An apprehension of bias may arise because of a member's previous involvement in the same proceedings or similar proceedings involving the same parties.

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73 ibid. 43–48.

74 *R v Magistrates Court at Lilydale: Ex parte Ciccone* [1973] 1 VR 122 at 127; Council of Chief Justices of Australia, above n 40, 15–16.

75 *City of St Kilda v Evindon Pty Ltd* [1990] VR 771; see also Administrative Review Council, above n 4, 38.

76 *Keirl v Kelson* (2004) 21 VAR 422, [14] (Byrne J).

77 *Re JRL; Ex parte CJL* (1986) 161 CLR 342.

78 C*ity of St Kilda v Evindon Pty Ltd* [1990] VR 771.

79 ibid. 777.

Examples of where an apprehension of bias may arise include:

- a decision in which the judge had previously made findings of fraud against one of the parties in proceedings involving similar facts, arising from the destruction of documents of which discovery was sought in the litigation[80]
- a decision where the decision-making panel is constituted by a member who was previously involved, albeit in a limited way, in the investigation of the underlying allegations before the panel: *Isbester v Knox City Council* (2015) 255 CLR 135, but see *City of Subiaco v Simpson MLA* [2014] WASC 493
- a decision where the judge was a member of the Law Society committee which had originally instituted proceedings against the appellant[81]
- a decision where the judge made a series of ex parte interlocutory decisions, including granting freezing orders, in the same proceedings[82]
- an appeal which was decided on the papers by a panel including the same senior member who had made the original decision
- a decision whether the member or judge has participated in pre-hearing dispute resolution processes in the matter without seeking the consent of the parties to the member holding a final hearing of the matter.[83]

3.4.9. Management of bias issues

3.4.9.1. Disclosure

The purpose of disclosure is to allow the parties to determine whether grounds for disqualification exist, and whether to waive their right to object to the member constituting the tribunal. There is no common law duty to disclose facts and circumstances that would not legally disqualify the member from hearing the matter.[84] There is only a duty not to hear a matter from which the member is disqualified unless the right to object has been waived. However, there are reasons why members might disclose a matter even if they do not think

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80 *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283, 330–33 (Heydon, Kiefel and Bell JJ).

81 *R v Lee; Ex parte Shaw* [1882] 9 QBD 394. But see also *Hall v New South Wales Trotting Club Ltd* [1977] 1 NSWLR 378, 389.

82 See *Michael Wilson & Partners Limited v Nicholls* (2011) 86 ALJR 14, although the application was unsuccessful because: 'in none of the [interlocutory] applications was the trial judge required to make, and in none of the applications did he make, any determination of any issue that was to be decided at trial'. There were also no findings on the credibility of witnesses. See in contrast the importance of findings of credibility in *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283. For a general discussion of how bias may arise in these circumstances, see: A Olijnyk, 'Apprehended Bias and Interlocutory Judgments' (2013) 35 *Sydney Law Review* 761

83 It was held that 'apprehension of bias in a tribunal member may be increased if the member omitted to disclose their prior involvement in a matter and did not ask whether there was objection to them continuing to sit. The observation has added pertinence where the tribunal member knows of their involvement, and knows that the litigant does not, and will not know until after the proceeding is determined': *Maher v Adult Guardian* [2011] QCA 225 at [24]. See also *Sengupta v Holmes* [2002] EWCA Civ 1104.

84 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 360 (Gleeson. CJ, McHugh, Gummow and Hayne JJ).

it justifies their disqualification: a failure to disclose might be one of the circumstances that gives rise to a reasonable apprehension of bias.[85] A majority of the High Court said in *Ebner* that it is good practice and prudent to disclose interests and associations 'if there is a serious possibility that they are potentially disqualifying'.[86] Tribunals commonly advise their members to take a more scrupulous approach to disclosure than may be required by the bias rule. Reflecting this approach the ARC's *A Guide to Standards of Conduct for Tribunal Members* appears to favour a low threshold for disclosure by tribunal members, in order to maintain public confidence in the tribunal's impartiality.[87] It proposed the following standard:

> (i) A tribunal member should be pro-active and comprehensive in disclosing to all interested parties interests that could conflict (or appear to conflict) with the review of a decision.[88]

3.4.9.2. The member's decision on a course of action

It is the member's decision whether to disqualify themselves from hearing the matter. The decision should be made at the earliest opportunity. Members are permitted and encouraged to consult with the tribunal head and colleagues to seek guidance on whether to stand down or to disclose the matter to the parties.[89] Tribunal procedures may require notification to the tribunal head or other office bearers before disclosure to the parties. If the hearing has not yet commenced or the matter is to be determined 'on the papers' without a hearing, it may be possible to avoid the need for disclosure by substituting another member who is unaffected by the potentially disqualifying circumstances. Other members of the tribunal are not disqualified by the bias of a member who has not been selected to constitute the panel.[90] Where a member considers that self-disqualification is the proper course, the member must act accordingly.[91] If the member is uncertain whether the circumstances warrant disqualification, disclosure should be made to the parties at the first opportunity. Disclosure may also be appropriate in a case where the member thinks there is no reason for disqualification, but apprehends that failure to disclose may lead to a subsequent complaint.[92] It is wise to err on the side of caution. The member should decide what information to disclose, and discourage further questioning by the parties or their representatives.

3.4.9.3. Objection and waiver following disclosure

If a member makes a disclosure of potentially disqualifying circumstances, the tribunal should then invite the parties to make submissions. The question of whether a party wishes

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85 ibid.
86 ibid. 360.
87 Administrative Review Council, above n 4, 38–41.
88 ibid. 38.
89 Council of Chief Justices of Australia, above n 40, 15.
90 *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70; *Vietnam Veterans' Association v Veterans' Review Board* (1994) 52 FCR 34.
91 Council of Chief Justices of Australia, above n 40, 15.
92 ibid. 13.

to object or to waive objection should also be addressed. The ARC's A Guide to *Standards of Conduct for Tribunal Members* advises:

- Although as a matter of law waiver may be implied, it is suggested that it is a tribunal member's responsibility expressly to raise the question of consent with the potentially prejudiced party.[93]
- Consent of the parties is not the determinative factor. Even if the parties waive objection, the member may decide not to sit if they consider that disqualification is the proper course.[94]

If the parties do not waive objection, the member will need to consider the submissions of the parties and decide whether to stand down. The following points should be noted:

- A member is not automatically obliged to stand down where objection is taken following disclosure.
- The fact that one or more of the parties has an actual suspicion that the member is biased does not satisfy the test for apprehended bias. The test is an objective one, requiring consideration of what a fair-minded observer would reasonably apprehend.
- The member should consider all the circumstances, including the stage of proceedings at which objection is taken, and any costs and delays that might result.

Courts have cautioned judges and tribunal members not to acquiesce too readily to applications for them to stand down, since this can cause hardship to parties, particularly if the matter is part heard. To stand down when there are no legal grounds for disqualification may even amount to an abdication of the member's duty.[95] The member may also consider whether standing down without sufficient grounds would encourage tactical objections and abuse of process in other cases.[96] If the member decides to sit, the reasons for that decision should be recorded. So too should the disclosure of relevant circumstances.[97] If the member decides to stand down, the ARC's *A Guide to Standards of Conduct for Tribunal Members* recommends that the member should explain to all the parties why this is being done.[98] Tribunal legislation or practice directions may specify the procedures for reconstituting the tribunal after a hearing has commenced.

3.4.9.4. Objection and waiver *not* following disclosure

A party may raise an objection to a member constituting the tribunal at the commencement of the hearing or at any time before the tribunal has discharged its function. Subject to any particular statutory requirements, the member should seek submissions from any other party

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93 Administrative Review Council, above n 4, 39.
94 Council of Chief Justices of Australia, above n 40, 15.
95 See e.g. *Re Polites: ex parte The Hoyts Corporation Pty Ltd* (1991) 173 CLR 78.
96 *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 at 294.
97 Administrative Review Council, above n 4, 13.
98 ibid. 41.

to the matter and then make a decision about disqualification. If necessary, the member may suspend the hearing briefly to consider the question.

If a party raises an objection to the member constituting the tribunal after the hearing has commenced, otherwise than in response to a disclosure by the member, the tribunal should inquire when the party first learned of the facts on which the objection is based. If there has been a delay in taking the objection, the tribunal should ask the party to explain why the matter was not raised sooner.

Objections on bias grounds are sometimes taken for tactical reasons, such as to have the matter heard before another member whom the objector believes is more likely to decide the case favourably to the objector. Parties who know of potentially disqualifying circumstances are not entitled to bide their time and raise the objection only once they perceive the case is going against them. To prevent such an abuse of process, the courts insist that objections be taken at the earliest opportunity once the objector knows of the potentially disqualifying facts and knows of the right to object.[99] If this is not done, the ground of objection may be taken to have been waived, and cannot later be relied upon to challenge the tribunal's decision.

3.5. Procedural fairness in administrative review and civil proceedings

3.5.1. Procedural fairness and obtaining information

In the absence of a clear contrary intention in legislation, both the hearing and the bias rules of procedural fairness apply in the making of primary administrative decisions, in the review of administrative decisions, and in the adjudication of civil disputes. The rules have an inbuilt flexibility that allows them to be applied in ways that take account of the differences in the composition and function of tribunals.

Tribunals commonly inform themselves in a different way to the courts.

Tribunals are generally empowered to inform themselves on the matter before them in any way they think fit (see Chapter Five at 5.2 and 5.2.1). In formal adversarial proceedings before the courts, judges are required to act only on evidence presented by the parties, except for matters of 'judicial notice'.[100] A tribunal may form certain views or acquire information in deciding previous cases. For example, the former Refugee Review Tribunal, now the Migration and Refugee Division of the AAT, accumulates 'country information' about the human rights situation in various countries, which it uses to evaluate evidence given by applicants from those countries.

Members of tribunals are often experts in the subject matter of the disputes that come before the tribunal, and are expected to use their professional knowledge and skill in reaching their decisions. This is known as official notice.

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99 *Vakauta v Kelly* (1989) 167 CLR 568 at 571–73 (Brennan, Deane and Gaudron JJ), 587–88 (Toohey J).

100 *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507 at 562 (Hayne J).

These systematic differences between courts and tribunals raise a question of how the rules of procedural fairness are applied to tribunal proceedings.[101]

3.5.2. Tribunal relying on its own knowledge

The use by the tribunal of its own knowledge can raise issues of prejudgment under the bias rule, and disclosure obligations under the hearing rule. The following points are worth noting.

- An expert tribunal is entitled to draw upon its general expertise and experience when evaluating the evidence and reaching its conclusions, and does not have to disclose its knowledge.[102] An apprehension of bias will more readily arise where the tribunal relies on particular rather than general information. Where the tribunal proposes to rely upon particular factual information known to it or discovered through its own investigations and the information is prejudicial to the interests of a party, the tribunal should disclose the information to the parties and give them an opportunity to respond to it.[103] For example, if a medical member knows that a diagnostic test relied upon by an expert medical witness for a party is unreliable, the member should put the point to the witness (if opportunity presents) or otherwise to the party. If the tribunal relies on information that is from an identifiable source such as a medical journal, the source as well as the information should be disclosed. That is particularly the case if the source material may contain errors or be open to misinterpretation: *Australian Associated Motor Insurers Ltd v Motor Accidents Authority of NSW* (2010) 56 MVR 108.

- Where the tribunal is relying on its own theory to explain events, it must disclose that theory to the parties. For example, in *Keller v Drainage Tribunal*,[104] a civil tribunal decided a claim on the basis that there was a perched water table which had caused the damage in issue. The existence of a perched water table had not been referred to by the parties, and the tribunal had given them no indication that it had this theory in mind.

- In some circumstances, a tribunal may rely on its own observations of the actions or demeanour of a party in reaching its decision. If the tribunal proposes to use the observation in a way that is prejudicial to the party, it should ask itself whether the party could reasonably be expected to anticipate how the tribunal might view the behaviour. If the answer is negative, the tribunal must notify the party and allow them to respond.

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101 See N Bedford and R Creyke, *Inquisitorial Processes in Australian Tribunals* (2005, Australian Institute of Judicial Administration Inc, Melbourne).

102 *Minister for Health v Thomson* (1985) 8 FCR 213 at 217 (Fox J), 224 (Beaumont J). However, this will not be the case where the knowledge goes beyond professional expertise and amounts to personal knowledge or observation: *Koppen v Commissioner for Community Relations* (1986) 11 FCR 360.

103 *R v Milk Board; Ex parte Tomkins* [1944] VLR 187.

104 [1980] VR 449.

For example, suppose that a party gives evidence that the party is incapable of sitting for more than an hour at a time due to back pain, but the tribunal observes the person in the hearing room sitting quite freely for hours at a time. If the tribunal proposes to rely on its observations of the behaviour to reject the party's evidence on that matter, it must first tell the person or their legal representative what it has observed and what conclusion it intends to draw, and give the person an opportunity to answer the point.[105]

This is an application of the general principle of procedural fairness that a party must be given an adequate opportunity to present their case. If a tribunal is proposing to rely upon evidence that contradicts the testimony of a party or witness, it must ensure that the substance of that contrary evidence is put to the person so that they have an opportunity to explain the contradiction. In court proceedings, this is known as the rule in *Browne v Dunn*.[106] Even a tribunal that is not bound by the rules of evidence may nevertheless be required to apply the rule to ensure procedural fairness.[107]

- The following additional points are reproduced from the Workers Compensation Commission (NSW) *Arbitrators Manual*.[108] A member may have personal knowledge not simply of a particular field, but also of the people who work within it. However, the accuracy of the member's knowledge or information will be untested, and might amount to little more than gossip. This kind of information must not be taken into account without the knowledge of the parties.

- Where a member is appointed because the person is known to possess certain knowledge, the member should take care to base their decision in a particular case on the facts of that case and not simply in accordance with preconceived views or knowledge.[109] If a member has personal knowledge of particular people involved or events at issue in a case, apart from knowledge gained from normal professional association, then the member should disclose the nature of this knowledge to the parties.

References

Legislation

New Zealand Bill of Rights Act 1990 (NZ)

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105 *Kassem v Crossley* [2000] NSWCA 276 (Unreported, NSW Court of Appeal, Mason P, Heydon JA and Clarke AJA, 13 June 2000).

106 (1893) 6 R 67 (HL).

107 *Marelic v Comcare* (1993) 47 FCR 437 at 443 (Beazley J); *A School v Human Rights and Equal Opportunity Commission* (No 2) (1998) 55 ALD 93 at 111–12 (Mansfield J).

108 Workers Compensation Commission (NSW), above n 37.

109 *Koppen v Commissioner for Community Relations* (1986) 11 FCR 360.

Case law

A School v Human Rights and Equal Opportunity Commission (No 2) (1998) 55 ALD 93

Ainsworth v Criminal Justice Commission (1992) 175 CLR 564

Annetts v McCann (1970) 170 CLR 596

Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 225 CLR 88

Attorney-General (NSW) v Quin (1990) 170 CLR 1

Auckland Casino Ltd v Casino Control Authority [1995] 1 NZLR 142 (NZCA)

Aussie Airlines Pty Ltd v Australian Airlines Pty Ltd (1996) 65 FCR 215

Australian Associated Motor Insurers Ltd v Motor Accidents Authority of NSW (2010) 56 MVR 108

B v DPP [2014] NSWCA 232

British American Tobacco Australia Services Ltd v Laurie (2011) 242 CLR 283

British American Tobacco Australia Ltd v Gordon [2007] NSWSC 109

Browne v Dunn (1893) 6 R 67 (HL)

Builders Registration Board of Qld v Rauber (1983) 47 ALR 55

C Inc v Australian Crime Commission (2008) 106 ALD 453

*Cains v Jenkins (*1979) 28 ALR 219

Calvert & Co v Dunedin City Council [1993] 2 NZLR 460

Cheatle v Davey (1989) 18 ALD 481

City of St Kilda v Evindon Pty Ltd [1990] VR 771

City of Subiaco v Simpson MLA [2014] WASC 493

Clenae Pty Ltd v Australian and New Zealand Banking Group Pty Ltd (2000) 205 CLR 337

Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd (1994) 49 FCR 576

Commissioner of Police for NSW v Jarratt (2003) 59 NSWLR 87

Cooper v Board of Works for the Wandsworth District (1863) 143 ER 414

Coutts v Close [2014] FCA 19

Coutts v Commonwealth (1985) 157 CLR 91

Dimes v Proprietors of Grand Junction Canal Pty (1852) 10 ER 301

Duncan v Ipp (2013) 304 ALR 359

Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337

FAI Insurance Ltd v Winneke (1982) 151 CLR 342

Fraser v State Services Commission [1984] 1 NZLR 116 (CA)

Haoucher v Minister for Immigration and Ethnic Affairs (1990) 169 CLR 648

Isbester v Knox City Council (2015) 255 CLR 135

Jaffarie v Director General of Security (2014) 226 FCR 505

Jarratt v Commissioner of Police (NSW) (2005) 224 CLR 44

Jeffs v NZ Dairy Production Marketing Board [1967] 1 AC 551

Johnson v Johnson (2000) 201 CLR 488

Kassem v Crossley [2000] NSWCA 276 (Unreported, New South Wales Court of Appeal, Mason P, Heydon JA, Clarke AJA, 13 June 2000)

Keirl v Kelson (2004) 21 VAR 422

Keller v Drainage Tribunal [1980] VR 449

Smits v Roach (2006) 227 CLR 423

Stewart v Ronalds (2009) 76 NSWLR 99

Sun Zhan Qui v Minister for Immigration and Ethnic Affairs (1997) 81 FCR 71

SZRUI v Minister for Immigration, Multicultural Affairs and Citizenship [2013] FCAFC 80

Taylor v Lawrence [2003] QB 528

Tucker v Minister for Immigration and Citizenship [2011] FCAFC 16

Ucar v Nylex Industrial Products Pty Ltd (2007) 17 VR 492

Uelese v Minister for Immigration & Border Protection (2015) 256 CLR 203

Vakauta v Kelly (1989) 167 CLR 568

Vietnam Veterans' Association v Veterans' Review Board (1994) 52 FCR 34

WABZ v Minister for Immigration and Multicultural Affairs (2004) 134 FCR 271

Webb v R (1994) 181 CLR 41

Weinstein v Medical Practitioners Board of Victoria (2008) 21 VR 29

Guides

Administrative Review Council, *A Guide to Standards of Conduct for Tribunal Members* (2001, rev'd 2009) <http://www.ag.gov.au/agd/WWW/arcHome.nsf/Page/Publications_Reports_Downloads_A_Guide_to_Standards_Of_Conduct> at January 2017

Council of Chief Justices of Australia, *Guide to Judicial Conduct* (2nd edn rev'd, 2016, AIJA Inc, Victoria) [3.3.4 (i)]<http://www.aija.org.au/online/GuidetoJudicialConduct(2ndEd).pdf> at January 2017

Federal Court of Australia, *Guide to Communications with Chambers Staff* <http://www.fedcourt.gov.au/going-to-court/chambers-staff> at January 2017

Workers Compensation Commission (NSW), *Arbitrators Manual* (2002)

Books and articles

M Aronson, M Groves, and G Weeks, *Judicial Review of Administrative Action* (6th edn, 2017, Thomson Reuters, Sydney)

Chief Justice R French, 'Procedural Fairness — Indispensable to Justice?' (Sir Anthony Mason Lecture, Melbourne, 7 October 2010) <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj07oct10.pdf> at January 2017

N Bedford and R Creyke, *Inquisitorial Processes in Australian Tribunals* (2005, Australasian Institute of Judicial Administration Inc, Melbourne)

R Creyke, J McMillan and M Smyth, *Control of Government Action* (4th edn, 2015, LexisNexis, Sydney)

Justice G Garde, 'Ensuring Procedural Fairness — Tribunals to Courts' (22 April 2016, COAT Victoria Chapter Conference) <http://www.coat.gov.au/publications.html> at January 2017

M Groves, 'The Imaginary Observer of the Bias Rule' (2012) 19 *Australian Journal of Administrative Law* 188

M Groves and G Weeks, *Legitimate Expectation in the Common Law World* (Hart Publishing, 2017)

J Longo, 'Affording Procedural Fairness: Culture and Interpreters in Tribunal Hearings' (22 April 2016, COAT Victoria Chapter Conference) <http://www.coat.gov.au/publications.html> at January 2017

PA Joseph, *Constitutional and Administrative Law in New Zealand* (2nd edn, 2001, Brookers, Wellington)

A Olijnyk, 'Apprehended Bias and Interlocutory Judgments' (2013) 35 Sydney Law Review 761

Chapter Four: Pre-Hearing

4.1. Key issues

Preliminary procedures:

- Many tribunals now employ pre-hearing or preliminary procedures.
- Preliminary processes serve a range of purposes, such as referring parties to alternative dispute resolution, exploring settlement, controlling timetabling, suggesting appropriate evidence, and determining preliminary procedural matters such as whether to extend the time for making an application.

Standing:

- Tribunals can only determine disputes upon an application from a person with standing, that is, the right to appear before the tribunal.
- Standing is conferred by legislation, which usually limits the class of persons who have standing to apply. Statutes commonly give standing to a person 'whose interests are affected by a decision'. There is a significant body of case law on standing.

Directions hearings and conferences:

- Directions hearings are short hearings held some time before the full hearing, in person, by teleconference, or by correspondence.
- Directions hearings promote case management and resolve issues such as:
  - jurisdiction or whether to grant an extension of time for an application
  - whether another person or body should be served or notified or joined as a party to the proceedings
  - whether to order that additional reasons or further and better particulars of claim be supplied, or documents provided.
- Many tribunals also use conferences as a pre-hearing process because they are flexible, and their relative informality encourages participation by self-represented parties. Conferences are often considered to be an alternative dispute resolution process.

Alternative dispute resolution:

- ADR includes processes other than formal adjudication, such as arbitration, negotiation, conciliation, mediation, neutral evaluation and blended processes.
- ADR objectives include:
  - resolving or limiting the issues in dispute as early as possible
  - accessibility and efficiency
  - enhancing the participation and satisfaction of the parties.
- ADR is now institutionalised in the practice of many tribunals, sometimes as a pre-requisite to a hearing on the complaint. Tribunal legislation commonly provides for referral of parties to ADR and for settlement agreements reached in ADR processes to be deemed to be orders of the tribunal.
- ADR services may be delivered by external providers or the tribunal's members and staff.

4.2. Preliminary procedures

Not all tribunals use pre-hearing procedures. In some tribunals, applications proceed directly to a hearing unless dealt with summarily 'on the papers' (that is, determined upon the evidence on file without an oral hearing). In some of the specialist merits review tribunals, the registry checks for compliance with jurisdictional requirements, that the agency has submitted its statement of reasons for the claim and relevant documents, provides copies to the applicant, and lists the matter subsequent pre-hearing steps, or for hearing.

The larger divisional tribunals, and tribunals in which parties are commonly represented, are more likely to use pre-hearing procedures. The type and format of the procedures varies widely, and different processes may be used in different lists or divisions of the larger tribunals.

Preliminary processes may serve different purposes, such as referring parties to alternative dispute resolution (ADR) processes, exploring possibilities for settlement, controlling the progression of individual cases, and determining preliminary procedural matters such as whether to extend the time for making an application. Where the procedures are intended to control case progression and activity, they form part of the tribunal's case management system (see Chapter Eight). In tribunals where a speedy decision is desirable on a topic, preliminary procedures may be reduced.

4.2.1. Applications

4.2.1.1. Standing

Tribunals are not vested with general power to determine disputes or other matters. They can only do so upon an application from a person who is entitled to apply. That is, they respond to applications made to them; they do not initiate applications. The right to apply must be given by legislation. Legislation usually limits the class of persons who have standing to apply to the tribunal in relation to a particular dispute or decision. The restriction on standing may be contained in the tribunal's governing legislation or in other enabling statutes which allocate additional jurisdiction to the tribunal.

For instance, under s 27 of the *Administrative Appeals Tribunal Act 1975* (Cth), an application for review of a decision may be made to the Administrative Appeals Tribunal (AAT) 'by or on behalf of any person, including the Commonwealth or an authority of the Commonwealth, whose interests are affected by a decision'.[1] The tests for standing before a tribunal commonly refer to a 'person whose interests are affected by a decision'. Broadly speaking, the phrase is taken to mean interests which 'a person has other than as a member of the general public and other than as a person merely holding a belief that a particular type of conduct should be prevented or a particular law observed'.[2] It is necessary to consider the nature of the decision and how it affects the applicant's interests.[3] 'Interests' are generally taken to be property or financial interests, rather than 'merely emotional' interests. However, 'interests' will extend to the protection of reputation.[4] There may be a special provision relaxing the standing requirement in the case of interest groups. For example, s 27(2) of the AAT Act (Cth) extends the meaning of 'interests affected' so that an organisation or association of persons, whether incorporated or not, is taken to have interests that are affected by the decision if the decision relates to a matter included in the objects or purposes of the organisation or association.

Once an application has been made to the tribunal, the legislation may allow other persons to apply to the tribunal to be joined as parties. A person applying for joinder as a party is commonly subject to the same test of standing as the original applicant unless the legislation provides otherwise. Tribunal legislation usually gives the tribunal discretion to refuse to join a person as a party to the proceeding even if the person satisfies the standing test.

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1 See generally *Re Control Investments Pty Ltd and Australian Broadcasting Tribunal* (No 1) (1980) 3 ALD 74, 81; *Re Gay Solidarity and Minister for Immigration and Ethnic Affairs* (1983) 5 ALD 289; R Creyke, J McMillan and M Smyth, *Control of Government Action* (4th edn, 2015, LexisNexis Butterworths, Sydney) 1161–65. The Administrative Review Council has recommended that s 27 be adopted as the test for standing, including under the *Administrative Decisions (Judicial Review) Act 1977* (Cth): Administrative Review Council, *Federal Judicial Review in Australia* (September 2012). That recommendation has not been implemented at the time of writing.

2 *Re Control Investments Pty Ltd and Australian Broadcasting Tribunal (No 1)* (1980) 3 ALD 74 at 79 (Davies J).

3 See *Re McHattan and Collector of Customs* (NSW) (1977) 1 ALD 67; *Kannan and Minister for Immigration and Ethnic Affairs* (1978) 1 ALD 489; *Re Queensland Investment Corporation and Minister for Transport and Regional Services* (2004) 84 ALD 717; *Re Son and Australian Trade Commission* (2005) 86 ALD 469.

4 *Annetts v McCann* (1990) 170 CLR 596.

There may be other relevant considerations, such as the costs and delays that might result from widening the dispute, and allowing all parties to be fully informed of the status of the proceedings and other relevant matters. Some tribunals have an obligation to contact parties who may have an interest in the proceeding.[5]

It is sometimes necessary for the tribunal to conduct a directions hearing or other preliminary procedure to determine whether an applicant has standing to apply, or whether a person should be joined as a party. These issues require a close examination of the facts and circumstances, and the relevant case law.

4.2.1.2. Procedure and time for application

The requirements as to the form, manner and time for making applications may be specified in legislation or in rules made by the tribunal.

Where the legislation specifies a time limit for making an application, the expiry of the time period for making a given application should be reckoned in accordance with the 'time' provisions in the relevant Interpretation statute for the particular jurisdiction (see the Reference section of this Manual). These provisions are not in standard form.

To take one example, if a Western Australian statute says that an application for review of a decision must be made within 28 days from the day on which the decision is made, the period is calculated by excluding the day on which the decision is made. If the 28th day falls on an 'excluded day' (a Saturday, Sunday, public service holiday, bank holiday or state public holiday), the period expires on the next day that is not an excluded day.[6]

The tribunal may have a discretionary power to extend the time period for the making of an application. Usually the tribunal can extend the time even if the application for extension is made after the time period has expired.

If the statute gives no specific criteria for deciding whether to grant an extension of time, the tribunal should consider what would best serve the interests of justice. In doing so, the tribunal will consider the following factors:

- the length and cause of the delay in making the application
- the merits and wider significance of the applicant's case
- the financial loss to the applicant and any prejudice to other parties.[7]

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5 Eg, *Superannuation (Resolution of Complaints) Act 1993* (Cth) ss 14A, 15D–F, 15H, 15J.

6 *Interpretation Act 1984* (WA), s 61(1).

7 See eg, *Hunter Valley Developments Pty Ltd v Cohen* (1984) 3 FCR 344 at 348 (Wilcox J); *Michelotti v Roads Corporation* (2009) 26 VR 609; *Hua-Aus Pty Ltd v Federal Commissioner of Taxation* (2009) 75 ATR 886; *SZQGO v Minister for Immigration and Citizenship* (2012) 125 ALD 449.

4.2.1.3. Stay orders

The making of an application to the tribunal to review a decision or to restrain an action does not of itself affect the legal operation of the decision or prevent action being taken to implement it. The tribunal may have a discretionary power under its legislation to *stay* (suspend) the operation of a decision or to prevent action being taken on it until the application has been determined. The factors to be considered in deciding whether to make a stay order vary with the jurisdiction and the subject matter of the application. They usually include the merits of the applicant's case and a balancing of any hardship or prejudice to the applicant and other parties if the decision is stayed or not stayed.[8]

4.2.2. Directions hearings

Tribunal legislation may empower the President or head of the Tribunal to give general directions on matters of practice and procedure. In addition, tribunal members are commonly empowered to make specific directions as to the procedure to be followed in individual cases.

While directions can be made at any time, some tribunals hold special hearings for this purpose. Directions hearings are short hearings held some time before the full hearing. The hearings may be held in person or by phone or videoconference. If the parties are represented, the tribunal usually requires the representatives to participate.

The purposes for which directions hearings are held, and the procedures followed, may be governed by the tribunal's practice directions. The hearings may be scheduled as a matter of course, or at the request of a party, or called by the tribunal when circumstances require.

They are primarily a case management procedure, intended to promote case progression and to resolve interim or preliminary issues such as:

- whether the tribunal has jurisdiction to determine the application
- whether to grant an extension of time for making an application
- whether to suspend the implementation of a decision under review
- whether another person or body should be served or notified or joined as a party to the proceedings
- whether to order that additional reasons or further and better particulars of claim be supplied, further evidence or documents provided.

The expected outcome is that the tribunal gives a direction or order, for example, that the parties exchange expert reports by a specified date.

A directions hearing may also be held where a party has failed to comply with legislative requirements or a direction of the tribunal, or has been responsible for undue delay. In a

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8 See eg, *Re Repatriation Commission and Delkou* (1985) 8 ALD 454 (AAT); *Re Secretary, Department of Employment and Workplace Relations and Croysdale* (2006) 45 AAR 378; *Re Nguyen and ASIC* (2011) 55 AAR 85.

case of default without lawful excuse, the tribunal usually has power to dismiss or strike out an application, to enter judgment by default against a respondent, or to take the failure into account in awarding costs. Where these sanctions are not available, a further direction may be given.

4.2.3. Conferences

Many tribunals have power to direct the parties to attend a pre-hearing conference conducted by a tribunal member or, in some cases, a registrar. The tribunal may hold one conference, or a series of conferences, or call them as needed. They are usually held in private, and may be conducted by telephone or videoconference.

Many tribunals use conferences as a pre-hearing process because they are flexible, can serve multiple purposes, and their relative informality encourages participation by self-represented parties. Legislation commonly gives the tribunal substantial control over the way that conferences are conducted. Conferences can be used to explore possibilities for settlement, to screen or refer matters to ADR processes such as mediation, to identify and resolve preliminary issues and to manage the progression of cases.

Tribunals use conferences for different purposes, depending on their powers and the caseload. Some tribunals use them as settlement conferences, where the presiding member uses ADR methods such as conciliation or mediation. This is more likely to occur where the tribunal lacks the power to refer parties to ADR processes without their consent.

Where conferences are used to explore possibilities for settlement, there is a need to protect the confidentiality of communications between the parties. It is common to find in tribunal legislation a provision restricting the admission, in any subsequent hearing by the tribunal, of anything said or done at a conference, unless all parties consent. The legislation may also provide that a member who took part in the conference (i.e. a pre-hearing procedure) must not constitute, or be part of, the tribunal for the purpose of hearing the proceeding, unless the parties consent. Alternatively, the statute may provide that the member must not take part in the subsequent hearing if a party objects.

4.3. Alternative dispute resolution processes

There is some debate as to the meaning of ADR. On one view, it means ‘assisted’ or ‘additional’ dispute resolution and includes all processes used to resolve disputes, including adjudication. For others, ADR means ‘alternative’ dispute resolution, and includes processes other than formal adjudication, such as arbitration, negotiation, conciliation, mediation

neutral evaluation and blended processes.[9] The AAT has identified the following objectives that should inform the use of its ADR processes:

- to resolve or limit the issues in dispute
- to be accessible
- to use resources efficiently
- to resolve disputes as early as possible
- to produce outcomes that are lawful, effective and acceptable to the parties and the Tribunal
- to enhance the satisfaction of the parties.[10]

ADR in its various forms is now institutionalised in the practice of many tribunals.[11] Tribunal legislation commonly provides for referral of parties to ADR and for settlement agreements reached in ADR processes to be deemed to be orders of the tribunal. ADR services may be delivered by external providers to whom the tribunal refers parties, or it may be part of the range of dispute resolution services offered by the tribunal through its members and staff. As noted by the National Alternative Dispute Resolution Advisory Council (NADRAC),[12] the types of disputes that are most likely to be governed by ADR provisions are those occurring within commercial contexts, workplace relations, international disputes, native title and family law. The most common arena in which an ADR process is provided for under Commonwealth legislation is within a statutory authority or court. Tribunals, international forums and non-government organisations are referred to less frequently.

4.3.1. Definitions of ADR processes

Tribunal legislation commonly empowers the tribunal to refer parties to particular ADR processes, often conducted under the title of 'conferences', for example, mediation conferences or conciliation conferences. Statutory definitions of processes are not used consistently.

Given the problems with terminology, it may be more useful to adopt a functional approach and describe processes according to whether they are 'facilitative', 'advisory' or 'determinative'.

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9 Section 3(1) of the *Administrative Appeals Tribunal Act 1975* (Cth) defines 'alternative dispute resolution processes' as including: conferencing, mediation, neutral evaluation, case appraisal, conciliation, and procedures or services specified in the regulations, but as excluding arbitration or court procedures or services.

10 Administrative Appeals Tribunal, *Alternative Dispute Resolution (ADR) Guidelines* (June 2006, AAT, Canberra) <http://www.aat.gov.au/LawAndPractice/AlternativeDisputeResolution/ADRGuidelines.htm> at 2 January 2017.

11 See New Zealand Law Commission, *Tribunals in New Zealand* (January 2008, Law Commission, Wellington) [9.29]; G Downes, 'Alternative Dispute Resolution at the AAT' (2008) 15 *Australian Journal of Administrative Law* 137. See, for example, *Civil and Administrative Tribunal Act 2013* (NSW) s 37.

12 National Alternative Dispute Resolution Advisory Council, *Legislating for Alternative Dispute Resolution: A Guide for government policy-makers and legal drafters* <https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/Legislating%20for%20Alternative%20Dispute%20Resolution.PDF> at January 2017.

As described by NADRAC,[13] the key difference between these processes is the role played by the ADR practitioner.

- *Facilitative*. In a facilitative process, the practitioner 'assists the parties to a dispute to identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement about some issues or the whole dispute'.

- *Advisory*. In an advisory process, the practitioner 'considers and appraises the dispute and provides advice as to the facts of the dispute, the law and, in some cases, possible or desirable outcomes, and how these may be achieved'.

- *Determinative*. In a determinative process, the practitioner 'evaluates the dispute (which may include the hearing of formal evidence from the parties) and makes a determination'.[14]

Legislation may provide for different dispute resolution processes to be used in sequence. For example, equal opportunity or discrimination complaints may be treated first with an advisory process, then a facilitative one, and finally a determinative stage for those that remain unresolved.

Based on the NADRAC *Dispute Resolution Terms* (2003), and in order to provide greater clarity on terminology in the provision of ADR services, the following process definitions were incorporated into the Australian Standard.[15]

- *Arbitration*. A process in which the parties to a dispute present arguments and evidence to a dispute resolution practitioner (the arbitrator) who makes a determination. It is the most common ADR process referred to in legislation, followed by conciliation, mediation, negotiation and conferencing.[16]

- *Mediation*. A process in which the parties to the dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted'.

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13 NADRAC was established in 1995 as an independent body to provide advice on policy matters to the Federal Attorney-General. NADRAC concluded in late 2013 following the whole-of-government decision to simplify and streamline the business of government. Its publications are available on the Attorney-General's website <https://www.ag.gov.au/legalsystem/alternatedisputeresolution/pages/default.aspx>.

14 National Alternative Dispute Resolution Advisory Council, Y*our Guide to Dispute Resolution* (July 2012, Attorney-General) <https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/Your%20Guide%20to%20Dispute%20Resolution.pdf> at January 2017.

