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AGENDA FOR REFORM: LESSONS FROM THE STATES AND TERRITORIES

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Background Issues

The classical division of governmental power into three categories, legislative, executive and judicial, is too crude an analytical tool to provide an adequate understanding of the role of government in the modern State. Whether, in the context of 18th century emerging democratic societies, it represented an adequate description of constitutional structure is a debate we can leave to the constitutional historians. Nevertheless, it still has a powerful influence on our thinking about the exercise of governmental authority. We still think in terms of an institutional structure which reflects the classical separation of powers doctrine. Thus it is common to make contrasts between courts and administrative agencies and, in particular, for the purposes of the present discussion, between courts and tribunals.

Chapter III of the Commonwealth Constitution embeds an institutional structure which reflects the classical doctrine. The general outline of that structure is clear enough. Only a court created by the Parliament and staffed by judges appointed in accordance with section 72 of the Constitution, or a State court, can exercise the judicial power of the Commonwealth as a political entity[1]. A court created by the Parliament in accordance with the Constitution may exercise only judicial power or other powers which are incidental to judicial power[2].

Viewed at close quarters, the limits are much more blurred. The exercise of power does not always fit neatly into a judicial/non-judicial classification. The same power may be judicial if the Parliament intended it to be exercised by a court, but executive if Parliament intended it to be exercised by an officer of the executive government[3]. Officials of a court who do not hold section 72 appointments may exercise judicial functions, so long as they do it by delegation from and under the supervision of section 72 judges[4]. Section 72 judges may exercise non-judicial powers, whether as members of administrative tribunals or otherwise, if they do so by virtue of individual appointments and not by virtue of their judicial office[5]. The difference between judicial power and non-judicial power may be reduced to a verbal formula in an Act of Parliament[6].

There are other matters which have received the tacit, if not the express, approval of the High Court. For example, the division of spoils between the

parties to a marriage dissolved under the Family Law Act, otherwise known as an order for altering the interests of the parties to the marriage in the property which they own, either jointly or separately, is not conceptually different from the making of an industrial award in determining an award wage in an industrial dispute. In both cases, what is being determined by the court is not an existing right based on the law as it stands, but future rights, based on the view of an adjudicator as to what is fair and just in the circumstances. The making of an industrial award has been held not to be an exercise of judicial power; a property order under the Family Law Act has been accepted as such[7].

Generations of Australian lawyers have been educated in the law and have practised their professional and academic trades in the double shadow of Dicey and Chapter III of the Commonwealth Constitution. In that umbral darkness, there has been a general failure to perceive the real complexities of the exercise of modern governmental power. We have sought to protect the trappings of judicial independence; we have not appreciated that the substantive body may be in the process of being kidnapped and spirited away and that we may be left holding an empty garment.

These concerns become manifest when we turn from a study of Commonwealth tribunals to a study of State and Territory tribunals.

Considering the practical importance of tribunals in the administration of justice in State and Territory administrations, they have been paid remarkably little attention in the academic literature. A search in the Index to Legal Periodicals under the heading "Administrative Courts" is instructive. Australian writings make up a substantial proportion of the articles indexed under that heading. For the most part, these have dealt with tribunals adjudicating on relations between government and citizen, and the overwhelming proportion have discussed only Commonwealth tribunals.

The main focus has been on tribunals as a means of resolving disputes arising in the course of Commonwealth public administration and establishing accountability of Commonwealth public officials for decisions affecting individuals[8]. Consequently, bodies such as the Administrative Appeals Tribunal, the Veterans Review Board, the Immigration Review Tribunal, the Social Security Appeals Tribunal and the Students Assistance Review Tribunal have received a good deal of attention. They are all concerned with the

resolution of disputes between citizens and Commonwealth government departments and agencies about the correctness or appropriateness of primary administrative decisions.

Chapter III of the Commonwealth Constitution has meant that tribunals dealing with relations between citizen and citizen have played little part in the Commonwealth body politic. The Industrial Relations Commission (and its predecessor bodies) is the most significant Commonwealth tribunal of this kind. The adjudicative powers of the Commission and its predecessors have been curtailed by a series of decisions applying Chapter III of the Constitution to ensure the separation of the exercise of the judicial power of the Commonwealth from the exercise of legislative and executive powers in industrial relations matters.

The Copyright Tribunal is another Commonwealth tribunal of this kind. It is invested with power to determine reasonable rates of royalty for the compulsory use of copyright works and to approve license schemes for the use of copyright works.

