REFORM OF THE NSW TRIBUNAL SYSTEM

(Edited version of papers presented at seminar of AIAL (NSW Chapter))

In October 2011, the NSW Legislative Council Law and Justice Committee established an inquiry into the opportunity to consolidate Tribunals in NSW.

The report of the inquiry was published in March 2012 and in the same month the New South Wales Chapter of the Australian Institute of Administrative Law held a seminar 'The Reform of the NSW Tribunal System'. This paper is an edited version of the main presentations at the seminar.

Justice Alan Wilson, President of the Queensland Civil and Administrative Tribunal

It seemed to me, having read the standing committee's report and also having given evidence before it that, insofar as I could bring any value to you, it would be by firstly sharing some experiences of the process of creating and setting up a super tribunal and secondly, by sharing some views I, as someone who is not a citizen or voter in New South Wales, have about the report and some elements of it.

It might be best if I get the 'with respect' part out of the way early. With respect to the members of the Standing Committee and with respect to everybody who made submissions to it about whom I might inadvertently or impliedly make comments or suggestions, I always do so with respect.

QCAT absorbed virtually all the tribunals in Queensland except one, the Mental Health Review Tribunal, which remains a discrete little body conducted under the auspices of the Queensland Health Department. The only material difference, between QCAT and VCAT is that we did not absorb the planning and environment jurisdiction which, in Queensland – a state that is unique in so many ways – remains a little offshoot of our District Court.

The other significant difference between us and WA SAT is that we absorbed something that we call the minor civil disputes, formerly the Small Claims Tribunal, which is a major part of our jurisdiction - a little over half of our applications are minor civil disputes.

The tribunal has a Supreme Court judge as President, a District Court judge as its Deputy President, 4 senior members who have both a decision-making and an administrative role, 9 permanent members and about 92 sessional members distributed throughout Queensland. It has a registry of administrative support staff of about 110 people. It receives over 30,000 applications a year. It took over premises occupied by a number of smaller tribunals in a commercial building that already had some hearing rooms set up. Those premises were immediately seen to be and have remained inadequate.

All of the members of the previous tribunals and all the registry staff were offered jobs in the new tribunal. They brought expertise and tradition in terms of the way they did things; the way the new tribunal did things was sometimes exciting or alarming to them but after 2 years I think that has all settled down. We also allowed all of the sessional members of all of the previous tribunals to transition if they wished and of about 130, 126 did.

So there was a tranche of inherited sessional members. We did not have the scope to select or appoint any further members. Members moved straight into the new tribunal from previously discrete tribunals like the Guardianship Tribunal. Their transition term of 2 years

expired in October last year, which was the first opportunity we had to undertake a selection process. Of the 120, about 90 reapplied. Of the 90 who reapplied, about 40 were reappointed and we appointed about 50 new members to make up the 90 or so that we have throughout Queensland at the present time.

In our first year of operation, we received just under 40% more applications than all of our constituent tribunals in the previous year. What the state government did effectively was: advertise our existence, our location, our website, and how to reach us. Queenslanders found us immediately.

We immediately realised we did not have enough funds to deal with the extra 40% of applications. There is little point in spending a lot of money on advertising if you do not also think about its consequences and ensure that your new tribunal has sufficient means and resources to address the tsunami of work.

I would like to start with some aspects of the New South Wales Standing Committee's report. First, regarding the expert panel and its members, the report suggests a variety of different kinds of persons with different kinds of interests who ought to constitute that panel.

Ours was comprised of a retired Court of Appeal judge, a senior barrister who is now a Supreme Court judge, and the head of one of the tribunals. Effectively, all of the work was done by the retired Court of Appeal judge. His three reports were consistent, lucid and helpful and, in fact, they signposted, with an almost astonishing degree of accuracy, what the tribunal ought to be, what it would become, and how it would function over its first 5 years.

It seems to me that the panel suggested by the Standing Committee has an obvious inherent tension in that there may be too many voices in it.

The second thing I wanted to talk about is maintaining expertise. I have seen the submissions to the parliamentary committee and, unsurprisingly, there is real concern in existing tribunals that expertise be maintained. I think QCAT dealt with that very successfully, firstly by allowing all of the sessional members from the previous tribunals to transition if they wished to; secondly by choosing amongst the permanent members of QCAT (and using Guardianship as an example) the President and two Deputy Presidents of the Guardianship Tribunal, so we brought all of the expertise that they had into the tribunal.