15 Standards Australia, *Dispute Management Systems,* AS4608–2004, (2nd edn, 2004) Appendix B. This was withdrawn on 13 January 2017 and had not been replaced at the time of writing.

16 *Legislating for Alternative Dispute Resolution*, above n 12.

- *Conciliation*. A process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the conciliator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The conciliator may have an advisory role on the content of the dispute or the most desirable outcome, but not a determinative role. The conciliator may advise on or determine the process of conciliation whereby resolution is attempted, and may make suggestions for terms of settlement, give expert advice on likely settlement terms, and may actively encourage the participants to reach an agreement. Note: there are wide variations in meaning for *conciliation*, and the term may be used to refer to a range of processes used to resolve complaints and disputes.

The AAT has developed process models for the different forms of ADR to ensure consistency. The process models set out the steps to be followed in a conference, a mediation, a neutral evaluation, a case appraisal or a conciliation.[17]

The AAT has also identified factors favouring each process to assist members and conference registrars to select the most appropriate ADR process.[18]

4.3.2. Tribunal practice

The processes actually conducted by various tribunals do not necessarily correspond to the definitions above. The labels applied to ADR processes in legislation are not used with consistent meaning, and may not match the definitions used in reputable sources.

Even where the same process term is used in different Acts, it may be applied differently in practice. In some tribunals, conciliation is a facilitative process practically indistinguishable from mediation;[19] a conciliator might have the determinative role of certifying that the parties have or have not negotiated in good faith; or parties to a conciliation conference might be left to engage in settlement discussion with no active involvement of the conciliator.[20] Some tribunals use blended dispute resolution processes. For example, a tribunal member may attempt to resolve the dispute by mediation and if that fails, impose a decision. In pre-hearing conferences, a member or registrar may undertake both an advisory and a facilitative role.

The diversity of ADR processes enables tribunals to respond flexibly to varied needs and circumstances. However, the lack of consistent terminology can lead to misunderstandings about the nature of the process. This is as a result of the rapidly developing nature of ADR and the contested definitions referred to earlier.

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17 Available at <http://www.aat.gov.au/LawAndPractice/AlternativeDisputeResolution.htm> at February 2017.

18 Administrative Appeals Tribunal, *Alternative Dispute Resolution (ADR) Guidelines* (June 2006, AAT, Canberra) <http://www.aat.gov.au/LawAndPractice/AlternativeDisputeResolution/ADRGuidelines.htm> at January 2017.

19 Australian Law Reform Commission (ALRC), *Alternative or Assisted Dispute Resolution* (1996, ALRC, Sydney).

20 ibid.

4.4. Issues in alternative dispute resolution

4.4.1. Standards for ADR practice and accreditation

Increasingly, tribunal members and registrars are undertaking ADR processes, sourcing training from a number of providers.[21] The development of legislative schemes for ADR processes operating in courts and tribunals has prompted discussion of the need to develop standards.[22] Some tribunals have established their own training programs and codes of practice, and some statutory schemes have their own accreditation criteria. Various standards (guidelines and benchmarks) for ADR practice and practitioner qualification have been developed by organisations in Australasia and overseas. However, these are not consistent or co-ordinated.

There is currently no comprehensive legislative framework for the operation of ADR in Australia. There are, however, well-recognised industry standards that are applied:

- The National Mediator Accreditation System (NMAS) is a scheme administered by the Mediator Standards Board which provides a minimum level of standards training and assessment for all mediator – see <https://www.msb.org.au/>. NMAS is well-established as an industry accreditation standard. AAT policy is that conciliations and mediations should be conducted by NMAS accredited mediators.

- The Resolution Institute (set up on 1 January 2015 as a result of the integration of LEADR – Lawyers Engaged in ADR, and IAMA – the Institute of Arbitrators and Mediators Australia) provides ADR accreditation and training – see http://www.resolution.institute/, applying the NMAS. NADRAC, the body which formerly advised the Australian Government on ADR matters, launched a discussion paper in March 2000 with the intention of promoting development of a national framework for ADR standards. Issues relating to attaining, maintaining and enforcing standards were considered, including education and training in ADR and accreditation of practitioners. A final report, entitled *A Framework for ADR Standards,* was published in April 2001.[23] Noting the diversity of ADR practice, NADRAC recommended that standards be developed on a sector-by-sector basis based on the framework described in the report.[24] The report identified key issues to be considered in developing standards, including the context of service provision, the appropriateness of existing or comparable standards and the standards of

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21 An example of such provider is Resolution Institute: <https://www.resolution.institute>.

22 Access to Justice Advisory Committee, *Access to Justice—An Action Plan* (1994, AGPS, Canberra).

23 Report to the Commonwealth Attorney-General, *A Framework for ADR Standards*, National Alternative Dispute Resolution Advisory Council, April 2001 <https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/Framework%20for%20ADR%20Standards%20Body%20of%20Report.pdf>.

24 ibid. 70–71.

practice that should apply to service providers and practitioners.[25] NADRAC published three major policy papers in 2006–07:[26]

- *Indigenous Dispute Resolution and Conflict Management* (January 2006). This policy recognises that ADR in indigenous communities should involve Indigenous people at the local level, and needs to take into account Indigenous perspectives on the nature of disputes and their resolution. The policy contains ten statements of principle relevant to Indigenous dispute resolution and conflict management.
- *Legislating for Alternative Dispute Resolution: A Guide for Government Policy-Makers and Legal Drafters* (November 2006). This document of more than 100 pages sets out the legislative context in the ADR area and refers to some of the principles relevant to selecting legislative instruments such as Acts or regulations. The document is premised on the previous federal government's promotion of ADR 'to relieve stress on the courts … and to foster a more conciliatory approach to dispute resolution, built on a foundation of constructive engagement between parties.'[27]
- *Advice on a New Accreditation System for Family Dispute Resolution Practitioners* (March 2007). This is a discussion paper produced by NADRAC aimed at providing input into the new accreditation system for family dispute resolution practitioners. It provides input into key issues including standards, accreditation, registration and complaints. The paper notes that, 'these are the issues that have, over the years, created tension between those who support a deregulated or self-regulated workforce and those who support increased regulation. Irrespective of which system is developed it is clear that there is a need to protect consumers from incompetent service providers, particularly in light of the increased growth in the market for family dispute resolution practitioners'.[28]

In July 2012, NADRAC published *Your Guide to Dispute Resolution* which contains a consolidated summary of what ADR is, provides practical tips for engaging in ADR processes, and sets out the National Principles for Resolving Disputes. The National Principles are:

1. self-responsibility is the first step
2. early resolution is good resolution
3. listen and participate
4. be informed when choosing an ADR process
5. use ADR, then the courts

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25 ibid. 96.

26 <https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/NADRACPublications-A-Z.aspx > at January 2017.

27 Then Attorney General Ruddock MP, 'Towards a less litigious Australia: The Australian Government's Alternative Dispute Resolution initiatives' (2004) 23 (1) *The Arbitrator and Mediator* 1.

28 *A Framework for ADR Standards*, above n 23, 1.

6. ask questions about ADR

7. share knowledge about ADR accurately.[29]

4.4.1.1. Codes of practice

NADRAC recommended that ADR service providers adopt and comply with a code of practice setting out essential standards for practice, to be developed by ADR service providers or associations through a consultative process.[30] Codes of practice should address the following areas relating to the provision of ADR:

- process, including the role of all participants
- informed participation, including obligations on service providers and practitioners 'to enable parties to make informed choices about the extent and nature of their participation in the process'
- access and fairness, including obligations on service providers and practitioners to determine the appropriateness of the dispute for the ADR process, to achieve fairness in procedure including neutrality and impartiality and to maintain confidentiality
- service quality, including the knowledge, skills and ethics that are required by practitioners
- complaints and compliance, including complaint handling.[31]

4.4.1.2. National Mediator Accreditation System

Within the rubric of ADR, there are areas of specialised accreditation, for example, in relation to mediation. The National Mediator Accreditation Scheme (NMAS) commenced on 1 January 2008. It involves a voluntary code whereby mediator organisations accredit mediators in accordance with a set of national standards. The NMAS is aimed at providing 'a minimum level of standards of training and assessment for all mediators'.[32] While it provides a base level of accreditation, other specialised bodies may include their own accreditation standards to reflect particular areas of practice, for example, family dispute resolution. The aim of NMAS is to have a national register of accredited mediators. NMAS is overseen by the Mediator Standards Board. The revised NMAS came into force on 1 July 2015. The revised NMAS includes an updated set of approval standards for mediators seeking approval under the NMAS and updated practice standards for mediators operating under the NMAS.

The approval standards cover an overview of the mediation process, set out the approval requirements for mediators, cover training and education items, and continuing accreditation requirements.

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29 ibid., ch. 2.4.
30 ibid., 71–72.
31 ibid., ch. 5.2.
32 See <http://www.msb.org.au/about-mediation/what-national-mediator-accreditation-system> at January 2017.

The practice standards cover an overview of the mediation process, specialist topics such as power issues, impartial and ethical practice, confidentiality, competence, inter-professional relations, information provided by the mediator, termination of the process, and charges for services. The standards also cover procedural fairness and the making of public statements and the promotion of services.

4.4.1.3. Knowledge, skills and ethics for ADR practitioners

NADRAC proposed that standards be developed for ADR practitioners in the areas of knowledge, skills and ethics. The standards should be adapted 'to suit the context of service provision and the roles and responsibilities of practitioners'.[33]

Areas of knowledge include knowledge about conflict, culture, negotiation, communication, context, procedures, self, decision-making and ADR.

Skills include assessing a dispute for ADR, gathering and using information, defining the dispute, communication, managing the process, managing interaction between the parties, negotiation, being impartial, making a decision and concluding the ADR process.

Ethics include promoting services accurately, ensuring effective participation by parties, eliciting information, managing continuation or termination of the process, exhibiting lack of bias, maintaining impartiality, maintaining confidentiality and ensuring appropriate outcomes.[34] In relation to accreditation, NADRAC recommended that this be considered on a sector-by-sector basis but suggested that there is a need for greater clarity and consistency in accreditation arrangements.[35] In response to NADRAC's proposal, the Commonwealth Government has funded a project to develop national standards for the accreditation of mediators.[36]

4.4.2. Referral to ADR

Various methods are used to refer disputes to ADR processes. Referrals may be made by a tribunal member; by a registrar, based on assessment of the suitability of the dispute for ADR processes; or may be done as a matter of course in certain classes of cases.

Increasingly, legislative schemes use a degree of compulsion to encourage parties to use ADR processes to resolve their disputes. A statute may require parties to attempt settlement through some ADR process before they can apply to a court or tribunal. Some tribunal legislation empowers the tribunal to refer parties to ADR processes (most often mediation or conciliation) without their consent. The parties may then be under a statutory duty to

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33 *A Framework for ADR Standards*, above n 23, 100.

34 ibid., xvi.

35 ibid., xiii, 83.

36 See also National Alternative Dispute Resolution Advisory Council, *Who Says You're a Mediator? Towards a National Standard for Accrediting Mediators* (March 2004, Attorney-General's Department, Canberra) <https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/NADRACPublications-A-Z.aspx> at January 2017.

participate 'in good faith'.[37] The legal meaning of 'good faith' is that of propriety or honesty. The AAT has published a guide to good faith in ADR, i.e. the person has to be engaged and genuine in their participation in the tribunal process.

Research findings are inconclusive on whether compulsory referral increases the likelihood that disputes will settle before hearing.[38] Those who are referred compulsorily to mediation generally do not object afterwards. It is also clear that few disputants will use mediation if it is entirely voluntary.[39]

4.4.2.1. Referral criteria

Not all disputes are suitable for referral to ADR processes. In deciding whether to make a referral, the primary consideration is the prospect of successful resolution of the dispute.[40] Individual tribunals may have their own guidelines for assessing which disputes to refer. Various attempts have been made to formulate generally applicable criteria for identifying which disputes are suitable for referral to ADR, or for matching disputes to particular ADR processes—usually mediation. In a research project undertaken for the then Australian Institute of Judicial Administration and NADRAC in 2003, Professor Kathy Mack examined the commonly proposed referral criteria in the light of findings from a number of empirical research projects in Australia and overseas.[41] She categorised the referral criteria in three groups and reached the following conclusions:

- Some criteria are preconditions for an ADR process to take place, rather than predictors of its effectiveness. These include factors that affect the capacity of parties to take part in ADR processes, such as fear of violence, cultural differences and intractable power imbalances, cost and the existence of a restraining order. These matters should be taken into account in deciding whether to make a referral.
- The following variables were not reliably established as barriers to participation in ADR, nor as indicators for its effectiveness: the type of case (e.g. family, civil), the amount in dispute, the involvement of multiple parties, social characteristics of the parties (e.g. gender, race), whether the dispute is primarily about facts, and whether the dispute raises multiple issues. Mack concludes that these factors should be treated cautiously as referral criteria.

The third group of factors may be significant indicators of the effectiveness of ADR in promoting settlement. Predictors for success of ADR processes include the presence of a genuine concern for children, and the participation of a party or representative with authority to settle or to be bound by any outcome. Factors making ADR less likely to succeed include the intensity of conflict and parties with major, non-negotiable value differences. Legal

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37 See e.g. s 34A(5) of the *Administrative Appeals Tribunal Act 1975* (Cth).

38 K Mack, *Court Referral to ADR: Criteria and Research* (2003, AIJA Inc and NADRAC) [1.4.2] <https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/NADRACPublications-A-Z.aspx> at January 2017.

39 ibid.

40 *Barrett v Queensland Newspapers Pty Ltd* (1999) 20 Qld Lawyer Reps 104 (Samios J).

41 Mack, above n 38.

representation of the parties may be a positive or negative indicator for success, depending on the attributes of the lawyer. Perhaps the most significant variable affecting the likelihood of success was the skill of the ADR practitioner.[42] Professor Mack concluded that there is no one set of generally applicable referral criteria. Each tribunal should develop its own criteria, taking into account 'its own program goals, jurisdiction and case mix, potential ADR users, local legal profession and culture, internal resources, and external service providers'.[43]

By way of example, the AAT has developed the following principles for members or conference registrars to consider when deciding if an ADR process will assist in the resolution of the dispute:

- the capacity of the parties to participate effectively
- whether the parties are represented
- the context of the application including the history of past applications by the applicant
- any identified need for urgency
- the number of parties involved in the application
- the complexity of the issues in dispute
- the bona fides of the parties
- cultural factors
- the safety of the parties
- the likelihood of an agreed outcome or reduced issues in dispute
- relative cost to the parties of an ADR process as compared with a determination
- case management requirements of the Tribunal
- whether an ADR process might offer a more flexible solution than a determination
- whether public interest issues require a determination.[44]

4.4.3. Self-represented parties and ADR

One of the issues in ADR practice is whether to include or exclude self-represented parties. Some court-based ADR programs have their own rules about this. There has been a concern that a power imbalance will result where one party is represented and another party is not. To address this concern, training programs for ADR practitioners now commonly include techniques for reducing the effect of an imbalance of power, and guidance for ensuring effective participation by parties is also provided in some standards developed for ADR

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42 ibid., [1.5.1]–[1.5.4].

43 ibid., [1.7], citing H Astor, *Quality in Court Connected Mediation Programs: An Issues Paper* (2001, AIJA Inc, Carlton).

44 Administrative Appeals Tribunal, *Alternative Dispute Resolution (ADR) Guidelines* (June 2006, AAT, Canberra) <http://www.aat.gov.au/LawAndPractice/AlternativeDisputeResolution/ADRGuidelines.htm> at February 2017.

practitioners.[45] With proper management of the issue, self-represented parties can benefit from participation in ADR processes.

4.4.4. Confidentiality and admissibility of evidence

ADR processes are unlikely to succeed unless the parties can make disclosures without prejudicing their case at a subsequent hearing if the matter fails to settle. To address this concern, tribunal legislation usually includes a confidentiality provision, making the disclosures inadmissible in subsequent proceedings unless all parties agree.

The confidentiality provisions in the various statutes are not in standard terms, and their scope is variable. For each statute, it is important to check what is made inadmissible, and in what proceedings. For example, a survey of confidentiality provisions in New South Wales Acts found that a statute may declare statements or admissions made at mediation to be inadmissible, but not mention documents.[46] A statute may provide that the material is inadmissible in proceedings before the tribunal, or in any proceedings under the Act, or in 'any other legal proceeding'.[47] Apart from restricting admissibility, the legislation rarely deals with other disclosures of confidential communications. The AAT has a guide to confidentiality for ADR processes. To the extent that the statutory confidentiality provision does not cover certain material, the common law principles will apply.[48] Oral or written admissions made by a party in a genuine attempt to settle a dispute by negotiation, whether expressed to be 'without prejudice' or not, are generally privileged, meaning that they are not admissible in subsequent proceedings without the consent of the parties.[49] There is some uncertainty as to the extent to which the privilege applies to communications made in ADR processes.[50] The obligations of ADR practitioners with respect to confidentiality and disclosure may be regulated by legislation and guidelines. Tribunal statutes show no consistent approach. For example, a given statute may:

- make it an offence for the practitioner to disclose to any other person any statements made to them in the course of the ADR process unless the person who made the statement consents
- require the ADR practitioner to take an oath of confidentiality as a precondition to receiving immunity from suit

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45 National Alternative Dispute Resolution Advisory Council, *A Framework for ADR Standards*, above n 22, 110–11.

46 T Altobelli, 'New South Wales ADR Legislation: The Need for Greater Consistency and Co-ordination' (1997) 8 *ADRJ* 203.

47 ibid.

48 In South Australia, admissibility of communications made with a view to compromising a *civil* dispute is regulated by s 67C of the *Evidence Act 1929* (SA). See also s 131 of the uniform evidence legislation (e.g. *Evidence Act 1995* (Cth); *Evidence Act 1995* (NSW); *Evidence Act 2008* (Vic).

49 *Field v Commissioner for Railways (NSW)* (1957) 99 CLR 285; *Rodgers v Rodgers* (1964) 114 CLR 608 at 614 (McTiernan, Taylor and Owen JJ); see generally, T Sourdin, *Alternative Dispute Resolution* (2005, Lawbook Co, Sydney) [7.430].

50 ibid.

- require the practitioner to report on whether a process has taken place, whether the dispute has been settled, whether a party has negotiated in good faith or what issues remain in dispute.

Where confidentiality is not protected by legislation, it may be provided for in an agreement entered into between the parties and the ADR practitioner before the process commences. Agreements are not normally used for ADR services provided under statutory schemes.

4.4.5. Communication with a member constituting the tribunal

Where a mediation conference is held, there should be no communication about the case between the mediator and a member who is to hear the matter, to avoid giving any reason for an apprehension of bias.[51]

4.4.6. Liability of ADR practitioners

Where a statute provides for tribunal members or staff to conduct ADR processes, it may also include a provision making the members immune from any action, demand or liability arising from their conduct of the process. The immunity is similar to that given to judicial officers in the performance of their judicial functions. Such provisions do not provide immunity for conduct outside the process, such as an unauthorised disclosure of confidential information. There is little consistency in the drafting of immunity provisions in tribunal statutes, and some have no provision at all.[52] Mediators and conciliators external to the tribunal are less likely to have statutory immunity, and may need to limit their liability through the use of written agreements with the parties. An ADR practitioner who lacks statutory immunity could in principle be sued for negligence, breach of contract or breach of fiduciary duty arising from their conduct of the process, although no such cases have been reported.[53] It is unlikely that any party would suffer loss resulting from the conduct of a facilitative process like mediation, which is intended to enable the parties to reach their own settlement.[54] Liability may be an issue where ADR practitioners undertake an advisory role, such as where they advise on the likely outcome if the dispute proceeds to a hearing.

References

Legislation

Administrative Appeals Tribunal Act 1975 (Cth)

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51 *Ruffles v Chilman* (1997) 17 WAR 1.

52 ALRC, above n 19.

53 A Lynch, 'Can I sue my mediator?—finding the key to mediator liability' (1995) 6 *ADRJ* 113, 117.

54 D Spencer and T Altobelli, *Dispute Resolution in Australia: Cases, Commentary and Materials* (2005, Thomson Reuters, Sydney) 271.

Civil and Administrative Tribunal Act 2013 (Vic)

Evidence Act 1995 (Cth)

Evidence Act 1995 (NSW)

Evidence Act 1929 (SA)

Evidence Act 2008 (Vic)

Interpretation Act 1984 (WA)

Case law

Annetts v McCann (1990) 170 CLR 596

Barrett v Queensland Newspapers Pty Ltd (1999) 20 Qld Lawyer Reps 104

Field v Commissioner for Railways (NSW) (1957) 99 CLR 285

Hua-Aus Pty Ltd v Federal Commissioner of Taxation (2009) 75 ATR 886

Hunter Valley Developments Pty Ltd v Cohen (1984) 3 FCR 344

Kannan and Minister for Immigration and Ethnic Affairs (1978) 1 ALD 489

Michelotti v Roads Corporation [2009] 26 VR 609

Re Control Investments Pty Ltd and Australian Broadcasting Tribunal (No 1) (1980) 3 ALD 74

Re Repatriation Commission and Delkou (1985) 8 ALD 454

Re Gay Solidarity and Minister for Immigration and Ethnic Affairs (1983) 5 ALD 289

Re McHattan and Collector of Customs (NSW) (1977) 1 ALD 67

Re Nguyen and ASIC (2011) 55 AAR 85

Re Queensland Investment Corporation and Minister for Transport and Regional Services (2004) 84 ALD 717

Re Repatriation Commission and Delkou (1985) 8 ALD 454

Re Secretary, Department of Employment and Workplace Relations and Croysdale (2006) 45 AAR 378

Re Son and Australian Trade Commission (2005) 86 ALD 469

Rodgers v Rodgers (1964) 114 CLR 608

Ruffles v Chilman (1997) 17 WAR 1

SZQGO v Minister for Immigration and Citizenship (2012) 125 ALD 449

Government papers and reports

Access to Justice Advisory Committee*, Access to Justice—An Action Plan* (1994, AGPS, Canberra)

Administrative Review Council, Federal Judicial Review in Australia (September 2012, ARC, Canberra)

H Astor, *Quality in Court Connected Mediation Programs: An Issues Paper* (2001, AIJA Inc, Carlton)

Australian Law Reform Commission, *Alternative or Assisted Dispute Resolution* (1996, ALRC, Sydney)

K Mack, *Court Referral to ADR: Criteria and Research* (2003, AIJA Inc & NADRAC) <*https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/NADRACPublications-A-Z.aspx* > at January 2017

National Alternative Dispute Resolution Advisory Council, *Legislating for Alternative Dispute Resolution: A Guide for Government Policy-makers and Legal Drafters* <https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/Legislating%20for%Alternative%20Dispute%20Resolution.PDF> at January 2017

National Alternative Dispute Resolution Advisory Council, *A Framework for ADR Standards* (April 2001, Attorney-General's Department, Canberra) <https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/NADRACPublications-A-Z.aspx > at January 2017

Who Says You're a Mediator? Towards a National Standard for Accrediting Mediators (March 2004, Attorney-General's Department, Canberra) <https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/NADRACPublications-A-Z.aspx> at January 2017

Your Guide to Dispute Resolution (July 2012, Attorney-General's Department) <https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/Your%20Guide%20to%20Dispute%20Resolution.pdf> at January 2017

New Zealand Law Commission, *Tribunals in New Zealand* (January 2008, Law Commission, Wellington)

Guides

Administrative Appeals Tribunal, *Alternative Dispute Resolution (ADR) Guidelines* (June 2006, AAT, Canberra *<http://www.aat.gov.au/LawAndPractice/AlternativeDisputeResolution/ADRGuidelines.htm>* at January 2017

Standards Australia, *Dispute Management Systems, AS4608–2004*, (2nd edn, 2004), removed and not replaced at time of writing.

Books

H Astor and C Chinkin, *Dispute Resolution in Australia*, (2nd edn, 2002, Butterworths)

L Boulle, *Mediation: Skills and Techniques*, (2001 Butterworths)

Mediation: Principles, Process, Practice, (2nd edn, 2005 Butterworths)

R Creyke, J McMillan and M Smyth, *Control of Government Action* (4th edn, 2015, LexisNexis, Sydney)

D Pearce and M Allars, *Australian Administrative Law Service* (1978, LexisNexis, Sydney, loose-leaf)

T Sourdin, *Alternative Dispute Resolution* (2nd edn, 2005, Thomson Reuters, Sydney)

D Spencer and T Altobelli, *Dispute Resolution in Australia: Cases, Commentary and Materials* (2005, Thomson Reuters, Sydney)

Journal articles and speeches

T Altobelli, 'New South Wales ADR Legislation: The Need for Greater Consistency and Co-ordination' (1997) 8 *Australian Dispute Resolution Journal* 203

G Downes, 'Alternative Dispute Resolution at the AAT' (2008) 15 *Australian Journal of Administrative Law* 137

A Lynch, *'"Can I sue my mediator?"— finding the key to mediator liability'* (1995) 6 *Australian Dispute Resolution Journal* 113

P Ruddock MP, 'Towards a less litigious Australia: The Australian Government's Alternative Dispute Resolution initiatives' (2004) 23 (1) *The Arbitrator and Mediator* 1

Chapter Five: Hearings

5.1. Key issues

Tribunal proceedings and a duty to inquire

- Tribunal proceedings are often described as 'inquisitorial' because, by virtue of statute, tribunal members are given greater control over the conduct of proceedings in contrast to courts operating in the adversarial system. The inquisitorial process is consistent with the merits review function of tribunals to reach the 'correct or preferable' decision.
- However, tribunals in Australasia really operate on an adversarial-inquisitorial spectrum, depending on the statute and legal culture within each tribunal.
- Tribunals are under no general duty to inquire. However, where material is readily available which is centrally relevant to the decision, the failure to obtain that information through reasonable inquiries may amount to a constructive failure to exercise jurisdiction.
- If a tribunal becomes aware of information which is relevant and significant through its own inquiries, it should generally be disclosed to the parties.

Conduct of the hearing:

- As much material as possible should be before the tribunal member and the parties before the hearing.
- Tribunal members should conduct themselves at hearings with respectfulness, diligence, humanity, fairness and rigour.
- Appropriate arrangements should be made for hearings, including arranging for security or interpreters as necessary.
- It is useful for the member to commence proceedings by: identifying who is present, including legal representatives, if any; orienting the parties; indicating what is going to take place; and setting out what is expected of those at the hearing.
- The absence of representation for parties imposes additional obligations on tribunal members.
- It is important that persons appearing before the tribunal as parties, witnesses or observers feel that they are treated with dignity, courtesy and respect and that information placed before the tribunal is treated with gravity.

Evidence:

- Most tribunals' legislation provides that tribunals are not bound by the rules of evidence.[1] This is important to ensuring flexibility and informality.
- However, common law rules of evidence are useful for determining what material is relevant, credible and of probative value.
- The privilege against self-incrimination applies in tribunal proceedings.
- It is generally, although not universally, accepted that legal professional privilege applies to tribunal proceedings.

5.2. Tribunal proceedings

The High Court in *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594 observed that 'the term "inquisitorial" has been applied to tribunal proceedings to distinguish them from adversarial proceedings and to characterise the Tribunal's statutory functions'.[2]

Proceedings before tribunals are generally described as *inquisitorial*. The following characteristics have been identified as typical of tribunal proceedings, as against those of courts:

- the 'parties' are not necessarily adversaries
- there is likely to be inequality of power and legal skills between the parties
- administrative review on the merits aids good government
- the interests of good administration require that the correct or preferable decision be made, not only for the parties but to provide guidance for the future
- good administration requires just, efficient and effective determination.[3]

These characteristics have an impact upon how tribunal hearings are conducted and distinguish tribunal hearings in important respects from those of courts. While tribunals have a duty to act 'judicially', this does not mean that they should emulate courts.[4]

Indeed, the Bland Committee, whose report provided one of the foundations for the modern Commonwealth system of administrative review, found that: 'the code of procedure for the Tribunals should clearly spell out that they are not bound to follow adversary

1 The *Evidence Act 1995* (Cth) does not apply to tribunals as its rules apply to a 'Federal Court' defined to include 'persons or bodies required to apply the laws of evidence'.

2 *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594 at [23].

3 J Dwyer, 'Overcoming the Adversarial Bias in Tribunal Proceedings' (1991) 20 *Federal Law Review* 252, 252–53; M Smyth, 'Inquisitorial Adjudication: The Duty to Inquire in Merits Review Tribunals' (2010) 34 *Melbourne University Law Review* 230.

4 *Hamblin v Duffy (No 1)* (1981) 3 ALD 153 at 157.

procedures. … [I]n most cases, the investigative or inquisitorial process would be most apposite'.[5]

Tribunals have, by virtue of statute, specific inquisitorial powers which 'enable the adjudicator to take the initiative in eliciting evidence and formulating legal arguments, and to control the way in which a case is presented'.[6] These include:

- discretion over procedure and the freedom to frame their own procedures in a less formal way,[7]
- the power to inform themselves on any matter and to undertake active investigations[8]
- utilising their own knowledge and making their own inquiries without necessarily being fettered by the technical rules of evidence and procedure which apply to courts.

An aspect of the informal character of tribunals is that, from time to time, it is appropriate for tribunal members to obtain information additional to what is formally provided to them by parties. However, when this takes place, parties must be advised of the information obtained[9] and given a proper opportunity to respond to it.[10] This is an example of the obligation for tribunals to extend procedural fairness to parties, explored in Chapter Three.

To the extent that a tribunal undertakes investigations, it must do so in such a way as to avoid the reality or appearance of bias.[11] Thus, where a tribunal does not receive the information during pre-hearing processes which it needs to make a just and informed decision, it can, at the hearing:

- raise the problem in the course of the hearing and suggest that extra information be put before it
- take steps itself to procure extra information but alert any party potentially adversely affected to the information so that it can locate other relevant information and make submissions in relation to the new material.

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5 Commonwealth, *Final Report of the Committee on Administrative Discretions*, Parl Paper No 316 (1973), 33 [172](j); DC Pearce, 'The Australian Government Administrative Appeals Tribunal' (1976) 1 *University of New South Wales Law Journal* 193, 196.

6 G Osborne, 'Inquisitorial Procedure in the Administrative Appeals Tribunal—A Comparative Perspective' (1982) 13 *Federal Law Review* 150, 150.

7 See e.g. *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 23; *Administrative Appeals Tribunal Act 1975* (Cth) s 33(1); *Civil and Administrative Tribunal Act 2013* (NSW) s 38.

8 See e.g. *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 26; *Administrative Appeals Tribunal Act 1975* (Cth) ss 33(1)(c), 37(2), 38(1); *Migration Act 1958* (Cth) s 359(1); *Civil and Administrative Tribunal Act 2013* (NSW) s 38(2).

9 See *Kappos v State Transit Authority* (1995) NSWCCR 386.

10 See e.g. *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88; *Wajnberg v Raynor* [1971] VR 665 at 678; *Re Macquarie University; Ex parte Ong* [1980] VR 449; *Australian Associated Motor Insurers Ltd v Motor Accidents Authority of NSW* (2010) 56 MVR 108. However, if the information obtained is not material or is uncontroversial, case law suggests that non-disclosure will not necessarily amount to a denial of procedural fairness: *Weinstein v Medical Practitioners Board of Victoria* (2008) 21 VR 29.

11 See *R v Optical Board of Registration; Ex parte Qurban* [1933] SASR 1.

Depending upon the powers given to it by its enabling legislation, a tribunal may be able to:

- summon a person to attend to give evidence or produce documents, at the request of a party or on the tribunal's own motion
- request or require an administering agency to exercise any powers it has to require a person to give information or give documents
- question witnesses
- authorise a person to take evidence on behalf of the tribunal
- arrange a medical examination or commission a report, or require an administering agency to do so
- require an administering agency to investigate a matter and report to the tribunal
- enter and inspect premises or authorise a person to do so, or
- refer a question of fact to an expert, expert panel or special referee empowered to advise or give an opinion, or, possibly, even to decide a question.

See the detailed discussion in Justice D Kerr, 'Keeping the AAT from becoming a Court' (2013, AIAL Seminar) <http://www.aat.gov.au/AAT/media/AAT/Files/Speeches%20and%20Papers/AIALNSWSeminar27August2013.pdf> at January 2017.

5.2.1. A duty to inquire

While generally tribunals are entitled to make their own inquiries, in general they are not under a *duty* to inquire.[12]

In the exercise of its review function, the Tribunal may obtain such information as it considers relevant. In this sense it has an inquisitorial function. That does not, however, impose upon it a general duty to undertake its own inquiries in addition to information provided to it by the applicant and otherwise under the Act.[13] However, the High Court accepted that:

> The duty imposed upon the Tribunal by the Migration Act is a duty to review. It may be that a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link

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12 In *Minister for Immigration and Citizenship v SZIAI* (2009) 259 ALR 429, the High Court held that:

> For a discussion of the recent case law and circumstances in which the tribunal should undertake inquiries, see: M Smyth, 'Inquisitorial Adjudication: The Duty to Inquire in Merits Review Tribunals' (2010) 34 *Melbourne University Law Review* 230; R Creyke, 'Pragmatism v Policy: Attitudes of Australian Courts and Tribunals to Inquisitorial Process', Chapter 2 in L Jacobs and S Baglay, (eds) *The Nature of Inquisitorial Processes in Administrative Regimes: Global Perspectives* (Ashgate, UK, 2013); M Groves, 'The Duty to Inquire in Tribunal Proceedings' (2011) 33 *Sydney Law Review* 177.

13 *Minister for Immigration and Citizenship v SZIAI* (2009) 259 ALR 429, [1].

> to the outcome to constitute a failure to review. If so, such a failure could give rise to jurisdictional error by constructive failure to exercise jurisdiction.[14]

The circumstances in which a decision will be flawed for failure to inquire are limited. It is not the responsibility of a decision-maker to make the applicant's case for them.[15] The adjudicator is impartial and objective and stands above the fray, represented by the dispute or issue between the parties. The adjudicator must remain a neutral umpire. However, in a matter where material is readily available which is centrally relevant to the decision to be made by the tribunal, an attempt should be made by the tribunal to procure the information. A failure to do so may render the decision-making of the tribunal unreasonable and give rise to jurisdictional error.[16] In certain cases, the prospects of a tribunal arriving at the correct or preferable decision are threatened if it does not make its own inquiries.[17] An example occurred where the Administrative Appeals Tribunal was found to have erred in determining an appeal on a claim for the invalid pension without informing itself on a material question of fact—namely, the likelihood of suitable work being available to the applicant.[18] There may be a greater expectation that the tribunal will make its own inquiries where the tribunal or administrative decision-maker has committed an error,[19] or the applicant is self-represented.[20]

5.2.2. A duty to disclose information

On occasions, a tribunal will be made aware of highly prejudicial information and determine not to give any or any significant weight to it even though it may be 'credible, relevant and significant'.[21] In such circumstances, because of the risk of it having exercised some unconscious influence over the tribunal's decision-making processes, the person concerned should generally be provided with some information about it so as to be able to respond to its contents.

For example, in *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*,[22] the Department of Immigration and Multicultural and Indigenous Affairs sent a letter that had been provided in confidence to it to the Refugee Review Tribunal. The letter set out adverse comments about an applicant for a protection visa. The Tribunal did not tell the applicant that it had received the letter. It subsequently decided not

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14 ibid, [25].

15 *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155 at 169.

16 ibid. See e.g. *Tickner v Bropho* (1993) 114 ALR 409; *Akers v Minister for Immigration and Ethnic Affairs* (1988) 20 FCR 363; *Li v Minister for Immigration and Multicultural Affairs* (1997) 74 FCR 275; *Videto v Minister for Immigration and Ethnic Affairs* (1985) 8 FCR 167.

17 See e.g. *Dhiman v Minister for Immigration and Multicultural Affairs* [1999] FCA 1291 at [21].

18 *Adamou v Director-General of Social Security* (1985) 7 ALN 203.

19 *SZJBA v Minister for Immigration and Citizenship* (2007) 164 FCR 14, 28–30; *SZMYO v Minister for Immigration and Citizenship* [2011] FCA 506.

20 *Minister for Immigration and Citizenship v Le* (2007) 164 FCR 151; *Akers v Minister for Immigration and Ethnic Affairs* (1988) 20 FCR 363; *Patricia Hudson and Child Support Registrar* [1998] AATA 863 (28 October 1998).

21 See *Kioa v West* (1985) 159 CLR 550 at 629 (Brennan J).

22 (2005) 225 CLR 88.

to grant protection visas to the applicant and his partner. On appeal, the High Court held that procedural fairness (see Chapter Three at 3.2) required that the Tribunal should have drawn the applicant's attention to the information so that the applicant could respond to the adverse information.[23]

The relevant person need not be provided with a full copy of the information, if this would, for instance, tend to disclose the identity of an informer, and thereby be contrary to the public interest. However, it does mean that the person should be acquainted at least with the general contents of the information.[24]

5.3. Preparation and organisation

Tribunals receive information that has the potential to constitute the basis for their decision-making in different ways. Some tribunals are proactive in the processes that they utilise to assemble information relevant for their inquiries and hearings. Others rely more upon evidence presented by those who appear before them.