The Australian Broadcasting Tribunal does not fit neatly into either category. In the practical exercise of many of its powers, it appears to be resolving contests between citizen and citizen, but that is because its exercise of executive power can only occur after a hearing in which opposing parties take part. In fact, it exercises its functions as part of a regulatory scheme. The exercise of regulatory authority by tribunals may well constitute a separate field of study.

A study of Commonwealth tribunals therefore gives little preparation for a study of State and Territory tribunals. Even the most casual excursion through the pages of the State statute books discloses the existence of a wide range of diverse tribunals, some of which are concerned with the administration of government agencies or the resolution of questions and disputes arising out of primary administration, but many of which are concerned with private rather than public law issues - if the private law-public law classification can be used to provide a rough guide as to the classification of the issues dealt with by tribunals. Free from the constraints of a formal constitutional separation of powers, State and Territory legislatures are not inhibited in creating tribunals having a variety of functions, many of which plainly involve the exercise of judicial power. There

is no demarcation between what ought to be regarded as a "court" and what ought to be in a separate category of "tribunal".

Any projected study of State and Territory tribunals is therefore immediately confronted with the question "what is to be regarded as a tribunal?" for the purposes of the study. Virtually all of the academic discussion of tribunals in Australia assumes that the term is well-defined. Unfortunately that is a mistaken assumption.

We could start with the dictionary definition of the word. It clearly has no precise legal connotation. The Macquarie Dictionary defines "tribunal" as

"1. a court of justice

2. a place or seat of judgement."

As a matter of language, therefore, a court is but one species of tribunal. This does not accord with the common usage of the lawyers.

Equally, there are difficulties with the word "court". Much of the discussion about courts in Australia is conducted in the shadow of Chapter III of the Commonwealth Constitution. For the federal constitutional lawyer, it is easy to define a court as a body which exercises exclusively the judicial power of the Commonwealth, and to treat bodies which are not of that kind as not being included within the term "court". The courts referred to in s.71 of the Constitution [9] are a species of tribunal within the broader meaning of that word, and were so described by Dixon J in Victorian Stevedoring and General Contracting Company v Dignan[10]. However, once out from under the shadow of the Commonwealth Constitution, there are no established criteria for considering some bodies to be courts and other bodies to be tribunals which are not courts. Accurate use of language does not admit of the common court/tribunal dichotomy.

State constitutions do not erect a formal legal constitutional bar to conferring judicial power on bodies which are not recognisably constituted as courts. Similarly no formal legal constitutional bar prevents the conferral of executive or legislative functions on bodies recognisably constituted as courts.

It is tempting to essay a precise definition of tribunal in the broadest sense, along such lines as:

> "A tribunal is a person or body of persons charged by law with the function of determining rights, privileges, duties or obligations of individual persons or associations of persons. In the making of such determinations, the tribunal is required to act judicially in accordance with procedures laid down by law."

Such a definition will not do; it includes too much of the ordinary administration of government. A registrar of motor vehicles determines one's right to take a motor vehicle on to the public street by the act or registering the vehicle; a policeman imposes an obligation on a motorist when he demands to see the motorist's driving license. Each is required to act according to law. The law imposes a general duty to act fairly. But neither could sensibly be regarded as a tribunal. Moreover, the suggested definition at least arguably includes the ordinary courts.

It is suggested that it will be more profitable to proceed in a descriptive rather than a definitive way to determine the field of study of State and Territory tribunals.

The study is not to be confined to bodies which exercise judicial power, nor does it extend so far as to embrace all of those decision-makers who are required to conform to the requirements of natural justice in their decision making. It is not to exclude all bodies which may take policy considerations into account, but it does not extend to bodies which may properly decide issues solely or primarily on the ground of policy. There must be some question or dispute to be determined, as distinct from an application or claim for decision in the course of administration. So the function of a medical registration board in registering a medical practitioner who has the requisite qualifications does not make the board a tribunal, but the disciplinary function of hearing a complaint about a practitioner and deciding what penalty to impose is one which might properly be regarded as belonging to a tribunal. This leaves the question whether the board should be regarded as acting as a tribunal if there is a question to be resolved about the sufficiency of a person's qualifications for registration.