In a practical sense, you need to think about the identity of your first president and deputy presidents. Traditionally in Australia they have been Supreme or District Court judges. There is an interesting aspect to that, which I can speak about from personal experience, which is whether or not your judicial members have had administrative experience.

I had the odd experience of listening to speeches at the time of my swearing in about how my work as a judge would greatly assist me in administering a new large super tribunal. My personal experience as a barrister for many years had been administering one-third of what was then called a secretary and, as a judge, administering one listings clerk, not an entire registry or a court. I came with no experience in administration.

Even if you choose judges or persons who do have administrative experience I think you ought to appoint them in sufficient time to allow them to undertake some kind of training and also to have the opportunity to work out their relationship with their administrative staff. The other critical issue is adequate initial resourcing. It is vital that the government makes a realistic estimate of the workload of this new tribunal. In Queensland there was a promise from the government that we would be revenue neutral compared to the cost of the eighteen

tribunals that we absorbed. That put tremendous restraint upon us that was unnecessary and unfortunate.

In another recent example, we were given what we call the Trees Jurisdiction, something that the NSW Land and Environment Court has. The Government said 'we think you'll have 190 applications about overhanging trees in Queensland each year'. Now, in Queensland in the last few years it has not stopped raining and new trees appear in the backyard momentarily! We have had the jurisdiction since 1 January this year. We already have 400 applications but the resourcing that was allocated to us was based upon the very much lower estimate.

It is also vital that premises be adequate and accessible. If you are going to have a single accessible doorway it has to be in one place, people have to be able to find it and it has to be close to major public transport links

It is also vital, in my opinion, that you resource new tribunals so that they can use modern digital technology effectively. I know that VCAT and WA SAT are doing this much better than we are. People need to be able to file and search online.

A vexed and interesting question is whether or not you give your new tribunal an internal appeals tribunal. Our internal appeals tribunal, which our Act said initially would be comprised of two judicial members, received a huge number of applications for leave to appeal from all of the jurisdictions in the first year and had only two people who could do it. I have now tapped a valuable resource - retired judges. They are an extraordinary asset. It is vital that the legislation, and ours was not originally, be set up in a way that allows us to use them.

My view is now different from the one I held at the end of 2010. A super tribunal ought to have an internal appeals tribunal. It is a question of access to justice and of accessibility. The number of appeals that are being brought to the internal appeals tribunal is far greater than the number that previously went from the old tribunals to the only places they could go, the Queensland Court of Appeal or the Queensland District Court.

There are practical and economic downsides to an internal appeals process in terms of workload and demand in resources, but I am satisfied that its presence has given the judicial members, the senior members of the tribunal, a valuable opportunity to oversee the work of the members and to correct errors quickly and inexpensively.

We do most of these things on the papers. It doesn't cost people much in terms of filing fees and if a case has gone seriously wrong, and our statistics show it only going seriously wrong in about 1 in 30 cases, we can fix it quickly and cheaply and we can fix things in cases where people would probably not have gone back if they had to go the Court of Appeal.

Every Australian tribunal is underpinned by legislation that contains some formula or phrase about being speedy, cheap and informal. We resolved from day one that we would be distinctly different from the courts; we would give those words 'speedy, inexpensive and informal' all of the meaning that we think Parliament plainly intended in the legislation and we would work hard to bring people justice in those terms.

One of the ways in which we have done that is through the use of compulsory conferences, which are both an ADR and a case management tool. It is a hybrid hearing conducted by a member with the parties to identify what the real issues are, what needs to be decided and the most effective and inexpensive way to do that. It has been spectacularly successful.

It has taken some time to introduce it in some jurisdictions. As mentioned earlier in relation to guardianship, we inherited highly qualified and experienced people. After I sat in on two or three guardianship hearings I could see that that is what they were doing anyhow. A guardianship hearing is very often a combination of an educative and informative process, a kind of therapeutic justice, an opportunity for people to deliver their narrative about family issues and a resolution of those in the most benign possible terms. We simply changed the terminology – it is now called a compulsory conference. It happens much faster than a hearing and most matters do not go past that stage.

Judge David Parry, Deputy President of the Western Australian State Administrative Tribunal

I was a barrister doing a great deal of administrative law, in particular planning and environmental law. In 2004 I saw an interesting proposal to set up a comprehensive tribunal in Western Australia which would have a planning component. I expressed an interest and, from the beginning of 2005 when it was established, I served as the senior member of the Development and Resources stream, one of the four streams of the Tribunal. In mid-2011, I was appointed to the District Court and in effect seconded back as one of the two Deputy Presidents of the Tribunal for a five year term.