However, tribunals' decision-making is assisted if as much material as possible is available for the tribunal members, as well as for the parties, prior to the hearing. This assists effective testing of evidence, and facilitates the making of submissions regarding the relevance of the evidence and the weight which should be accorded to it. It also helps tribunal members prepare for hearings and focuses attention upon those issues which are in dispute—they can manage the inquiry process more effectively than if they come to the hearing completely afresh and dependent solely upon the information proffered by the parties.

It is helpful, wherever possible, for tribunal members in advance of the hearing to:

- read the file
- identify the matters apparently in dispute between the parties
- check that service of relevant documents has been properly effected
- orient themselves to relevant statutory provisions
- refer to their Tribunal Manual, to the extent that it is necessary or helpful.

In addition, a number of matters can usefully be done prior to a hearing to optimise the way in which it runs. These include:

- booking interpreters

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23 ibid [21].

24 ibid [29]. Compare the approaches adopted in *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 26 ALR 247; *Tucker v Minister for Immigration and Citizenship* [2011] FCAFC 16; *Minister for Immigration and Citizenship v Maman* (2012) 200 FCR 30; and *Coutts v Close* [2014] FCA 19. For a general discussion of the approach courts have adopted in judicial review of tribunal decisions, see generally, R Creyke, J McMillan and M Smyth, *Control of Government Action* (4th edn, 2015, LexisNexis) at ch. 10.4.

- ensuring appropriate access for people with disabilities
- confirming the availability of telephone and videoconferencing equipment
- considering the need for additional security
- confirming the lodgement of any material which was required to be lodged.

5.4. Tribunal member conduct at the hearing

It is important for the conduct of tribunal members to be such as to command the confidence of those who appear before them and of the general public. This is explored further in Chapter Nine. The hallmarks of tribunal member conduct should include respectfulness, diligence, humanity, fairness and rigour.

The Administrative Review Council's *A Guide to Standards of Conduct for Tribunal Members* and the Australasian Institute of Judicial Administration's *Guide to Judicial Conduct*, which are discussed in Chapter Nine, set out standards of behaviour for tribunal members and judges.[25]

5.4.1. Punctuality

It is important for tribunal members to be seen to treat parties appearing before them with respect and to model appropriate behaviour at the hearing. Part of this is commencing the hearing, as far as possible, at the appointed time, and, if that cannot be done, explaining why and apologising for the delay.

It is helpful for tribunal members to arrive at the hearing venue a suitable period before the appointed sitting time. This facilitates preparation that is not unduly rushed and enables commencement of the sitting in a timely way.

When breaks are taken, it is worthwhile making sure that everyone is aware of their expected duration. This allows parties and witnesses to maintain punctuality. Likewise, it is important to adhere to the pre-announced duration of breaks, unless there is a good reason to the contrary.

5.4.2. Attire of tribunal members

Members should wear standard business attire for tribunal hearings in person.

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25 Administrative Review Council, *A Guide to Standards of Conduct for Tribunal Members* (2nd edn, 2009, ARC, Canberra) <http://www.arc.ag.gov.au/Documents/GuidetoStdsofConduct-RevisedAug2009.pdf> at January 2017; *Guide to Judicial Conduct* (2nd edn, 2007, AIJA Inc, Victoria).

5.4.3. Demeanour of tribunal members

It is important that persons appearing before the Tribunal as parties, witnesses or observers feel that they are treated with dignity, courtesy and respect and that information placed before the tribunal is treated with gravity. This facilitates a perception that parties have received procedural fairness and reduces the potential for generalised feelings of dissatisfaction and disenfranchisement.

Accordingly, indications of impatience by tribunal members, such as repeated looking at their watch, fidgeting behaviour, sending text messages on their telephone, and comments that evidence is taking too long or that the hearing should be completed more quickly should be avoided. Such conduct could also suggest that witnesses are not being listened to attentively and that parties are not receiving a fair hearing because tribunal members have prejudged the case.

Likewise, behaviour that is suggestive of bias for or against a witness, party or representative or is similarly discourteous should not be engaged in. Examples of such behaviour are:

- rolling of the eyes
- shaking of the head
- looking out the window
- glaring
- gesturing
- slamming of books
- overly aggressive questioning
- ostentatious discarding of papers
- sarcastic questions or comments.

It is important too that persons known to tribunal members (for instance, by reason of their having appeared before the tribunal before) not be 'welcomed' to the hearing or otherwise treated in a way that suggests that their evidence will be dealt with in an unequal or uncritical fashion.

Inevitably, at times, and for a variety of reasons, attentiveness of tribunal members will wane. It is essential to monitor one's attention levels and to take suitable measures to maintain concentration. If necessary, a short break should be taken if attention is drifting and there is a risk of an impression being given that the witness or representative is no longer receiving due attention.

Because an integral part of assessing evidence includes taking into account how it is delivered, it can be helpful for a reasonable measure of eye contact to be maintained with witnesses. A balance needs to exist between taking notes and inspecting documents, on the one hand, and paying attention to a witness, on the other hand. If a significant document

needs to be read by the tribunal, it is appropriate for the tribunal to ask the parties to wait or to stand the matter down briefly.

Use of humour by tribunal members needs to be undertaken with discernment. While a light-hearted comment or a joke can reduce tension, lighten an atmosphere and put participants at ease, there is also the risk that it can be misinterpreted. It can induce an impression that a party or witness or the case generally is not being taken seriously. Tribunal members should be cautious in employment of jokes, double meanings and light-hearted comments, being conscious of the impression that their demeanour and behaviour may create.

5.5. Procedures and processes at hearings

5.5.1. Security procedures

On occasions there may be reason to conclude in advance or in the course of a hearing that a party may be violent or unacceptably abusive, threatening or disruptive. This can be an issue from the perspective of occupational health and safety, and risk to witnesses and parties, as well as the orderly conduct of hearings.

Where it can be done, sufficient security arrangements should be put in place prior to the commencement of a hearing. These may include having security personnel stationed in the vicinity or ensuring that an alarm will enable a suitable emergency response. The presence of security staff can often temper poor behaviour at or in the vicinity of hearings.

While assaults or seriously abusive behaviour are very rare at tribunal hearings, a responsibility of tribunal members is to take the steps necessary to minimise the risk to participants in tribunal hearings, as well as to observers and staff. If suitable security arrangements cannot be instituted, it may be necessary to consider whether the hearing should be adjourned to another time or place to ensure safety. Sometimes, a short break is sufficient to reduce tensions and enable safe resumption of the hearing.

An incident report should be prepared when any violent behaviour or assault has taken place at a tribunal hearing. This can facilitate the preferring of criminal charges, if that is appropriate, as well as reflection on how security arrangements can be improved for future hearings.

5.5.2. Interpreters

Matters such as the need for an interpreter also need to be addressed at a very early juncture, preferably before the hearing commences. The matter should be stood down when adequate arrangements have not been made in advance for proceedings to be translated. Nothing is more likely to adversely affect the fairness of proceedings than for them to take place without parties having an adequate understanding of what is occurring. As a rule of thumb, serious

consideration should be given to procuring an interpreter where a party or a witness asks for one or if there is a suspicion that a person giving information to the tribunal is impaired in any significant way in communicating to the tribunal or their legal representative. It is always preferable for suitably accredited interpreters to be used rather than family members or friends. Failure to arrange for an interpreter may amount to a denial of procedural fairness.[26] Tribunal members and parties should ask questions in the usual way when an interpreter is interpreting questions and answers, maximising the extent to which communication is taking place directly with the witness. It is recommended that:

- questions be addressed directly to the party concerned and not through the interpreter (that is, ask 'What did you do next?' to the party rather than say to the interpreter 'Please ask Mr X what he did next')
- the member asking the question look directly at the party concerned and not the interpreter
- sentences be kept short with sufficient breaks to allow the interpreter to interpret the content as accurately as possible
- tribunal members ensure that interpreters understand that *everything* that is said must be translated *exactly* as said
- tribunal members ensure that interpreters understand that if they need clarification of what has been said, they should indicate this first to the tribunal
- working conditions and status, including briefings and background
- rates of remuneration
- practices during proceedings, including explaining the interpreter's role, controlling the flow of proceedings, alerting the tribunal to cross-cultural differences and dealing with complaints about interpreters and translations.

The Australasian Institute of Judicial Administration has published a study on interpreter policies and practices in Australian courts and tribunals,[27] which includes recommendations for qualifications, training and engagement of interpreters.

A number of Australian tribunals have developed policies regarding the use of interpreters, which may serve as useful guides for members:

- Administrative Appeals Tribunal <http://www.aat.gov.au/steps-in-a-review/overview-of-the-review-process/interpreters>
- NSW Civil and Administrative Tribunal <http://www.ncat.nsw.gov.au/Pages/going_to_the_tribunal/access_support/interpreters_and_translators.aspx>

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26 See the discussion in *Minister for Immigration and Citizenship v Le* (2007) 164 FCR 151.

27 See S Hale, *Interpreter Policies, Practices and Protocols in Australian Courts and Tribunals: A National Survey* <http://www.aija.org.au/online/Pub%20no89.pdf> at January 2017.

The Judicial Council on Cultural Diversity (JCCD) has developed draft *Australian National Standards for Working with Interpreters in Courts and Tribunals* with the accompanying *Supplementary Materials* to establish minimal and optimal practices for Australian courts and tribunals. The Standards are accompanied by *Model Rules* and a *Model Practice Note* that give effect to the Standards. The JCCD's draft standards are subject to a public consultation process, see <http://jccd.org.au/wp-content/uploads/2016/06/National_Standards_for_Working_with_Interpreters_in_Courts_and_Tribunals_-_Final_Consultation_Version_June_2016.pdf> at January 2017.

5.5.3. Legal representation

In many instances, the statutory framework establishing tribunals expressly grants a right to legal representation. Sometimes it precludes it. Generally, if statutory provisions exclude legal representation, that is the end of the matter.[28] The case is strongest for a right to legal representation where statutory provisions are silent, and when proceedings are conducted orally and in person.[29] The law on the subject is not settled[30] but Australian law has tended to support the proposition that there is no absolute right to legal representation.[31] By contrast, the New Zealand Court of Appeal has held that the right to counsel is an entitlement under the common law principles of natural justice.[32] However, this can be removed or relaxed by specific statutory provision. In the absence of a statutory provision stating that there is no entitlement to legal representation, it may be advantageous for parties to be represented so that they receive legal advice and assistance in making their arguments. It often results in hearings taking a shorter time and parties communicating more effectively what they want the tribunal to know. However, legal representation can increase the level of formality and the adversarial nature of the proceedings.[33]

5.5.4. Preliminary matters

It is common, and helpful, for the chairperson of the tribunal to commence proceedings by:

- identifying who is present, including legal representatives, if any

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28 However, the validity of subordinate legislation to that effect has been said potentially to be open to an argument that it is beyond power: see *Freedman v Petty and Greyhound Racing Board* [1981] VR 1001. Legislation ousting the common law right to legal representation will also be construed narrowly: *Appellant WABZ v Minister for Immigrations and Multicultural Affairs* (2004) 134 FCR 274.

29 See JRS Forbes, *Justice in Tribunals* (4th edn, 2014, Federation Press, Sydney) 136.

30 For the right, see *Edgar and Walker v Meade* (1916) 23 CLR 29; *R v Visiting Justice at Pentridge Prison; Ex parte Walker* [1975] VR 883; *Appellant WABZ v Minister for Immigration and Multicultural Affairs* (2004) 134 FCR 271; for the absence of the right, see *Maclean v The Workers Union* [1929] 1 ch. 602.

31 See e.g. *Smith v Aldrich* (1993) QCA 253 (Unreported, Queensland Court of Appeal, Pincus, Davies and McPherson JJA, 9 July 1993); *MacNab v Auburn Soccer Sports Club Ltd* [1975] 1 NSWLR 54; *Cains v Jenkins* (1979) 28 ALR 219; *Finch v Goldstein* (1981) 4 ALD 419; *Doepgen v Mugarinya Community Association Incorporated* [2014] WASCA 67.

32 *Drew v Attorney-General* [2002] 1 NZLR 58.

33 N Bedford and R Creyke, *Inquisitorial Processes in Australian Tribunals* (Australasian Institute of Judicial Administration, 2006) 49–52.

- orienting the parties
- indicating what is going to take place
- setting out what is expected of those at the hearing.

In some kinds of hearings, it is also helpful to identify who else is present in the tribunal room so that their potential contribution or perspective can be recognised and factored into the proceedings.

Generally, it is appropriate that persons be referred to by their surnames. This reflects the seriousness of proceedings, can reduce power imbalances, and accords due respect to all participants. However, it is important to retain flexibility; on some occasions, and in some circumstances, it can be appropriate to use first names—for instance, where it is the expressed wish of witnesses, and with young persons. There is the need to balance formality and informality and to avoid the appearance of being patronising or showing favour.

Provision of information about sitting times and resolving what materials are already in the possession of the tribunal, as well as the parties, is an important early step. If proceedings are being recorded for the purpose of a transcript, this should also be noted by the chairperson of the tribunal. If there are preclusions upon publicity (such as in relation to the identity of a notifier), these should be stipulated so that there are no misunderstandings.

It is often worthwhile for the tribunal chairperson to provide a brief summary of the dispute to be resolved by the tribunal and to inform the parties about relevant rights and entitlements. This can remove misapprehensions which some persons may harbour about the constituency of the tribunal, its independence or its role. It also aids discussion about the parameters of the hearing and clarifies those matters which remain contentious, as opposed to those which are the subject of agreement.

Where proceedings are confidential, this ought to be identified. If there is an application for proceedings to be closed (assuming they are generally open) or for a suppression order to be made (for example, in the interests of justice or the administration of justice or to protect commercial confidences), this should be facilitated at a very early stage.

An explanation of the order in which evidence will be received is also generally helpful. This will usually involve informing the parties the stages involved in the process of parties or others giving evidence. Whether cross-examination or re-examination will occur depends on the nature of the tribunal and the issue before it.[34] For example, where the tribunal follows procedures analogous to a court, three basic stages will be followed by the tribunal:

- the applicant or complainant will give evidence first
- the respondent (if there is one) then has the opportunity to cross-examine

34 *Hurt v Rossall* (1982) 43 ALR 252.

- the applicant or complainant has the right to re-examine.[35]

This process applies *to each* of the applicant's or complainant's witnesses and, at the end of this aspect of the case, is repeated for the respondent and their witnesses.

Sometimes, the retention of flexibility in the order of proceedings can be constructive, such as where there are serial, discrete issues that need to be determined, or where there is a particularly anxious party or witness from whom it may be advantageous to hear out of order. An example of this can occur in hearings before mental health review tribunals and guardianship tribunals. By contrast, in matters such as planning disputes, the responsible authority, defending its decision, often goes first, followed by the objector and the applicant for the planning permit.

It is often constructive for the chairperson of a tribunal to indicate that questions will be asked from time to time by members of the tribunal to clarify matters as they arise and also after cross-examination before re-examination.

Where there is the potential for a matter to be settled, it can be advantageous for the possibility to be raised by the chairperson of the tribunal at the outset. It can be useful to offer to stand the matter down or even adjourn it to enable the parties to speak further with a view to reaching a settlement. Such urging may be particularly appropriate where a party appears not to have had legal advice and requires it or where costs are likely to exceed the amount of money in dispute.

Where there is a realistic prospect that an applicant may be in a worse position as a result of a hearing (for instance, where a debt may be increased, or compensation awarded by a lower tribunal overturned), it is proper for these issues to be explicitly raised at the outset with the applicant. The tribunal chairperson should make it clear that this does not mean that a concluded view on the issue has been formed by the tribunal. Suitable time for the applicant to reconsider their position should be made available. The same considerations can arise in respect of respondents where they have adopted an adversarial posture which appears not to be justified by the evidence adduced or likely to be adduced.

Where there is an indication on a file that an applicant stands in jeopardy of criminal prosecution associated with matters before the tribunal, the applicant should be warned accordingly. For example, this may occur in the context of social security matters. It is helpful for the applicant to be asked if they have received a formal communication relating to the possibility of prosecution action. The applicant should be advised that the information that they give to the tribunal may be incorporated in the written decision of the tribunal. This will be seen by Centrelink and the relevant department and may be used in a criminal prosecution.

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35 See e.g. *Harbour Inn Seafoods Ltd v Switzerland General Insurance Co Ltd* (1990) 3 PRNZ 653 at 654. But the tribunal is not required to advise an applicant how to conduct their case: *Heyward v Minister for Immigration and Citizenship* (2009) 113 ALD 65.

It is generally advantageous to extend the opportunity for preliminary or housekeeping matters to be raised at the outset so that issues such as jurisdictional problems, the availability of witnesses or legal representation or problems arising from time constraints or other logistical difficulties are made known early. If a party is unclear as to what is taking place or any aspect of the 'ground rules', this provides them with the opportunity to say so, enabling remedial action to be taken promptly.

It can also be useful to provide an indication of the likely duration of the hearing, when a decision will be handed down and whether there are appeal rights from the decision.

5.5.5. Disqualification for bias

Chapter Three explored the requirement for tribunal members to be impartial and disinterested. Where a question is raised as to the independence or impartiality of a tribunal member, the governing principle is, subject to qualifications relating to waiver, that a tribunal member should disqualify themselves from sitting if a fair-minded observer might reasonably apprehend that the tribunal member might not bring an impartial mind to the resolution of the question the tribunal member is required to decide.[36] This 'apprehended bias test' reflects the importance of maintaining public confidence in the administration of justice and its capacity to ensure that cases are decided impartially. As Barwick CJ, Gibbs, Stephen and Mason JJ explained in the case of *R v Watson; Ex parte Armstrong*,[37] such an apprehension on the part of a fair-minded observer might arise from prior contact a tribunal member has had with a party or a witness, from behaviour previously engaged in by a tribunal member or from the way in which they conduct themselves in the course of a hearing.

However, not every contact, previous behaviour or conduct during a hearing will reach the point of being such as to satisfy the contention that a tribunal member should disqualify themselves for bias. For instance, it has been held that the apprehended bias test does not involve imputing to the hypothetical observer a propensity to draw the most sinister implications from every ruling or adopt the least favourable interpretation of every comment made.[38] Where a tribunal member has had some interaction with a person appearing before the tribunal or where there is any reason for a disinterested bystander to have concern about the capacity of a tribunal member to bring an unprejudiced mind to bear on the matters to be determined, it is appropriate that such issues be disclosed by the tribunal member at the earliest juncture in the hearing. On occasions, this will only become apparent when a tribunal member physically recognises a person. On other occasions, it will become apparent when the tribunal member prepares for the hearing. It may even occur after a tribunal member has

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36 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 344.

37 (1976) 136 CLR 248 at 263.

38 See *R v Doogan Ex parte Lucas-Smith* [2005] ACTSC 74 (Unreported, ACT Supreme Court, Higgins CJ, Crispin and Bennett JJ, 5 August 2005) at [78]. See the circumstances in which an apprehension of bias may arise set out in ch. 3 and M Groves, 'The Imaginary Observer of the Bias Rule' (2012) 19 *Australian Journal of Administrative Law* 203.

reflected upon evidence given in the course of a hearing. It is a fundamental entitlement that a party who might be troubled by the prior knowledge or interaction of the tribunal member should be afforded an opportunity to make submissions upon whether the tribunal member should refrain from sitting on the hearing.

5.5.6. Non-appearance of parties

On occasions, an applicant or a respondent, where there is one, does not attend a hearing in a timely way or at all. Non-appearance of a party does not of itself postpone or terminate a hearing. Natural justice requires an opportunity to be heard, but it is waived by a failure to attend a hearing.[39] However, it is important that the tribunal assure itself that the non-attending party has duly received proper notice of the date, location and status of the hearing. It may be appropriate for the matter to be stood down for a short period of time to enable some latitude to be extended to the person who has not attended. Generally, it is not the responsibility of the tribunal to undertake inquiries about the absence of the party or the reasons for it. However, this is not an invariable rule. On occasions, it is proper for inquiries to be made about whether it had been anticipated that the party was going to attend and whether anything is known about why the person is not present.

Tribunals' policies about the granting of adjournments because of non-attendance of parties vary considerably. Some regularly extend an opportunity to a party, especially an applicant or a party under review, to attend on a subsequent occasion. Others proceed with a hearing, after the matter has been stood down for a short while, taking into account the information available on the file and what is presented by any party that is present.

5.5.7. Adjournment of proceedings

Adjournment of proceedings refers to the delay of a hearing for resumption on a later day. When matters are delayed until later in the same day, they are generally referred to as being *stood down*.

Tribunals have different policies, procedures and practice directions in relation to the granting of adjournments. For many tribunals, adjournments are only granted as a last resort.

However, when matters cannot be fairly and adequately resolved on the day for which their hearing has been set down, they may need to be adjourned. Similarly, if a party to a hearing is ill or otherwise for good reason unable to continue to participate in a hearing, an adjournment may be appropriate. On occasion, where there is a question mark over assertions about matters such as ill health, it can be necessary for a tribunal to require a party to provide documentary or other evidence about what is precluding them from participation in the hearing. This evidence might include, depending on the context:

- a medical certificate

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39 See *Ostreicher v Secretary of State for Environment* [1978] 1 WLR 810.

- a letter from an employer
- confirmation of a family emergency or other emergency.

If proceedings are part-heard (in other words, if they have commenced but have needed to be stopped part the way through), they should generally be adjourned to a tribunal hearing with the same personnel. However, if a tribunal member hearing a matter dies, becomes incapacitated or is unable to continue hearing the matter, consideration needs to be given to adjourning the hearing to allow it to be conducted afresh by a differently constituted tribunal. Sometimes, parties can agree to the contrary. However, this depends upon the exact terms of the legislation establishing the tribunal's hearing processes.

Fairness to parties is the yardstick for determining whether an adjournment should be granted. For instance, if a party has been served with documentation too late to prepare adequately for the hearing, it is generally appropriate either to stand the matter down or to adjourn it to a later date. Consideration should be given to the length of the adjournment in the circumstances of the case. For example, in *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union v Abigroup Contractors Pty Ltd* [2013] FCAFC 148, the Court held that standing the matter down for just 30 minutes to enable a party to review and respond to complex evidence of more than 350 pages was procedurally unfair.

If a party wishes to lodge a late counterclaim, it may be appropriate to dispense with service requirements, on the basis that its late lodgement will not cause prejudice to the other parties. Alternatively, the matter may need to be adjourned to enable the other side to respond in the usual way.

When a party raises complex legal or factual matters which the other side was not in a position to anticipate or prepare for adequately, it may be appropriate to adjourn the hearing to allow them to read, reflect and respond to the new issues or submissions.

When a party is taken by surprise (or 'ambushed') in relation to important matters raised by the other side at the hearing, it may be appropriate to adjourn the hearing to enable them to present answers or contextualise evidence that they would have presented had they been aware of the need for it. On occasion, too, a matter cannot be finalised within the time allotted to it. The hearing should not be unduly rushed or take place in circumstances which are oppressive in an attempt to conclude the hearing. It is important that a party at potential risk of an adverse decision be given an adequate opportunity to be properly heard and to make submissions.[40] It can also be appropriate for an adjournment to be granted where, through no fault of a party, an important witness cannot be present. Often the actual presence of a witness is preferable to relying only on their written statement or report, but this depends upon the facts of the particular case. The yardstick is whether the tribunal's decision-making

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40 *R v Thames Magistrates' Court; Ex parte Polemis* [1974] 1 WLR 1371; *Love v AFL Canberra Limited and the Members of the Disputes Tribunal of AFL Canberra Limited* [2009] ACTSC 135.

will be disadvantaged by the absence of the physical presence of the witness or whether a party's interests will be materially worsened.

A hearing may also need to be adjourned for a variety of reasons. These include:

- a party with limited English requires an interpreter whose presence cannot promptly be secured
- a party asks for an adjournment to enable relevant material to be placed before the tribunal when they were not in a position to procure the material prior to the hearing date, or when the tribunal concludes that it would be substantially assisted by access to such material
- another person should be joined in the proceedings
- a party is unable to attend, for a legitimate reason
- it is decided that a witness should be summonsed to attend and/or produce documents
- the basis of the hearing significantly changes in running—for example, if serious new allegations are added in the course of a disciplinary hearing
- it is decided that further expert or other evidence is required.

Failure to grant an adjournment, if unreasonable or procedurally unfair, could ultimately invalidate the tribunal's decision. Any refusal to grant an adjournment must be justifiable on an intelligible and reasoned basis: *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332.

5.5.8. Stays of proceedings

Tribunals have only those powers that are provided to them by express legislative provisions. However, tribunals have a responsibility to avoid their processes being abused. Superior courts on application have an inherent power to ensure that court processes are not abused and can stay (suspend) an action temporarily or permanently for that purpose. This can be done where proceedings are frivolous or vexatious, or where they are unfair to a party before a tribunal.

Where tribunals are given comparable powers by legislation, they can behave similarly. However, they must be conservative in granting stays if they are not explicitly empowered to do so. As they are generally not bound by formal rules of procedure, they can adjourn proceedings until certain procedural matters are complied with. However, the status of such conditional adjournments, which equate to stays, has not been resolved by the courts.

5.5.9. Self-represented parties

Many tribunal hearings take place with persons who are not legally represented and who have limited understanding of the procedures used by the tribunal and the legal constraints which govern the matters that can be dealt with by the tribunal. These facts, together with

the inevitable anxiety engendered by appearance before an official body, highlight the need for clear and calm communication to parties by tribunal members about matters such as:

- the nature and legal limits of the tribunal's role
- what is expected and permitted of parties
- how the proceedings will be conducted
- parties' appeal rights.

Good communication practices relevant to tribunals are set out in Chapter Seven.

While it is unrealistic to expect that all non-legally-qualified parties will be equipped to conduct themselves with an informed understanding of tribunal processes and enabling legislation, it remains appropriate to impose limits upon questioning and conduct so as to facilitate the conduct of orderly, efficient and dignified hearings. However, the absence of representation for parties imposes upon tribunal members additional responsibilities to enable parties to participate effectively in proceedings. These extend to:

- the provision of additional information to self-represented parties
- giving guidance about the posing of questions to witnesses
- exploring technical matters of which self-represented parties may be unaware
- posing questions and raising issues which have not been canvassed by parties.

Two useful sources of information on self-represented litigants are the *Equality before the Law Bench Book,* produced by the Judicial Commission of NSW, and the *Self-Represented Litigants Literature Review,* produced by the Australian Centre for Court and Justice System Administration, Monash University.[41]

5.5.10. Managing the hearing

One of the challenges for tribunal members is to manage hearings so that they run efficiently and fairly, as well as in such a way as to achieve the statutory obligations of the tribunal. A number of factors can interfere, such as the conduct of legal representatives, the conduct of parties and witnesses, and an imbalance caused by one party being legally represented and another not being represented. It is the responsibility of tribunal members to ensure that legal representatives assist the tribunal and do not obstruct or hinder the orderly assembly of

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41 Judicial Commission of NSW, *Equality before the Law Bench Book* (Judicial Commission of NSW, Sydney, 2006); E Richardson, T Sourdin and N Wallace, *Self-Represented Litigants Literature Review* (ACCJSI, Monash University, 2012) <http://www.law.monash.edu.au/centres/acji/projects/self-represented-litigants/self-rep-litigant-lit-review-accjsi-24-may-2012.pdf> at January 2017. See also E Richardson, T Sourdin and N Wallace, *Self-Represented Litigants: Gathering Useful Information, Final Report* (ACJI, Monash University, 2012) <https://www.ag.gov.au/LegalSystem/Documents/2012%20Report%20Self-Represented%20Litigants%20Report%20-%20Gathering%20Useful%20Information%20Monash%20University.PDF> at January 2017; T Sourdin and N Wallace, *The Dilemmas Posed by Self-represented Litigants — The Dark Side* (ACCJI, Monash University, 2014) <http://www.civiljustice.info/cgi/viewcontent.cgi?article=1031&context=access> at January 2017.

relevant information by the tribunal. On occasion, representatives are more accustomed to the adversarial culture of, for instance, the criminal courts and need to be assisted to adjust to the inquisitorial environment of tribunals. Such assistance can involve representatives being advised of the tribunal's procedures, and being constrained from unhelpful styles of cross-examination and other conduct that is not compatible with the orderly running of the hearing.

Potentially problematic forms of cross-examination include:

- harassing, intimidating or bullying witnesses
- using distressing or embarrassing questioning
- deploying demeaning or patronising questioning
- resorting to the usage of unhelpfully complex or multi-part questions
- questioning directed toward collaterally indirect issues of a party or witness's credit and veracity.

It is in the interest of the tribunal that witnesses are enabled to communicate effectively with the tribunal. This can require tribunal members tempering what might otherwise be aggressive forms of questioning which may or may not be acceptable in other legal forums.

Some legal representatives attempt also to intimidate tribunal members and to behave in a disrespectful way. This can include:

- making inappropriate comments
- making improper objections
- insisting on the application of the rules of evidence
- lodging serial demands that tribunal members disqualify themselves for bias.

In such situations, it is appropriate for tribunal members to maintain a dignified and firm control over proceedings, making clear and explicit rulings which derive directly from the terms of the tribunal's enabling legislation and which are guided by considerations of procedural fairness. (See Chapter Three.)

Another issue that arises from time to time is an imbalance caused by the legal representation of one party and the lack of legal representation for another party. To a lesser degree, it can also arise when there is a significant difference in the quality of legal representation. For tribunal members, either scenario results in a need to provide assistance and explanations so as to facilitate the capacity of parties to participate effectively in the proceedings. In a practical sense, it means that tribunal members may need to be more detailed in their explanations of tribunal procedures than they otherwise would be and to extend a measure of latitude to non-legally-trained persons who wish to ask questions and make submissions. It can also necessitate tribunal members being more involved in asking questions that self-represented persons are not able to formulate and in assisting parties than they otherwise would be where effective legal representation was involved.

5.5.11. Managing disruptions during a hearing

Certain categories of parties, witnesses and legal representatives pose particular challenges for the orderly and efficient conduct of hearings. Sometimes it is the bitterness and antagonism of self-interest that generate the difficulties. On other occasions, specific tactics of intimidation and disruption are deliberately or otherwise adopted and risk impairing procedural fairness within the hearing process. It is the responsibility of tribunal members to manage such scenarios within the context of their duty to accord fairness to all parties and, as far as possible, to minimise any harmful consequences of hearings.

It is important for tribunal members to control persistent interruptions and the expression of abuse or insults directed at the tribunal or witnesses. Generally, this can be done in a way that is neither heavy-handed nor dependent upon threats.

Early and full explanation of what is acceptable conduct, and the drawing of clear lines in a calm but firm voice as to what is not permissible suffices in most circumstances. However, where that proves not to be sufficient, there are other strategies that can be employed.

On occasion, it is anxiety and tension that results in persons (for instance, those with mental illnesses, personality disorders or intellectual disabilities) speaking in a disrespectful way or conducting themselves disruptively or abusively. If those causes of stress can be addressed, this can go a long way toward reducing the problematic behaviours and enhancing the person's contribution to proceedings. The following strategies may be found useful:

- reassuring an anxious and apprehensive applicant that they will have a full opportunity (a little later) to say what they wish to communicate and to ask questions of witnesses
- providing a pen and paper, where the person is literate, to facilitate making notes of issues that they wish to address
- explaining quietly that the behaviour that the person is engaging in is not helpful to the tribunal or to the person's interests, whether that be in terms of 'winning' the case or in being accepted as a reliable, credible witness
- calmly explaining that certain kinds of behaviour in which the person is engaging are not acceptable or fair to others who are present
- standing the hearing down temporarily to allow the person 'time out' to reflect on whether they want to continue with the hearing, whether there is a specific submission that they wish to make, or whether they would prefer the matter to be adjourned
- asking a person to speak more slowly so that the tribunal member can take full notes of everything that they are saying.

Ultimately, the yardstick for managing inappropriate conduct is to consider what needs to be done to ensure that the hearing proceeds properly, with fairness to parties and in such away as to command public confidence. If it is necessary to exclude persons from hearings,

a number of tribunals are enabled by statute to take such a step where the person's conduct is disruptive or amounts to contempt.[42]

5.6. Evidence at hearings

Evidence placed (or adduced) before tribunals may be either oral or documentary. Where there is more than one party to a hearing, it can be appropriate for evidence to be placed before the tribunal by way of examination-in-chief, cross-examination and re-examination. However, many tribunals function less formally and in an environment which is not conducive to such formal procedures. The following paragraphs briefly describe examination-in-chief, cross-examination and re-examination.

5.6.1. Examination-in-chief

Tribunals are generally not bound by the rules of evidence.[43] Where there are multiple parties and where parties are legally represented it is common, though not a strict requirement, for the basic rule that applies to examination-in-chief to be applied—namely, that the questions asked should not be leading in the sense that they:

- directly or indirectly suggest a particular answer, i.e. they plant an idea or suggestion
- assume the existence of a fact the existence of which is in dispute in the proceeding and as to the existence of which the witness had not given evidence before the questions are asked.[44]

It can be useful for tribunals to adhere to this rule as it enables information from witnesses to be assessed for its reliability.

5.6.2. Cross-examination

There is no general right for parties to cross-examine in tribunals.[45] In respect of some tribunals, however, parties are given a right to cross-examine. For instance in *Barrier*

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42 See e.g. *Residential Tenancies Act 1986* (NZ), s 112(2).

43 See e.g. *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 8; *Administrative Appeals Tribunal Act 1975* (Cth) s 33(1)(c); *Migration Act 1958* (Cth) s 353; *Civil and Administrative Tribunal Act 2013* (NSW) s 38(2).

44 See *Evidence Act 1995* (Cth) and *Evidence Act 1995* (NSW), Dictionary, Pt 1.

45 *Kingham v Cole* (2002) 118 FCR 289 at 295; see also *O'Rourke v Miller* (1985) 156 CLR 342 at 352. Compare *Australian Postal Commission v Hayes* (1989) 23 FCR 320 where Wilcox J (at 327) accepted an argument that:

> the testing of opposing relevant material by cross-examination is an essential feature of the opportunity to correct or contradict that material; it is not enough that the party against whom the evidence is led has the right to present evidence in reply. Moreover, although counsel accept there exists some discretion to control cross-examination so as to ensure relevance and to guard against repetition and prolixity, it is said that the right to cross-examine means the right effectively to cross-examine. If directions given by a court or a tribunal have the effect of so fettering cross-examination that a witness's evidence cannot properly be tested, procedural fairness has been denied.

Reef Broadcasting Pty Ltd v Minister for Post and Telecommunications[46] Brennan J found that legislation that provided that counsel might 'examine' witnesses implied a right to cross-examine. However, Forbes has argued that there are several good reasons for the law restricting cross-examination in respect of tribunals because their rules of evidence are less formal than that of a court:

- a right to cross-examine would be ineffectual when there is no power to compel witnesses to attend and answer questions
- many tribunals can conduct 'hearings' wholly in writing, meaning that opportunities for cross-examination do not arise
- tribunals may rely on their own knowledge and cannot themselves be cross-examined
- tribunals are entitled to act on hearsay which defies effective cross-examination.[47]

In general, if evidence is given orally, it is prudent for cross-examination to be permitted.[48]

Allowing parties to cross-examine (setting limits as necessary) enables them to perceive that they have been provided with procedural fairness. It is also likely to assist the tribunal more effectively to evaluate the evidence before it because it has been tested. Finally, it relieves tribunal members of the need to ask extensive questions themselves and it reduces the likelihood of the tribunal members being identified as biased.

The essential purpose of cross-examination is to test the reliability of evidence given by a witness and leading questions are permitted. A common form of cross-examination challenges the reliability of evidence, such as by suggesting that the witness is not dispassionate, accurate or honest. Frequently, cross-examination simply tests whether other possibilities existed than the account provided by a witness in examination-in-chief. It may scrutinise the quality of memory or cite a witness's previous account of an event to suggest that it was inconsistent. This may imply that the witness is unreliable or that their later account is affected by the passage of time or even prompted by a malign motive. The fact that a witness has omitted key details may be utilised in submissions later to suggest that their account is fabricated or embellished—in one way or another either not truthful or not reliable.

An important role of the tribunal is to ensure that witnesses are not gratuitously attacked, harassed or demeaned during questioning. The line between robust testing of assertions by a witness and badgering or harmful interrogation can be a fine one. The presiding tribunal member has the role of balancing the need to obtain a perspective that enables evaluation of a witness's evidence and preventing the tribunal process from causing any harm to witnesses.

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46 (1978) 19 ALR 425 at 455.