Likewise, it will be convenient to use a term such as "ordinary court" in speaking of courts, without being overly concerned about what lies at the margins. The term "ordinary court" will comprehend the Supreme Courts, the District or County Courts and the Magistrates or Local Courts. They epitomise what would be generally understood as the nature of a court, notwithstanding that some of their functions might not be functions which could validly be given to a federal court or conferred on a State court by the Federal

Parliament. They embody what has been described as "the adversarial-adjudicative paradigm that is at the heart of decision-making by courts"[11].

A clarification of terminology is a prerequisite for any systematic study of tribunals, and for understanding the role of tribunals as an instrument of government. It allows us to escape from stereotypic notions. It gives freedom to ask important questions which do not emerge until we have been released from the bondage of terminology. Thus, to anticipate an issue for later examination in this paper, we are able to see that the more important question is not what constitutes judicial independence for a court, as important as that question may be, but what are the functions in a free and democratic society which require substantial independence from the executive and legislative functions of government and how should the bodies which perform those functions be organised.

No State or Territory agency exists to exercise a general oversight over a wide range of tribunals as does the Council on Tribunals in England. Nor is there a State or Territory an agency equivalent to the Administrative Review Council of the Commonwealth. Although it has a much more sharply focussed charter than the Council on Tribunals, the Administrative Review Council nevertheless provides much information about the scope and nature of Commonwealth tribunals concerned with public law issues.

My researches have not revealed any comprehensive study of State and Territory tribunals, nor even an attempt to list them all. For Queensland, the Electoral and Administrative Reform Commission (EARC) has produced a listing of bodies which exercise a merits review of primary government decision making[12]. EARC has also prepared a list of bodies the decisions of which might be subject to a merits review[13].

The tribunals listed by EARC are mainly concerned in one way or another with the making of decisions in the course of government administration, whether the administration be that of ministerial departments of government or of agencies operating under statutory authority, or of the administration of the universities. The information about the review bodies was obtained by a survey questionnaire sent to all Queensland Government Departments and to some statutory authorities[14]. The list of bodies in respect of which merits review might be provided was compiled from an examination of all Queensland Acts and some regulations[15]. It is not clear whether the EARC listings

constitute a complete survey of all Queensland tribunals established by or under statute, nor does the EARC paper disclose what criteria were used for inclusion in the list.

Such a listing of tribunals provides no more than a starting point, although an essential starting point, for research. It tells nothing about the way in which they are constituted or operate, their funding and the other relationships between them and the executive government, and it provides very little information about their jurisdiction.

Ouster of Jurisdiction of Ordinary Courts

Impressionistic evidence is that there has been a substantial shift of jurisdiction away from the ordinary courts into tribunals in recent years. Even without a systematic study, examples can be given of tribunals having been established to exercise powers which are plainly judicial or are of a kind which have hitherto been performed by the ordinary courts.

> The Dust Diseases Tribunal was set up in NSW by the Dust Diseases Act 1989. Its function is to hear common law claims for damages resulting from exposure of a person during the course of employment to industrial dusts such as silicon and asbestos. Jurisdiction over these common law claims was taken away from the Supreme Court and the District Court by the Act.
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> The Residential Tenancies Tribunal was established by the Residential Tenancies Act 1987 (NSW). It deals with disputes between landlord and tenant concerning tenancy of residential premises. In so far as these concern claims for money they would have otherwise been within the ordinary jurisdiction of the District and magistrates courts. The power of the Tribunal to declare that a rent is excessive is akin to the jurisdiction to set aside or to rewrite unconscionable contracts vested in the District Court. The Supreme, District and Local Courts are expressly stripped of their powers to make ejectment orders in respect of residential premises subject to a residential tenancy agreement.
>
> A like tribunal has been established in Victoria under the Residential tenancies Act 1980 (Vic). The Victorian tribunal has power to fine or to imprison for contempt of the tribunal[16].

The Disability Services and Guardianship Act 1987 (NSW) established the Guardianship Board with power, inter alia, to make guardianship orders. While the Act preserves the relevant jurisdiction of the Supreme Court[17] it nevertheless provides that a guardianship order granted by the Board in respect of a person who is the subject of a guardianship order by the Supreme Court has the effect of terminating the Supreme Court order[18].

A similar tribunal and jurisdiction has been established in Victoria under the Guardianship and Administration Board Act 1986.

Licensing Courts have long been a feature of the administration of State liquor laws. The NSW Licensing Court, for example, performs a mixture of executive and judicial functions. It is empowered, inter alia, to grant licenses[19], to impose conditions on licenses[20], to exercise disciplinary powers over licensees[21], and to try persons charged with offences under the Liquor Act[22].