The Tribunal has a 'cohesive jurisdiction'. The phrase comes from the second reading speech of the then Attorney General, who championed the legislation and the whole concept. It is a nice turn of phrase because the purpose of tribunal consolidation in Western Australia and, as I understand it from reading the Legislative Council report, as proposed in NSW, is to provide increased access to justice. My experience is that the cohesive nature of the jurisdiction, which the Attorney General recognised as an important component from the outset, has been very important in enhancing access to justice.

The SAT was established in 2005. It was intended to be not only a comprehensive tribunal in civil and administrative matters but also a cohesive tribunal, as I emphasised. It replaced a system that really, as recognised in the final report that lead to the legislation, was not much of a system at all. It comprised fifty different doors.

The reason for so many doors was partly because of the 25 vocational regulation boards that the SAT replaced. There were 25 other decision-makers of various sorts: the courts; a number of specialist tribunals; boards; ministers and so on. The SAT exercises broad jurisdiction under many different laws.

The SAT's work falls into three main categories. Probably 95% of administrative review rights actions in Western Australia come before the Tribunal. In addition, vocational regulation in relation to disciplinary matters and original jurisdiction in relation to a variety of specialist civil disputes such as building disputes, also come before the Tribunal. More recent additions are commercial matters, guardianship and administration, land compensation, and equal opportunity.

The Tribunal is required to achieve the resolution of questions, deal with the substantial merits of the case, act speedily with minimal cost and make appropriate use of the knowledge and experience of tribunal members.

These objectives are important but not unique to the SAT, nor are they unique to tribunals; one also sees these sort of objectives in modern court Acts. What is important in my experience is not just the expression of the objectives but their application at all levels of a tribunal, in the formulation of practice and procedures, in the decision-making, and in the very character of the place.

The structure of the Tribunal, like VCAT and QCAT, is a model that applies a judicial leadership. In my view, judicial leadership of a tribunal of this sort is critical to drive novel methods of dispute resolution and for there to be public and professional acceptance of those models.

The success of the tribunal depends on the leadership and the membership of the tribunal. The personalities of the members make an enormous difference in terms of the capacity of a tribunal to do that which the legislation requires. The accepted hallmarks of a tribunal: relative informality, avoidance of technicality, flexibility, proportionality and so on are well and good in legislation but their success on the ground depends on the conscious effort of members not only to create but then to maintain that character.

That is something that the tribunal, if there is to be a tribunal in NSW, should consider championing. Professions that are routinely involved in the work of the Tribunal have become champions of the processes, can see the benefits to their own clients, can see the benefits in terms of the wider administration of justice. They become not only active participants but 'suggesters' of how practices that have been developed can be enhanced for the Tribunal.

As with QCAT and many other tribunals that have replaced individual tribunals through consolidation, the SAT brought on board the experience and expertise of the various jurisdictions that were incorporated. That is critical but it is also very useful to see jurisdictions through a fresh set of eyes and it is the combination, I think, of the experience and the capacity to see how things might be done slightly differently to get an improved outcome that is one of the hallmarks of the SAT story. The benefits have been extraordinary in terms of the cross-pollination of ideas.

Both as a matter of flexibility within the Tribunal so as to make good use of its membership and also in terms of professional development, and because there were some members who had no background in guardianship but had an interest in the jurisdiction, the senior member of the Tribunal developed a training program to bring those people up to speed. They have been listed under very careful supervision of the senior member to do simple guardianship matters and have also been incorporated into panels on appeals. That sort of application of membership has, I think, resulted in a better jurisdiction, flexibility and ultimately better resolutions.

In my experience the nature of the Tribunal as a multi-disciplinary tribunal has been of enormous benefit to everyone, particularly to the administration of justice and also to the membership. We are required by the SAT Act to make 'appropriate use to the knowledge and experience of tribunal members' but that as you know can be something in an objective without application. An important part of the SAT story is that there is no hierarchy within the membership. There are senior members who run streams and judicial members who have particular roles but there is consciously no hierarchy between legally and non-legally qualified members.

Over a period of years the Tribunal adopted the phrase 'facilitative dispute resolution'. We do not talk about alternative dispute resolution or additional dispute resolution, for the very reason that it is regarded as core and mainstream. It refers to a suite of processes that are available under the Act. The processes are not unique to the SAT, they are available in all tribunals and in all courts as well. It is the way in which they have been applied which has been an interesting experience.