47 See JRS Forbes, above n 16, 223.

48 *R v Brighton and Area Rent Tribunal; Ex parte Marine Parade Estates 1936 Ltd* [1950] 2 KB 410; see too *Brighton v Selpam Pty Ltd* [1987] VR 54 at 59.

5.6.3. Re-examination

Re-examination enables clarification by the person who has previously examined a witness in-chief of issues that may have become confusing or ambiguous in the course of cross-examination. It is important for tribunals to prevent re-examination being used as an opportunity to open up new issues not raised during examination-in-chief. Should that occur, a further opportunity for cross-examination should be given.

5.6.4. Administration of oath and affirmation

Practices in tribunals vary in relation to whether evidence is taken on oath, by affirmation or simply by way of less formal provision of information. There are two advantages of taking evidence by oath or affirmation:

- it emphasises to the witness the importance of telling the truth and being accurate in what they say to the tribunal
- it enables a prosecution for perjury if the evidence given is wilfully false.

The disadvantage of taking evidence by oath or affirmation is that it is a formal and potentially intimidating procedure.

Statutory provisions such as Oaths Acts often prescribe the form of an oath. A common example is: 'I swear by almighty God that the evidence that I shall give before this tribunal will be the truth, the whole truth and nothing but the truth'.

However, many witnesses prefer to make a non-religious promise to tell the truth by an affirmation. There is no difference in probative quality between evidence given on affirmation and evidence given on oath. It is important that witnesses be made to feel comfortable about taking an affirmation as against an oath. They should be offered their options in a non-judgmental way.

A common form of an affirmation is: 'I sincerely declare and affirm that the evidence I shall give before this tribunal will be the truth, the whole truth and nothing but the truth'.

5.6.5. Questioning by tribunal members

It is often helpful for tribunal members to ask questions to clarify issues and to assist their own decision-making processes. However, it is important that the asking of questions by tribunal members is not seen to be coming from a pre-determined position (comparable to that of a party undertaking cross-examination) or to be acting as 'prosecutors'. This would suggest that a party is not receiving a fair hearing because the decision-maker is biased.

Questions should be asked in an open-ended format to avoid cross-examination and to give witnesses a full opportunity to answer. Questions in the style of interrogatives, commencing with 'who', 'what', 'when' and 'why', are best employed, and questions which contain their own answers or suggest answers are best avoided. The latter can give the impression that tribunal members are coming from a fixed position and thus have made a premature decision.

In addition, they tend not to elicit answers from witnesses that will assist the tribunal as much as open-ended questions, which enable witnesses to say what they actually wish to communicate. Expression of astonishment or overt doubt is unhelpful from the perspective of tribunal members appearing to conduct the hearing without preconceived views.

5.6.6. Telephone evidence

There is a particular need to ensure fairness where any aspect of proceedings is conducted in the physical absence of any of the parties. For instance, it is important to ensure that parties have access to all documentary material that is the subject of evidence before the tribunal.

In *O'Reilly v Firework Professionals Ltd*,[49] Abbott DCJ suggested:

> It might be preferable if the Registrar was to direct that there be an exchange of documentary material prior to a Disputes Tribunal hearing which is to involve the participation of a party by way of a telephone conference. Such a procedure would also avoid any impression of unfairness that could be given by a requirement that documents be filed seven days prior to such a hearing only by the party who intends to participate in the hearing by a telephone conference.

When documentary evidence is not sent beforehand to or from a person who is not physically present at the hearing and it becomes relevant in the course of a hearing, it should be remitted by email, fax or other means and, if necessary, the hearing should be stood down (that is, temporarily suspended) for that purpose. If adequate telephone facilities are not available, once again it is appropriate for the hearing to be stood down or adjourned to enable suitable arrangements to be made. This may include adjourning the hearing and extending the opportunity to the absent party to attend in person.

5.6.7. Videoconferencing

Videoconferencing facilities can be very useful for enabling hearings to take place and witnesses to give evidence when otherwise that would not be possible. Such facilities can also be financially advantageous. However, the technology brings its own challenges. It introduces a level of artificiality into proceedings and, by reason of its telescoping of the field of vision and time delays between questions and answers, it can impair the capacity of the tribunal to appreciate the context within which a witness is functioning. It can cause a significant reduction in spontaneity. In addition, it makes assessment of demeanour and credibility difficult.

Witnesses providing information to a tribunal on camera at distance do so in an environment to which they are usually unaccustomed. Thus, members should be slow to draw inferences about credibility or reliability based upon witnesses' demeanour and answering style on a videoconferencing hearing.

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49 (Unreported, District Court, Christchurch, 13 March 2001).

If a tribunal forms the view that the videoconferencing technology is malfunctioning, it should stand the matter down for the problem to be addressed or adjourn the hearing for it to be conducted when the technology is functioning satisfactorily or for the hearing to take place in person.

If a tribunal concludes that it is unable effectively to assess the evidence because the hearing is taking place by videoconferencing, again it should adjourn the hearing for it to be reconvened in person.

5.6.8. Documentary evidence

Much of the information received by tribunals is in the form of written documents. A role for the tribunal is to evaluate the relevance and reliability of this evidence. The tribunal should ensure that documentation received is what it purports to be and should learn of the circumstances in which it was generated. An example of potential unreliability is a downloaded email which purports to be from a certain person but may have been generated by others with access to the person's computer.

When documents are provided to the tribunal, or 'tendered', they are generally marked as 'exhibits' and retained until the conclusion of the hearing. This occurs after they have been identified by a witness. Where there are two parties, it is common for the documents tendered by one party to be marked with a letter of the alphabet and for those tendered by the other to be marked with a number. A technique often used is to tender a document 'absolutely' where a witness can identify it and to simply 'mark it for identification' where a witness is shown a document but is not in a position to identify it.

5.6.9. Closing submissions

Tribunals vary as to whether they receive submissions from those who appear before them. Where hearings are brief, and where persons are not legally represented, it is common for there not to be closing submissions.

The advantage of closing submissions is that they have the potential to summarise the most important parts of the evidence that has been given and enable a party to explain how they consider the tribunal should view the information before it. They give a final opportunity for a party to explain how they consider the tribunal should finally determine a matter. The disadvantage of extending the opportunity for submissions is that they may not assist the tribunal's fact-finding responsibility by reason of being disorganised, argumentative, or 'speechifying'. It is up to tribunals in particular cases to determine whether they will be assisted by closing submissions.

A further issue when tribunals decide to receive submissions is to determine whether they should be oral or in writing. Again, practices of tribunals vary. However, where a hearing has been lengthy (for example, extending for several days or weeks) or complex, it can be

of assistance to the tribunal to receive written submissions that bring together the extensive material in a way which will aid its decision-making.

5.7. Evidentiary issues

5.7.1. Inapplicability of the rules of evidence and procedure

One of the characteristics of tribunals is that they are not fettered by the need to apply the rules of evidence and procedure.[50] Most tribunals' legislation permits them to proceed without being bound by legal forms and technicalities. The common law assumes that the rules of evidence do not apply to them.[51] This provides important latitude and flexibility in terms of how tribunals acquire and evaluate information. However, the fact that the rules of evidence do not have to be applied does not provide a licence for either receiving or utilising information that is:

- irrelevant
- unreliable
- scandalous (that is, harmful but lacking probative value).

Particular care needs to be taken by tribunal members with evidence that is:

- *irrelevant*: evidence that does not bear directly on the issues before the tribunal, but is perhaps prejudicial
- *hearsay evidence*: an account by a person about what someone else, not present before the tribunal, said or did
- *opinion evidence*: inferences drawn on the basis of data that may not be clear or when the expertise of the person offering the opinion may be questionable
- *similar fact evidence*: evidence that invites reasoning that because something happened on a previous occasion, it is more likely that it happened on a later occasion
- *character evidence*: evidence that because a person has behaved in an improper way on a previous occasion, it is likely that they have done so again.

The rules of evidence, while on occasion technical, provide useful guidance as to what courts have regarded as information worthy of reliance.[52] The fact that they need not be applied

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50 See generally E Campbell, 'Principles of Evidence and Administrative Tribunals' in E Campbell and L Waller (eds), *Well and Truly Tried* (1982, Law Book Company, Sydney); D Giles, 'Dispensing with the Rules of Evidence' (1991) 7 *Australian Bar Review* 233.

51 See e.g. *Australian Football League v Carlton Football Club Ltd* [1998] 2 VR 546.

52 See the principles set out in *Ileris v Comcare* (1999) 56 ALD 301. For instance, in *Lipovac v Hamilton Holdings Pty Ltd* (Unreported, ACT Supreme Court, Higgins J, 13 September 1996) at [102], Higgins J noted that 'the rules relating to expert evidence at common law are largely based on good sense and fairness'. See too *Pearce v Button* (1986) 8 FCR 408 at 422; *Bannon v The Queen* (1995) 70 ALJR 25; *DPP v Christie* (1914) 10 Cr App R 141 at 164.

does not mean that they should be ignored and does not mean that they should in all cases be wholly abandoned.[53] For example, it is essential that evidence permitted before tribunals be relevant, in the sense of bearing directly on issues that have to be decided. In addition, third-hand hearsay may well have such minimal probative value that it should not be permitted.[54] Opinion evidence from persons not possessed of expertise may not be regarded as helpful. Information whose relevance is highly tangential or lacking logical probative qualities may not be regarded as advancing the fact-finding process.[55] Where a party had the opportunity to call a witness, to give evidence personally, to tender documents or other evidence, or to put them to an expert witness, but the party did not use this opportunity, this may well lead to an inference that the uncalled evidence would not have assisted their case.[56] Tribunals are not strictly bound by evidentiary rules relating to propensity or similar facts and can allow and act on material that would fall short of what would be admissible in the courts.[57] However, tribunals should be cautious in doing so. Because a person has engaged in a certain form of conduct on particular occasions does not necessarily mean that they have done so again. There is a particular risk in propensity or disposition reasoning because it can result in unfair prejudice. The yardstick used by the common law courts has been that there should be a striking similarity[58] between other prior matters and that which is the subject of the hearing before the prior matters should be taken into account. The criminal courts have gone even further, excluding similar fact evidence unless there is no rational view of the evidence consistent with the innocence of the accused.[59] A useful guideline in assessing the probative force of similar fact evidence is by reference to:

- the cogency of the evidence showing a person's 'bad disposition'
- the extent to which such evidence supports the inference sought to be drawn from it
- the degree of relevance of that inference to some fact in issue in the proceedings.

The obligation of a tribunal is to make 'every effort … to administer "substantial justice" '.[60] The major challenge for tribunal members, unconstrained by the formal rules of evidence and procedure, is to determine when information will assist sound fact-finding, as against when it will not serve a useful purpose in crystallising issues in dispute, evaluating other evidence and assessing the matters that are required to be the subject of findings of fact. Tribunals should not act on material of little probative value but significant prejudicial effect.[61]

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53 See in particular *A and B v Director of Family Services* (1996) 132 FLR 172 at 177, holding that in a curial context where a statutory provision stated that the rules of evidence need not be applied 'They should still be applied unless, for sound reason, their application is dispensed with'.

54 See *Gardiner v Land Agents Board* (1976) 12 SASR 458 at 474–75.

55 See *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 33.

56 The inference deriving from *Jones v Dunkel* (1959) 101 CLR 298 has been held to be legitimate for tribunals: see *Stasos v Tax Agents' Board of NSW* (1990) 90 ATC 4950.

57 See e.g. *Davis v Carew-Pole* [1956] 1 WLR 833.

58 See e.g. *Makin v Attorney-General* (NSW) [1894] AC 57.

59 *Pfennig v The Queen* (1995) 182 CLR 461 at 482–83.

60 *War Pensions Entitlements Tribunal; Ex parte Bolt* (1933) 50 CLR 228 at 256.

61 See *Moore v Guardianship and Administration Board* [1990] VR 902.

5.7.2. Expert evidence

Evidence by experts, namely persons possessed of specialised knowledge by reason of their skill, training or experience, constitutes an important source of information for tribunals. It is important for tribunals to ascertain, through questions posed by legal representatives or their own members, that experts possess the requisite specialised knowledge to assist the tribunal on the questions before it. While a witness may be an expert in the sense of possessing tertiary qualifications or significant experience, it does not follow that the witness has knowledge on the relevant area which will assist the tribunal. A distinction should be drawn between experts' evidence of fact and evidence of opinion.[62] It is helpful to identify with precision:

- the practical experience or knowledge held by experts
- the data upon which experts base their opinions
- what observations have been made by experts
- what tests have been undertaken by experts
- the reasoning process engaged in by experts
- whether other interpretations of test results or data could reasonably be drawn.

If experts have made assumptions these should be clarified, as should what expert witnesses regard as the reasons for the differences amongst the views expressed by different experts to the tribunal.

Tribunals are generally assisted by being able to identify the processes employed by experts to reason from the basis of data to inference, and whether different forms of reasoning from the available data could legitimately be employed.

Where expert evidence is unclear or where expert evidence or further expert evidence would assist the tribunal in its fact-finding, this can be identified by the tribunal, whereupon suitable arrangements can be made for such expert material to be located. It is prudent for tribunal members not to play a close role in interacting with such experts because of the risk that adverse inferences of influence might be drawn by a reasonable observer, leading to allegations of bias against tribunal members. However, not every interaction between a tribunal member and an expert witness outside the tribunal may give rise to the appearance of bias.[63]

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62 See generally I Freckelton and H Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy* (3rd edn, 2005, Law Book Co, Sydney). See too *Daniel v Western Australia* (2000) 178 ALR 542; *Harrington-Smith v Western Australia (No 8)* (2004) 207 ALR 483.

63 *R v Doogan; Ex parte Lucas-Smith* [2005] ACTSC 74 (Unreported, ACT Supreme Court, Higgins CJ, Crispin and Bennett JJ, 5 August 2005). See further I Freckelton and D Ranson, *Death Investigation and the Coroner's Inquest* (2006, Oxford University Press, Melbourne) ch. 17.

5.7.3. Privilege against self-incrimination

The privilege against self-incrimination applies to evidence given before tribunals and documents required to be provided to tribunals.[64] It applies to oral and documentary disclosures, not to requirements to provide a fingerprint, a breath sample, a tissue sample or to show one's face for identification.[65] It relates to natural persons, not corporations.[66] However, the privilege varies from jurisdiction to jurisdiction. In general terms, there is an entitlement on the part of witnesses in tribunals either to decline to answer questions or to provide documents, unless given protection by way of a certificate limiting the use that can be made of the answers where the answers or the provision of documentation may expose them to a criminal conviction. In general, the privilege only applies to the answers to specific questions and cannot be claimed globally. It is for the person claiming the privilege to assert it and justify its basis.

It is conventionally said that the claimant must establish a bona fide[67] apprehension of the consequence on reasonable grounds.[68] The witness's mere contention that they are at risk of prosecution is not sufficient, even though it may be made on oath and apparently be bona fide. The tribunal needs to identify from the circumstances of the matter before it, and the nature of the evidence that the witness is called upon to give, that there is a reasonable ground to apprehend danger for the witness in answering the question.[69] The risk must be real and appreciable, not a danger of an imaginary or insubstantial character, having reference to an extraordinary or barely possible contingency so improbable that no reasonable person would allow it to influence their conduct.[70] The privilege traditionally applies also to the risk of a civil penalty[71] or disciplinary proceedings.[72]

5.7.4. Legal professional privilege

Although there is conflicting authority, it is now generally accepted that legal professional privilege applies to evidence given before tribunals and documents required to be provided

64 See *Rogerson v Law Society* (NT) (1991) 1 NTLR 100.
65 *King v McLellan* [1974] VR 773; *Sorby v Commonwealth* (1983) 152 CLR 281 at 292–93; *R v Deenik* [1992] Crim LR 578.
66 See *Triplex Safety Glass Co Ltd v Lancegaye Safety Glass (1934) Ltd* [1939] 2 KB 395.
67 *Ex parte Reynolds; In re Reynolds* (1882) 20 Ch D 294; *Brebner v Perry* [1961] SASR 177; *Jackson v Gamble* [1983] 1 VR 552 at 556; *BTR Engineering (Australia) v Patterson* (1990) 20 NSWLR 724 at 730.
68 See *National Association of Operative Plasterers v Smithies* [1906] AC 434 at 438; *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380 at 441.
69 See e.g. *R v Boyes* (1861) 1 B & S 311, 121 ER 730.
70 See *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380; *Rio Tinto Corporation v Westinghouse Electric Corporation* [1978] AC 547 at 574, 579, 581, 612, 627 and 628.
71 See e.g. *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 332.
72 See e.g. *Police Service Board v Martin* (1985) 156 CLR 397.

to tribunals.[73] A person may decline to answer questions or to supply documentation to a tribunal if the subject matter relates to communications with a legal adviser which were made for the dominant purpose of obtaining or giving legal advice or for the dominant purpose of current or reasonably anticipated legal proceedings.[74] The privilege relates to three kinds of communication:

- communications between a client or the client's agents and the client's professional legal advisers, if made for the dominant purpose of the client obtaining legal advice or for contemplated legal proceedings
- communications between a client's professional legal advisers and third parties, if made for the dominant purpose of contemplated legal proceedings
- communications between a client or a client's agent and third parties, if made for the dominant purpose of obtaining advice upon pending or contemplated legal proceedings.

The Australian High Court has explained that:[75]

> The rationale of this head of privilege, according to traditional doctrine, is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor. The existence of the privilege reflects, to the extent to which it is accorded, the paramountcy of this public interest over a more general public interest, that which requires that in the interests of a fair trial litigation should be conducted on the footing that all relevant documentary evidence is available. As a head of privilege legal professional privilege is so firmly entrenched in the law that it is not to be exorcised by judicial decision.

It is common for documents to be generated for multiple purposes, so it is often necessary for the party claiming the privilege to establish that the purpose of the creation of the document or the communication was of a kind that is covered by the parameters of the privilege.

5.7.5. Receipt of additional material after the hearing

Generally, the provision of information to a tribunal hearing concludes prior to the making of submissions. On occasions, though, parties to a tribunal hearing submit additional material after the conclusion of a hearing. This is not necessarily problematic. However, it can create

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73 See *Farnaby v Military Rehabilitation and Compensation Commission* (2007) 97 ALD 788; *Comcare v Foster* [2006] FCA 6 at [38]–[39]; ALRC Discussion Paper 73, 'Client Legal Privilege and Federal Investigatory Bodies', ch. 3, 72. But see *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Market Ltd* (2006) 233 ALR 369 for the opposing view.

74 See *Esso Australia Resources Limited v Commissioner of Taxation* [1999] HCA 67.

75 *Grant v Downs* (1976) 135 CLR 674 at 685.

difficulties. Where there are two or more parties to a hearing, the tribunal needs to be careful and vigilant to ensure that the additional material, if it is to be taken into account in any way, is provided to all parties so that they can respond to it.

Should the new material be significant, or should parties seek to respond to it, the hearing may need to be reconvened for the information to be tested and/or for further submissions to be made in relation to it. However, often the obligations of procedural fairness can be satisfied by the tribunal ensuring that all parties have the additional material and that an opportunity is provided for further submissions to be made in respect of it.

References

Legislation

ACT Civil and Administrative Tribunal Act 2008 (ACT)

Administrative Appeals Tribunal Act 1975 (Cth)

Civil and Administrative Tribunal Act 2013 (NSW)

Evidence Act 2011 (ACT)

Evidence Act 1995 (Cth)

Evidence Act 1995 (NSW)

Evidence Act (NT)

Evidence Act 1977 (Qld)

Evidence Act 1929 (SA)

Evidence Act 2001 (Tas)

Evidence Act 2008 (Vic)

Evidence Act 1906 (WA)

Migration Act 1958 (Cth)

Residential Tenancies Act 1986 (NZ)

Case law

A and B v Director of Family Services (1996) 132 FLR 172

Adamou v Director-General of Social Security (1985) 7 ALN 203

Akers v Minister for Immigration and Ethnic Affairs (1988) 20 FCR 363

Appellant WABZ v Minister for Immigrations and Multicultural Affairs (2004) 134 FCR 274

Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2005] HCA 72, (2005) 225 CLR 88

Australian Associated Motor Insurers Ltd v Motor Accidents Authority of NSW (2010) 56 MVR 108

Australian Football League v Carlton Football Club Ltd [1998] 2 VR 546

Australian Postal Commission v Hayes (1989) 23 FCR 320

Bannon v The Queen (1995) 70 ALJR 25

Barrier Reef Broadcasting Pty Ltd v Minister for Post and Telecommunications (1978) 19 ALR 425

Brebner v Perry [1961] SASR 177

Brighton v Selpam Pty Ltd [1987] VR 54

BTR Engineering (Australia) v Patterson (1990) 20 NSWLR 724

Cains v Jenkins (1979) 28 ALR 219

Comcare v Foster [2006] FCA 6

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union v Abigroup Contractors Pty Ltd [2013] FCAFC 148

Coutts v Close [2014] FCA 19

Daniel v Western Australia (2000) 178 ALR 542

Davis v Carew-Pole [1956] 1 WLR 833

Dhiman v Minister for Immigration and Multicultural Affairs [1999] FCA 1291

Doepgen v Mugarinya Community Association Incorporated [2014] WASCA 67

DPP v Christie (1914) 10 Cr App R 141

Drew v Attorney-General [2002] 1 NZLR 58

Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337

Edgar and Walker v Meade (1916) 23 CLR 29

Esso Australia Resources Limited v Commissioner of Taxation (1999) 74 ALJR 339

Ex parte Reynolds; In re Reynolds (1882) 20 ch. D 294

Farnaby v Military Rehabilitation and Compensation Commission (2007) 97 ALD 788

Finch v Goldstein (1981) 4 ALD 41936 ALR 287

Freedman v Petty and Greyhound Racing Board [1981] VR 1001

Gardiner v Land Agents Board (1976) 12 SASR 458

Grant v Downs (1976) 135 CLR 674 at 685

Hamblin v Duffy (No 1) (1981*)* 3 ALD 15334 ALR 333

Harbour Inn Seafoods Ltd v Switzerland General Insurance Co Ltd (1990) 3 PRNZ 653

Harrington-Smith v Western Australia (No 8) (2004) 207 ALR 483

Heyward v Minister for Immigration and Citizenship (2009) 113 ALD 65

Hurt v Rossall (1982) 43 ALR 252

Ileris v Comcare (1999) 56 ALD 301

Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Market Ltd (2006) 233 ALR 369

Jackson v Gamble [1983] 1 VR 552

Jones v Dunkel (1959) 101 CLR 298

Kappos v State Transit Authority (1995) NSWCCR 386

King v McLellan [1974] VR 773

Kingham v Cole [(2002]) 118 FCR 289

Kioa v West (1985) 159 CLR 550

Li v Minister for Immigration and Multicultural Affairs (1997) 74 FCR 275

Lipovac v Hamilton Holdings Pty Ltd (Unreported, ACT Supreme Court, 13 September 1996)

Love v AFL Canberra Limited and the Members of the Disputes Tribunal of AFL Canberra Limited [2009] ACTSC 135

Maclean v The Workers Union [1929] 1 ch. 602

MacNab v Auburn Soccer Sports Club Ltd [1975] 1 NSWLR 54

Makin v Attorney-General (NSW) [1894] AC 57

Minister for Immigration and Citizenship v Maman (2012) 200 FCR 30

Minister for Immigration and Citizenship v Le (2007) 164 FCR 151

Minister for Immigration and Citizenship v Li (2013) 249 CLR 332

Minister for Immigration and Citizenship v SZGUR (2011) 241 CLR 594

Minister for Immigration and Citizenship v SZIAI (2009) 259 ALR 429

Minister for Immigration and Ethic Affairs v Teoh (1995) 183 CLR 273

Moore v Guardianship and Administration Board [1990] VR 902

National Association of Operative Plasterers v Smithies [1906] AC 434

O'Reilly v Firework Professionals Ltd (Unreported, District Court, Christchurch, 13 March 2001)

O'Rourke v Miller (1985) 156 CLR 342

Ostreicher v Secretary of State for Environment [1978] 1 WLR 810

Patricia Hudson and Child Support Registrar [1998] AATA 863 (28 October 1998)

Pearce v Button (1986) 8 FCR 408

Pfennig v The Queen (1995) 182 CLR 461 at 482–3

Police Service Board v Martin (1985) 156 CLR 397

*Prasad v Minister for Immigration and Ethnic Affairs (*1985) 6 FCR 155 at 169

Pyneboard Pty Ltd v Trade Practices Commission (1983) 152 CLR 328 at 332

R v Boyes (1861) 1 B & S 311, 121 ER 730

R v Brighton and Area Rent Tribunal; Ex parte Marine Parade Estates 1936 Ltd [1950] 2 KB 410

R v Deenik [1992] Crim LR 578

R v Doogan; Ex parte Lucas-Smith [2005] ACTSC 74 (Unreported, Australian Capital Territory Supreme Court, Higgins CJ, Crispin and Bennett JJ, 5 August 2005)

R v Optical Board of Registration; Ex parte Qurban [1933] SASR 1

R v Thames Magistrates' Court; Ex parte Polemis [1974] 1 WLR 1371

R v Visiting Justice at Pentridge Prison; Ex parte Walker [1975] VR 883

R v Watson; Ex parte Armstrong (1976) 136 CLR 248

Rank Film Distributors Ltd v Video Information Centre [1982] AC 380

Re Macquarie University; Ex parte Ong [1980] VR 449

Re Pochi and Minister for Immigration and Ethnic Affairs (1979) 2 ALD 33

Rio Tinto Corporation v Westinghouse Electric Corporation [1978] AC 547

Rogerson v Law Society (NT) (1991) 1 NTLR 100

Smith v Aldrich (1993) QCA 253 (Unreported, Queensland Court of Appeal, Pincus, Davies and McPherson JJA, 9 July 1993)

Sorby v Commonwealth (1983) 152 CLR 281

Stasos v Tax Agents' Board of NSW (1990) 90 ATC 4950

SZJBA v Minister for Immigration and Citizenship (2007) 164 FCR 14

SZMYO v Minister for Immigration and Citizenship [2011] FCA 506

Tickner v Bropho (1993) 114 ALR 409

Triplex Safety Glass Co Ltd v Lancegaye Safety Glass (1934) Ltd [1939] 2 KB 395

Tucker v Minister for Immigration and Citizenship [2011] FCAFC 16

Videto v Minister for Immigration and Ethnic Affairs (1985) 8 FCR 167

Wajnberg v Raynor [1971] VR 665

War Pensions Entitlements Tribunal; Ex parte Bolt (1933) 50 CLR 228

Weinstein v Medical Practitioners Board of Victoria (2008) 21 VR 29

Books

N Bedford and R Creyke, *Inquisitorial Processes in Australian Tribunals* (Australasian Institute of Judicial Administration, 2006)

R Creyke, J McMillan, and M Smyth *Control of Government Action* (4th edn, 2015, LexisNexis)

JRS Forbes, *Justice in Tribunals* (4th edn, 2014, Federation Press, Sydney)

I Freckelton and D Ranson, *Death Investigation and the Coroner's Inquest* (2006, Oxford University Press, Melbourne)

I Freckelton and H Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy* (3rd edn, 2005, Law Book Co, Sydney)

S Hale, *Interpreter Policies, Practices and Protocols in Australian Courts and Tribunals: A National Survey* (Australasian Institute of Judicial Administration, 2011) <http://www.aija.org.au/online/Pub%20no89.pdf> at January 2017.

Reports

Administrative Review Council, *A Guide to Standards of Conduct for Tribunal Members* (2nd edn, 2009) <http://www.arc.ag.gov.au/Documents/GuidetoStdsofConduct-RevisedAug2009.pdf > at January 2017

ALRC Discussion Paper 73, *Client Legal Privilege and Federal Investigatory Bodies* (ALRC, 2007)

Commonwealth, *Final Report of the Committee on Administrative Discretions*, Parl Paper No 316 (1973)

Judicial Commission of NSW, *Equality before the Law Bench Book* (Judicial Commission of NSW, Sydney, 2006)

Guides

Administrative Appeals Tribunal, *Interpreters*, <http://www.aat.gov.au/steps-in-a-review/overview-of-the-review-process/interpreters> at January 2017

NSW Civil and Administrative Tribunal, *Interpreters and Translators*, <http://www.ncat.nsw.gov.au/Pages/going_to_the_tribunal/access_support/interpreters_and_translators.aspx> at January 2017

Judicial Council on Cultural Diversity, *Draft Australian National Standards for Working with Interpreters in Courts and Tribunals*, <http://jccd.org.au/wp-content/uploads/2016/06/National_Standards_for_Working_with_Interpreters_in_Courts_and_Tribunals_-_Final_Consultation_Version_June_2016.pdf> at January 2017

Journal articles and book chapters

E Campbell, 'Principles of Evidence and Administrative Tribunals' in E Campbell and L Waller (eds), *Well and Truly Tried* (1982, The Law Book Company, Sydney)

R Creyke, 'Inquisitorial Practice in Australian Tribunals', (2006) 57 *Admin Review* 16

R Creyke, 'Pragmatism v Policy: Attitudes of Australian Courts and Tribunals to Inquisitorial Process' Ch 2 in L Jacobs and S Baglay (eds) *Inquisitorial Processes in Administrative Regimes: Global Perspectives* (Ashgate Publishing Ltd, 2013)

J Dwyer, 'Overcoming the Adversarial Bias in Tribunal Proceedings' (1991) 20 *Federal Law Review* 252

D Giles, 'Dispensing with the Rules of Evidence' (1991) 7 *Australian Bar Review* 233

M Groves, 'The Imaginary Observer of the Bias Rule' (2012) 19 *Australian Journal of Administrative Law* 203

M Groves, 'The Duty to Inquire in Tribunal Proceedings' (2011) 33 *Sydney Law Review* 7

G Osborne, 'Inquisitorial Procedure in the Administrative Appeals Tribunal — A Comparative Perspective' (1982) 13 *Federal Law Review* 150

D C Pearce, 'The Australian Government Administrative Appeals Tribunal' (1976) 1 *University of New South Wales Law Journal* 193

N Rees, 'Procedure and Evidence in 'Court Substitute' Tribunals', (2006) 28 *Australian Bar Review* 41

E Richardson, T Sourdin and N Wallace, *Self-Represented Litigants Literature Review* (ACCJSI, Monash University, 2012) <http://www.law.monash.edu.au/centres/acji/projects/self-represented-litigants/self-rep-litigant-lit-review-accjsi-24-may-2012.pdf> at January 2017

E Richardson, T Sourdin and N. Wallace, *Self-Represented Litigants: Gathering Useful Information, Final Report* (ACJI, Monash University, 2012) <https://www.ag.gov.au/LegalSystem/Documents/2012%20Report%20Self-Represented%20Litigants%20Report%20-%20Gathering%20Useful%20Information%20Monash%20University.PDF> at January 2017

T Sourdin and N Wallace, *The Dilemmas Posed by Self-represented Litigants — The Dark Side* (ACCJI, Monash University, 2014) <http://www.civiljustice.info/cgi/viewcontent.cgi?article=1031&context=access> at January 2017

M Smyth, 'Inquisitorial Adjudication: The Duty to Inquire in Merits Review Tribunals' (2010) 34 *Melbourne University Law Review* 230

Chapter Six: Decision-Making

6.1. Key issues

Decision-making processes:

- Where appropriate, threshold legal questions should be determined as preliminary questions.
- Decisions by multi-member tribunals should be unanimous and, if not, by majority.
- Subject to the terms of the statute, merits review is contemporaneous review, based on the facts and law before the tribunal.
- The tribunal should state the reasons for making findings of fact on material issues.
- In general, there is no formal onus of proof in tribunal hearings. The tribunal is usually required to be 'satisfied' of its decision. Generally this is reached on the balance of probabilities. Where serious allegations are made, the *Briginshaw* standard may apply.

Reasons:

- Tribunals are generally required by statute to give reasons for their decisions. Giving reasons for decisions reflects the values of transparency and accountability that permeate administrative law.
- Reasons, whether oral or in writing, should contain sufficient information for a losing party to understand (although not necessarily accept) the outcome.
- Reasons should be extensive enough for a dissatisfied party to exercise their appeal or review rights and for the higher body to be able to understand the factual and legal bases of the tribunal's decision, as well as its reasoning processes.
- Reasons should include:
  - findings on material questions of fact, such as credibility or differing accounts of incidents
  - identification of the sources of evidence and information upon which such findings rely
  - brief reference to the law, rule, policy or principle applicable to significant issues before the tribunal
  - a logical statement of the reasoning process engaged in by the tribunal, showing the connection between facts, legal principles and the decision arrived at

  - the actual decision of the tribunal.
- In general, it is not necessary to refer specifically in reasons for a decision to information if such disclosure would reveal confidential, dangerous or privileged information.

Costs and other orders:

- Some tribunals have a power to order costs. Depending upon the tribunal, the practice may be for costs to coincide with the successful party. Alternatively, the award of costs may depend upon considerations set out in the legislation governing the tribunal.
- A tribunal should only make orders within the express terms allowed for orders within its enabling legislation. Creative orders outside the terms of such legislative provisions are fraught with risk.

6.2. Decision-making processes

Tribunals are obliged to make their decisions in ways which are comparable with those of courts, namely, on the basis of information properly presented and available for testing and upon which submissions can be made by a person potentially adversely affected.

Decision-making should not take place on the basis of prejudice or preconceived views.

Tribunals generally are empowered to act without being constrained by formalities of evidence and procedure and to provide a mechanism 'that is fair, just, economical, informal and quick'.[1] However, this does not provide a licence for reasoning processes that are substandard, intellectually deficient or unreasonable. Nor does it allow a tribunal to take into account irrelevant considerations, ignore relevant considerations or fail to reveal its fundamental reasoning.

6.2.1. Determination of preliminary questions

On occasions, threshold legal arguments are placed before tribunals which require them to consider matters such as:

- whether there is a reviewable decision
- whether a person claiming to be a party should be accorded party status
- the interpretation of enabling legislation
- the application of the rules of natural justice.

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1 See e.g. *Administrative Appeals Tribunal Act 1975* (Cth), s 2A.

Such matters need to be dealt with as preliminary matters, as they logically precede the issues of fact which may or may not need to be determined, depending upon the threshold decision of the tribunal.

Preliminary matters generally are questions of law. Tribunals cannot authoritatively determine questions of law in the same way as a court. However, they are entitled, and often have a duty, to determine questions of law for the purpose of guiding themselves to make a lawful decision. In general, tribunals cannot make decisions about the constitutional validity of statutes.[2] However, a tribunal should consider the constitutional validity of legislation in order to determine whether or not it has jurisdiction, and if it considers that the legislation is unconstitutional, it should decline to exercise the jurisdiction purportedly conferred on it by that legislation: *Re Walsh and Commissioner of Taxation* (2012) 130 ALD 200 at [19] per Deputy President Jarvis. The question of whether a tribunal can determine whether a legislative instrument is beyond power) has not finally been determined.[3]

6.2.2. Decisions by majority

The decisions of multi-member tribunals are usually unanimous. However, there is no legal requirement to this effect.[4] Where there is division of view, there are a number of ways in which differences can be resolved. On some bodies, for instance, there is a statutory provision that a casting vote of the presiding member breaks a deadlock. On others, a simple majority will determine the outcome. The member who is in the minority, in many tribunals, can provide the reasons for their dissent in writing. Sometimes it can be confusing for persons appearing before tribunals if tribunals are unable to come to decisions that exhibit a common approach. Multi-member panels should expend significant efforts to attempt to reach a joint position or, at least, to isolate the issues upon which they disagree.

In such instances, there will be a majority decision and a dissenting decision. The status of each should be clear. A majority decision should indicate that that is its status. A dissenting decision should:

- refer to the majority decision of the tribunal
- explain where the points of disagreement lie
- state the decision which the dissenter would have reached
- articulate clearly the reasons for the different approach.

It can be helpful for a dissenting decision to commence with words such as, ‘I have read the decision of the majority and I agree with it, save that …’.

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2 *Re Adams and the Tax Agents’ Board* (1976) 1 ALD 251.

3 See *Re Jonsson and Marine Council (No 2)* (1990) 12 AAR 323; *Re Neviskia Pty Ltd and Department of Health and Aged Care* (2000) 32 AAR 129; *Radio 2UE Sydney Pty Ltd v Burns (EOD)* [2005] NSWADTAP 69.

4 *Owen-James v Delegate of the Director-General of the Department of Health* (1992) 27 NSWLR 457.

There are two circumstances in which there can be a division of approach, namely, in regard to the:

- outcome of the case
- reasoning which leads to the outcome.

Tribunal members should record their dissent when they are of the view that the outcome should have been different from that which other members of the tribunal in the case have determined. However, when the difference consists 'only' of the reasoning process by which the ultimate decision is arrived at, the need for the recording of a separate decision may not be so compelling.

A tribunal member who dissents should ensure that they do not sign the majority decision.