What might otherwise be regarded as domestic tribunals have been established by statute to deal with matters arising within the horse racing and other racing industries. The Racing Appeals Tribunal Act 1983 (NSW) establishes the Racing Appeals Tribunal with jurisdiction to hear appeals from decisions of the Committee of the Australian Jockey Club[23]. A like tribunal is established by the Racing Act 1988 (Vic)[24].

The Drainage of Land Act 1975 (Vic) establishes the Drainage Tribunal[25], which is empowered to grant damages or mandatory or restraining orders in respect of disputes concerning drainage and water flow disputes.

The Industrial Appeals Court is established by the Labour and Industry Act 1958 (Vic)[26]. This body has a diversity of functions, some legislative, some executive and some judicial in nature[27].

The Mental Health Act 1986 (Vic) established the Mental Health Review Board[28] and the Psychosurgery Review Board[29].

The Motor Car Traders Act 1985 (Vic) established the Motor Car Traders Licensing Authority[30] with power to adjudicate in disputes resulting from the sales of second hand motor vehicles.

The Retail Tenancies Act 1985 (Vic) provides for the compulsory referral to arbitration of disputes relating to tenancy of retail premises[31]. It further provides that a dispute capable of being referred to arbitration under the Act is not justiciable in any court[32].

The Commercial Tribunal, established by the Commercial Tribunal Act 1984 (NSW), exercises jurisdiction in a wide range of commercial disputes.

These examples, taken from the NSW and Victorian statute books of recent years, serve to illustrate the way in which jurisdiction in many matters of every day importance has been moved from the traditional courts into specially created tribunals.

This movement of jurisdiction has assumed particular significance in Victoria, because Victoria, alone of the States, has a formal constitutional provision entrenching to a limited extent the jurisdiction of the Supreme Court. The judges of the Victorian Supreme Court were moved in 1988 to protest about the inroads being made into the jurisdiction of their court by the establishment of specialised tribunals[33]. The statutory provisions in Victoria for a Council of Judges and the making of an annual report also give the Victorian Supreme Court Judges a forum for comment on such issues for which there is no equivalent in any other State or Territory.

The Constitution Act 1975 (Vic) provides, in s.85(1):

> Subject to this Act the Court shall have jurisdiction in or in relation to Victoria its dependencies and the areas adjacent thereto in all cases whatsoever and shall be the superior court of Victoria with unlimited jurisdiction."

S.87(1) of the Constitution Act provides that the Court is not bound to exercise its jurisdiction in relation to any matters in respect of which jurisdiction is given to any other court, tribunal or body.

These provisions do not amount to a formal separation of powers in favour of the courts. The Constitution expressly recognises that "jurisdiction" which

might involve the exercise of the judicial power of the State may be conferred on tribunals. The provisions of the Constitution relating to the Supreme Court are partly entrenched by the requirement in section 18 of the Constitution Act for an absolute majority in each House of the Victorian Parliament for any Bill altering those provisions. The Judges commented in relation to section 18:

> "The introduction of this provision in 1975 was a constitutional recognition of the importance of the Supreme Court as the guarantor of the rule of law in this State. This notable advance distinguishes Victoria from other States where the jurisdiction of the Supreme Court has no comparable entrenchment."[34]

The Report went on to say:

> "The result is that if a lower court or tribunal was regarded as not properly applying the law a litigant could instead initiate a proceeding in the Supreme Court and persuade the Court to hear it. That course would seldom be resorted to: an appeal to the Supreme Court from the lower court or tribunal would usually be regarded as sufficient.
>
> "Since 1975 many Acts have conferred jurisdiction on tribunals whose members do not have the permanency of appointment of judges but rely on the Executive for appointment at the end of a period. Some of these members are liable to summary dismissal by the Executive. We draw attention to the fact that jurisdiction which previously belonged to the Court has been conferred on other bodies and individuals who, however distinguished, are obviously not independent of the Executive."[35]

The Report went on to draw attention to the fact that in a number of cases where tribunals had been established with exclusive jurisdiction it appeared that the procedure required by s.18 of the Constitution Act had not been complied with[36]. Subsequently, legislation was enacted to remedy any such deficiencies[37].