Directions hearings in the SAT are not primarily a case management tool. They are primarily a facilitative dispute resolution tool. So, in most areas across the Tribunal (guardianship

being an exception) all matters are listed for an initial directions hearing before a member within two to three weeks; that member then takes a hands-on approach as to what are the key issues, what are the methods towards resolution. The member begins developing the processes towards resolution that include judicial members.

The Tribunal has power under section 31 of the SAT Act to invite an original decision-maker to review proceedings at any stage and to reconsider its decision. This is generally done as an adjunct to mediation or a compulsory conference.

For example, in a planning case a mediation will more often than not result in amendments to a proposal or further information. Armed with those amendments or further information the Tribunal invites the original decision-maker to reconsider its decision and in 90% of those cases the matter is then resolved satisfactorily. It is the unsung hero of the SAT legislation and is a very useful adjunct to mediation in the review context.

Over five or six years these processes have come to be the core methods by which the Tribunal resolves disputes and, depending on the particular area, other than in guardianship, between two thirds and three quarters of applications are resolved by the active facilitation of members with a variety of processes rather than adjudication or direct negotiation between the parties.

Why have there been these results and this emphasis? I think that it is a product to some extent of this type of comprehensive tribunal that has the right judicial leadership that emphasises the importance of this being a core element, not simply an adjunct. Also in the SAT the people who would otherwise be decision-makers – the members – mediate, and so there is their experience. This comes through in empirical work that has been done in surveys – tribunal members are seen to have qualities of independence, credibility, knowledge and experience.

Linda Pearson, Commissioner, Land and Environment Court (NSW)

My comments are based on my broad experience as a member of a number of tribunals, not just my current experience at the Land and Environment Court which I note even though it wasn't discussed in the Legislative Council report, and even though it is housed in a court, the bulk of the work of the Commissioners of that Court is merits review jurisdiction which is exercised in other places in a tribunal, and it shares many common procedural features with that.

My experience covers a broad spectrum, from non-adversarial tribunals (social security, migration) where the department whose decisions are under review does not appear, to the more formal adversarial dispute resolution process where the issues are defined by the parties and where most of the parties are legally represented, and varying points in between. In terms of subject matter the tribunals that I have worked on have ranged from classic merits review of decisions of government agencies about benefits, entitlements etc to disciplinary or occupational licensing decision-making and, most particularly in the guardianship context, original jurisdiction that would otherwise be exercised by a court. I have two general comments before I move on to what I would characterise as my wish list.

The first is that it is very clear from the Legislative Council report that the question of whether to have separate specialist, stand-alone tribunals or to have an amalgamated super tribunal with different divisions was clearly significant for the committee and it would be significant for the panel if that is the way the government decides to go. It is obvious from our previous two speakers and other contexts, that New South Wales is not alone in grappling with this question. I think it might be useful in thinking about this to go back to some of the work that

Stephen Legomsky did in 1990 (*Specialized Justice: Courts, Administrative Tribunals and a Cross-national Theory of Specialization*, OUP) in which he looked at specialised adjudication both in courts and tribunals, and identified a number of factors that point either to specialist adjudication or to generalists dabbling in different areas.

I also note that it is not an 'either/or' situation. Ontario, for example, has come up with the notion of clustering tribunals, they have an executive chair who sits on top of a range of tribunals in vaguely analogous subject matter fields. The first was the environment and lands tribunal cluster, more recently there has been a social justice tribunals cluster.

A final point on this structural question is that it is clear that a divisional structure in a large tribunal can have significant benefits, in addition to the administrative benefits, in opening up ideas of different ways of doing things and cross fertilisation across divisions. However, I think it is misleading to assume that smaller specialist, stand-alone tribunals necessarily run the risk of becoming insular or self-referential. My experience is that there is a vast pool of part-time tribunal members who work on more than one tribunal, and cross fertilisation of ideas is already happening in New South Wales tribunals.

The second general point relates to Robin Creyke and Narelle Bedford's work on the inquisitorial/adversarial debate (*Inquisitorial Processes in Australian Tribunals*, AIJA, 2006); it is clear from that work that labels do not actually tell you very much. What is important is how the tribunal is constituted, how its objectives are framed in its statute, what powers are given to it, and what the obligations on the tribunal and on the parties who appear before it are.