6.2.3. Timing issues

Generally, a decision comes into effect when it is published. However, there is an exception when an appellate tribunal varies or sets aside a decision under review and substitutes a decision that may have effect from the date on which the first instance decision had effect. Another exception occurs when it is the will of the tribunal that the decision take effect from a date in the future—for instance, when a health practitioner has been able to effect closure of a therapeutic relationship. The date of effect of a decision ought to be clearly stipulated.

In general, an administrative tribunal that makes primary decisions or undertakes merits review of decisions is required to apply the law that is in force at the date that it makes its decision.[5] Put another way, the tribunal applies the current law, not the law that was in force at the date of the primary decision or the date on which a prior event or incident occurred. However, this is subject to two exceptions:

- where a statute expressly or impliedly requires a tribunal to apply the law that was in force at an earlier date—for example, where an appeal is limited to the question of whether the primary decision breached a procedure
- where the matter involves accrued rights or liabilities.

Take, for example, the following scenario. Q applies for a pension on 30 June 2010 and is refused in error. On 1 September 2010 an amendment comes into operation that restricts qualifications for the pension. Q would not qualify if she applied under the new provisions, and the amending Act gives no indication that it applies retrospectively. Q's rights accrued when she was eligible for the pension and applied for it. A tribunal hearing her appeal would be required to apply the provisions in force at the date of her application.

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5 See *Re Smith and Defence Force Retirement and Death Benefits Authority* (1978) 1 ALD 374; *Kavvadias v Commonwealth Ombudsman* (1984) 1 FCR 80; *Esber v Commonwealth* (1992) 174 CLR 430.

6.2.4. Formal requirements of a decision

A decision needs to contain a number of formal elements—foundation or preliminary issues, substantive findings on issues of evidence etc. and the decision and orders of the tribunal. It should record clearly each of these three elements and their component parts:

Foundation or preliminary issues

- when and where the hearing took place
- the names of the persons who sat on the hearing
- where there is a decision under review, what that decision was, who made it and when it was made
- the key statutory provisions applicable to the decision
- the identity of the applicant and the respondent (if there is one) before the tribunal
- the identity of the main persons who provided information to the tribunal
- whether, and if so, by whom, the applicant and the respondent (if there is one) were represented.

Relevant evidence, findings and reasoning

- important information taken into account by the tribunal
- the findings of fact made by the tribunal
- the reasoning of the tribunal.

Decision and orders

- the actual decision of the tribunal
- any orders made by the tribunal.

The basic details relating to the matter such as the names of the parties, the tribunal member(s) deciding the matter, the date(s) of the hearing and the actual decision or orders are set out on a cover sheet or at the end of the reasons. To assist with this process, many tribunals have developed pro formas or templates for their decisions. The use of templates, however, should never interfere with the independent reasoning and fact-finding process of members.

In his analysis of best practice in drafting tribunal decisions, Justice Downes states that reasons should be clear, comprehensible, concise, cogent and complete. Reasons should:

- identify the issues and set out the essence of the case at the start
- state the facts rather than engage in narrative
- contain nothing irrelevant to the decision

- follow a logical reasoning process.[6]

6.2.5. Delays in handing down decisions

Waiting for decisions can be stressful for persons with an interest in their outcome. It is important for tribunals to be sensitive to such matters and for decisions to be given promptly after the conclusion of the provision of information and/or the giving of evidence and submissions.[7] In addition, some tribunals are obliged by statute to deliver their decisions within a specified timeframe. If such timeframes are not complied with or if there is an inordinate delay in giving a decision or reasons for a decision, a superior court may grant an order compelling the tribunal to give a decision or reasons for a decision.[8] Decisions are most easily written when matters are fresh in members' minds and before the passage of time confuses impressions and perceptions about evidence.[9] Commitment to formalising decisions within a short timeframe works against writing blocks and bank-up of decision-making responsibilities.

Strategies for writing decisions promptly include:

- use of standard paragraphs (usually setting out the legislation, policies and questions to be decided) and standard orders[10]
- starting the preparation of the statement of reasons before or during the hearing by inserting information such as names of parties, the legislation and so on
- using a standard cover sheet which includes dates, names of members and so on, and which can be prepared by tribunal staff
- keeping records of proposed findings of fact and assessments of witnesses to assist when recollections fade with the passage of time when writing-up of reasons is undertaken.

6.2.6. Burden and standard of proof

In general, the onus, or burden, of proving an assertion rests on the balance of probabilities with the party making a claim. However, in many proceedings before tribunals it is not appropriate to view the matter on the basis of burdens of proof. The question may simply be whether the tribunal is satisfied that a matter is established. The tribunal bears the

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6 Justice G Downes, 'Best Practice in Drafting: How to Draft Reasons for Decision as Efficiently and Effectively as Possible – Techniques for Structure, Organisation and Coverage of Essential Issues' <http://www.aat.gov.au/AAT/media/AAT/Files/Speeches%20and%20Papers/ExcellenceinDecisionMakingSeminarOctober2010.pdf> at January 2017.

7 See Justice M Kirby, 'On the Writing of Judgments' (1990) 64 *Australian Law Journal* 691; Justice M Kirby, 'Ex Tempore Judgments—Reasons on the Run' (1995) 25 *Western Australian Law Review* 213, 214.

8 Such an order would be by way of prerogative relief: mandamus or an order in the nature of mandamus to compel performance. An example is *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 80 ALJR 367.

9 *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 80 ALJR 367.

10 This has been held to be legitimate: see *Lek v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 43 FCR 100. However, the member must engage in their own independent fact-finding and reasoning process.

responsibility of being reasonably satisfied on each component issue. The standard of proof, or level of evidence, required for such satisfaction is generally considered to be 'on the balance of probabilities'—whether it is established that something is more probable than not, more likely than not.[11]

However, there is an important qualification in this regard. Although our law knows only two standards of proof—beyond reasonable doubt and on the balance of probabilities—where serious allegations are made, the gravity of the assertion requires a higher level of proof than 'mere balance of probabilities'. As Latham CJ put it in *Briginshaw v Briginshaw*:[12]

> There is no mathematical scale according to which degrees of certainty of intellectual conviction can be computed or valued. But there are differences in degree of certainty, which are real, and which can be intelligently stated, although it is impossible to draw precise lines, as upon a diagram, and to assign each case to a particular subdivision of certainty. No court should act upon mere suspicion, surmise or guesswork in any case. In a civil case, fair inference may justify a finding upon the basis of preponderance of probability. The standard of proof required by a cautious and responsible tribunal will naturally vary in accordance with the seriousness or importance of the issue.

Justice Dixon[13] framed the test similarly:

> The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality.
>
> No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes. Fortunately, however, at common law no third standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences.

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11 See the principles set out succinctly in *Repatriation Commission v Smith* (1987) 15 FCR 327; *McDonald v Director-General of Social Security* (1984) 1 FCR 354.

12 *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 343–44; *Barten v Williams* (1978) 20 ACTR 10; *Re Sutherland* [1994] 2 NZLR 242 (HC) at 251 (Barker ACJ).

13 ibid. 361–62.

Where an allegation of criminal activity (such as fraud) is made, it is ordinarily not appropriate for a tribunal to make a finding that a person has committed a crime, unless such a finding is a necessary component of the tribunal's reasoning. Ordinarily, such language should be avoided where possible, lest it appear that a tribunal is purporting to decide on collateral matters such as criminal guilt. It is quite permissible on occasion to make factual findings that amount to a finding of the commission of a criminal offence as long as the finding is not phrased as though the tribunal were a criminal court. Since the finding, although not expressed in criminal law language, is tantamount to a finding of commission of crime, a tribunal can only make such a finding where it is very confident that the facts underpinning the finding are established. See the recent approach of the High Court in *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352 and the discussion in *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625.

The President of the Administrative Appeals Tribunal has addressed the applicability of onus of proof and rules of evidence to the AAT in detail in Justice D Kerr, 'A Freedom to be Fair' (2013, AGS Symposium, Excellence in Government Decision-making) <http://www.aat.gov.au/AAT/media/AAT/Files/Speeches%20and%20Papers/FreedomToBeFair21Jun2013.pdf> at January 2017.

6.2.7. Using tribunal knowledge

Tribunal members should make decisions based upon the information placed before them. In general, while tribunal members can draw upon their general knowledge as members of the community, or the specialist expertise they bring to the tribunal, fact-finding specific to the particular case before the tribunal should come from information made available during the hearing. If it was clearly foreseeable that non-legal materials would be used in decision-making from the way in which the hearing was conducted, such matters can be relied upon. However, it is unfair and a breach of the rules of natural justice if information (other than legal authorities) is relied on by a decision-maker which was not foreseen by or known to the parties.

Personal knowledge or expertise may be used in assessing the information presented to a tribunal or to assist in the questioning of witnesses. However, such knowledge or expertise should not form a basis for decision-making unless the facts are so commonly known that they are within the awareness of the general community or they are capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy.[14] Tribunals should only rely on matters canvassed during the hearing or, if tribunal members propose to use other materials, they should signify that intention in such a way that the materials are made available to parties before the tribunal and they are enabled at least to make submissions in relation to the materials. It is legitimate for tribunal members to rely upon other decisions, published policies, scholarly writings or specific information, provided that they were made available during the hearing or floated as a possibility in the

14 In the courts, this concept is known as 'judicial notice'; in tribunals 'official notice'.

course of the hearing. Tribunal members can cite a legal commentary or case authority in answer to a legal issue even though that source was not mentioned in the hearing. However, if the discovery of such a commentary or decision was not canvassed at all at the hearing, there are occasions when the hearing should be reconvened to enable a party or parties to make submissions in relation to its applicability to the decision to be made by the tribunal.

6.2.8. Structuring decision-making

It is good practice to structure the decision-making process so as to separate its constituent parts. Questions that can be useful for this exercise are:

- what is the decision under review or the nature of the application?
- what is its procedural history?
- what decision or order is the applicant seeking?
- what is the statutory test that must be applied?

Sometimes, the power exercised by a tribunal is discretionary. If so, it is helpful to identify the factors that are relevant to the exercise of the discretion. Often it is worthwhile to detail them. This can be done by reference to prescribed statutory criteria that may or may not be exhaustive. They may also be inclusive. This allows latitude for the use of other criteria, as long as they are consistent with the statutory objects and purposes of the tribunal and its functions. On occasion, decisions of courts or other tribunals will give guidance, as may administrative policies. However, such policies should not unduly fetter the exercise of the tribunal's discretion.

It is generally helpful to identify the matters on which findings of fact need to be made. Whether or not a fact is a *material* one will depend upon an analysis of the relevant law. In administrative proceedings, the material facts are those on which the existence and exercise of the relevant powers depend. They are to be identified by analysis of the appropriate legislative provisions.

A *material fact* may involve an element of judgment or discretion (for example, that the circumstances causing severe financial hardship were 'reasonably foreseeable' to the applicant). The information that is relevant needs to be identified and applied to make a finding on the material facts. This analysis should be part of the case preparation before the hearing.

Raymond has emphasised the need for decision-making to avoid 'rambling through facts and allegations without distinguishing the credible from the implausible'.[15] He refers to bad decision-making as:

- switching constantly from one party's version to the other's

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15 JC Raymond, 'The Architecture of Argument' (2004) 7 *The Judicial Review* 39, 42–43.

- simply reproducing the evidence given instead of analysing it
- meandering from one argument to another in a 'stream of consciousness' style rather than in an orderly sequence.

Raymond argues that the following seven steps are helpful for organising a decision, even if the case is complex:

- identify and partition the issues
- prepare a LOPP (losing party's position)/FLOPP (flaw in losing party's position) analysis for each issue
- arrange the analysis of issues like rooms in a house in which each room follows from another in a straight line leading from the front verandah to the back verandah
- prepare an outline with case-specific headings
- write a beginning
- write an ending
- review the draft decision with a checklist.

6.2.9. Making findings of fact

The evidence or other information upon which findings on material questions of fact are based should be referred to. Reasons should show that a finding of fact is rationally based upon identifiable evidence, otherwise an inference may be drawn that it was based on 'mere' speculation.[16] Findings of fact are an exercise in judgment in which a decision-maker sifts and weighs various sources of evidence and makes conclusions or draws inferences.[17] Reasons should identify the evidence considered in relation to facts which the decision-maker considered material.[18]

6.2.10. Assessing credibility

Assessment of the truthfulness and reliability of witnesses' accounts is a fundamental role of tribunal decision-making. Tribunal members should be aware of the consequences for witnesses of adverse findings about their credibility. If such findings are made on limited evidence and there have been few chances for the decision-maker to assess witnesses' behaviour properly, there is the potential for considerable unfairness. If the issue before a tribunal can be determined reliably without making 'findings which will be extremely hurtful to one or other of the contending sides, and which depend on estimates of credibility

16 See *Minister for Immigration v Pochi* (1980) 4 ALD 139 at 159–60.
17 See *Ansett Transport Industries (Operations) Pty Ltd v Taylor* (1987) 18 FCR 498.
18 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323.

that have to be formed on a very limited view of the persons whose credit is in question', it can be preferable not to make them.[19]

Close observation of the demeanour of a witness tested by probing questions (such as competent cross-examination) is an aid to reliable decision-making. If a witness is unable to advance a coherent narrative and varies their story in an effort to avoid inconvenient questions, this may prompt doubt as to the witness's truthfulness.[20]

However, undue reliance should not be placed on observations of a witness's demeanour. For instance, Samuels JA has commented:

> The cases seem to treat as axiomatic the proposition that a trial judge can reliably assess the credibility of a witness simply on the basis of their demeanour in the witness box. But it should not be taken for granted. Indeed, recent scientific studies cast doubt on the correctness of this view … One might well agree with Lord Atkin in *Société d'Avances Commerciales (Société Anonyme Egyptienne) v Merchants' Marine Insurance Co (The 'Palitana')* (1924) 20 L1 L Rep 140 at 142 that 'an ounce of intrinsic merit or demerit in the evidence, that is to say, the comparison of evidence with known facts, is worth pounds of demeanour' … Nevertheless, I think it too late in the day to deny the truth of the axiom that forms the basis of a considerable body of jurisprudence. It may be a fiction, but it has the sanction of long-established authority.[21]

This passage was referred to by the High Court in 2003 in *Fox v Percy*[22] where Gleeson CJ, Gummow and Kirby JJ went on to say:

> Considerations such as these have encouraged judges, both at trial and on appeal, to limit their reliance on the appearances of witnesses and to reason to their conclusions, as far as possible, on the basis of contemporary materials, objectively established facts and the apparent logic of events. This does not eliminate the established principles about witness credibility; but it tends to reduce the occasions where those principles are seen as critical.

Where there are incontrovertible facts at odds with the evidence of an apparently convincing witness, logic dictates that the incontrovertible facts prevail over the appearance or demeanour of the witness. There can be a range of reasons unconnected with truthfulness as to why people may appear to be evasive, unconfident or even deceptive. There is no straightforward key to detecting lying or unreliability.[23] Non-verbal cues can be particularly prejudicing and it is important for tribunal members to be cautious in applying their own prejudices to the process of evaluation of evidence. It is helpful to attempt to:

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19 *R v Amad* [1962] VR 545 at 550.

20 See e.g. *Devries v Australian National Railways Commission* (1993) 177 CLR 472 at 479.

21 *Trawl Industries v Effem Foods Pty Ltd* (1992) 27 NSWLR 326 at 348.

22 (2003) 214 CLR 118 at 128–29.

23 See A Vrij, *Detecting Lies and Deceit: The Psychology of Lying and the Implications for Professional Practice* (2000, John Wiley, Chichester, New York).

- analyse evidence on its merits, setting aside the identity of the person who has given it
- factor into the evaluation what is known about the witness's cultural, economic, educational and social background, characteristics and potential motives for unreliability
- come to a decision based on only the evidence that is placed before the tribunal
- ignore extraneous information
- be cautious about assumptions of accuracy and unreliability on the part of witnesses
- be wary of concluding that a witness has lied by virtue of factors such as body language and demeanour
- identify one's own emotional responses, and attempt to place them to one side
- remain conscious of the standard of proof.

In addition, it is significant for an assessment of veracity and credibility that witnesses sometimes tell the truth about some matters and not others.

When there is more than one account about a material issue, the task for tribunal members is not simply to decide which account they prefer but to determine whether they are satisfied that one of the accounts is correct. If they are not, then it is proper not to accept the account of either witness.

6.2.11. Evaluating expert information

Most tribunals receive expert evidence. It may be in the form of evidence of fact or evidence of opinion. This was explored in Chapter Five. Insofar as it is evidence of fact, it should be treated in the same way as other forms of information about what people have done, seen, heard or otherwise perceived. Insofar as it is evidence of speculation, purporting to be expert opinion, it should be accorded little if any weight.[24] Insofar as it is evidence of opinion, it falls into a special category of information. It need not be accepted by the tribunal. Provided it assists the tribunal, it can be accepted in whole or in part. If it seems flawed to the tribunal, or if its bases are unacceptable or the reasoning unconvincing, it can be rejected.[25] This is so even if there is no other evidence on the subject. It can be helpful for tribunal members to:

- reflect upon the level of relevant expertise of the expert (for example, clinical expertise or in relation to a particular industry)
- identify the factual bases of expert opinions
- consider whether the bases are sufficient and, if sampling is involved, whether it is fair and representative
- assess the appropriateness of any tests employed by the expert

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24 See *HG v The Queen* (1999) 197 CLR 414.
25 See e.g. *Middleton v The Queen* (2000) 114 A Crim R 258 at 270–72.

- consider whether other tests might have been employed
- evaluate whether the tests undertaken necessarily give rise to the inferences drawn from them
- determine whether other inferences might have been drawn
- assess whether the expert appeared neutral, non-partisan and focused on assisting the tribunal, rather than advancing the cause of a party before the tribunal.

6.2.12. Weighing evidence

Justice Peter Young has advanced the following practical suggestions in relation to weighing evidence:[26]

1. The usual is more likely to be what occurred than the unusual.
2. A witness whose evidence suffers from no internal inconsistency is more likely to be correct than a person whose evidence cannot be so ranked.
3. A witness whose evidence is consistent with the other witnesses is likely to be correct.
4. The witness whose evidence is consistent with the documents is more likely to be correct.
5. Do not think that there exists an innate ability to spot a fraud or a liar. Try not to judge a case wholly on observations of demeanour.
6. All observation evidence needs to be examined in the light of the opportunity to observe, so that distance, position, light and amount of time available to observe are important.
7. Many witnesses will lie when the matter is vital or when they think they can escape detection.
8. Do not be misled by advocates' tricks.
9. Sometimes one unassailable piece of evidence will reveal where the true facts fall.
10. Take into account cultural or other characteristics that operate on the witness. Watch the forces that are likely to influence the witness in formulating the evidence.
11. Just because a witness says that something is not so and is shown to be a liar, this does not establish that that something is so.
12. Beware of counsel gaining such sympathy for a party that one begins to see life through that party's eyes.

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26 See Justice P Young, 'Fact Finding' (1998) 72 *Australian Law Journal* 21, 21–22; see too Justice J Douglas, 'How Should Tribunals Evaluate the Evidence?' (Paper presented to the 7th Annual AIJA Tribunals Conference, Brisbane, 11 June 2004).

13. Formal rules such as *Browne v Dunn*[27] and *Jones v Dunkel*[28] may provide the solution. The rule in *Browne v Dunn* is explored in Chapter Three and provides that where a party intends to contradict testimony given by a witness, it should give the witness an opportunity to comment by putting the substance of the contradictory version to the witness in cross-examination. *Jones v Dunkel* deals with the adverse inferences that may be drawn from the failure to give or call evidence.

14. The truth can sometimes be inferred from the fact that a witness has not said something or that counsel has not asked the question.

6.3. Reasons

6.3.1. Need for reasons

It is a legitimate entitlement of persons appearing before a tribunal that they will receive reasons for the tribunal's decision so that they can understand a decision in a matter affecting their interests. Giving reasons for decisions underpins the values of transparency and accountability that permeate administrative law.[29]

As Justice McHugh noted in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palm*e (2003) 216 CLR 212 at [105]:

> The rationale of the obligation to provide reasons for administrative decisions is that they amount to a "salutary discipline for those who have to decide anything that adversely affects others". They encourage "a careful examination of the relevant issues, the elimination of extraneous considerations, and consistency in decision-making". They provide guidance for future like decisions. In many cases they promote the acceptance of decisions once made. They facilitate the work of the courts in performing their supervisory functions where they have jurisdiction to do so. They encourage good administration generally by ensuring that a decision is properly considered by the repository of the power. They promote real consideration of the issues and discourage the decision-maker from merely going through the motions. Where the decision effects the redefinition of the status of a person by the agencies of the State, they guard against the arbitrariness that would be involved in such a redefinition without proper reasons. By giving reasons, the repository of public power increases "public confidence in, and the legitimacy of, the administrative process".

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27 (1894) 6 R 67; see too *Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation* [1983] 1 NSWLR 1 at 16.

28 (1959) 101 CLR 98.

29 Administrative Review Council, *Best Practice Guide 4, Decision Making: Reasons* (2007) <http://www.arc.ag.gov.au/Publications/Reports/Pages/Downloads/ARCBestPracticeGuide4Reasons.aspx> January 2017.

On occasions oral reasons will be sufficient, but often a party will have a right to written reasons. Usually the duty to provide reasons will arise from legislation. Most tribunals are under a legislative obligation to give reasons on request. The obligation may be to provide reasons orally or in writing or both. There is no common law right to reasons unless there are 'special circumstances'.[30] It is probable that a tribunal can decline to give reasons only if:

- no interests are affected by its decision or
- the decision is not reviewable or
- reasons have already been given or
- (sometimes) the request is not in writing or
- (questionably) legislation does not require the giving of reasons or
- the request is out of time.[31]

6.3.2. Adequacy of reasons

In general, more is expected in reasons by tribunals, particularly those constituted by members with legal qualifications, than is expected of primary decision-makers.[32] Reasons, whether oral or in writing, should contain sufficient information for a losing party to understand (although not necessarily accept) the outcome.[33] Further, reasons should be extensive enough for a dissatisfied party to exercise their appeal or review rights and for the higher body to be able to understand the factual and legal bases of the tribunal's decision, as well as its reasoning processes.[34] The exposure of tribunals' reasoning is also important in engendering confidence in the community that decision-makers have gone about their task appropriately and fairly.[35] Justice Finn in *Comcare v Parker*[36] commented that the adequacy of reasons 'will depend upon the circumstances of the case. But the reasons will be inadequate

30 See *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656; *Sherlock v Lloyd* (2010) 27 VR 434, 438; *Hancock v Executive Director of Public Health* [2008] WASC 224; *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480.

31 See Administrative Review Council, *Practical Guidelines for Preparing Statements of Reasons* (2002) <http://www.arc.ag.gov.au/Documents/arcguidelinesnew.pdf> January 2017.

32 *Dodson v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 31 FCR 451 at 465; see also *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 291 (Kirby J).

33 See *Comcare v Lees* (1997) 151 ALR 647.

34 See Justice A Goldberg, 'When are Reasons for Decision Considered Inadequate?' (2000) 24 *AIAL Forum* 1; W Martin, 'The Decision-maker's Obligation to Provide a Statement of Reasons, Fact and Evidence: the Law' (1999) 51 *Admin Review* 19; T Thawley, 'An Adequate Statement of Reasons for an Administrative Decision' (1996) 3 *Australian Journal of Administrative Law* 189; P Bayne, 'The Inadequacy of Reasons as an Error of Law' (1992) 66 *Australian Law Journal* 302; *Ansett Transport Industries (Operations) Pty Ltd v Wraith* (1983) 48 ALR 500 at 507 (Woodward J).

35 Administrative Review Council, *Commentary on the Practical Guidelines for Preparing Statements of Reasons* (2002).

36 [1996] FCA 1670 (Unreported, Federal Court of Australia, 2 August 1996).

if (a) the appeal court is unable to ascertain the reasoning upon which the decision is based or (b) justice is not seen to have been done'.[37] Reasons should be:

- comprehensible for parties appearing before a tribunal and, on occasions, for the public[38]
- written for their audience, having regard to the objective of tribunals to be simple, affordable, timely and fair[39]
- concisely written without lengthy reproductions of the evidence[40]
- written in a logical sequence, not a stream of consciousness[41]
- capable of a logical explanation.[42]

An issue for tribunals where there are multiple members is the degree of involvement that each member should have in the reasons. The fundamental principle is that the reasons must be those of each member (subject to any dissent). It follows that it is inappropriate and an abrogation of their responsibilities for tribunal members unquestioningly to adopt the draft of other members.

It is legitimate for standard sentences or paragraphs to be used across decisions (particularly as to the explanation of matters such as legal tests), provided that the specific issues of the case are considered individually. Many tribunals have developed reasons templates. These can be very helpful provided that they are tailored to the facts of specific cases.

Inadequacy of reasons can be a ground for appeal from a tribunal decision.[43] The statement of bare conclusions without the statement of reasons will always expose the tribunal to the suggestion that it has not given close enough attention, or that it has allowed extraneous matters to cloud its consideration. There is yet another purpose to be served … An obligation

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37 Adopting the views of Gray J in *Sun Alliance Insurance v Massoud* [1989] VR 8 at 18; *Minister for Immigration and Multicultural Affairs v Singh* (2000) 98 FCR 469; *Civil Aviation Safety Authority v Central Aviation Pty Ltd* (2009) 253 ALR 263.

38 See *Commonwealth v Pharmacy Guild of Australia* (1989) 19 ALD 510; *Re Palmer and Minister for the Capital Territory* (1978) 1 ALD 183.

39 See S Tongue, 'Writing Reasons for Decisions' in S Kneebone (ed.), *Administrative Law and the Rule of Law: Still Part of the Same Package?* (1998, AIAL Inc, Canberra).

40 Sir Frank Kitto in 'Why Write Judgments' (1992) 66 *Australian Law Journal* 787, 792 commented:

> Perhaps the most common case of an insufficiently disciplined judgment is one which recites the facts—in a degree of pedestrian detail that scorns to discriminate between those that really bear on the problem, those that may interest a story-teller but not one possessing the lawyer's love of the relevant, and those that are not even interesting but just happen to be there—which identifies the question to be decided, and then, without carefully worked out steps of reasoning but with a 'blinding flash of light' (as has been said) produces the answer with all the assurance of a divine revelation.

41 See Raymond, above n 14, 42–43.

42 See Administrative Review Council, above n 30, 13.

43 See H Katzen, 'Inadequacy of Reasons as a Ground of Appeal' (1993) 1 *Australian Journal of Administrative Law* 33; Justice M Kirby, 'Reasons for Judgment: Always Permissible, Usually Desirable and Often Obligatory' (1994) 12 *Australian Bar Review* 121; JRS Forbes, *Justice in Tribunals* (4th edn, 2014, Federation Press, Sydney) ch. 13; Justice A Goldberg, 'When are Reasons for Decision Considered Inadequate?'(2000) 24 *AIAL Forum* 1; Justice S Rares, 'Judicial Review of Administrative Decisions — Should there be a 21st Century Rethink?' [2014] *Federal Judicial Scholarship* 18. See also *LVR (WA) Pty Ltd v Administrative Appeals Tribunal* (2012) 203 FCR 166.

to give reasons imposes upon the decision-maker an intellectual discipline. The tribunal is required to state publicly what its reasoning process is. This is a sound administrative safeguard tending to ensure that a tribunal such as this properly discharges its important statutory functions.[44]

However, a statement of reasons need not necessarily be lengthy.[45] It needs to be logical. In addition, appellate courts have made it clear that they have realistic views of what is to be expected of tribunal decisions. The courts have held that they should not submit tribunal decisions to meticulous analysis,[46] construe them finely and minutely 'with an eye keenly attuned to the perception of error'[47] or go through the words of the decision-maker with 'a fine appellate tooth comb, against the prospect that a verbal slip will be found warranting the interference of a court of law'.[48]

6.3.3. Content of reasons

Notwithstanding this latitude, key elements that should be addressed in reasons include:

- findings on material questions of fact, such as credibility or differing accounts of incidents
- identification of the sources of evidence and information upon which such findings rely
- reference to or summary of the law, rule, policy or principle applicable to significant issues before the tribunal
- a logical statement of the reasoning process engaged in by the tribunal, showing the connection between facts, legal principles and the decision arrived at by the tribunal
- the actual decision of the tribunal.

6.3.3.1. Material questions of fact

Material questions of fact are those which are essential to the decision-making process. The significance of such matters may be indicated by legislation that prescribes that certain matters must be considered. Or it may be apparent by inference from the subject matter of the scope or purpose of the legislation. The tribunal should set out those critical matters of fact which were taken into account in making its decision. However, a statement of reasons is not expected by appellate courts to be 'watertight' and to include reference to each and every salient fact.

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44 *Commonwealth v Pharmacy Guild of Australia* (1989) 19 ALD 510 at 514 (Sheppard J).

45 *Ansett Transport Industries (Operations) Pty Ltd v Wraith* (1983) 48 ALR 500.

46 *Strbak v Newton* [1989] NSWCA 202 (Unreported, New South Wales Court of Appeal, Gleeson CJ, Samuels and Priestley JJA, 18 July 1989) (Samuels JA).

47 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272–73; *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 at 287.

48 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 292 (Kirby J).

The High Court of Australia in *Minister for Immigration and Multicultural Affairs v Yusuf*[49] considered what is meant by a requirement that the decision-maker set out findings on 'material facts'. The Court held that the findings have to be those that the decision-maker did actually make, not those that legislation requires the decision-maker to make. If the decision-maker has failed to make a finding required by the Act, the decision may be reviewable on grounds such as error of law. However, a tribunal does not have to explain in any detail why it rejected or made no finding about evidence led by the parties that was not material to its decision.[50]

6.3.3.2. Findings on credibility

Where a finding as to credibility is made, there are many ways in which it can be phrased. It is problematic, however, for a decision simply to state that a tribunal did not find a witness credible, that it rejects the evidence of a particular witness, or that it prefers one witness to another. Reasons for such conclusions should be set out. They need not be lengthy but they should go beyond stating 'I prefer the evidence of Dr Y to that of Mr X'. They should identify what it is that has led to a witness's account not being accepted or one witness being found more believable than another.

Examples of such reasoning might lie with a witness having been inconsistent in their account, exhibiting problematic gaps in memory, or lacking practical knowledge of an industry or experience in a form of evaluation. Alternatively, a witness's account may be more contemporaneous with an event or corroborated by documentary material.

6.3.4. Oral reasons

It is common for oral reasons to be given at the end of a hearing. The tribunal statute may stipulate whether oral or written reasons are required, or both. The advantage of oral reasons is that they are immediate, they flow straight from the information provided and they enable prompt closure of issues. Oral delivery of reasons also enables anomalies or misunderstandings as to reasons or orders to be dealt with straight away. Attempts by either party to make submissions at this stage should be resisted.

In addition, oral reasons facilitate effective communication to a party adversely affected by the decision, rather than the more indirect form of communication via written reasons.

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49 (2001) 206 CLR 323 at 346.

50 See *Re the Minister for Immigration and Multicultural Affairs: Ex parte Duaraiajasingham* (2000) 74 ALJR 405 at 417–18 (McHugh J). See also *Roncevich v Repatriation Commission* (2005) 222 CLR 115 at [63]; *Civil Aviation Safety Authority v Central Aviation Pty Ltd* (2009) 253 ALR 263 at [29]; *Summers v Repatriation Commission* [2014] FCA 608 at [56]-[57]. In *Minister for Immigration and Multicultural Affairs v Singh* (2000) 98 FCR 469, the Full Federal Court held that:

> if a decision… turns upon whether a particular fact does or does not exist, having regard to the process of reasoning the tribunal has employed as the basis for its decision, then the fact is a material one. But a requirement to set out findings on material questions of fact, and refer to the material on which the findings are based, is not to be translated into a requirement that all pieces of conflicting evidence relating to a material fact be dealt with.

Where an attempt is made to mentor or to give guidance to a party, such as in a disciplinary hearing, this can be an effective form of interaction undertaken with a view to enhancing insight and the impetus for change.

Oral reasons should correspond broadly to, and not be inconsistent with, written reasons, if they are subsequently delivered. However, they can be short-form.

Largely, aside from any legislative requirements, the decision to give oral reasons depends upon the kind of hearing, the preference of the tribunal member and the capacity of the member to encapsulate effectively what they wish to communicate in oral form. It can be useful to have a set of notes to guide the oral delivery of reasons so that what is said maintains a coherent flow, so that important aspects are not omitted and so that all major elements of the decision are effectively communicated.

See the useful discussion in Justice J Chaney, 'Oral Decisions Masterclass' (COAT WA Chapter, 2014) <http://www.coat.gov.au/images/downloads/wa/Oral%20Decisions%20masterclass%20-%20Justice%20Chany%20(3%20April%202014).pdf> at January 2017.

6.3.5. Written reasons

6.3.5.1. Points to note

The following may be useful pointers for the delivery of reasons.[51] A number of the suggestions apply also to the delivery of oral reasons:

- briefly set out statutory and case law requirements. Do not paraphrase them as it is almost impossible to do so without changing the meaning
- summarise accurately important information from the hearing that is relevant to deliberations and findings of fact
- discuss material issues, even if not addressed by a party or parties
- summarise important submissions advanced in the hearing
- where evidence conflicts about material issues, make clear findings as to which, if any evidence is preferred, and why
- summaries should be given of any concessions or admissions made
- resist the temptation to moralise or to be gratuitously critical, especially of persons who did not appear before the tribunal
- be circumspect about making generalised recommendations for reform or change of practice

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51 Some of these suggestions are derivative of proposals advanced by D Fitzgerald, 'Tribunal Decision Writing' (Seminar Paper, Administrative Decisions Tribunal, Sydney, 2000).

- avoid collateral comments or irrelevancies, instead focusing upon the matter squarely before the tribunal
- ensure orders are clear, unambiguous and capable of being enforced
- avoid legal terminology and legalese as far as possible; but use the statutory language when applying a statutory test
- where there is more than one application before the tribunal, make orders that relate to each application
- do not simply rely on part of submissions of one party[52]
- avoid metaphors, similes or other flowery forms of expression
- avoid unnecessarily personally judgmental language
- use words and turns of phrase that are not paternalistic, condescending or unhelpfully emotive
- be conscious of the various audiences of reasons and the potentially harmful consequences of some forms of language
- use simple, straightforward language, rather than convoluted terminology and jargon
- employ the active voice, rather than the passive: for example, 'Centrelink asked the recipient of the pension for details' rather than 'the recipient of the pension was asked by Centrelink for details'
- avoid double negatives: for example, 'the tenant did not refrain from making undue noise'
- use parties' actual names, unless there is a good reason not to do so
- if anonymity is given to a party or a witness, ensure that the anonymising descriptor is effective—thus, for instance, use of the initials of the person is best avoided
- employ headings, reasonable margins and an accessible font. Paragraph numbers can also be useful
- proofread the decision carefully before it is provided to the parties.

6.3.5.2. Reference to legal materials

While it is important for tribunal decisions not be unduly legalistic, there are many occasions on which it is appropriate for case law, statutory provisions and legal commentary to be the subject of reference. It is important that cases, legal articles and books, as well as statutes, are cited accurately and in standard legal style so that a person wishing to follow up the reference can locate the relevant document. It is useful to refer to medium-neutral citations

52 *LVR (WA) Pty Ltd v Administrative Appeals Tribunal* (2012) 203 FCR 166.

of cases so that persons without ready access to legal libraries can read the decision cited, if they wish.[53]

In addition, if a case is cited to support a proposition, the relevant passage within the case should be referred to, not just the case generally. This does not mean that substantial passages from the case need to be quoted in full or even in part, simply that the reader should be enabled to find the passage and understand its significance to the point being made by the tribunal.

6.3.5.3. Confidential information

In general,[54] it is not necessary to refer specifically in reasons for a decision to information if such disclosure would:

- reveal a trade secret
- breach a statutory[55] or common law[56] duty to keep information confidential[57]
- endanger national security
- infringe legal professional privilege.

It can also be unhelpful to detail communications made, for instance, between a doctor and their patient, if this would harm the relationship or cause distress or embarrassment to the patient.

Given the increasing accessibility of tribunal decisions on the internet, it can be important to exclude discussion of highly sensitive and embarrassing personal details, such as health information, if it is not fundamental to the reasoning within the decision. Some tribunals go further in protecting anonymity in anonymising the names of all or some of the parties and even the names and locations of expert witnesses or of children referred to are suppressed.

6.3.5.4. Submissions

An aspect of demonstrating to persons potentially adversely affected by a decision that they have been treated with respect and been listened to actively is summarising submissions advanced on their behalf as well as evidence that has been presented.

A failure to refer to a submission is problematic because, amongst other things, it may be interpreted as indicative of a view that the submission had no merit. Accordingly, if it did have merit, such failure to refer to it could be regarded as a legal error on appeal.

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53 The Australian Legal Information Institute provides a website that can be searched for cases that use media-neutral citations: <http://www.austlii.edu.au/>.