Judicial Independence

The significance of any shift of jurisdiction away from the ordinary courts lies in an appreciation of the role that the ordinary courts play in the structure of our system of government. The audience at this seminar does not need reminding of the importance of the separation of the judicial power from the executive and legislative powers in a free and democratic society. The

interpretation and enforcement of the law must be separated from the making and administration of the law. Judicial independence is not a doctrine developed for the benefit of the judges, although it may often have appeared as such. Contemporary writings on judicial independence have recognised that there is more to judicial independence than the independence of individual judges. A court as an institution must be able to function free from Executive involvement in its internal workings. This is not the occasion to go into this subject in depth; it has been dealt with in a number of recent papers and articles[38].

Judicial independence in respect of a tribunal therefore depends on such factors as:

- the mode of appointment and removal of tribunal members
- their tenure of office
- a guarantee of remuneration during office
- a tradition of acting with independence recognised both by the tribunal members and the Executive
- the way in which the tribunal is funded and staffed
- whether there is Executive involvement in the internal operations of the tribunal.

It does not appear that there are any established standards in these matters. In practice it seems that provisions in these matters vary a good deal. For example, in the tribunals mentioned earlier, provisions for removal of members from office range from removal by the Governor for "incapacity, incompetence or misbehaviour" in the case of the Commercial Tribunal (NSW)[39] to "The Governor in Council may remove any member of the Tribunal" in the case of the Drainage Tribunal (Vic) notwithstanding that some members of the Tribunal may be County Court judges[40]. In other cases where members of a tribunal are judges those members hold office during their term of appointment so long as they continue to be judges[41].

The criticism by the Victorian Supreme Court judges of the establishment of tribunals drew a response from the editorial columns of the Australian Law Journal:

> "Also, it is maintained that the specialist tribunals are not part of the machinery of administration by the Executive, but are there for adjudication on the rights of citizens, while far from being 'unsettling' to the community, they respond to the needs of the community, more especially the 'middle' section thereof, which cannot afford the costs

> and charges of initiating Supreme Court proceedings that involve a highly priced formal statement of claim, by being accessible in an inexpensive and easy manner (cf art 14 of the International covenant of 1966 on Civil and Political Rights, ratified by Australia, on the right of all persons to access to courts and tribunals)."[12]

Whether it can be said of a particular tribunal that it is "not part of the machinery of administration by the Executive" must depend upon whether it is established in such a way that it has a sufficient degree of independence so that it may properly adjudicate on the rights of citizens.

Why are Tribunals Established?

At the same time as there has been a renewed interest in the subject of judicial independence, there is much evidence of a growing public dissatisfaction with the traditional courts. Contributing factors are the cost of court proceedings, the complexity of the procedures and the general bewildering atmosphere of the courts, and the delays which have been endemic in most courts in recent years. It may be supposed that the reasons for conferring jurisdiction on tribunals are that their members have expert knowledge and that their procedures are best suited to the types of dispute with which they deal, so that they are assumed to be quicker, cheaper and better than a court in determining a dispute[13]. Extensive research through departmental and other reports, and second reading speeches in Parliaments is needed to determine the precise reasons in each case for the establishment of particular tribunal and to see whether any pattern might emerge.

For example, in the case of the Dust Diseases Tribunal (NSW), the second reading speech of the Attorney-General revealed that the reason for its establishment lay in the long delays in matters in the Supreme Court and, particularly, the District Court. These delays were often much longer than the period between diagnosis of a disease resulting from exposure to, say, asbestos dust and the resultant death of the person concerned. The establishment of the Tribunal was accompanied by some statutory relaxation of the rules of evidence. But apart from the changes in the rules of evidence, designed to facilitate the admission of evidence in essentially non-controversial matters, the purposes served in setting up the tribunal could have been achieved by the courts themselves reforming their own procedures to take account of the special needs of a class of litigants. The courts had failed to

recognise a problem and to respond by altering their own procedures to provide the fast-tracking of the relevant cases in the way which was achieved by setting up a separate tribunal.

But there may be more fundamental reasons for the trend to tribunals. The traditional approach of the courts to adjudication isolates the disputants from their economic and social contexts. For example, in adjudication of contractual disputes the common law traditionally assumed an equality of bargaining position between the parties to the contract.While the courts had regard to the relative bargaining power only where the circumstances revealed that the party seeking to enforce the contract had acted unconscionably[14], this had no real relevance to, say, a person on law income seeking a house to rent in a tight rental market.

The ordinary courts stand at arms-length from the policies of the government of the day. This induces concern that even where policies are incorporated into legislation the statute might not be interpreted in a way which the government would see as sympathetic to those policies. The adversarial process of the courts does not generally admit the possibility of a government putting its views on how legislation should be administered directly to the court.