So here is my wish list. The first item is, whether or not we have separate tribunals or a larger tribunal with different divisions, procedural flexibility is absolutely critical. It is critical that methods other than formal adjudication in a hearing process are not labelled 'alternative dispute resolution' processes but are integrated in the core work of the tribunal. Related to that is the need for resources, to be put up front into a triage process. It is misleading to assume that the amount of money at stake or the nature of the issue tells you anything very significant about how best to deal with it. The classic example is that some of the most ferociously complex legal issues arise in social security matters where the amount of money at stake is objectively relatively small.

A further point in procedural flexibility is that where you have both parties present in the process, conciliation is a valuable tool in the procedural armoury of any tribunal, and here I think the label does matter. I think it is unhelpful to describe this as a preliminary conference or a prehearing conference. I don't think it matters whether you call it a compulsory conference or a mediation, the fact that it is mainstream is what matters; these processes should be conducted by people who in other contexts will be making decisions at the end of a formal adjudication process.

There is benefit in having people who are familiar with how things might pan out in an adjudication doing it; there is also value in having the capacity for the parties to consent to whoever conducts the conciliation going on to make the decision, if that is appropriate. This saves everybody time and money and is a good way of making use of expertise. Those processes can perform both a dispute resolution function, getting to an outcome that is agreed between the parties, or performing a fairly good case management function, narrowing the issues, resolving what is actually there to be fought about if it goes to a hearing.

There are two other useful procedures. The first is the power to make a decision on the papers without having to have a formal oral process. In the migration tribunals this arises if

the tribunal thinks it can make a decision favourable to the applicant. The power given to the New South Wales ADT is more broadly framed: 'if it appears to the tribunal that the issues can be adequately determined in the absence of the parties' (s 76). A classic example, FOI exemption claims, involves sitting down with a whole bunch of documents and going through them; there is not a lot that an oral hearing can add in terms of value to that process.

The second procedure is the power to remit the matter back to the decision-maker. In New South Wales the provision is stronger than to 'invite the decision-maker to reconsider the decision'. The ADT has the power to remit the matter 'for reconsideration' (s 65). Often that occurs at the end of a process of planning meetings and discussion but I think there is a real value in having the agency or the decision-maker own the ultimate decision that comes out of the process.

In terms of the hearing process, there ought to be an obligation built into all tribunals to ensure that the parties understand the nature of the assertions that are made, the legal issues, what it is all about. We live in a world where increasingly we have self-represented applicants, and to impose a positive obligation on tribunals to be active in the hearing process is valuable. When you look at what the High Court has been doing recently on whether there is a duty on tribunals to inquire, the Court seems to be framing that in a fairly limited and narrow context, and I think one response to that might be to legislate to require the tribunal to ensure that it has all the relevant material it needs to dispose of the matter properly. If that means asking the government agency whose decision is under review to obtain a document or to provide information, an active tribunal can do that.

The second item on my wish list is resources. It will come as no surprise to you to hear that tribunals need to be resourced properly. That starts at the basic level: comfortable, proper hearing rooms and other facilities with sufficient technology - telephones and videoconferencing that work. In a state as large as New South Wales (I imagine exactly the same happens in Queensland and WA), the ability to go outside major metropolitan areas and expect that you can conduct tribunal conferences in adequate venues is important. Well-equipped websites, forms, information, resources and links are critical as is the presence of adequate registry staffing, particularly when dealing with a large number of self-represented applicants.

The third item on my wish list concerns the appointment, training and support of members. I think the best summary was given by Sue Tongue, formerly Principal Member of the Migration Review Tribunal, many years ago, when she said that 'a tribunal, like a court, is only as good as its worst member on their worst day'. I think there is a lesson for us all in that. Obviously, we start with an open, transparent and merit based process, with terms of appointment that are long enough to be attractive and also to justify the cost of training and mentoring tribunal members. If you have to choose between specialist expertise and generic decision-making skills, my view is that you go for the generic decision-making skills. Reasoning and analytical skills, independence, and oral and written communication skills are absolutely critical. Back that up with training, general training in the subject matter of the tribunal jurisdiction and also training in the specific skills that most lawyers and other professionals who may end up on tribunals do not necessarily have, such as working with interpreters and working with, talking to and understanding people with cognitive impairment or psychological conditions.

I think it actually saves money to have sufficient administrative and legal support for decision-makers. Decision-makers should be paid to think, not to format documents, and decision-makers with good legal support will more often than not produce a good decision that will withstand review or appeal.