54 See, specifically, the *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 13A.

55 See e.g. health information protected by the *Health Records Act 2001*, s 27.

56 See e.g. the name of a notifier: *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171 at 246.

57 See e.g. *Crimes Act 1914* (Cth) in relation to information held by Commonwealth Officers.

6.3.6. Reserved decisions

Where a decision is reserved at the conclusion of the provision of information at a hearing, this means it will be delivered at a later time in writing or orally. When the decision is given in writing, a copy should not be given to anyone before it is given to the party or parties. This does not preclude a tribunal member discussing the decision with a colleague on the tribunal, but no-one outside the tribunal should see or hear about the decision before it is formally delivered.

Where there is more than one party before the tribunal, the attempt should be made for the member to receive the decision at about the same time. If a decision is likely to attract media interest, the parties should receive the decision at the same time or before the media is given access to the decision.

6.3.7. Inadequate reasons

If reasons are inadequate—for instance, if they fail to address an issue that they are obliged to address under statute—it can be appropriate on application for the reasons to be rewritten to address the deficit. Such rewriting cannot introduce fundamentally new analysis, but can replace omissions or gaps in the reasoning of a tribunal and omissions in terms of compliance with statutory requirements.

6.4. Costs

Some tribunals have a power to order costs. Depending upon the tribunal, the practice may be for costs to coincide with the successful party. Alternatively, the award of costs may depend upon considerations set out in the legislation governing the tribunal.

Costs generally recompense a party for their time and expense in attending a hearing, but also for matters such as:

- the costs and disbursements of witnesses
- the costs of obtaining photographs or other material necessary for the hearing
- travelling to the hearing
- application fees.

Where costs can be awarded, it is appropriate generally to enable submissions to be put as to whether and in what sum costs should be awarded. Factors such as the following can be relevant in determining whether costs should be awarded and in what sum:

- the length of the hearing
- the sums involved
- the importance of the issues to the parties
- the legal and factual complexity of the hearing

- any matters of particular urgency
- unnecessary steps caused by a party's conduct
- whether the party bringing or resisting the proceedings was obdurate or unduly time-consuming in their conduct of the case
- whether arguments advanced lacked merit
- whether there was any abuse of process, including whether the action was brought or defended for collateral purposes, or was brought frivolously or vexatiously
- the standard of documentation produced for the hearing
- whether the matter should have been settled during a pre-hearing step such as mediation
- whether the party applying for costs was wholly or partly successful
- whether a party increased the length of the hearing by their conduct.[58]

6.5. Orders

A tribunal only has the power to make orders to the extent that the statute creating it provides it with such power. Thus, a tribunal should only make orders within the express terms allowed for orders within its enabling legislation. Creative orders outside the terms of such legislative provisions are fraught with risk.

In general, however, it is important that the following guidelines concerning orders by tribunals be taken into account.

- Orders should be in clear language and convey unambiguously what it is that the tribunal is mandating be done.
- If a decision of another decision-maker is being overturned or varied, that decision should be identified with precision.
- To the extent that a previous decision is being varied, this should be specified by explicit and meticulous reference to what was previously decided.
- Where an order is that a person undertake a task, this should be framed in such a way that the person knows what they are obliged to do and the task should be capable of performance.
- Where a timeframe is contemplated for compliance with an order, this should be clear and not unrealistic or unduly onerous.
- Where any aspect of a decision is contingent, a mechanism that is feasible should be set out.

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58 See *Holden v Architectural Finishes Ltd* (1987) 10 PRNZ 685.

6.6. Finality

As a general rule, once a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances.[59] This arises from the doctrine of *functus officio*, which prescribes that once a person or body has discharged a statutory power or duty by exercising it, the person or body has no authority thereafter to embark upon the exercise again. This doctrine is explored in Chapter Two. A further issue is the applicability of the doctrines of *res judicata* (a matter judged) and issue estoppel. As explored in Chapter Two, it has been held in respect of *res judicata* that a judicial determination directly involving an issue of fact or law disposes once and for all of the issue, so that it cannot afterwards be raised between the same parties or their representatives. Estoppel is a narrower concept. It covers only those matters which the prior judgment, decree or order necessarily established as the legal foundation or justification of its conclusion.[60] It is fundamental to the operation of the estoppel that a dispute between the parties results in what might be described as 'a final judgment', which determines once and for all the dispute between the parties.[61] A statutory tribunal may be a tribunal to which the doctrines extend,[62] but the question is whether in the exercise of its decision-making process it finally decides a question arising between the parties. The doctrine does not apply when a tribunal is making a 'mere' administrative decision.[63] The decision must be one made in respect to an issue between parties, after considering the evidence and argument.[64] An example of a hearing falling outside the scope of such a doctrine was an 'informal hearing' conducted by the Medical Practitioners Board of Victoria to decide whether a medical practitioner had engaged in 'unprofessional conduct not of a serious nature'.[65]

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59 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 603; see too *Chandler v Alberta Association of Architects* [1989] 2 SCR 848.

60 *Blair v Curran* (1939) 62 CLR 464.

61 *Kabourakis v Medical Practitioners Board of Victoria* [2005] VSC 493 (Unreported, Victorian Supreme Court, Gillard J, 20 December 2005) at [86].

62 Thus, for instance, the General Medical Council has been found to be a civil disciplinary tribunal to be regarded as 'judicial': *Hill v Clifford* [1907] 2 ch. 236. A similar decision has been made in respect of the Medical Board of Victoria: *Basser v Medical Board of Victoria* [1981] VR 953 at 975.

63 *Administration of Papua New Guinea v Daera Guba* (1973) 130 CLR 353 at 353. In *Pastras v Commonwealth* (1966) 9 FLR 152, Lush J considered the procedures and determination of the Commonwealth Commission for Employees Compensation. His Honour stated (at 155):

> The underlying principle of this form of estoppel is that the parties who have had a dispute heard by a competent tribunal should not be able to litigate the same issues in other tribunals. When the decision-making body is an administrative body not affording the opportunity of presenting evidence and argument, it seems to me that there is no room for the operation of this principle.

64 *Kabourakis v Medical Practitioners Board of Victoria* [2005] VSC 493 (Unreported, Victorian Supreme Court, Gillard J, 20 December 2005) at [87].

65 ibid. at [88].

References

Legislation

Administrative Appeals Tribunal Act 1975 (Cth)
Administrative Decisions (Judicial Review) Act 1977 (Cth)
Crimes Act 1914 (Cth)
Health Records Act 2001 (Vic)
Health Professions Registration Act 2005 (Vic)

Case law

Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd (2015) 255 CLR 352
Administration of Papua New Guinea v Daera Guba (1973) 130 CLR 353
Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation [1983] 1 NSWLR 1
Ansett Transport Industries (Operations) Pty Ltd v Taylor (1987) 18 FCR 498
Ansett Transport Industries (Operations) Pty Ltd v Wraith (1983) 48 ALR 500
Balog v Independent Commission Against Corruption (1990) 169 CLR 625
Barten v Williams (1978) 20 ACTR 10
Basser v Medical Board of Victoria [1981] VR 953
Blair v Curran (1939) 62 CLR 464
Briginshaw v Briginshaw (1938) 60 CLR 336
Browne v Dunn (1894) 6 R 67
Chandler v Alberta Association of Architects [1989] 2 SCR 848
Civil Aviation Safety Authority v Central Aviation Pty Ltd (2009) 253 ALR 263
Collector of Customs v Pozzolanic Enterprises Pty Ltd (1993) 43 FCR 280
Comcare v Lees (1998) 151 ALR 647
Comcare v Parker [1996] FCA 1670 (Unreported, Federal Court of Australia, Finn J, 2 August 1996)
Commonwealth v Pharmacy Guild of Australia (1989) 19 ALD 510
D v National Society for the Prevention of Cruelty to Children [1978] AC 171
Devries v Australian National Railways Commission (1993) 177 CLR 472
Dodson v Minister for Immigration, Local Government and Ethnic Affairs (1991) 31 FCR 451
Esber v Commonwealth (1992) 174 CLR 430
Fox v Percy (2003) 214 CLR 118
Hancok v Executive Director of Public Health [2008] WASC 224
HG v The Queen (1999) 197 CLR 414
Hill v Clifford [1907] 2 ch. 236
Holden v Architectural Finishes Ltd (1987) 10 PRNZ 685
Jones v Dunkel (1959) 101 CLR 298
Kabourakis v Medical Practitioners Board of Victoria [2005] VSC 493 (Unreported, Victorian Supreme Court, Gillard J, 20 December 2005)
Kavvadias v Commonwealth Ombudsman (1984) 1 FCR 80

Lek v Minister for Immigration, Local Government and Ethnic Affairs (1993) 43 FCR 100

LVR (WA) Pty Ltd v Administrative Appeals Tribunal (2012) 203 FCR 166

McDonald v Director-General of Social Security (1984) 1 FCR 354

Middleton v The Queen (2000) 114 A Crim R 258

Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259

Minister for Immigration and Multicultural Affairs v Bhardwaj (2002) 209 CLR 597

Minister for Immigration and Multicultural Affairs v Singh (2000) 98 FCR 469

Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323

Minister for Immigration v Pochi (1980) 4 ALD 139

NAIS v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 80 ALJR 367

Owen-James v Delegate of the Director-General of the Department of Health (1992) 27 NSWLR 457

Pastras v Commonwealth (1966) 9 FLR 152

Public Service Board of New South Wales v Osmond (1986) 159 CLR 656

Radio 2UE Sydney Pty Ltd v Burns (EOD) [2005] NSWADTAP 69

Re Adams and the Tax Agents' Board (1976) 1 ALD 251

Re Jonsson and Marine Council (No 2) (1990) 12 AAR 323

Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme (2003) 216 CLR 212

Re Neviskia Pty Ltd and Department of Health and Aged Care (2000) 32 AAR 129

Re Smith and Defence Force Retirement and Death Benefits Authority (1978) 1 ALD 374

Re Palmer and Minister for the Capital Territory (1978) 1 ALD 183

Re Sutherland [1994] 2 NZLR 242

Re the Minister for Immigration and Multicultural Affairs: Ex parte Duaraiajasingham (2000) 74 ALJR 405

*Re Walsh and Commissioner of Taxation (*2012) 130 ALD 200

R v Amad [1962] VR 545

Repatriation Commission v Smith (1987) 15 FCR 327

Roncevich v Repatriation Commission (2005) 222 CLR 115

Sherlock v Lloyd (2010) 27 VR 434

Société d'Avances Commerciales (Société Anonyme Egyptienne) v Merchants' Marine Insurance Co (The 'Palitana') (1924) 20 L1 L Rep 140

Strbak v Newton [1989] NSWCA 202 (Unreported, New South Wales Court of Appeal, Gleeson CJ, Samuels and Priestley JJA, 18 July 1989)

Summers v Repatriation Commission [2014] FCA 608

Sun Alliance Insurance v Massoud [1989] VR 8

Trawl Industries v Effem Foods Pty Ltd (1992) 27 NSWLR 326

Wingfoot Australia Partners Pty Ltd v Kocak (2013) 252 CLR 480

Guides

Administrative Review Council, *Practical Guidelines for Preparing Statements of Reasons* (2002) <http://www.arc.ag.gov.au/Documents/arcguidelinesnew.pdf> at January 2017

Administrative Review Council, *Best Practice Guide 4, Decision Making: Reasons* (2007) <http://www.arc.ag.gov.au/Documents/Revised+Best+Practice+Guide+4+-+Reasons+-+24+April+2008.pdf> at January 2017

Books

JRS Forbes, *Justice in Tribunals* (4th edn, 2014, Federation Press, Sydney)

A Vrij, *Detecting Lies and Deceit: The Psychology of Lying and the Implications for Professional Practice* (2000, John Wiley, Chichester, New York).

Journal articles and book chapters

P Bayne, 'The Inadequacy of Reasons as an Error of Law' (1992) 66 *Australian Law Journal* 302

Justice J Chaney, 'Oral Decisions Masterclass' (COAT WA Chapter, 2014) <http://www.coat.gov.au/images/downloads/wa/Oral%20Decisions%20masterclass%20-%20Justice%20Chany%20(3%20April%202014).pdf> at January 2017

Justice G Downes, 'Best Practice in Drafting: How to Draft Reasons for Decision as Efficiently and Effectively as Possible—Techniques for Structure, Organisation and Coverage of Essential Issues' (2010, Migration Review Tribunal) <http://www.aat.gov.au/AAT/media/AAT/Files/Speeches%20and%20Papers/ExcellenceinDecisionMakingSeminarOctober2010.pdf> at January 2017

Justice A Goldberg, 'When are Reasons for Decision Considered Inadequate?' (2000) 24 *AIAL Forum 1*

Justice D Kerr, 'A Freedom to be Fair' (2013, AGS Symposium, Excellence in Government Decision-making) <http://www.aat.gov.au/AAT/media/AAT/Files/Speeches%20and%20Papers/FreedomToBeFair21Jun2013.pdf> at January 2017

Justice D Kerr, 'Keeping the AAT from becoming a Court' (2013, AIAL Seminar) < http://www.aat.gov.au/AAT/media/AAT/Files/Speeches%20and%20Papers/AIALNSWSeminar27August2013.pdf> at January 2017

H Katzen, 'Inadequacy of Reasons as a Ground of Appeal' (1993) 1 *Australian Journal of Administrative Law* 33

Justice M Kirby, 'Ex Tempore Judgments—Reasons on the Run' (1995) 25 *Western Australian Law Review* 213

Justice M Kirby, 'On the Writing of Judgments' (1990) 64 *Australian Law Journal* 691

Justice M Kirby, 'Reasons for Judgment: Always Permissible, Usually Desirable and Often Obligatory' (1994) 12 *Australian Bar Review* 121

Sir Frank Kitto, 'Why Write Judgments' (1992) 66 *Australian Law Journal* 787

W Martin, 'The Decision-maker's Obligation to Provide a Statement of Reasons, Fact and Evidence. The Law' (1999) 51 *Admin Review* 19

J C Raymond, 'The Architecture of Argument' (2004) 7 *The Judicial Review* 39

Justice S Rares, 'Judicial Review of Administrative Decisions—Should there be a 21st Century Rethink?' [2014] *Federal Judicial Scholarship* 18

T Thawley, 'An Adequate Statement of Reasons for an Administrative Decision' (1996) 3 *Australian Journal of Administrative Law* 189

S Tongue, 'Writing Reasons for Decisions' in S Kneebone (ed.), *Administrative Law and the Rule of Law: Still Part of the Same Package?* (1998, AIAL, Canberra)

Justice P Young, 'Fact Finding' (1998) 72 *Australian Law Journal* 21

Conference papers

Justice J Douglas, 'How Should Tribunals Evaluate the Evidence?' (Paper presented to the 7th Annual AIJA Tribunals Conference, Brisbane, 11 June 2004)

D Fitzgerald, 'Tribunal Decision Writing' (Seminar paper, Administrative Decisions Tribunal, Sydney, 2000)

Chapter Seven: Communication

7.1. Key issues

Communicating with tribunal users:

- Tribunals should ensure that their processes are clear, easy to follow and fair.
- Research surveys of the users of courts and tribunals have frequently shown that parties involved in proceedings attach a high priority to the way in which the proceedings themselves are conducted.
- The International Framework for Tribunal Excellence states that:
  - It should never be forgotten that tribunals exist for users, and not the other way round. No matter how good tribunals may be, they do not fulfil their function unless they are accessible by the people who want to use them, and unless the users receive the help they need to prepare and present their cases.
- Clear communication processes are particularly important when a tribunal is dealing with cases involving people from different ethnic and cultural backgrounds, those with lower level literacy and linguistic skills, and people with various kinds of disabilities.
- Tribunals have adopted a range of innovative procedures and technology to communicate more effectively with a diverse range of tribunal users.

Communicating with stakeholders and the media:

- Courts and tribunals frequently deal with matters of high public interest. The media will very often wish to report these and for that reason has a strong interest in ready access to the details of court and tribunal proceedings.
- The media plays a key role in educating and enlightening the community about the place of tribunals in our governmental arrangements.
- Where appropriate, tribunals should consider the use of websites and social media to enhance consultation and feedback from stakeholders and the media.
- However, communicating with the public and the media may create problems for the tribunal concerning, amongst other things, procedural fairness, the tribunal's integrity and privacy of tribunal users.

- Tribunals ought to consider whether to develop protocols for dealing with the public and the media. The Judicial Conference of Australia's publication, *Working with the Media: A Handbook for Australian Judicial Officers,* may be a useful starting point.[1]

7.2. Introduction

7.2.1. General simplification

This Chapter is concerned with a number of aspects of what might loosely be termed *communication* in relation to the operation of tribunals. Communication in many shapes and forms is the very essence of a court or tribunal proceeding and it is suggested that this Chapter be read in conjunction with Chapter Five which relates generally to communication and demeanour during hearings.

All kinds of communication are involved in the lead-up to hearings, during the hearings themselves, and, very often, afterwards as well. The major question is whether the communicating which goes on is effective and appropriate. Special attention must be paid to the needs and interests of the people who are not regular, professional 'players' in the system, notably, the parties to cases, and those who attend to give evidence, to support the parties or simply as members of the public to observe what happens.

In recent years a lot of work has been done by judicial officers, tribunal members, members of the legal profession, administrators, law reformers and others to simplify and improve the legal system and its various processes. Procedures have been rationalised and simplified, a lot of obscure terminology and jargon, including the use of Latin phrases, for example, has been removed, and there is now a strong emphasis on the use of 'plain language' in the legal and adjudication systems.

While those reform efforts have been in progress, there have been countervailing forces at work, because society itself has become a good deal more complex and diverse than in the past. Not surprisingly, this increased complexity and diversity tends to manifest itself in the legal system. Societal trends are inevitably reflected in the problems and issues with which the legal and dispute resolution systems have to deal.

These developments have meant that those responsible for the operation of tribunals have had to redouble their efforts to achieve as much simplicity and accessibility in the system as possible. This is certainly not an easy task, especially since tribunals are often operating with insufficient financial resources.

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1 Sir Andrew Leggatt cited in Council of Australasian Tribunals, *International Framework for Tribunal Excellence* (November 2012, COAT, Melbourne).

Finally, changes in communication technology, including the prevalence of social media, have presented challenged for courts and tribunals and changed community expectations. Chief Justice Marilyn Warren has described the challenge as follows:

> There is now an expectation that open justice involves the judiciary adopting new media technologies and engaging in a direct dialogue with the community. The judiciary must find a way to meet these expectations whilst at the same time preserve the fundamental aspects of the rule of law — fairness and judicial impartiality. Otherwise, the judiciary risks being left behind and trapped by its own traditions. If so, the courts risk a continued decline in the basis of judicial authority — public confidence.[2]

7.2.2. Tribunals leading the way

The rapid and continuing development of tribunals is a ready indicator of the strong drive towards greater simplicity and accessibility in dispute resolution services. Generally speaking, tribunal proceedings are much simpler than those in courts. Entry fees are usually low or non-existent; there are often restrictions on legal representation; decisions are handed down quickly; and costs are not normally available. These features are essentially why tribunals have become so popular with users, compared with courts, and why governments have provided them with a good deal of support in recent years.[3]

Nevertheless, many of the general 'court craft' and communication issues discussed in the modern judicial administration literature apply very much in the tribunals sector as well. Equally, there is now a perceptible trend in the court system towards adoption of the less formal approaches to procedure and hearings usually adopted by tribunals.

When it comes to particular aspects such as communication skills and techniques, the use of plain language in verbal and written communications, and the issues of ethnic, cultural, linguistic, religious, gender and disability considerations, the courts and tribunals share a strong common interest because all these matters are relevant in both domains. This Chapter proceeds upon that general assumption, while clearly recognising that some areas are far more directly pertinent to tribunals than others.

7.3. Communication and plain language

There are at least three central reasons why there should be good communication and the use of plain language in tribunals:

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2 Chief Justice M Warren, 'Open Justice in the Technological Age' (2014) 40 *Monash University Law Review* 45 <http://www.austlii.edu.au/au/journals/MonashULawRw/2014/5.pdf> at January 2017

3 R Creyke 'Tribunals – "Carving out the Philosophy of Their Existence": The challenge for the 21st century' (2012) 71 *AIAL Forum* 19–33.

- Good communication is important in order for the tribunal to find out what the parties before it are saying about their respective cases. Sometimes this will be straightforward, especially if the parties are well prepared and articulate in their presentations. In other instances, considerable skill can be required of the tribunal member in establishing a process of 'two-way' communication with a party (or parties) in order to get a clear picture of what they are attempting to communicate to the tribunal. This skill can be vital for effective case resolution.

- Good communication ensures that the process is a full, clear and fair one. Research surveys of the users of courts and tribunals have frequently shown that parties involved in proceedings attach a high priority to the way in which the proceedings themselves are conducted. People in that situation can often accept an adverse result provided they believe that they have had a full and fair hearing. This will often be dependent on good communication processes having been deployed by the tribunal in question.

- Good communication processes assist other people who may wish to observe proceedings to understand what is going on. These are processes of public justice and it is necessary that they are conducted in as simple and as straightforward a manner as possible.

Good communication processes, therefore, are essential to the proper conduct of individual cases and to the maintenance of public confidence in the system. Without reasonably high levels of that confidence, any judicial or quasi-judicial system will struggle to maintain its proper position in the scheme of governmental arrangements.

A study of court and tribunal process identified five key process-oriented factors as contributing the perception of fairness and public confidence:

1. The expectations of, and information provided to, participants.

2. The quality of participation granted to participants (i.e. the extent to which, and the process through which, participants are able to get their story out in a way they view as accurate and fair).

3. The quality of treatment and, in particular, the respect shown to the participant during their time at the tribunal.

4. Issues of convenience and comfort, including timeliness and efficiency.

5. Judgments about tribunal members and staff, including whether they were perceived as helpful and empathetic.[4]

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4 R Moorhead, M Sefton and L Scanlan, *Just Satisfaction? What Drives Public and Participant Satisfaction with Courts and Tribunals* (March 2008, Cardiff Law School, Wales) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2425127> at January 2017; Council of Australasian Tribunals, *International Framework for Tribunal Excellence* (November 2012, COAT, Melbourne).

A number of tribunals now offer training for members in communicating with the public and tribunal users, and in drafting reasons for decision that are clear and to the point.[5]

7.3.1. Communication and fairness

The United Kingdom's Judicial College *Equal Treatment Bench Book*[6] makes an important connection between communication issues and fairness of the overall process.

It notes the following:

- The judicial process must be seen to be fair and must inspire the confidence of all who enter into it.
- Fairness is demonstrated by effective communication.
- People view the world from individual perspectives that are culturally conditioned.
- People with personal impairments or who are otherwise disadvantaged in society are entitled to a fair hearing.
- A person's outlook is based on their knowledge and understanding; there is a fine line between relying on this and resorting to stereotypes that can lead to injustice.
- Effective communication is the bedrock of the legal process—everyone involved in proceedings must understand and be understood or the process of law will be seriously impeded.

The document goes on to note that these kinds of considerations are most important in the processes of law and justice because if the parties involved in cases (and the relevant tribunal member) do not understand the material put before them, and the questions and answers being provided, the process is flawed and justice may be denied.

7.3.2. Dealing with difference

Good communication, especially through the use of simple concepts and plain language, is a universally desirable quality in a tribunal system, but it has particular significance when a tribunal is dealing with cases involving people from different ethnic and cultural backgrounds, those with lower level literacy and linguistic skills, and people with various kinds of disabilities.

In this respect, the United Kingdom Judicial College bench book is also useful. It provides a series of suggestions as to 'dos' and 'don'ts' (modified for the purposes of this Manual)

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5 Justice G Downes, 'Future Directions in Administrative Law: Part 2' (2011) 67 *AIAL Forum* 39 <http://www.aat.gov.au/about-the-aat/engagement/speeches-and-papers/the-honourable-justice-garry-downes-am-former-pre/future-directions> at January 2017.

6 Judicial College, *Equal Treatment Bench Book* (2015, Judicial College, London) <https://www.judiciary.gov.uk/wp-content/uploads/2013/11/equal-treatment-bench-book-2013-with-2015-amendment.pdf > at January 2017.

in relation to the conduct of proceedings generally, but with some particular emphases on cases involving one or more parties who may be in a situation of some disadvantage or from a particular background:

7.3.2.1. Do …

- Get names and modes of address correct by asking parties how they wish to be addressed.
- Make a point of obtaining, well in advance if possible, precise details of any disability or medical condition that a person appearing before you may have.
- Allow more time for special arrangements, breaks, and so on, to accommodate special needs during a hearing.
- Give particular thought to the difficulties facing disabled people who attend tribunals—prior planning will enable their various needs to be accommodated as far as possible.
- Consider the position of the individual—the stress of attending a tribunal hearing should not be made worse unnecessarily through a failure to anticipate foreseeable problems.
- Bear in mind the problems facing self-represented parties.
- Admit a child's evidence, unless the child is incapable of giving intelligible testimony.
- Ensure that appropriate measures are taken to protect vulnerable witnesses; for instance, children, those with mental or physical disabilities or those who are afraid or distressed.
- Be polite, courteous and patient at all times.
- Make provision for oath taking in accordance with different belief systems.
- Take the initiative to find out about different local cultures and faith communities.
- Display an understanding of difference and difficulties with a well-timed and sensitive intervention where appropriate.

And, in conjunction with administrators:

- Encourage the availability of documents and advance information in different local languages and alternative formats, for example Braille, large print, audiotape.
- Encourage the use of teleconferencing facilities to communicate with tribunal users in regional areas.
- Encourage the use of online communications, including, where appropriate and within the tribunal's resources:
  - online lodgement, email notices, service and tracking of cases

  - the use of websites and social media to enhance consultation and feedback from stakeholders and parties.[7] Encourage the provision of access to interpreters and signers.

- Encourage the provision of appropriate facilities for all tribunal users.
- Help to promote a high standard of service to all tribunal users.
- Support the provision of posters and leaflets in English and local minority languages and in alternative formats, for example, large print.

7.3.2.2. Don't …

- Underestimate the stress and worry faced by those appearing for hearings, particularly when the ordeal is compounded by an additional problem such as a disability or having to appear without professional representation.
- Overlook the use—unconscious or otherwise—of gender-based, racist or homophobic stereotyping as an evidential shortcut.
- Allow advocates to attempt over-rigorous cross-examination of children or other vulnerable witnesses.
- Let the tribunal's processes become unduly formal. The relative flexibility and informality of tribunal proceedings make them less intimidating to those unfamiliar with the legal system.[8]
- Use words that imply an evaluation of the sexes, however subtle—for instance, 'man and wife', girl (unless speaking of a child), 'businessmen'.
- Use terms such as 'mental handicap', 'the disabled'—use instead 'learning disability', 'people with disabilities'.
- Allow anyone to be put in a position where they face hostility or ridicule.
- Make assumptions based on stereotypes or misinformation.
- Use offensive words or terminology.

The same document has a detailed treatment of aspects of dealing with cases in which issues of ethnicity, race, culture or religion may arise. It also has specific sections devoted to dealing with children, people with disabilities, issues of gender, sexual orientation and other matters.

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7 See the detailed discussion in M Bromberg-Krawitz, 'Challenges of Social Media for Courts & Tribunals' (2016) <http://www.aija.org.au/Social%20Media%20Sym%2016/Papers/Krawitz.pdf> at January 2017. For an overview of the use of the internet and social media by the New South Wales Consumer, Trader and Tenancy Tribunal, see: K Ransome, 'Should Tribunals go Social?' (June 2012, COAT, Sydney).

8 See generally R Creyke, 'Tribunals as the Generic Face of Justice: a Challenge for the 21st Century' (June 2012) <http://www.coat.gov.au/images/downloads/nsw/tribunals_as_the_generic_face_of_justice-Robin_Creyke.pdf> at January 2017.

7.3.3. Other sources of assistance

Some tribunals have manuals that may also be of assistance. For example, the New Zealand *Tenancy Tribunal Bench Book*,[9] deals with a large number of tribunal issues, and includes coverage of cultural aspects and matters of equal treatment generally. And, while it is specifically directed to matters of mental health, the *Guide to Solution-Focused Hearings in the Mental Health Tribunal*[10] is an extremely useful publication for general tribunal purposes and has a detailed section titled 'Practical Communication Skills'.

Additional material is available in relation to 'self-represented' litigants. Although court-oriented, there are two documents that may be useful for tribunal members. These are the Australasian Institute of Judicial Administration's *Litigants in Person Management Plans: Issues for Courts and Tribunals*[11] and the more recent report of *Forum on Self-Represented Litigants*.[12] Both of these documents present a wealth of useful information and ideas for conducting court and tribunal proceedings in which one or more of the parties is representing themselves in their own case.[13]

7.4. Dealing with the media

7.4.1. General aspects

Of increasing importance in the modern era is the relationship between the courts and tribunals sectors and the media. This relationship operates in different ways and at a number of different levels but is fundamentally to do with issues of communication. There are two key aspects of the relationship between the courts and tribunals sectors and the media that are of particular interest.

The first is the more obvious and time-honoured one. Courts and tribunals frequently deal with matters of high public interest. The media will very often wish to report these and for that reason has a strong interest in ready access to the details of court and tribunal proceedings. For their part, courts and tribunals have a general obligation to provide such access and

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9 *Tenancy Tribunal Bench Book* (2004, New Zealand). The manual is not available online; the Tenancy Tribunal should be contacted directly for access.

10 Mental Health Tribunal, *A Guide to Solution-Focused Hearings in the Mental Health Tribunal* (2014, Mental Health Tribunal, Melbourne) <http://www.mht.vic.gov.au/wp-content/uploads/2014/07/Solution-focused-hearings-guide.pdf> at January 2017.

11 Australasian Institute of Judicial Administration (AIJA), *Litigants in Person Management Plans: Issues for Courts and Tribunals* (2001, AIJA, Melbourne) <http://www.aija.org.au/online/LIPREP1.pdf> at January 2017.

12 Australasian Institute of Judicial Administration (AIJA), *Report of Forum on Self-Represented Litigants* (2004, AIJA, Melbourne) <http://www.aija.org.au/online/SRLForumReport.pdf> at January 2017.

13 Material produced by the AIJA can be obtained by writing to the Australasian Institute of Judicial Administration Inc, Ground Floor, 555 Lonsdale Street, Melbourne, Vic 3000, or from the website: <http://www.aija.org.au/index.php/aija-publications>.

also have an interest in ensuring, as far as possible, that reporting of cases, whether it be by electronic or press media, is accurate and responsible. These are thus matters of mutual interest to the media and court and tribunal authorities.

The second aspect is a little less obvious and perhaps a bit more one-sided. While the media is mostly interested only in reporting particular cases, and usually the more sensational the better as far as they are concerned, courts and tribunals have a more general interest in their relationship with the media. They well understand, particularly in more recent times, the key role played by the media in educating and enlightening the community about the place of the court and tribunal system in our governmental arrangements. This is on the basis that members of the community develop ideas and impressions about the system through media coverage of particular cases and events. For a democratic society to work well it is important that members of that society have a reasonable knowledge of, and regard for, the various institutions of government, including the judicial and related components. This is often put in terms of 'community confidence' in such institutions. A tribunal's relationship with the media is clearly extremely important at a general level as well as in performing its day-to-day functions.

7.4.2. Media liaison officers

So widespread has been the modern recognition of the mutual importance of the court and tribunal system and the media that in recent years media liaison officers have been appointed to quite a number of courts and tribunals. The specific details of their roles vary quite considerably but the important general point is the fact of their appointments and its general recognition of the importance of the relationship with the media.

At a very practical level, the appointment of such people means that their services are available to the media in the event that particular problems or issues arise. It also means that the relevant courts and tribunals can themselves approach the media to explain or clarify matters that may have arisen or to liaise about media coverage of a pending case or cases. In addition, the appointment of such officers can provide an important internal resource to individual judicial officers and tribunal members who may need assistance in dealing with the media on aspects of their work.

7.4.3. Media arrangements and protocols

It is risky to generalise about the working relationships between tribunals and the media, because there are so many aspects involved. For example, there may be occasions when a tribunal as a whole will wish to make a statement about something through the media. Most courts and tribunals have developed protocols, or at least common understandings, about such matters. In most instances, it will be the head of the court or tribunal who makes any media statement, often assisted by the relevant media liaison officer, if there is one. Such matters are usually of little or no concern to individual tribunal members.

At a different level, there will usually be protocols or arrangements adopted by each court and tribunal in relation to media coverage of cases. There will usually be rules regarding media usage of notes, sketches, recording equipment, television cameras and so on. These may be reasonably prescriptive procedures arranged for the organisation as a whole or they may be more general in nature, leaving quite an amount of discretion to individual members as to how to proceed. Obviously, the situation of each court and tribunal will differ to some degree, but it should be a straightforward matter for individual members to find out what the appropriate operating procedures are for their particular organisation.

7.4.4. Judicial Conference of Australia media booklet

In 2003 the Judicial Conference of Australia (JCA) published a useful booklet for judges and magistrates on working with the media.[14] This publication should be of considerable interest to members of tribunals as well because the issues are common to both. The booklet has three general aims:

- to help judicial officers understand the media better and how it works
- to assist individual judicial officers in deciding whether, and if so, how, to involve themselves with the media
- to facilitate generally the process of communication between the media and the judiciary as an institution.

The Introduction to the booklet covers such matters as when it may be appropriate to engage with the media and also provides some useful insights into the attitudes and approaches of the modern media in relation to the reporting of court cases and coverage of courts generally. Relevant to both these aspects it is observed that:

> A critical part of working with the media is understanding the motivations, pressures and logistics of being a journalist—for only then can judicial officers make informed decisions about their involvement in media commentary.[15]

In its treatment of a wide range of issues the booklet has a very practical orientation. For example, it poses and answers the ten most commonly asked questions about the media.

- What is their role?
- Who are they?
- What is the hierarchy of journalists?
- What motivates journalists?
- Does the motivation vary between different branches of the media?
- Where do they get their stories?

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14 Judicial Conference of Australia, *Working with the Media: A Handbook for Australian Judicial Officers* (2004, JCA).
15 ibid., Section 2: 'The Media: The Answers to the Most Commonly Asked Questions', [1].

- What is their level of understanding of the law?
- What are some of the particular concepts and phrases used by journalists?
- Do they have a code of ethics?
- To whom are they accountable?

The booklet also has a detailed section on what is termed 'the rules of engagement' in regard to judiciary media relations. In this respect it provides a whole series of practical suggestions on such aspects as:

- whether to 'engage'
- dealing with unwanted enquiries
- preparation for involvement in an interview or story
- the actual participation with the particular media representatives.

The booklet is especially helpful on when to engage with the media and what to do with unwanted media enquiries. In relation to the first of these matters, it is pointed out that whether to engage is never an easy decision because every media story is different and the same approach will not work every time. The questions which need to be asked are:

- Is it appropriate for me to engage?
- What can I achieve through engagement?
- Will my involvement introduce balance and accuracy or justify a larger and more inaccurate story?
- Do I have enough expertise to engage in this situation or do I need help—if so from whom?
- What can go wrong if I do not engage or if I do engage?
- Am I the appropriate person?

On the issue of unwanted media approaches, the booklet cites the examples of being followed down the street or media people being camped outside the tribunal. The key issue here is how to get the best possible coverage of the main messages to be conveyed. The booklet suggests that this will involve not inflaming the story but bringing it back to the facts:

> As tempting as it might be, you can rarely achieve this by running away from the camera, jostling the journalist, or tripping up the cameraman. All these actions do is create an even better lead for the story and one that completely replaces your key messages or your capacity to reintroduce balance.[16]

The advice provided is that the options are to communicate on the spot, issue a written statement or to hold one's line and refuse with dignity to comment. It comes down to

16 ibid., Section 4: 'Dealing with Unwanted Enquiries', [2].

judgment. A strategy should be selected and adhered to. It is good to seek professional advice and, having chosen a strategy, not to change it in mid-stream without very careful consideration.

Helpful suggestions are also made about different aspects of being an interviewee.

Clearly, the advice provided in this JCA publication is very useful, but its relevance and application to individual tribunal members will depend very much on what media relations policy, if any, the tribunal in question has adopted. Any tribunal-wide policy may not entirely govern the approach of individual members to media issues, but it is likely at least to be heavily influential. However, even if a particular tribunal has developed policies and procedures in regard to media relations, the JCA booklet is an extremely useful and interesting source of information and ideas on such matters and is highly recommended for general reference.

7.5. Conclusion

All people working in courts or tribunals, especially judicial officers and tribunal members, who conduct hearings and make decisions, need to be aware of the importance of different kinds of communication skills. This Chapter has briefly highlighted a few key communication areas:

- the importance generally of conducting proceedings in a clear, simple and fair manner
- the need for the use of plain language; often, the importance of establishing a 'dialogue' with parties who appear before the tribunal in question
- the significance of awareness and sensitivity when dealing with people whose racial, cultural and linguistic backgrounds perhaps put them outside or on the fringe of mainstream society
- the major role of the media, both print and electronic, in covering proceedings in certain individual cases and in 'representing' the courts and tribunals sectors to the general public.