Governments are particularly sensitive, especially in current economic circumstances, to the impact of adjudication on budgetary and economic policy. Where the adversarial and individualistic approach of the court is to focus only on the consequences for the parties of its decision, government administration takes a broader view. The approach adopted by a court or tribunal to the interpretation in a particular case of a legislative provision admitting of a range of outcomes may have far-reaching budgetary consequences for government[15].

The regulation of business dealings, of professions, of powerful groupings such as trade unions, of sporting activities and other matters, occupies an major place in government policy. It finds expression in such laws as those regulating market-places, whether of specific regulation, as in the broadcasting industry or in broader corporations, consumer protection and fair trading laws, and in laws governing the admission to professions and trades and the supervision of those engaged in professions and trades.

Government policy, expressed through legislation, also extends to social relationships in such areas as equal opportunity, sex and racial discrimination and community welfare matters such as family issues, guardianship, aged care and so on.

In all of these areas, a choice must be made between committing the resolution of disputed matters to the ordinary courts or establishing special tribunals to deal with them[16]. The courts may be perceived by the proponents of the policies involved as conservative, resistant to change, as well as being slow, expensive, complex and out of touch with current community concerns. But the consequence of establishing special tribunals in these matters of current community concern may be increasingly to confine the courts to the margins.. The concern of the judges and other lawyers for judicial independence may thus be viewed as a self-serving interest on the part of an increasingly archaic institutional structure rather than as of central importance in a free and democratic society.

The Agenda for Reform

Thus high on the agenda for reform must be the question whether the traditional courts as an institution can adapt to the rapidly changing needs of society in the modern state for new areas of adjudication, whether we will continue to be faced with an increasing proliferation of specialised tribunals, or whether many of the tribunals can be aggregated into new bodies which may look much more like courts than the tribunals they replace[17]. This is a question facing EARC in the preparation of its report on administrative appeals in Queensland. An issues paper has already canvassed the option of establishing a number of appeal tribunals catering for sectoral interests instead one comprehensive tribunal along the lines of the Commonwealth or Victorian AAT's or instead of committing the appeals to the Supreme Court or the District Court[18]. This does not, however, represent EARC's final position, which will be established in its final report on the subject.

Whether the courts have either the will or the capacity to make the requisite adaptations is another important agenda item. There are signs that a substantial number of judges are accepting the need for the courts to respond to the changed circumstances. Three dangers face the courts. One is that in adapting to these changed circumstances some essential characteristics of independence will be lost. But the greater threat to independence may be

failure to adapt. There is a real risk that changes will be forced upon the courts by executive governments and by legislatures, increasingly impatient in the face of public pressures about the slowness and the costs of justice[19]. Or governments may take the other course of by-passing the courts altogether[20]. In either case, there is a real loss to independence and status.

It seems unlikely, however, that in the immediate future the trend to tribunalisation will be turned around. There are, therefore, some immediate agenda items to be addressed.

One is to establish the appropriate balance between independence and responsiveness to the broad issues of government policy. An adjudicative tribunal should not be subject to direction by government, or by other vested interests, in the making of individual decisions. There will be common agreement that decisions in individual cases should not be dictated by the particular political circumstances or ambitions of the government of the day. Nor should the arbitrary intervention of government policy dictate the decision to be made in a particular case, whether it be an appeal against a decision of a Minister or a decision on the proper treatment of a mental patient. Experience in government has taught me that the possibility of such an occurrence is not so remote as to be dismissed out of hand. But many of the tribunals cannot stand aside entirely from government policy. Those which are concerned with decision-making as part of the machinery of executive government must have regard to the policy of the government of the day when exercising discretionary powers, including the making of value judgments within the proper scope of the interpretation of legislation requiring the making of those value judgments. Those which have been established as part of the machinery of implementation of broader social and economic policies must remain sensitive to those underlying policies, or they will lose their reason for being. The accommodation of policy and independence will not be easy; much has already been done by the Commonwealth and Victorian AAT's.

The second follows from the first. It is the need to establish and recognise conventions of conduct in relations between tribunals, other agencies of government, and the "clients" of the tribunals. Much of the traditional independence enjoyed by the courts rests at least as much on convention as it does on law. The Victorian Supreme Court Judges, in their 1988 Report, expressed concern that tribunals which were taking over the jurisdiction of

the courts were administered by departments other then the Attorney-General's Department. The Report said:

> "Departmental support for a tribunal is sometimes provided by a Department other than the Attorney-General's Department. Other Departments are often unfamiliar with and do not follow the practices and conventions which should govern the relations between a Department and an independent judiciary."[51]

The third is the need to establish normative provisions governing the appointment and tenure of office of tribunal members. Attention is drawn earlier in this paper to a great divergence of practice.