The fourth point on the wish list is supervision and appeal. The High Court in *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 has made it clear that judicial review is fundamental to any kind of administrative or other decision-making system, and has warned that we have to avoid creating what was rather nicely described as 'islands of power immune from supervision and restraint'. Clearly judicial review is essential, but I think that the model which QCAT and the ADT have of an internal appeal panel within the tribunal is a valuable mechanism in terms of providing accessibility, simplified procedures and decision-makers who understand the different types of jurisdiction.

Equally, there is merit in whatever tribunals stay outside the system having, what is described in the New South Wales ADT as 'external appeals', going to that body rather than the legal process which is rarely ever implemented in the reality of Supreme Court or other judicial scrutiny.

The fifth point is the statutory framework. There is a standard tribunal formula. For example, the Commonwealth formula refers to 'fair, just, economical, informal and quick'. Interestingly, QCAT has added 'accessible'. Clearly, any New South Wales tribunal that emerges from this process would have similar kinds of objectives; we know from the experience of more than 35 years of comprehensive merits review that it can be difficult to balance those different objectives. The courts have the same problem.

In New South Wales, the *Civil Procedure Act* says that the overriding purpose of the Act and the rules is to facilitate the 'just, quick and cheap resolution of the real issues in the proceedings'; we all have to cope with that tension. I think that tribunals can be assisted in doing that by some specific provisions in their constituting statutes; for example, a provision that both empowers and encourages the tribunal to engage in active case management by whatever process, whether you call it conciliation, mediation or something else.

In addition, the framework should impose an obligation on the parties to assist the tribunal to achieve its objectives. The AAT has such an obligation as do QCAT and WA SAT. Imposing an obligation on the tribunal to ensure that the parties understand the nature of the issues and the legal implications goes a long way towards empowering tribunals to be active in the management of their dispute resolution.

The sixth point on my wish list is that I think tribunals have to add value to the system. There is a general acceptance that tribunals, internally, need to be consistent in their decision-making. Some, for example, QCAT, have that as one of the objects of the Act: to 'promote the quality and consistency of tribunal decisions'. There is also a function of providing guidance to decision-makers and others outside the tribunal, which is also present in the QCAT legislation.

There are different ways in which tribunals can promote internal consistency and provide guidance to others. In VCAT, for example, there is a statutory provision that VCAT can publish reports or bulletins of typical decisions for the guidance of those who wish to bring proceedings. I would go further than that and not limit it to those who wish to bring proceedings. I think that there is value in having a statutory authorisation for any tribunal that might emerge from this process to both ensure consistency of its own decision-making, in the context obviously of maintaining fairness and determining each case on its merits, and at the same time providing a mechanism to provide guidance to ensure that whatever emerges from that process can add value to agency decision-making, can make best use of the expertise in the tribunal, and can inform the community about what tribunals do. That general aim would both ensure fairness to the parties in the tribunal and the community generally and also justify the enormous public resources that tribunals have invested in them.

Kate Eastman, Barrister, Sydney

What I want to give this afternoon is the perspective of a practitioner. I estimate that I have appeared in or been involved in assisting at least 40 tribunals over the last 20 years. This has included appearing before tribunals such as the dental technicians review board (where you can complain about the quality of your false teeth) and appearing in complex AAT matters in which senior members of the Federal Court sit on the tribunal.

So, my focus is not to critique tribunals but to look at my experience over the last few years in appearing in VCAT, ACAT and QCAT versus appearing in the numerous tribunals that exist in New South Wales. I will highlight what, as a practitioner and a representative of applicants and respondents in the tribunals, I think are the features of a good tribunal. It perhaps follows that if these features are missing they undermine the quality of the tribunal.

My first point is that each tribunal has its own distinct culture and, if you are familiar with that culture, appearing in that tribunal will be a comfortable experience. If you are not familiar with that tribunal and its culture and the language and jargon used, it can be a daunting experience, particularly for most people who use tribunals, who tend to have little or no experience of courts or lawyers.

Their complaint might be about guardianship matters, they might have been discriminated against at work, they might want to have access to a document through an FOI process, they might be complaining about trees in their neighbours' back yards. They come to a tribunal to get justice, to get a sense that they are going to have their day in court, that someone will actually listen to them and that somebody who knows something about the topic will make a fair decision.