References

Guides

Australasian Institute of Judicial Administration (AIJA), *Litigants in Person Management Plans: Issues for Courts and Tribunals* (2001, AIJA, Melbourne) <http://www.aija.org.au/online/LIPREP1.pdf> at January 2017

Australasian Institute of Judicial Administration (AIJA), *Report of Forum on Self-Represented Litigants* (2004, <http://www.aija.org.au/online/SRLForumReport.pdf> at January 2017 Council of Australasian Tribunals, *International Framework for Tribunal Excellence* (November 2012, COAT, Melbourne)

Judicial Conference of Australia (JCA), *Working with the Media: A Handbook for Australian Judicial Officers* (2004, JCA)

Judicial College, *Equal Treatment Bench Book* (2015, Judicial College, London) <https://www.judiciary.gov.uk/wp-content/uploads/2013/11/equal-treatment-bench-book-2013-with-2015-amendment.pdf> at January 2017

Mental Health Tribunal, *A Guide to Solution-Focused Hearings in the Mental Health Tribunal* (2014, Mental Health Tribunal, Melbourne) <http://www.mht.vic.gov.au/wp-content/uploads/2014/07/Solution-focused-hearings-guide.pdf> at January 2017

Tenancy Tribunal Bench Book (2004, New Zealand)

Journal articles

M Bromberg-Krawitz, 'Challenges of Social Media for Courts & Tribunals' (2016) <http://www.aija.org.au/Social%20Media%20Sym%2016/Papers/Krawitz.pdf> at January 2017

R Creyke, 'Tribunals as the Generic Face of Justice: a Challenge for the 21st Century' (June 2012) <http://www.coat.gov.au/images/downloads/nsw/tribunals_as_the_generic_face_of_justice-Robin_Creyke.pdf> at January 2017

R Creyke 'Tribunals – "Carving out the Philosophy of Their Existence": The challenge for the 21st century' (2012) 71 *AIAL Forum* 19

Justice G Downes, 'Future Directions in Administrative Law: Part 2' (2011) 67 AIAL Forum <http://www.aat.gov.au/about-the-aat/engagement/speeches-and-papers/the-honourable-justice-garry-downes-am-former-pre/future-directions> at January 2017

R Moorhead, M Sefton and L Scanlan, 'Just Satisfaction? What Drives Public and Participant Satisfaction with Courts and Tribunals' (March 2008, Cardiff Law School, Wales) < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2425127 > at January 2017

K Ransome, 'Should Tribunals "Go Social"?' (June 2012, COAT, Sydney)

Chief Justice M Warren, 'Open Justice in the Technological Age' (2014) 40 *Monash University Law Review* 45 <http://www.austlii.edu.au/au/journals/MonashULawRw/2014/5.pdf> at January 2017

Chapter Eight: Caseflow Management

8.1. Key points

Emergence and principles of caseflow management:

- Caseflow management in a legal context is about managing the progression or movement of cases through a formal adjudication or dispute resolution system, whether a court or tribunal.
- Systems of modern caseflow management first emerged as a significant development in the United States in the early 1970s. Australia saw the progressive introduction into courts and tribunals of schemes from the mid-1980s.
- The principles of modern caseflow management essentially dictate that the court or tribunal should bear a large responsibility for dealing effectively and efficiently with cases and this involves supervising their progress from the time of initiation to completion.
- The proponents of caseflow management have long indicated that it has other benefits besides delay reduction, for example, an increase in early settlements, reduced litigant costs and more efficient use of court resources.

Elements of successful programs:

- Academic commentary suggests there are seven fundamental elements of successful caseflow management:
  - judicial commitment and leadership
  - consultation with the legal profession
  - supervision of case progress
  - developing standards and goals
  - monitoring and information systems
  - listing for credible hearing dates
  - strict control of adjournments.
- The Australasian Institute of Judicial Administration, the Australian Law Reform Commission and the Law Council of Australia have recently released publications outlining challenges and principles of successful caseflow management.

Caseflow management on the ground:

- Caseflow management arrangements are largely determined by each court and tribunal to suit its own particular circumstances.
- By way of example, the Administrative Appeals Tribunal has a structured case management process designed to deal with applications in a flexible and timely manner. When the Tribunal receives an application, it notifies the primary decision-maker of the application. The decision-maker then has 28 days to provide the Tribunal and the applicant with a statement of reasons for the decision and all documents relevant to the review.
- A conference registrar or member holds one or more conferences with the parties—in person or by telephone—to discuss the issues in dispute, identify and consider additional material that may be obtained and explore whether the matter can be settled.

8.2. Introduction

Caseflow management in a legal context is about managing the progression or movement of cases through a formal adjudication or dispute resolution system, whether a court or tribunal. Being an exercise in management, the devising of schemes is very much a matter for the particular court or tribunal, and, once devised, the scheme in question will usually be adopted and followed by all the judicial officers and tribunal members.

The important point about this for individual tribunal members is that, while they may have a say in the collegial formulation of a particular caseflow regime, and will later operate according to it, they will have very little discretion or leeway as to how it actually works in practice. Unlike the hearing and decision-making aspects of the role of tribunal members, the implementation of the caseflow management scheme is a much more mechanistic and programed function. For those reasons, this Chapter is written as a general guide to the policy and development of modern caseflow management, which has been adopted across Australasian tribunal and court systems in the last decade or so. Suggestions as to the management of cases on a single day can be found in Chapter Five: Hearings.

8.3. Emergence of modern caseflow management

Systems of modern caseflow management first emerged as a significant development in the United States in the early 1970s.[1] Australia saw the progressive introduction into courts and tribunals of schemes based on the American principles from the mid-1980s onwards.[2]

1 See M Solomon and D Somerlot, *Caseflow Management in the Trial Court: Now and for the Future* (1987, American Bar Association).

2 See P Sallmann, 'Managing the Business of Australian Higher Courts' (1992) 2 *Journal of Judicial Administration* 80.

These schemes are now regarded as absolutely vital to the successful conduct of court and tribunal operations. This is because they involve a managerial approach to the processing of cases. Traditionally, this aspect of court and tribunal operations was not really managed at all, at least not in any modern sense, and the result was delay and inefficiency.

The stimulus for the development of caseflow management programs was the growing frustration and impatience over many years with delay in the processing of cases in courts and tribunals, that is, caseflow management was basically introduced as a delay-reduction mechanism. Writing in the late 1980s in the United States, Maureen Solomon, one of the pioneers of modern caseflow management, observed:

> [A]s now generally accepted in the courts community, caseflow management connotes supervision or management of the time and events involved in the movement of a case through the court system from the point of initiation to disposition, regardless of the type of disposition.[3]

The introduction of this new approach to dealing with the processing of cases in courts and tribunals was seen as a revolution in the traditional method of dealing with case processing in common law societies. The old approach relied on broad rules and procedures laid down over many centuries by the courts, and the conduct of litigation was very much in the hands of the litigants and their lawyers. The rationale for this was that civil cases were regarded essentially as private matters between the parties and the role of the courts was to move into action only when the parties indicated that they were ready for judicial intervention.

Related to this was a sense that doing justice according to law in the determination of disputes between parties was the dominant and primary goal and that the pace at which cases proceeded through the system was not really a relevant consideration at all.

In the second half of the twentieth century there was increasing concern in common law systems about the problem of caseloads, backlogs and delays. While high standards of justice prevailed once cases reached the court or tribunal, in many instances it took so long for them to get there that people became frustrated, disillusioned and even impecunious in the process.

The principles of modern caseflow management essentially dictate that the court or tribunal should bear a large responsibility for dealing effectively and efficiently with cases and this involves supervising their progress from the time of initiation to completion. This is the sense in which the application of caseflow management principles constitutes a revolution in the approach to case disposition.

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3 Solomon and Somerlot, above n 1, 3.

8.4. Principles of caseflow management

There are many different practical examples of modern caseflow management. The model to be adopted will depend to some extent on the specific requirements of the particular individual court or tribunal. There are, however, a number of general, almost universal, principles or elements which usually underpin successful schemes. The literature repeatedly suggests that there are seven commonly agreed fundamental elements:

- judicial commitment and leadership
- consultation with the legal profession[4]
- supervision of case progress
- standards and goals
- monitoring and information systems
- listing for credible hearing dates
- strict control of adjournments.

As Eyland et al. and others have indicated in a report evaluating caseflow management programmes in the intermediate courts of New South Wales and Victoria:

> The essential feature is that the court takes responsibility for the progress of proceedings, *from commencement to finalisation*, by actively ensuring that requisite procedural steps are actually taken within prescribed times. The principle of 'court control' under the modern model of case management is then to be contrasted with the principle of 'party control' that prevailed previously.[5] [Emphasis in the original]

The same authors noted that this emphasis on court and tribunal control is in stark contrast to the traditional approach in which very little interest was shown in proceedings unless and until they were brought to its attention by one of the parties. In the past, the rules of court tended only to operate to enable a party to compel the expeditious prosecution of the case if the party was willing to seek the intervention of the court to have the rules enforced. Active involvement of judicial officers and tribunal members is also a key element. The standard, traditional arrangement was that of the 'cuckoo clock' judge, that is, the judicial officer or tribunal member would only appear on cue from the parties.

8.5. Impact of programs

The proponents of caseflow management have long indicated that it has other benefits besides delay reduction, for example, an increase in early settlements, reduced litigant

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4 For tribunals, consultation would need to be undertaken with major user groups as well as the legal profession.

5 A Eyland, T Wright, M Karras and N Nheu, *Case Management Reform: An Evaluation of the District Court of NSW and County Court of Victoria 1996 Reforms* (2003, Law and Justice Foundation of New South Wales) 4.

costs and more efficient use of court resources. These ancillary outcomes are now more explicitly and actively pursued as part of many modern case management systems. Modern caseflow management was not always received enthusiastically by Australasian courts and tribunals. Its introduction constituted a cultural and operational revolution and there were some doubters among judicial officers, tribunal members, court administrators and members of the legal profession.

In New Zealand, caseflow management was a judicial initiative and flowed on to tribunals through the leadership of the tribunal head. Over time, the number of critics of caseflow management seems to have reduced significantly, and it is now well accepted as part of the day-to-day operational routine of courts and tribunals in Australia and New Zealand.[6]

In the United States there has been a great deal of research conducted by various institutes and consultancy bodies. Prominent among these has been the National Center for State Courts (NCSC). For many years, the Center has provided various forms of assistance to American courts and tribunals, including the conduct of research. A similar role has been played in Australasia by the Australasian Institute of Judicial Administration (AIJA), which had a prominent role in the introduction of caseflow management ideas to courts and tribunals, commencing in the late 1980s. Since then the Institute has conducted regular caseflow management seminars for judicial officers, tribunal members and administrative staff. The purpose of these seminars is to exchange information and ideas with a view to the ongoing improvement of caseflow management schemes in the courts and tribunals. There has been considerable success in this regard.

8.6. Elements of successful programs

8.6.1. Key features

The American empirical research, and some later local research, has proved important in the monitoring and improvement of schemes in Australia, New Zealand and elsewhere in the South Pacific region. A consistent, overall conclusion of these research studies has been that the introduction of a modern, managerial approach has been highly beneficial. In particular, there has been a noticeable impact on delay. While the local research has been more limited than the American, it has produced the same results.

The research has identified the following common elements of successful caseflow management programs in courts and tribunals:

- leadership

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6 Case management is now generally seen by tribunals as a key means of addressing backlogs of cases: Professor M Lavarch, *Report on the Increased Workload of the Migration Review Tribunal (MRT) and the Refugee Review Tribunal (RRT)* (2012, Department of Immigration and Citizenship, Canberra).

- goals
- information
- communication
- policies and procedures
- judicial commitment
- administrative staff involvement
- education and training and
- mechanisms for accountability.

8.6.2. Features in practice

A leading American expert on judicial administration and caseflow management, Dr Barry Mahoney, has elaborated upon these various common elements. He has emphasised that leadership is a critically important factor:

> Successful courts and court systems—like successful businesses and successful political entities—will almost surely be ones that have the benefit of leadership by chief judicial officers who have the vision, persistence, personality and political skills necessary to develop broad support for court improvement policies and programmes.[7]

Mahoney also emphasises that in court improvement initiatives, leadership is by no means the exclusive province of chief judicial officers. The role played by other judicial officers and tribunal members and, in particular, by court and tribunal administrators, has been extremely important. Leadership within the legal profession is also vital to developing workable programs and in encouraging the legal profession to support them.

In regard to goals, Mahoney has emphasised the importance of courts and tribunals developing time standards which set clear expectations regarding the maximum length of time appropriate for the processing of various kinds of cases. He notes in this respect that the experience in America has been that the trial court performance standards developed some years ago for application to general jurisdiction trial courts have been very helpful in setting an overall framework of goals and standards within which systems can operate.[8]

As to information, Mahoney indicates that this is the lifeblood of any court or tribunal system, and particularly for the operation of a caseflow management system. Reliable information is needed to identify any problems that need to be addressed, to develop baseline

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7 B Mahoney, 'Improving the Administration of Justice in Limited Jurisdiction Courts' (1991) 1 *Journal of Judicial Administration* 46, 49.

8 But see also: JJ Spigelman, 'Judicial Accountability and Performance Indicators' (2001) 21 *Civil Justice Quarterly* 18; JJ Spigelman, 'The "New Public Management" and the Courts' (2001) 75 *Australian Law Journal* 748.

data and knowledge, to monitor progress towards the achievement of goals, to evaluate the effectiveness of specific policies and programs, and to plan for the resource needs of the future. Computer technology has also been extremely important in improving the information capacities of courts and tribunals. This, in turn, has been a boon to the successful development of caseflow management programs. It enables the continuous monitoring and supervision that is so important for an effective case processing system.

In a similar way, communication strategies and techniques have been most important. As Mahoney notes, if there is any one lesson from the research and experimentation of recent times, it is that good communication and broad consultation are essential if a court improvement program is to succeed. The regular seminars conducted by the AIJA have been important in establishing systems of national and international communication between courts and tribunals on matters of caseflow techniques and strategies. This in turn has been important in the further development of schemes, not only in Australia and New Zealand, but elsewhere in the region as well.

As to general policies and procedures, the research indicates that the courts and tribunals which have been most successful have been those that have accepted basic responsibility for the expeditious resolution of cases and have devised special rules and procedures for achieving that purpose. Also of key significance is commitment from judicial and tribunal leaders.

One of the early challenges for chief judicial officers and tribunal heads was to muster sufficient support for change from colleagues. To some extent this is an educational process, often quite a long-term one. This is because judicial officers and tribunal members, especially those not in positions of any administrative responsibility, are often inclined to continue doing things the way they have done them in the past. As Mahoney notes, conferences, seminars, tribunal meetings, and the dissemination of studies and reports, can all play a role in communicating the goals and objectives of a system and in gathering support for the successful implementation of that system.

For similar reasons, the involvement and support of court and tribunal staff at all levels is critical. In this respect the research shows that for all the successful courts and tribunals, the success of delay reduction programs through caseflow management has often been heavily affected by the extent to which the non-judicial staff has been aware of the goals and operational requirements of the systems in question and have worked to support them.

Education and training have been important in developing the schemes and making them successful. On this aspect, Mahoney observes:

> Well designed educational programmes can do a lot to overcome … resistance especially when they can incorporate recent precedents that support the change—for example, presentations by judicial officers and staff from other jurisdictions who have successfully introduced a similar programme in their own courts.[9]

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9 ibid., 54.

This is very much the approach used by the AIJA in the conduct of its early introductory seminars in the late 1980s and early 1990s, recently resumed in 2005.

On accountability, it is important that the progress and results of caseflow management initiatives be monitored, evaluated and reported. Those whose efforts are important to the success of such schemes will quickly lose faith and interest in them unless provided with information that shows their strengths and weaknesses. The provision of information of this kind has traditionally been a weakness of courts and tribunals in Australia and New Zealand, but in recent times has begun to improve quite significantly. Again, the cultural and attitudinal change involved has been important, as has the introduction of sophisticated computer technology to collect and process the relevant information.

8.7. Monitoring of developments

8.7.1. Role of the Australasian Institute of Judicial Administration (AIJA)

Mention has been made of the important developmental work undertaken in Australasia by the AIJA through its series of caseflow management conferences and seminars involving judicial officers and tribunal personnel and their relevant administrative officers (New Zealand has been involved in these AIJA activities since their inception). The methodology of these meetings is that each court and tribunal is represented by a senior team consisting of judicial, quasi-judicial and administrative personnel who are able to compare notes with their counterparts from other courts and tribunals across Australasia as to what is happening in the world of caseflow management.

By the end of the 1990s most Australian and New Zealand courts and tribunals were operating with the basic American principles, first promulgated in the 1970s but adapted to the particular circumstances of their own organisations and their specific operational requirements. The AIJA conferences and seminars have given them all the opportunity to refresh their ideas and thinking, to see the results obtained in other jurisdictions, and to return to their home jurisdictions with material and ideas for the further development of their own schemes.

In the case of the tribunals sector, this process of research and development was given a significant boost when the AIJA commenced conducting Annual Tribunals Conferences in 1998. These conferences enable the presentation of papers on many aspects of the work of tribunals, including those dealing with the more effective and efficient disposition of tribunal business.

8.7.2. Australian Law Reform Commission (ALRC) report

The common interest of courts and tribunals in the issues of caseflow management came to a head in the *Managing Justice* report of the Australian Law Reform Commission (ALRC) in 2000.[10] The Commission noted the traditional adversarial approach to dispute resolution, resting the primary responsibility for the pace of litigation in the hands of the parties and their lawyers, and also the major change which had occurred over the previous decade. (In this respect the Commission dealt with courts and tribunals.) It noted the caseflow management revolution of the 1990s involved the deliberate transfer of some of the initiative and responsibility for the conduct and progress of cases from the parties to the relevant court or tribunal. It also noted that in order to support modern caseflow system objectives, practice and procedure rules had to be extensively modified so that the operational aspects were subject to court and tribunal control and supervision.

Confirming the earlier American and local research, the Commission reiterated the importance of judicial commitment and support. It quoted Justice Michael Kirby in describing the following changes to the judicial role:

> It has become more common for judges to take an active part in the conduct of cases than was hitherto conventional. In part, this change is a response to the growth of litigation and the greater pressure of court lists. … In part it arises from a growing appreciation that a silent judge may sometimes occasion an injustice by failing to reveal opinions which the party then affected has no opportunity to correct or modify. In part, it is simply a reflection of the heightened willingness of judges to take greater control of proceedings for the avoidance of injustices that can sometimes occur from undue delay or unnecessary prolongation of trials. [11]

The ALRC also emphasised the significance of team effort for the successful operation of case management schemes. Good teamwork is essential to make a system work well.

As well as individual officer and tribunal member commitment, and the significance of a team approach, the ALRC emphasised the importance of fully informing the legal profession about proposed caseflow management arrangements. Members of the legal profession should be informed and involved as a matter of good practice and also because their support and co-operation is essential to the success of any scheme. The Commission quoted The Hon Justice Murray Gleeson, in this regard:

> The justice system is … in some respects … not a system at all. Litigants, lawyers, court administrators, judges and the executive government all influence the time and expense involved in the process of litigation. Their interests often conflict. In civil litigation, for example, plaintiffs and defendants, and their respective lawyers do not have common interests … the process of litigation is not co-operative. This

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10 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (1999) Report No.89. <http://www.austlii.edu.au/au/other/lawreform/ALRC/1999/89.html> at January 2017.

11 ibid., 390.

> does not mean that it is chaotic, but it is unrealistic to expect that it can be managed with a view to producing an outcome satisfactory to everybody.[12]

The fact that there are different and conflicting interests involved in the conduct of individual pieces of litigation means it is important that courts and tribunals involve the legal profession and other interest groups in devising appropriate systemic responses to caseflow management problems.

8.8. Second generation caseflow management issues

A significant aspect of the treatment of caseflow management by the ALRC was the identification of what it referred to as a series of 'second generation' case management issues. These are aspects which today's courts and tribunals are advised to examine to ensure that their earlier forays into caseflow management are successfully consolidated. The ALRC uses the following examples.

- Courts and tribunals may experience case management difficulties because their information systems are not sufficiently sophisticated to support case management functions.
- The suggestion that successful systems may need what the Americans call 'rambo' style judges to make them work most effectively.
- The tendency in some jurisdictions for case management systems to be implemented on a scripted basis which fails sufficiently to recognise the particularities of local practices.
- Occasionally, the failure to distinguish for case management purposes the different needs of single and multi-jurisdiction courts and tribunals.
- In some instances, problems associated with the imposition of unrealistically ambitious time standards.
- In some jurisdictions, problems associated with the continued existence of redundant or ineffective case events or hearings.
- Sometimes, the tendency for caseflow management rules to be overly rigid and to promote draconian rule and procedure changes.

Overall, the ALRC was highly supportive of caseflow management in courts and tribunals and recommended that further work be done to refine and develop the various schemes. Its recommendations 124 and 127 dealt specifically with the Administrative Appeals Tribunal (AAT). Recommendation 124 suggested that the AAT should focus development of its

12 ibid., 392.

case management processes on reducing case duration in all review jurisdictions, and on engendering a culture of compliance with directions, while Recommendation 127 was that the AAT should not operate under a single case management model but rather should utilise a range of practices and procedures adapted to suit its different review jurisdictions, including those which have been effective and successful in the existing specialist federal review tribunals.

8.9. The AIJA case management report

The caseflow management literature emphasises that while the basic principles of court and tribunal supervision of cases from commencement to completion are non-negotiable, it is a matter for each court and tribunal to produce a system appropriately tailored to its own particular requirements. These sentiments were very much to the fore at a major AIJA seminar held in Sydney in 2005.[13]

The report of the seminar notes that the pioneering seminars of the late 1980s and early 1990s were aimed at assisting courts and tribunals in the establishment and pilot-testing of modern caseflow management schemes. It says that the proposal to conduct the 2005 seminar was 'prompted by a feeling that it was timely to again provide a forum that could enable an exchange of ideas and experiences for those involved in practical day to day activities of case management'.[14] Also noted is the significance of a busy preceding decade of computer developments in most courts and tribunals. These have greatly improved the capacity to measure and evaluate the outcomes of various reforms and initiatives. For the purposes of this seminar, each participating court and tribunal was asked to prepare a detailed paper outlining its caseflow management and case listing arrangements. The report lists a number of second generation challenges and initiatives in caseflow management as follows:

- change in case management practices
- self-represented litigants
- computerised case management systems
- influx of cases
- cultural change
- judicial education
- long trials
- use of technology

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13 Australasian Institute of Judicial Administration, *Case Management Seminar, Sydney, 25 February 2005*, *Report* (2005, AIJA, Melbourne) <http://www.aija.org.au/online/CaseMgt05Report.pdf> at January 2017.

14 ibid., 1.

- changes in operating environments
- resources
- expert evidence.

The report elaborates on each of these and is a valuable source of information for those in courts and tribunals with an interest in this area. It also deals with a series of current issues which are relevant and important to caseflow management thinking and practice:

- alternative dispute resolution
- the issue of over or under listing
- estimation of hearing times
- evaluation.

Each of these issues is elaborated upon in the report, providing useful food for thought for those engaged at policy and practical levels in this area.

A series of themes and issues is also identified for future consideration:

- the cost of case management
- judicial leadership and administrative support
- the need to engage the legal profession and other stakeholders
- discovery
- pre-action protocols
- listing of cases
- witness statements
- targeted case management
- alternative dispute resolution
- education
- high volume courts.

The papers produced for this seminar constitute by far the most comprehensive source of recent information on caseflow management in Australasia. This was achieved by the fact that the participants were representatives of courts at all levels from all over Australia, as well as Industrial Relations Commissions, tribunals and courts from New Zealand, Fiji, Papua New Guinea and the Solomon Islands. The appendix to the report contains some 28 pages of detailed information on how each of the participating organisations currently deals with the processing and management of its caseload. This includes, among other things, comprehensive responses to the question, 'Is ADR a part of the process, when does it occur and is it compulsory?' There is also information on the times involved in processing cases and on the approaches to adjournments.

8.10. The Federal Court of Australia Case Management Handbook

The *Federal Court of Australia Case Management Handbook* was developed by the Law Council of Australia in conjunction with the Federal Court. It contains extensive material regarding the Federal Court's case management system, including:

- the requirement to take 'genuine steps' to resolve a dispute before commencement
- the first directions hearing, case management conferences, evaluation conferences and trial management conferences
- identifying and narrowing the issues
- operating the fast track case management list
- dealing with discovery and evidence expeditiously
- referral to alternative dispute resolution.

The Handbook is a useful guide to the development and operation of caseflow management, and the advantages and pitfalls of particular techniques adopted in the Federal Court. Following the Federal Court's *National Court Framework* reforms, the Law Council of Australia and the Federal Court are currently working together to review the Handbook.[15]

8.11. Caseflow management 'on the ground'

The approach taken to the discussion of caseflow management in this Chapter is a broad and slightly 'academic' one. This is because the modern systems of caseflow management now operated by most, if not all, tribunals and courts in Australasia are centralised, systemic arrangements laid down by the tribunal or court itself.

Once established, individual tribunal members and judicial officers are usually expected to 'toe the party line' on what is then regarded as a collegial administrative arrangement for the management of caseflow. This will normally include procedural and time-related rules and expectations, agreed listing processes, control of adjournments and information collection requirements.

On that basis, it is inappropriate and impractical in this Manual to 'lay down the law' for tribunal members as to how the flow of cases should be managed. The approach, rather, has been to sketch the conceptual policy framework within which modern caseflow management now operates. Thus, the idea is to assist those interested to appreciate the background and pedigree of the systems within which they work.

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15 Law Council of Australia, *Federal Court of Australia Case Management Handbook* (2014, Law Council of Australia) <http://www.lawcouncil.asn.au/FEDLIT/images/pdfs/CaseManagementHandbook.pdf> at January 2017.

By way of example, the AAT has a structured case management process designed to deal with applications in a flexible and timely manner. When the Tribunal receives an application, it notifies the primary decision-maker of the application. The decision-maker then has 28 days to provide the Tribunal and the applicant with a statement of reasons for the decision and all documents relevant to the review: the 'T Documents' or 'Section 37 documents'.

A conference registrar or Tribunal member holds one or more conferences with the parties—in person or by telephone—to discuss the issues in dispute, identify and consider additional material that may be obtained and explore whether the matter can be settled. The future conduct of the review will also be discussed, including whether another form of ADR. Directions hearings may be held at any time to deal with case management and other procedural matters.

If agreement cannot be reached, the Tribunal then conducts a hearing and makes a decision. It uses case management targets to ensure applications are dealt with expeditiously.[16]

In some AAT registries, a 'triage' system for applications has also been trialled. Registry staff, a conference registrar and a member conduct a daily meeting to examine the previous day's applications, assess whether the application is within jurisdiction, and decide on the priority each case should be accorded in the caseflow process. The process has been educative as all those involved have gained an appreciation of the procedures, workload and other pressures faced by the others, and of the various stages needed to progress a file. The initiative has also enhanced the collegiality in these registries. Prioritising of files has ensured that appropriate timeliness is achieved.

Practical assistance in the actual handling of hearings can be found in Chapter Five. As to the handling and management of self-represented litigants, interested readers are referred to Chapter Seven in which there is reference to a significant growth in the practical literature designed to assist tribunal members and court officers in this area. Reference is also recommended to the earlier chapters dealing with the conduct of hearings and related matters.

8.12. Conclusion

Because caseflow management arrangements are very largely determined by each court and tribunal to suit its own particular circumstances, almost by definition, they become a system-wide operational arrangement. While each individual judicial officer or tribunal member may have some discretion as to the application of particular rules and procedures, by and

16 See: G Downes, 'Case Management in the Administrative Appeals Tribunal' (February 2007, AAT, Sydney) <http://www.aat.gov.au/about-the-aat/engagement/speeches-and-papers/the-honourable-justice-garry-downes-am-former-pre/case-management-in-the-administrative-appeals-trib> at January 2017. Administrative Appeals Tribunal, *What we do* <http://www.aat.gov.au/about-the-aat/what-we-do> at January 2017. For a diagram setting out the AAT's process see: <http://www.aat.gov.au/steps-in-a-review/overview-of-the-review-process> at January 2017.

large, the approach is determined by 'head office', and individual officers usually operate very much within an overall system. This must be so, otherwise the system simply would not work. A managerial initiative of this nature needs to operate on a centralised basis in accordance with clearly articulated, understood and uniform procedures.

Systems of caseflow management rely heavily for their effectiveness and efficiency on the activities of individual judicial officers and tribunal members. This is because modern caseflow management arrangements dictate that it is no longer simply the job of individual judicial officers and tribunal members to hear and decide cases but also to handle them as part of a management scheme used in each particular court and tribunal. This means that the job of the judicial officer and tribunal member is different from what it used to be. This might have implications for the future selection of judicial officers and tribunal members, and also their training and education needs. Also, the role of individual judicial officers and tribunal members is important in identifying any adjustments and improvements that may be required in the system from time to time.

References

Government papers and reports

Administrative Appeals Tribunal, *What We Do* < http://www.aat.gov.au/about-the-aat/what-we-do> at January 2017

Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (1999) Report No.89. <http://www.austlii.edu.au/au/other/lawreform/ALRC/1999/89.html> at January 2017

Australasian Institute of Judicial Administration (AIJA), *Case Management Seminar, Sydney, 25 February 2005* <http://www.aija.org.au/online/CaseMgt05Report.pdf> at January 2017

Law Council of Australia, *Federal Court of Australia Case Management Handbook* (2014, Law Council of Australia) <http://www.lawcouncil.asn.au/FEDLIT/images/pdfs/CaseManagementHandbook.pdf> at January 2017

Professor M Lavarch, *Report on the Increased Workload of the Migration Review Tribunal (MRT) and the RRT* <http://www.immi.gov.au/visas/humanitarian/_pdf/lavarch-review-report.pdf> at 20 January 2013

Books

A Eyland, T Wright, M Karras and N Nheu, *Case Management Reform: An Evaluation of the District Court of NSW and County Court of Victoria* 1996 (2003, Law and Justice Foundation of New South Wales)

M Solomon and D Somerlot, Caseflow *Management in the Trial Court: Now and for the Future* (1987, American Bar Association)

Journal articles and speeches

G Downes, 'Case Management in the Administrative Appeals Tribunal' (February 2007, AAT, Sydney) < http://www.aat.gov.au/about-the-aat/engagement/speeches-and-papers/the-honourable-justice-garry-downes-am-former-pre/case-management-in-the-administrative-appeals-trib > at January 2017

B Mahoney, 'Improving the Administration of Justice in Limited Jurisdiction Courts' (1991) 1 *Journal of Judicial Administration* 46

P Sallmann, 'Managing the Business of Australian Higher Courts' (1992) 2 *Journal of Judicial Administration* 80

JJ Spigelman, 'Judicial Accountability and Performance Indicators' (2001) 21 *Civil Justice Quarterly* 18

JJ Spigelman, 'The "New Public Management" and the Courts' (2001) 75 *Australian Law Journal* 748

Chapter Nine: Conduct of Tribunal Members

9.1. Key issues

The importance of good behaviour:

- Tribunals play a crucial role in our system of government and in upholding the rule of law. Consequently, tribunal members are subject to high standards of behaviour in their professional and private lives. These standards are analogous, although not identical to, those of judicial officers.
- It is difficult to define what constitutes misbehaviour which would render a member unsuitable for office. 'Misbehaviour' will depend on the circumstances of each case, but is generally behaviour which constitutes such a serious departure from the standards of proper behaviour that it could undermine public confidence in the tribunal.

Standard guides for tribunal members:

- The Administrative Review Council's A Guide to *Standards of Conduct for Tribunal Members* and the Australasian Institute of Judicial Administration's *Guide to Judicial Conduct* are highly useful documents setting out standards of behaviour for tribunal members and judges.
- The Administrative Review Council's *A Guide to Standards of Conduct for Tribunal Members* identifies seven major administrative law values for tribunal members:
  - respect for the law
  - fairness
  - independence
  - respect for persons
  - diligence and efficiency
  - integrity
  - accountability and transparency.
- The Australasian Institute of Judicial Administration's *Guide to Judicial Conduct* identifies three fundamental principles against which conduct should be tested:
  - impartiality

  - independence
  - integrity and personal behaviour.
- It indicates the key objectives to which these principles are directed:
  - to uphold public confidence in the administration of justice
  - to enhance public respect for the institution of the judiciary
  - to protect the reputation of individual judicial officers and of the judiciary generally.
- Many tribunals now publish protocols for tribunal users to make complaints about tribunals members and staff, and setting out the process by which complaints will be dealt with.

9.2. Introduction

9.2.1. Importance of good behaviour

In societies in common law countries it is traditional that very high standards of 'on-duty' and 'off-duty' behaviour are expected of judicial officers and tribunal members. 'On-duty' and 'off-duty' are terms of convenience in this context for categorising behaviour involved in 'carrying out official duties' and 'private life' respectively.

The basic reason for this is the unique and special position which courts and tribunals occupy in the public life of a modern, civilised, democratic society. Courts and tribunals constitute a key component of government, with a significant role in ensuring adherence to the rule of law and in adjudicating in relation to the rights and interests of individual citizens, corporations, governments and statutory authorities. Courts and tribunals also frequently stand between the individual citizen and the State in the independent resolution of disputes.

In determining disputes and in performing other key functions, tribunals are carrying out a vital civilising role in modern society. Proper observance of the rule of law requires that laws and their related regulations are administered fairly, rationally, predictably, consistently and impartially. Behaviour by judicial officers and tribunal members is wrong if it is incompatible with these kinds of ideals and objectives. As former Chief Justice Spigelman of New South Wales observed, 'the preservation of the rule of law is the basic reason for establishing mechanisms for dealing with judicial misconduct, whether it takes the form of corruption or less serious forms of misbehaviour'.[1]

The same sentiments and reasoning apply to tribunal members.

Chief Justice Spigelman went on to say:

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1 Justice J Spigelman, 'Dealing with Judicial Misconduct' (Paper presented to the 5th World Wide Common Law Judiciary Conference, Sydney, 2003) 1.

- Fairness requires reasonable consideration of the rights and duties asserted.
- Rationality requires a reasoned relationship between the rights and duties and the outcome.
- Predictability requires a process by which the outcome is related to the original rights and duties.
- Consistency requires similar cases to lead to similar results.
- Impartiality requires the decision-maker to be indifferent to the outcome.

Judicial misconduct, particularly improper external influence, distorts all of these objectives.[2]

These ideals and values are at the very core of the proper administration of justice and what is expected of those who hear and determine disputes and who make decisions about the rights and obligations of parties who appear before them. It is useful for tribunal members to reflect on these fundamental principles from time to time as they go about their everyday work. They are, after all, the 'cornerstones' of the law and justice enterprise.[3]

9.2.2. On-duty and off-duty activity

The hearing and decision-making role of tribunal members is regarded as such an important part of the good operation of society that high standards of behaviour are expected not only in the tribunal activities of these decision-makers but also in their private lives. While most complaints about the behaviour of tribunal members concern their activities in the hearing and deciding of cases, sometimes issues can arise about behaviour well removed from the tribunal hearing room. Perhaps the most obvious example of this would be a conviction for a serious or mid-range criminal offence. For obvious reasons, something of that nature may well cause the resignation or removal from office of the individual in question. Similarly, there are other kinds of misbehaviour, which, although not criminal in nature, would reflect very poorly on the individual in question and in consequence the office that person holds—thereby potentially leading to legitimate pressure for that person's removal from office.

9.2.3. Misbehaviour

While boundary lines between acceptable and unacceptable off-duty conduct can no doubt become blurred, there is little doubt that some behaviour short of a criminal offence could well be unacceptable in general terms from a tribunal member and could raise questions about the suitability of that person to continue in the role.

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2 ibid.

3 On ethics in relation to tribunal practice see, generally, A Christou, 'A Moveable Feast: Identifying Ethical Norms Within Quasi-Judicial Practice' (Paper presented to the 7th Annual AIJA Tribunals Conference, Brisbane, June 2004).

By analogy with the judicial sphere, there is some guidance from the Commissioners who investigated the case of former Australian High Court Justice Lionel Murphy in the 1980s.[4] The Commissioners (Messrs Lush, Blackburn and Wells), dealing with the question as to what might constitute removable behaviour on the part of a judge, spoke about notions such as whether:

- the conduct, judged by contemporary standards, throws doubt on suitability to continue in office
- the conduct, being morally wrong, demonstrates unfitness to continue
- the behaviour represents such a serious departure from the standards of proper behaviour that it must be found to have destroyed public confidence.