The fourth item is the desirability of establishing, either by statute or convention, norms of procedure to be followed by tribunals. The Kerr Committee recommended a Commonwealth statute to set down standard rules of procedure to be followed by Commonwealth tribunals. Having been involved in an attempt to give some effect to that recommendation, and having been faced with the great diversity in the circumstances in which tribunals must operate, I can testify to the difficulty of putting that proposal into effect. Indeed, it may well have been beneficial that statutory expression was not given to that recommendation. If it had been, we may well have ended up with procedures not unlike those of the Commonwealth AAT. There would not have been the opportunity to experiment, as with the Immigration Review Tribunal, with quite different procedures.

But one matter which should be attended to by statute is the duty of a tribunal to give reasons for its decisions. The failure of the High Court to grasp the opportunity to impose that obligation as a common law duty[52] is a matter of regret. The enactment of section 13 of the Administrative Decisions (Judicial Review) Act ranks high on the list of importance of the Commonwealth administrative law reforms.

Fifthly, proper appeal structures must be put in place. I put the matter of appeals at this point in the list, because the introduction of an appeal structure without having made some progress on the other matters may well have adverse effects. The general court structure in Australia admits of at least one appeal as of right from a first instance decision, with at least one more appeal by leave. The nature of that first appeal step varies from a re-hearing with new evidence being admitted to the more narrow appeal in which

the findings of the trial judge on questions of fact will not be disturbed unless error is shown.

It should not be assumed that an appeal from a tribunal ought to be of the first kind, with the appellate body being entirely free to admit new material and to make its own findings of fact. That may be appropriate in some cases; in many cases, including those where there has been a full hearing before the primary tribunal, such a re-hearing would not be appropriate. It would add to cost and delay, without any significant benefit to the parties. Proper procedures at the primary tribunal stage will provide a better safeguard than a complete re-hearing.

The question what ought to be the appellate body does not admit of a simple answer. That there should be a single appeal tribunal, or that all appeals should go to the Supreme Court or the District Court, is too superficial a proposition. That EARC has yet to make its final report on appeals in administrative matters in Queensland has already been mentioned. In some cases, an appeal to the Supreme Court or the District Court will clearly be appropriate, as in the case of the Dust Diseases Tribunal (NSW). In other cases, an appeal to a court, without some change of approach on the part of the court, may inhibit the flexibility of the primary tribunal. To have a single appellate tribunal, separate from the court system, loses some of the advantages claimed for establishing tribunals in the first place, because it is unlikely to have available to it the range of expert knowledge that the primary tribunals working in particular fields will possess.

Finally, on the matter of appeals, the introduction of an appeal on the facts will of itself introduce the possibility of delay and add to the cost, and so detract from some of the advantages claimed for the establishment of tribunals in the first place.

Sixthly, although I put the matter with some diffidence, consideration should be given in each jurisdiction to establishing the equivalent of the UK Council on Tribunals or the Commonwealth Administrative Review Council. The Commonwealth ARC, with its interesting mix of the heads of the principal Commonwealth administrative review agencies, senior public servants, academics and others, may not readily transplant into other soil. The factors which have established its importance in the scheme of Commonwealth administration may not be easily repeated in other jurisdictions. Moreover, as noted earlier, the

ARC has a fairly sharply focussed charter; it does not have to deal with the wide variety of tribunals encountered in the States. Although it is not easy to make judgments from a distance, the U.K. Council on Tribunals does not seem to have been a conspicuous success in influencing government policy in the development of tribunals.