We spend a lot of time as lawyers focussing on how we think we can deliver justice, but we rarely listen to the people who actually use these tribunals and ask them what they want from the process. It is quite common for lawyers to tell their clients that 'well, if we're in this tribunal you should know this is a very applicant friendly tribunal' or, alternatively, 'if we've got this particular tribunal member in this jurisdiction we know that he or she is very respondent friendly'. Those preconceptions can affect the way in which matters are run.

It is important that whoever comes to a tribunal can have confidence that the tribunal will conduct itself professionally, that it will be a tribunal of integrity and that you will have a fair hearing regardless of what side of the case you are on.

If you are an unrepresented person coming to a tribunal, it is important that you have some idea of what to expect. More and more unrepresented litigants are quite well versed in using the internet and often will have 'surfed around' to look at who is on the tribunal and what decisions might be there. However, I find that tribunals really fail to provide information about the process to unrepresented or unsophisticated parties.

For example, sending someone 20 pages of a guide to how the tribunal works, when the person's English might be fairly limited or they are only really concerned about their case, is not particularly helpful. More helpful, as on some tribunal websites, is a flow chart that says: step one will be a meeting with so and so; step two will be this and this will happen; and step three is the time to ask for documents or whatever it might be. It is enormously helpful because it creates some equality between the parties at the beginning of the process, it empowers the unrepresented or unsophisticated parties to get information that will help them understand the process. You should assume that lawyers and parties represented by lawyers should be able to find this out for themselves, nevertheless sometimes they also need to be assisted in the process.

What goes hand in hand with this is efficient and responsive registry staff. In some tribunals even ringing the bell on the front desk to get anybody to pay any attention to you can be difficult. QCAT has, or had, a system where you press a button for what type of matter you are on and get a ticket or a number. I found that quite an efficient way of helping people. VCAT also has a good system, at the entry point there is an office where people can find out where their case is being held and all the information that they need.

The other critical aspect for a good tribunal is consistency in decision-making of procedural rulings. For those of us familiar with working, for example, in the Federal Court with a docket system, once the judge has a matter allocated to him or her, you are fairly confident that the judge is going to have a working knowledge of that particular proceeding and will see it through. With many tribunals, if the directions hearings or case conferences are before sessional members (and there might be 4 or 5 case conferences before a final hearing), it is not uncommon for each sessional member to take a slightly different approach to procedural rulings; this can be an enormous frustration to litigants.

The other frustration is that if you have different tribunal members dealing with the preliminary steps and they don't know the history of the matter or the tribunal file doesn't make that clear, litigants are constantly having to tell their story over and over again as to what happened on the previous occasion and, invariably, they are not going to agree as to what happened on the previous occasion. An enormous amount of time can be spent by tribunal members and litigants in trying to work out 'well how do we actually organise this matter for a hearing' and 'didn't last time we say that I could have a summons issued, but today you are saying I can't have a summons issued'; all of which adds significantly to the cost of tribunals.

The issue of cost is a vexed question for tribunals. As a practitioner my personal view is that the ability to make costs orders can operate as a very important discipline for all parties in a proceeding – if, for example, the tribunal has the ability to make a costs order, to keep in check procedural processes or evidence collecting processes or actual conduct of the trial.

If it is a no-cost jurisdiction then you often see terrible cases of applicants being represented by lawyers who incur enormous amounts of costs that will never be recovered; in the ADT in the EOT Equal Opportunity Division, there are cases where the damages awarded might be $10,000 but the applicant will have costs in the order of $90,000. That seems to me to be a completely unjust result and, obviously, having a capacity to control the costs and the amount that is spent by litigants in these processes is enormously important.

Better support for unsophisticated and unrepresented parties is important; I am a big fan of having referral systems or duty solicitors so that those individuals can have appropriate assistance.

The last thing on my wish list is that there be internal appeals processes and also judicial oversight. We assume that most of the time the tribunals will get their decisions right – if not they will be corrected by an internal appeal – but there are occasionally cases where because of procedural problems or substantive questions of law, there is a need to go to superior courts.

One feature of the NSW ADT, which I think is excellent, is the right to appeal to the Court of Appeal from an appeal panel decision. It does not happen often but having that facility is important because guidance from superior courts on issues of procedure and substance can be enormously helpful in reinforcing consistent decision-making among the tribunal members.

Justice Roger Boland, President, Industrial Relations Commission (NSW)

I am going to talk about the Industrial Relations Commission and the implications of this Committee report for my Tribunal and Court.