While these suggestions are useful, and may apply in general terms to tribunal members, it will be the relevant decision-maker who will ultimately judge the nature of the behaviour and its implications. In the judicial sphere this means, as Professor Tony Blackshield has noted in the Federal judicial context, that 'misbehaviour' is essentially a political rather than a legal notion.[5] This is not to deny that a decision by Parliament in relation to a Federal judicial officer may well be justiciable before the High Court. One of the difficulties in this area is that there is very little jurisprudence to draw upon in Australasia in relation to the general notion of misbehaviour, whether it be in a tribunal or judicial context. A signal exception was *LVR (WA) Pty Ltd v Administrative Appeals Tribunal* (2012) 203 FCR 166 in which judicial review was brought to challenge a decision of the AAT on the ground that the tribunal in its reasons had substantially copied material from the submissions of one of the parties. This could be characterised as a breach of the obligations on tribunal members of diligence, impartiality and integrity. Although the Commissioners in the Murphy case were talking generally of behaviour, which could threaten the position of a judicial officer tribunal member, it is clear that various behaviours falling well short of a 'hanging offence' should be avoided by people who have judicial and quasi-judicial roles to perform.

A useful rule of thumb is for a tribunal member to avoid behaviour or incidents which might attract the attention of the editors of newspapers, and find themselves reported on the cover page. As noted in the *Guide to Judicial Conduct*:

> Judges should be experienced in assessing the perception of reasonable fair-minded and informed members of the community in deciding whether conduct is or is not likely to diminish respect in the minds of such persons.[6]

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4 Australian Parliament, Parliamentary Commission of Inquiry, *Special Report* (August 1986).

5 AR Blackshield, 'The Appointment and Removal of Federal Judges,' in B Opeskin and E Wheeler (eds), *The Australian Federal Judicial System* (2000, Melbourne University Press, Melbourne) 422.

6 *Guide to Judicial Conduct* (2nd edn, 2007, AIJA Inc, Victoria) at p. 6. <http://www.aija.org.au/online/GuidetoJudicialConduct(2ndEd).pdf> at January 2017.

Precisely what behaviour should be avoided is often difficult to indicate with any precision, but the fact that there are now various kinds of conduct guides available provides considerable assistance. This is an improvement on the position in the past.

9.3. Conduct guides

There are some specific sources of assistance for tribunal members and judicial officers. The close relationship between tribunals and courts in this context is useful, because over a number of years in overseas jurisdictions, particularly in the United States, conduct codes and guides of various descriptions have been produced. Codes are rather prescriptive and definitive in nature, while a guide is precisely that—a series of indications of the principles and standards that might operate in particular situations. So far, the clear Australasian preference has been for the guidelines or standards approach rather than the more prescriptive approach of a code.

Some commentators associate the development of these codes and guides with the progressive, positive maturation of tribunals and courts as active modern institutions of government. Others see their development more as an indication perhaps of a fall in public confidence in the judicial system and a perception that the norms of uprightness among judicial and quasi-judicial officers in many common law countries are not being maintained. The important thing is the existence of these guideline documents and the conceptual and practical assistance they provide in relation to conduct and ethics matters in the area of tribunals and courts.

With some obvious inspiration from overseas models some home-grown guides to conduct have been published in Australia. In September 2001 the Administrative Review Council (ARC) published *A Guide to Standards of Conduct for Tribunal Members.* This guide was updated by way of a second edition in 2009.[7] In 2002, the then Australian Institute of Judicial Administration (AIJA), on behalf of the Council of Chief Justices of Australia, published a *Guide to Judicial Conduct.* This guide was updated in 2007.[8] Together, these two publications provide a very useful source of information and ideas as to what might be expected in terms of on-duty and off-duty conduct and activities. A little should be said about the background to each of these publications before providing some detail on the kinds of assistance they might provide.

In addition to these two general publications, each tribunal may publish its own standards for members. For example, the Administrative Appeals Tribunal has published its *Conduct Guide for AAT Members*. The AAT Guide identifies core values of independence, impartiality and integrity, and sets out expectations for both public and private conduct:

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7 *A Guide to Standards of Conduct for Tribunal Members* (2nd edn, 2009, ARC, Canberra) <http://www.arc.ag.gov.au/Documents/GuidetoStdsofConduct-RevisedAug2009.pdf> at January 2017.

8 Above n 6.

<http://www.aat.gov.au/AAT/media/AAT/Files/Directions%20and%20guides/Conduct-Guide-for-AAT-Members.pdf>.

9.3.1. Australian guides

The background to the ARC's *A Guide to Standards of Conduct for Tribunal Members* was a series of ethics workshops in 1997. These were conducted by the ARC and led to a project to develop the guide. The publication of the ARC's Guide was timely, given the heightened focus on standards of conduct for public officers. The second edition reflects consultations undertaken in late 2008 and early 2009 to ascertain the use that had been made of the Guide and suggestions for improvement. As a result, the revised Guide is centred on seven major themes as core administrative law values: respect for the law, fairness, independence, respect for persons, diligence and efficiency, integrity, and accountability and transparency.[9]

A similar pattern of development occurred in relation to the *Guide to Judicial Conduct*. In the late 1990s the AIJA published a discussion paper on judicial ethics.[10] Later, the Council of Chief Justices commissioned some retired Supreme Court judges to prepare a statement of judicial conduct principles. The AIJA provided administrative support to this project and in 2002 published the first edition of the *Guide to Judicial Conduct* on behalf of the Council. In the Preface, the then Chief Justice of Australia, The Hon Justice Murray Gleeson, says:

> The Australian Chief Justices decided that it was time to provide members of the judiciary with some practical guidance about conduct expected of them as holders of judicial office and that such guidance should reflect the changes that have occurred in community standards over the years.

The *Guide to Judicial Conduct* has been very well received by Australian courts at all levels. The second edition was published in March 2007. The fact of the Guide's production has itself been applauded and there seems to be considerable support for its substance as well. It has also received favourable attention within the tribunals sector, and a number of tribunals have specifically endorsed it. The Guide is 35 pages in length and is divided into seven chapters. It is written in accessible terms and it is recommended that tribunal members refer to it.

The approach taken in this Chapter to the substantive issues of conduct which can arise from time to time in tribunal context is essentially to recommend reference to these two very useful documents. Tribunal members can refer to them for guidance on particular issues or areas in which they may have an interest.

It should also be noted that the material in the next two subsections of this Chapter can be read by reference to the discussion of bias issues in Chapter Three and the discussion in Chapter Seven regarding the appropriate treatment of persons who appear before tribunals.

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9 ARC, *A Guide to Standards of Conduct for Tribunal Members*, above n 7, at v.

10 D Wood, *Judicial Ethics: A Discussion Paper* (1996, AIJA, Victoria).

9.3.2. Guide for tribunals

Both the ARC and the Council of Chief Justices rejected the idea of a code, in other words a prescriptive kind of document, and opted instead for a guidelines or standards approach which set out basic principles, without seeking to be exhaustive or to 'cover the field.' As noted in part 2 of the *A Guide to Standards of Conduct for Tribunal Members*:

> Why Principles? To distinguish from more specifically directed codes of conduct, the Council has chosen to describe the standards of conduct for tribunal members contained in the Guide as a set of 'principles' rather than a 'code'.[11]

The *Standards Guide for Tribunal Members* lists the following principles of conduct and accompanies them with useful commentary:

- respect for the law
- fairness
- independence
- respect for persons
- diligence and efficiency
- integrity
- accountability and transparency
- responsibility of tribunal heads.

As noted, there is a special section of the guide devoted to the responsibilities of tribunal heads (Part 2, Item 8) to assist their members in complying with the accepted principles and ideas of conduct. As the accompanying commentary indicates:

> Tribunal heads have a responsibility to assist tribunal members to comply with the principles of conduct. This is particularly so if the Guide is to be used as part of a tribunal's performance management strategy. In addition to the personal leadership of tribunal heads, this can be satisfied by ensuring that adequate training and educational resources are available to tribunal members.
>
> Without personal support staff, keeping up to date may be particularly difficult for part-time members. Tribunals may need to develop strategies to ensure that relevant information is easily accessible to part-time members.
>
> Compliance with this principle might also entail support for, and cooperation with any initiatives by COAT, in relation to member training.[12]

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11 Above n 7, at 2.

12 *A Guide to Standards of Conduct for Tribunal Members*, above n 7, at 57.

The basic principles are fleshed out into a series of sub-categories or components and later in the Guide more detailed comments are provided about each of these elements.

9.3.2.1. Respect for the law

- A tribunal member should demonstrate a respect for the law in the performance of their tribunal responsibilities. The ARC suggests that when behaviour has the capacity to damage the integrity or reputation of the tribunal or raise doubts as to the ability of the member to perform tribunal functions in an appropriate fashion, it is in breach of the principle of 'respect for the law'.
- A tribunal member should also demonstrate a respect for the law in private life. Unless specifically provided for by statute or administratively, the question of what is and what is not acceptable behaviour must be determined on the basis of the facts of each case, judged from the viewpoint of a reasonable person.[13]

9.3.2.2. Fairness

- A tribunal member should ensure that each party to a proceeding is afforded the opportunity to put their case. (See Chapter Three at 3.3.3.)
- A tribunal member should act without bias and in a way that does not give rise to an apprehension of bias in the performance of their tribunal decision-making responsibilities. (See Chapter Three at 3.4.)
- A tribunal member should be pro-active and comprehensive in disclosing to all interested parties interests that could conflict (or appear to conflict) with the review of a decision. (See Chapter Three at 3.4.8.)
- A tribunal member should have regard to the potential impact of activities, interests and associations in private life on the impartial and efficient performance of their tribunal responsibilities. Notwithstanding that many tribunal members are appointed to a tribunal precisely because of their knowledge of and interest in a particular group or field of professional activity, a high standard of impartiality is required. (See Chapter Three at 3.4.)
- A tribunal member should not accept gifts where this could reasonably be perceived to compromise the impartiality of the member or the tribunal.

9.3.2.3. Independence

- A tribunal member should perform their tribunal responsibilities independently and free from external influence.

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13 See also Justice Thomas, *Judicial Ethics in Australia* (2nd edn, 1997, Law Book Company Ltd) 140–41, 198–99.

- While tribunals are part of the executive arm of government, tribunal members should bring the same quality of independent thought and decision-making to their task as do judges.

9.3.2.4. Respect for persons

- A tribunal member should be patient, dignified and courteous to parties, witnesses, representatives, tribunal staff and officials and others with whom the member deals and should require similar behaviour of those subject to their direction and control. (See Chapter Five.)
- A tribunal member should endeavour to understand and be sensitive to the needs of persons involved in proceedings before the tribunal. (See Chapter Five.)

9.3.2.5. Diligence and efficiency

- A tribunal member should be diligent and timely in the performance of tribunal responsibilities. (See Chapter Five at 5.4.1.)
- A tribunal member should take reasonable steps to maintain and to enhance the knowledge, skills and personal qualities necessary to the performance of tribunal responsibilities. (See Chapter One at 1.5.)

9.3.2.6. Integrity

- A tribunal member should act honestly and truthfully in the performance of tribunal responsibilities.
- A tribunal member should not knowingly take advantage of, or benefit from, information not generally available to the public obtained in the course of the performance of tribunal responsibilities.
- A tribunal member should not use their position as a member to improperly obtain, or seek to obtain, benefits, preferential treatment or advantage for the member or for any other person or body.
- A tribunal member should be scrupulous in the use of tribunal resources.
- In private life, a tribunal member should behave in a way that upholds the integrity and good reputation of the tribunal.

9.3.2.7. Accountability and transparency

- A tribunal member is accountable for decisions and actions taken as a tribunal member and should fully participate in all applicable scrutiny regimes (including legislative and administrative scrutiny).
- Accountability is fundamental to good government and is a cornerstone value of a modern, open society.

- A tribunal member should be as open as possible about all decisions and actions (including lack of action) taken in the performance of tribunal responsibilities.

9.3.2.8. Responsibility of tribunal head

- A tribunal head should assist tribunal members to comply with the principles of conduct and to perform their tribunal responsibilities, through the provision of appropriate leadership, training and support.

A *Guide to Standards of Conduct for Tribunal Members* covers the subject matter in a clear, succinct and accessible manner. It also has quite extensive footnotes referring to various sources such as case law, journal articles, and commission and committee reports. In addition, it has an Appendix (Appendix 2) which lists a range of analogous conduct documents and publications, such as those which apply to public servants, politicians and other professional groups, as well as specific documents which have been adopted by tribunals.

9.3.3. The guide to judicial conduct

The *Guide to Judicial Conduct* should also be of considerable interest and assistance to tribunal members on conduct issues. This is also discussed in Chapter Three. Its purpose is to give 'practical guidance' to members of the Australian judiciary at all levels. It seeks to be positive and constructive and to indicate how particular situations might best be handled. It also makes the preliminary point that in the area of conduct and ethics there is often a range of reasonably held opinions on many of the issues which arise for discussion. In other words, it will often not be possible or sensible to 'lay down the law' on what the correct approach to a particular issue might be. There may well be different considerations and approaches.

In the Preface to the second edition of the Guide, Chief Justice Gleeson noted that:

> The document assumes a high level of common understanding on the part of judges of basic principles of judicial conduct, many of which are the subject of settled legal rules. It sets out to address issues upon which there is more likely to be uncertainty and upon which guidance will be helpful.[14]

The Guide to Judicial Conduct identifies three fundamental principles as the test for assessing conduct:

- impartiality
- independence
- integrity and personal behaviour.

The key objectives to which these principles are directed are:

- to uphold public confidence in the administration of justice

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14 Above n 6 at p. ix.

- to enhance public respect for the institution of the judiciary
- to protect the reputation of individual judicial officers and of the judiciary generally.[15]

Particular chapters are devoted to matters such as impartiality, conduct in court, activities outside court, non-judicial activities, and post-judicial activities. Readers are referred to the guide itself for the detail of these discussions but the following provides an overview of some particularly relevant chapters.

Chapter 3 of the *Guide to Judicial Conduct* deals with impartiality under the following subheadings:

- associations and matters requiring consideration
- activities requiring consideration
- conflicts of interest
- shareholding in litigant companies, or companies associated with litigants
- business, professional and other commercial relationships
- judicial involvement with litigant community organisations
- personal relationships
- other grounds for possible disqualification
- disqualification procedure.

For details on these issues contained within this Manual, see Chapter Three at 3.4.

Chapter 4 of the *Guide to Judicial Conduct* is devoted to issues of conduct in court and has the following items:

- conduct of hearings
- participation in the trial
- private communications
- criminal trials before a jury
- revision of oral judgments
- oral judgments
- summing up to a jury
- reserved judgments
- critical comments
- the judge as a mediator.

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15 Above n 6 at p. 3.

Activities outside the court are covered in Chapter 5. Assistance is provided in relation to matters such as:

- membership of government advisory bodies or committees
- making submissions or giving evidence to a parliamentary inquiry relating to the law or some aspect of the legal system
- judicial officers performing law reform type tasks
- membership of non-judicial tribunals or parole boards
- making public comments and participating in public debate on various matters
- legal teaching and writing for newspapers or periodicals
- appearing on television or radio
- new books—prefaces and book launches
- payment for writing legal books
- taking part in conferences
- professional development
- welfare of fellow judicial officers.

On dealing with the media, see further in this Manual at Chapter Seven.

Chapter 6 of the *Guide to Judicial Conduct* covers various aspects of conduct further removed from mainstream judicial activities. It includes matters such as the following:

- judicial officers being involved in commercial activities
- acting as executors or trustees
- accepting gifts
- being engaged in community organisations and public fund raising
- providing character and other references
- participating in social and recreational activities
- membership of clubs
- visits to bars and clubs
- gambling
- involvement in sporting and other clubs and committees.

Chapter 7 is of interest because it deals with a number of ethical or conduct issues which may affect judicial officers following their resignation or retirement from the bench. These include matters such as:

- returning to private legal practice

- working as mediators or arbitrators (see in this Manual, Chapter Four at 4.4)
- engaging in commercial, political and other activities.

While these aspects may not be as pertinent to tribunal members as to judicial officers, they are still relevant and likely to be of interest.

9.4. Conduct and professional development

Australasian tribunals obviously have their own internal discussions about matters of conduct and ethics. Some jurisdictions now have formal professional development bodies which conduct programs for tribunal members. For example, in Victoria the Victorian Civil and Administrative Tribunal (VCAT) is a full participant in the activities of the Judicial College of Victoria. This means that VCAT members can have their own internal discussions about matters of conduct and ethics but can also participate in any ethics and conduct programs and seminars that are conducted by the College from time to time.[16] The fact that in recent years the ARC's *A Guide to Standards of Conduct for Tribunal Members* and the Council of Chief Justices's *Guide to Judicial Conduct* have become available means that there are now very useful ready sources of information available to provide a basis for discussion of conduct issues within particular courts and tribunals and on an inter-jurisdictional basis as well. In addition, these guides can be used by individual tribunal members as a ready source of personal reference in regard to on-duty and off-duty conduct issues.

There is, of course, nothing to stop individual tribunals from developing their own conduct guides or codes, such as the Administrative Appeals Tribunal's *Conduct Guide for AAT Members*.

While it is usually argued that participation in professional development by tribunal members should as a matter of principle be entirely voluntary, there is increasing acceptance of the idea that it is an important part of the role to do so. In some United States jurisdictions, participation in ongoing educational programs is regarded in itself as a principle of conduct. In other words, it is viewed as poor professional conduct not to participate in such activities.

9.5. Removal and complaint procedures

From time to time complaints are made about the conduct of tribunal members. Complaints may be about on-duty or off-duty conduct, although the vast majority will usually deal with the hearing and decision-making aspects of cases. Sometimes they may even relate to behaviour alleged to have occurred before appointment as a tribunal member.

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16 See, for example, J Pizer, *Pizer's Annotated VCAT Act* (4th edn, 2012, JNL Nominees Pty Ltd).

People may complain to a government official, such as the Attorney-General, or to the head of the relevant tribunal or head of the list or division of which the member in question is part. As mentioned, complainants themselves will usually be people who have been involved in a case before the tribunal in question but there is no restriction on who may make a complaint about a tribunal member. Usually, the complaint must be about the conduct of the member as distinct from a particular decision the member may have made.

Some complaints may allege behaviour of sufficient seriousness to raise the possibility of the member being removed from office, should the matter be substantiated. This is very rare. Most will be about matters of far less seriousness. Different jurisdictions and different tribunals have distinct rules and procedures for dealing with these matters. For that reason, it is not sensible to go into any detail about particular regimes, nor to attempt to generalise about how these matters are approached within the tribunals sector as a whole.

It may, however, serve a useful purpose to mention the example of the VCAT in relation to which some recent significant changes have occurred. Under the *Victorian Civil and Administrative Tribunal Act 1998* (Vic), the President, who is a Supreme Court Judge, has power, with the approval of the Minister, to suspend a non-judicial member from office if the President believes that there may be grounds for removal. If the President exercises the power of suspension, the Minister must then appoint a person nominated by the President to undertake an investigation of the relevant member's alleged conduct.

There will then be a report to the Minister on the investigation, a copy of which is provided to the member in question and to the President. Such a report may include a recommendation that the member be removed from office. On receipt of a report containing such a recommendation, the Minister may, after consulting with the President, recommend to the Governor-in-Council that the member be removed from office. Until recently the grounds for removal of a non-judicial member of VCAT were: the conviction of an indictable offence or an offence, which, if committed in Victoria, would be an indictable offence; being incapable of performing or neglecting to perform the duties of office; or being unfit to hold office because of misconduct.[17]

As a result of a review of conduct and complaint arrangements in Victoria in relation to both judicial officers and tribunal members, a recommendation was made that the grounds for removal of judicial officers and non-judicial members of VCAT be the same and that those grounds should be the same as for Federal judicial officers under the Australian Constitution—proven misbehaviour or incapacity.[18] That recommendation has been adopted in the *Courts Legislation (Judicial Conduct) Act 2005* (Vic). While the actual removal grounds for VCAT members have changed, the removal procedure has remained the same.

Consistent with what happens in the court system in Victoria, and in most other jurisdictions, any lower level (non-removal) type complaints about VCAT members are referred to the President for informal consideration. Variations of this approach are standard practice among

17 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ss 22–24.

18 *Report on the Judicial Conduct and Complaints System in Victoria* (2003, Department of Justice, Victoria).

tribunals across Australia and New Zealand.[19] Also consistent with a number of other courts and tribunals around Australia, VCAT has published a *Complaints Protocol*[20] setting out the basis and procedure for dealing with a complaint.

As already noted, a complaint must be about the *conduct* of a member, as opposed to the decision made by the member. If the matter is about conduct, the President (or delegate) will consider the complaint and take whatever action is open and appropriate in the circumstances. While members are expected to be polite, they are also expected to manage proceedings efficiently and effectively. At times it may be necessary to be brief or assertive.

These general principles are basic and universal among Australasian tribunals, and the procedural arrangements will tend to vary only in the particular detail which applies from one organisational setting to another.

9.6. Conclusion

Whereas in many areas of law and procedure governing the operation of tribunals it is possible, and indeed sensible, to be reasonably definitive, and perhaps even emphatic, about how things should work, for the most part this is not so in regard to conduct issues. Many aspects of conduct and ethics affecting tribunal members are not conducive to clear-cut, definitive statements. They are often open to debate and discussion. That is why much of the material in this Chapter is not expressed in terms of dos and don'ts but rather as matters of general advisory principle. Interested readers are strongly recommended to refer to the ARC and Council of Chief Justices conduct guides for useful discussions of general matters of principles and suggestions as to what the appropriate approaches might be in particular circumstances.

References

Cases

LVR (WA) Pty Ltd v Administrative Appeals Tribunal (2012) 203 FCR 166

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19 See, for example, Administrative Appeals Tribunal, *Service Charter*, <http://www.aat.gov.au/about-the-aat/our-commitment-to-you/service-charter> at January 2017.
NCAT, *Complaints about NCAT*, <http://www.ncat.nsw.gov.au/Documents/ncat_factsheet_complaints_about_ncat.pdf> at January 2017.
QCAT, *Complaint Policy and Procedure*, <http://www.qcat.qld.gov.au/__data/assets/pdf_file/0008/284588/QCAT-complaints-policy.pdf> at January 2017.

20 Victorian Civil and Administrative Tribunal, *Complaints Protocol,* <https://www.vcat.vic.gov.au/sites/default/files/resources/complaint_about_a_tribunal_member_or_mediator_staff_member_service_or_process_form.pdf> at January 2017.

Legislation

Courts Legislation (Judicial Conduct) Act 2005 (Vic)

Victorian Civil and Administrative Tribunal Act 1998 (Vic)

Government papers and reports

Australian Parliament, Parliamentary Commission of Inquiry*, Special Report* (August 1986)

Report on the Judicial Conduct and Complaints System in Victoria (2003, Department of Justice, Victoria)

D Wood, *Judicial Ethics: A Discussion Paper* (1996, AIJA Inc, Victoria)

Guides

Administrative Appeals Tribunal, *Conduct Guide for AAT Members*, <http://www.aat.gov.au/AAT/media/AAT/Files/Directions%20and%20guides/Conduct-Guide-for-AAT-Members.pdf> at January 2017

Administrative Appeals Tribunal, *Service Charter*, <http://www.aat.gov.au/about-the-aat/our-commitment-to-you/service-charter> at January 2017

Administrative Review Council, *A Guide to Standards of Conduct for Tribunal Members* (2001) <http://www.arc.ag.gov.au/Documents/GuidetoStdsofConduct-RevisedAug2009.pdf> at January 2017

Council of Chief Justices of Australia, *Guide to Judicial Conduct* (2nd edn, 2007, AIJA Inc, Victoria) <http://www.aija.org.au/online/GuidetoJudicialConduct(2ndEd).pdf> at January 2017

NCAT, *Complaints about NCAT*, <http://www.ncat.nsw.gov.au/Documents/ncat_factsheet_complaints_about_ncat.pdf> at January 2017

QCAT, *Complaint Policy and Procedure*, <http://www.qcat.qld.gov.au/__data/assets/pdf_file/0008/284588/QCAT-complaints-policy.pdf> at January 2017

Victorian Civil and Administrative Tribunal, *Complaints Protocol*, <https://www.vcat.vic.gov.au/sites/default/files/resources/complaint_about_a_tribunal_member_or_mediator_staff_member_service_or_process_form.pdf> at January 2017

Books

J Pizer, *Pizer's Annotated VCAT Act* (4th edn, 2012, JNL Nominees Pty Ltd)

Justice Thomas, *Judicial Ethics in Australia* (2nd edn, 1997, Law Book Company Ltd)

Book chapters

AR Blackshield, 'The Appointment and Removal of Federal Judges' in B Opeskin and E Wheeler (eds), *The Australian Federal Judicial System* (2000, Melbourne University Press, Melbourne)

Conference papers

A Christou, 'A Moveable Feast: Identifying Ethical Norms Within Quasi-Judicial Practice' (Paper presented to the 7th Annual AIJA Tribunals Conference, Brisbane, June 2004)

Justice J Spigelman, 'Dealing with Judicial Misconduct' (Paper presented to the 5th World Wide Common Law Judiciary Conference, Sydney, 2003)

References, Glossary and Index

References

General references on Law

T Blackshield and G Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (6th edn, 2014, Federation Press, Sydney)

S Bottomley and S Bronitt, *Law in Context* (4th edn, 2012, Federation Press, Sydney)

R Cook, R Creyke, RS Geddes, D Hamer and T Taylor, *Laying Down the Law* (9th edn, 2015, LexisNexis, Sydney)

R Hinchy, *The Australian Legal System: History, Institutions and Methods* (2008, Pearson, Sydney)

R Hughes, G Leane and A Clarke, *Australian Legal Institutions; Principles, Structure and Organisation* (2003, Lawbook Co, Sydney)

S Joseph and M Castan, *Federal Constitutional Law: A Contemporary View* (3rd edn, 2009, Thomson Reuters, Sydney)

LexisNexis *Concise Australian Legal Dictionary* (4th edn, 2011, LexisNexis, Sydney)

J Miller, *Getting into Law* (2002, Butterworths)

General references on Administrative Law

1 Textbooks and casebooks

M Allars, *Introduction to Australian Administrative Law* (1990, Butterworths, Sydney)

M Aronson, M Groves and G Weeks, *Judicial Review of Administrative Action* (6th edn, 2017, Thomson Reuters, Sydney)

J Barnes and R Douglas, *Administrative Law: Butterworths Questions and Answers* (2nd edn, 2007, Butterworths, Sydney)

R Creyke, J McMillan and M Smyth, *Control of Government Action: Text, Cases & Commentary* (4th 2015, LexisNexis, Sydney)

R Douglas, Douglas and Jones' *Administrative Law Cases and Materials* (6th edn, 2009, Federation Press, Sydney)

J R S Forbes, *Justice in Tribunals* (4th edn, 2014, Federation Press, Sydney)

M Head, *Administrative Law: Context and Critique* (3rd edn, 2012, Federation Press, Sydney)

H Katzen and R Douglas, *Butterworths Tutorial Series: Administrative Law* (1999, Butterworths, Sydney)

P Joseph, *Constitutional and Administrative Law in New Zealand* (3rd edn, 2007, Brookers, Wellington)

2 Loose-leaf services and commentaries

D Pearce and M Allars, *Australian Administrative Law Service* (1978– , Butterworths, Sydney)

GA Flick, *Federal Administrative Law* (2nd edn, 1984– , Sydney, Law Book Co)

Government papers and reports

Administrative Review Council <http://www.ag.gov.au/agd/WWW/archome.nsf/Page/Publications> at 7 January 2014

— *Review of the Commonwealth Merits Review Tribunals: Discussion Paper* (1994)

— *Better Decisions: Review of Commonwealth Merits Review Tribunals*: Report No. 39 (1995)

— *Internal Review of Agency Decision Making*: Report No. 44 (2000)

— *Report on the Council of Australasian Tribunals*: Report No. 45 (2002)

Australian Law Reform Commission <http://www.alrc.gov.au/publications/index.htm> at 7 January 2014

— *Alternative or Assisted Dispute Resolution: Adversarial Background Paper 2* (1996)

— *Review of the Adversarial System of Litigation: Federal Tribunal Proceedings: Issues Paper* No 24 (1998)

— *Review of the Federal Civil Justice System: Discussion Paper No. 62* (1999)

— *Managing Justice: A Review of the Federal Civil Justice System: Report No. 89* (2000)

Australian Senate, Legal and Constitutional Affairs Committee, *Inquiry into the Provisions of the Administrative Review Tribunal Bill 2000 and the Administrative Review Tribunal Bill (Consequential and Transitional Provisions) Bill 2000* (February 2001) <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/1999-02/art/report/index > at 7 January 2014

New Zealand Law Commission, Report No. 85: *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (2004) <http://www.lawcom.govt.nz/publications/?filters=none> at 7 January 2014

Sir Andrew Leggatt, *Tribunals for Users: One System, One Service* (2001) ('Leggatt Report') <http://www.tribunals-review.org.uk/leggatthtm/leg-00.htm> at 7 January 2014

Lord Woolf, *Access to Justice – Final Report* (1996) ('Lord Woolf Report') <http://www.dca.gov.uk/civil/final/index.htm> at 7 January 2014

Judicial Studies Board (UK), *Tribunal Competencies: Qualities and Abilities in Action* (2nd edn, 2007) <http://www.judiciary.gov.uk/Resources/JCO/Documents/Guidance/Comp_Framework_October_07_FINAL.pdf> at 7 January 2014

Guides

Administrative Review Council <http://www.ag.gov.au/agd/WWW/archome.nsf/Page/Publications> at 7 January 2014, available under 'Other Publications'

— *A Guide to Standards of Conduct for Tribunal Members* (Revised 2009)

— *Practical Guidelines for Preparing Statements of Reasons* (Revised 2002) and *Commentary on the Practical Guidelines* (Revised 2002)

Council of Chief Justices of Australia, *Guide to Judicial Conduct*, (2nd edn, 2007, AIJA Inc, Victoria) <http://www.aija.org.au/online/GuidetoJudicialConduct(2ndEd).pdf> at January 2017

Books of essays and conference proceedings

Note: The publications marked with an asterisk are available online through the Australian Institute of Administrative Law (AIAL) website under 'Proceedings of AIAL National Conferences.' <http://www.aial.org.au/Publications/PubProcNatConf.html> at 7 January 2014

S Argument (ed.), *Administrative Law and Public Administration: Happily Married or Living Apart Under the Same Roof* (1994, AIAL)

S Argument (ed.), *Administrative Law: Are the States Overtaking the Commonwealth?* (1995, AIAL)

P Bayne et al (ed.), *Administrative Law: Retrospect and Prospect* (1989, Canberra Bulletin of Public Administration)

P Bayne (ed.), *AAT Essays: 1976–1996* (1996, AAT)

K Cole (ed.), *Administrative Law and Public Administration: Form vs Substance?* (1995, AIAL)

R Creyke, *The Procedure of the Federal Specialist Tribunals* (1994, Centre for International & Public Law, ANU)

R Creyke and J McMillan (eds), *Administrative Justice: the Core and the Fringe* (2000, AIAL)

R Creyke and J McMillan (eds), *The Kerr Vision of Australian Administrative Law — At the Twenty-Five Year Mark*, (1998, Centre for International and Public Law, ANU)

R Creyke and J McMillan, *Commonwealth Tribunals: The Ambit of Review,* (1998, Centre for International and Public Law, ANU)

R Creyke, *Administrative Tribunals: Taking Stock* (1992, Centre for International and Public Law)

C Finn (ed.), *Sunrise or Sunset?: Administrative Law in the New Millennium* (2001, AIAL)

M Harris and V Waye (eds), *Australian Studies in Law: Administrative Law* (1991, Federation Press)

S Kneebone (ed.), *Administrative Law and the Rule of Law: Still Part of the Same Package?* (1998, AIAL)

J McMillan (ed.), *Administrative Law: Does the Public Benefit?* (1992, AIAL)

J McMillan (ed.), *The AAT—Twenty Years Forward* (1998, AIAL)

J McMillan (ed.), *Administrative Law Under the Coalition Government* (1998, AIAL)

L Pearson (ed.), *Administrative Law: Setting the Pace or Being Left Behind?* (1996, AIAL)

M Taggart (ed.), *Judicial Review of Administrative Action in the 1980s: Problems and Prospects* (1986, Oxford University Press)

M Taggart (ed.), *The Province of Administrative Law* (1997, Oxford, Hart Publishing)

Journal articles

There is a large number of articles on tribunal developments and administrative law.

Journals which publish articles of interest to tribunals include:

AIAL Forum, past issues are available online from the AIAL website under 'Publications—AIAL Quarterly Forum' <http://www.aial.org.au/Publications/PubQuartForum.html> at 7 January 2014

Admin Review, a bulletin published by the Administrative Review Council and available from the Council's website at <http://www.ag.gov.au/agd/WWW/archome.nsf/Page/Publications> at 7 January 2014

Australian Dispute Resolution Journal

Australian Journal of Administrative Law

Canberra Bulletin of Public Administration

Federal Law Review

Papers given at the annual Tribunals Conference conducted by the Australian Institute of Judicial Administration are available on the AIJA website at <http://www.aija.org.au/> at 7 January 2014

Public Law Review

Recent relevant articles include:

DG Jarvis, 'Procedural Fairness as it applies in the Administrative Appeals Tribunal', (2007) 81 *ALJ* 465.

M Smyth, 'Inquisitorial Adjudication: The Duty to Inquire in Merits Review Tribunals' (2010) 34, *Melbourne University Law Review* 230

MA Noone, 'Improving access to justice: Communication skills in the tribunal setting,' (2006) 16 *JJA* 18.

N Rees, 'Procedure and evidence in "court substitute" tribunals', (2006) 28 *Australian Bar Review*, 41.

Statutes

Acts Interpretation Act 1901 (Cth)

Acts Interpretation Act 1954 (Qld)

Acts Interpretation Act 1931 (Tas)

Acts Interpretation Act 1915 (SA)

Interpretation Act 1987 (NSW)

Interpretation Act 1984 (WA)

Interpretation Act 1999 (NZ)

Interpretation of Legislation Act 1984 (Vic)

Legislation Act 2001 (ACT)

Glossary

Act of Parliament	a piece of legislation produced by one of Australia's nine parliaments (Commonwealth, six states, two territories)
Adduced	as in evidence adduced in court; providing evidence in a court or tribunal to prove or disprove a fact; *see* ch. 5.5.
Administrative power	power of tribunals
Balance of probabilities	more likely than not; the burden of proof in civil cases
Beyond a reasonable doubt	a very high percentage probability; the burden of proof in criminal cases
Burden of proof	the duty of one party to make the case out against the other
Common law	a system and source of law based on cases and precedent
Cross examination	examination of another party's witness
Delegated legislation	legislation made by a person or body other than parliament, but made under authority granted by parliament
Discretionary powers	some choice is involved, as opposed to mandatory powers
Due process	fair and just process; due administration of justice

Equity	a source of law, arising out of 15th century England; the system arose so as to try and offset some of the rigidities of the early common law
Examination in chief	examination of one's own witness
Executive	a branch of government; in Australia at a Commonwealth level it includes the Governor General, the public service, and the Federal cabinet
Federal system	a system of government based on two or more tiers of government power eg States and Commonwealth; as opposed to a unitary system
Judicial power	power of courts
Jurisdiction	the scope of a court's power to determine a dispute; with statute, the geography and people over whom it applies
Legislation	an Act of Parliament
Mandatory powers	no choice is involved, as opposed to discretionary powers
Natural justice	see procedural fairness. The right to be given a fair hearing and to present one's case
Obiter dicta	that said by the way; all that part of judgment (written or oral) which is not part of the *ratio decidendi*
Objective test	a test based on a hypothetical or generalised example eg the reasonable adult; as opposed to a subjective test
Off-duty	private life issues. *See* 'on-duty'
On-duty	carrying out official duties; *see* 'off-duty'
Onus of proof	*See* 'burden of proof'
Precedent	where a court is bound by a prior decision of another court, or a court superior in the court hierarchy. The *ratio decidendi* is binding (as opposed to *obiter dicta*)
Presumptions	assumptions or 'preliminary positions' that can be overturned, depending on the circumstances and the evidence adduced. For example, there are eight common law presumptions as regards the interpretation of statutes
Procedural fairness	natural justice; the probity and efficacy of decision-making
Ratio decidendi	the reason for a decision of a court in a particular case brought before it; the central core of the case
Retrospectivity	in relation to a statute, an operating date which is before the date of creation of the Act; there is a common law presumption which applies to the effect that statutes are presumed not to be retrospective, unless parliament specifically intends them to be
Separation of powers	the doctrine applicable in western democracies that separates courts from parliaments from the executive
Stare decisis	the doctrine whereby a superior court such as the High Court can theoretically overturn its own prior decisions but will be reluctant in practice to do so

Subjective test	a test based on a particular person's circumstances and knowledge, as opposed to an objective test
Unitary system	a one level system of government, as opposed to a Federal system

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