1. Waterside Workers Federation of Australia v Alexander (1918) 25 CLR 434.
2. Attorney-General v The Queen, ex parte Boilermakers' Society (1957) 95 CLR 254.
3. R v Quinn; ex parte Consolidated Foods Corporation (1977) 138 CLR 1.
4. Harris v Caladine (1991) 99 ALR 193.
5. Drake v Minister for Immigration and Ethnic Affairs (1979) 24 ALR 577; Hilton v Wells (1985) 157 CLR 57.
6. R v Trade Practices Tribunal; ex parte Tasmanian Breweries (1970) 123 CLR 361
7. Mallett v Mallett (1984) 156 CLR 605. Cf. Talga v MBC International (1976) 133 CLR 622.
8. An exception is J R S Forbes, Disciplinary Tribunals, Law Book Company, 1990.
9. The High Court, the courts created by the Parliament pursuant to s.72 of the Constitution and the courts established by the States. The s.71 courts do not include Territory courts.
10. (1931) 46 CLR 73 at 97-8.
11. W A Bogart, "Courts and Tribunals: Conflict and Co-existence", (1989) 8 Civil Justice Quarterly 7.
12. Electoral and Administrative Review Commission, Issues Paper No.14, Appeals from Administrative Decisions, June 1991, Appendix B.
13. Electoral and Administrative Review Commission, Issues Paper No.18, Appeals from Administrative Decisions, February 1992, Schedule.
14. Electoral and Administrative Review Commission, Issues Paper No.14, Appeals from Administrative Decisions, June 1991, para 1.14. The text of the survey questionnaire is at Appendix A.
15. Electoral and Administrative Review Commission, Issues Paper No.18, Appeals from Administrative Decisions, February 1992, para 10.
16. Residential Tenancies Act 1980 s.46.
17. Disability Services and Guardianship Board Act 1987 (NSW) s.8.
18. Ibid s.22.
19. Liquor Act 1982 s.18.
20. Ibid s.20.
21. Ibid s.69.
22. Ibid s.145.
23. Racing Appeals Tribunal Act 1983 s.15.

24. Ibid s.83G.

25. Drainage of Land Act 1975 s.40(1).

26. Ibid s.42.

27. See the discussion of the powers of the Industrial Appeals Court in R v Industrial Appeals Court; ex parte Maher [1978] VR 126.

28. Mental Health Act 1986 s.21.

29. Ibid s.56.

30. Motor Car Traders Act 1985 s.91.

31. Retail Tenancies Act 1985 s.21.

32. Ibid s.21(4).

33. Supreme Court of Victoria Annual Report 1988 pp.33.

34. Ibid p.21.

35. Ibid pp.21-22.

36. Ibid, pp.23-24.

37. Constitution (Supreme Court) Act 1989.

38. See, for example, R E McGarvie, "The ways available to the judicial arm of government to preserve judicial independence", an unpublished paper delivered to the 1992 Conference of the Supreme and Federal Court Judges, Canberra, 21 January 1992; R E Mcgarvie, "The Independence of the Judiciary", Quadrant March 1992, page 55; R E McGarvie, "Judicial Responsibility for the Operation of the Court System", (1989) 63 ALJ 79; Sir Guy Green, "The Rationale and Some Aspects of Judicial Independence", (1985) 59 ALJ 135; L J King, "Minimum Standards of Judicial Independence", (1984) 58 ALJ 340; I R Scott, "Court Administration: The Case for a Judicial Council", Inaugural Lecture, University of Birmingham,1979; Thomas Church and Peter Sallmann, "Reflections on Court Governance", Governing Australia's Courts, AIJA, 1991; Perry S Millar and Carl Baar, "The Constitutional Setting for Judicial Administration", Judicial Administration in Canada, 1981.

39. Commercial Tribunal Act 1984 s.12(2).

40. Drainage of Land Act 1975 s.41(1).

41. See e.g. Dust Diseases Tribunal (NSW) and Racing Appeals Tribunal (NSW).

42. (1990) 64 A.L.J. 387.

43. Supreme Court of Victoria Annual Report 1988 p.22.

44. See, for example, Bank of Australia Limited v Amadio (1983) 151 CLR 447.

45. Peter Walsh, "Equities and Inequities in Administrative Law", *Administrative Law - Retrospect and Prospect*, (1989) 58 Canberra Bulletin of Public Administration 29.

46. A somewhat different, but essentially parallel, approach to the classification of the issues is taken by W A Bogart, *op cit.*

47. Thus many would argue that the Commonwealth Administrative Appeals Tribunal has much more of the characteristics of a traditional court than the tribunals it has replaced.

48. Electoral and Administrative Review Commission, Issues Paper No.18, Appeals from Administrative Decisions, February 1992, para 10.

49. The recent changes in the structure of the Queensland Supreme Court provide a vivid illustration of executive impatience with what was perceived, rightly or wrongly, to be resistance to change.

50. Compare the establishment of the Dust Diseases Tribunal in NSW.

51. Supreme Court of Victoria Annual Report 1988 p.22.

52. Public Service Board of NSW v Osmond (1986) 159 CLR 656.