The Committee's main recommendations were first of all to pursue the establishment of a new tribunal that consolidates existing tribunals, that is, a super tribunal, but where appropriate. It was not saying categorically that we had to have the super tribunal and all existing tribunals had to be folded into it.

The second main recommendation was to appoint an expert panel to pursue consolidation, formulation and an appropriate structure of this consolidated tribunal.

The third main recommendation was that there should be specialised lists or divisions to be created within a consolidated tribunal.

The fourth main recommendation was to consolidate facilities, office space, registries, court and tribunal rooms and, in effect, establish a one-stop shop in metropolitan and regional centres.

And finally the CTTT, for the reasons that the Committee expressed, should stand alone.

The Minister responsible for industrial relations has said that as far as the Industrial Relations Commission is concerned, he has not yet determined whether he would support the idea of the Commission becoming part of this super tribunal.

What are the implications of that for the Industrial Relations Commission? It is undoubtedly the case that the Commission's workload has declined. The Industrial Relations Commission's jurisdiction is now confined to about 500,000 employees in the public sector in NSW and about 50,000 employees in the local government sector. As well there are a range of both large and small companies who are corporations – constitutional corporations – but who have elected to stay with the NSW Commission as it provides what they must obviously consider to be appropriate dispute resolution functions.

It seems to me that the main rationale for the Committee's recommendation that the Industrial Relations Commission be included in the expert panel's deliberations in relation to a super tribunal is that the Commission's workload has declined. I find that a somewhat strange basis upon which to base a recommendation that the IRC should be part of a super tribunal but, in any event, that seems to be the recommendation.

Whether or not the Commission will become part of a super tribunal is of course a matter for the expert panel in the first instance and, ultimately, for the Parliament but, if you have read the report, there was negligible support among stakeholders for the Commission to be part of a super tribunal. Perhaps this is because the stakeholders were very satisfied with the services the Commission provides, but I also think it is based on the fact that the Commission has characteristics that you won't find in any other tribunals.

For example, the Commission operates as a combination of a court and a tribunal and it can switch easily from one to the other. It performs conciliation, arbitral and judicial functions. It has both a civil and criminal jurisdiction. It has an internal appeal mechanism. The seven judges of the Commission have the Supreme Court's rank and status. It deals with both individual and collective disputes. Industrial organisations have standing in a representative capacity as well as in their own right. It regulates the affairs of all the industrial organisations in New South Wales. It has a very strong regional presence. It has dual appointments with

the federal body, Fair Work Australia. The Industrial Court exercises federal jurisdiction and the Industrial Relations Commission is a dispute resolution provider under the *Fair Work Act*. These are some of the characteristics that set us apart.

Although the language was somewhat muted, it was clear from the stakeholders who had anything to say about the Industrial Relations Commission, who made submissions to the Committee, that they preferred option 1 and were seriously against the Commission becoming part of a super tribunal.

Option 1 was the transfer of functions of other tribunals to the Commission and re-naming the Commission the Employment and Professional Services Commission. The other tribunals that could conceivably be transferred to the Industrial Relations Commission are the Medical Tribunal – judges of the Industrial Court already act as chairpersons of the Medical Tribunal – and the nine other health professional tribunals.

The anti-discrimination division and professional discipline functions in relation to lawyers from the ADT would be a neat fit with the Industrial Relations Commission. The common law employment contract matters currently dealt with in the District and Supreme Courts could easily constitute part of the jurisdiction of the Commission. The Vocational Training Tribunal would fit easily. The Racing Appeals Tribunal was recently presided over by a member of the Industrial Court. The Local Government Pecuniary Interest Tribunal is another neat fit and, of course, the Parliamentary Remuneration Tribunal (where, already, a judge of my Court constitutes that tribunal).

So there is clearly an alternative, in my view, to amalgamating the Commission or making the Commission a part of any super tribunal and in that respect, I make some observations about the Committee's report.

The six member Committee was divided over the Industrial Relations Commission becoming part of a super tribunal. It had been moved in the Committee that an additional paragraph be included at the end of Chapter 6 of the Report to the following effect:

> The Committee recognises that the nature of the IRC's jurisdiction, dealing with wide ranging industrial disputes that can affect key sectors of the economy, together with the making of new rights through industrial awards, is a unique jurisdiction that must be very carefully dealt with in any review of tribunals in NSW.

On the casting vote of the Chair the motion was defeated. This led to three members of the six-member Committee making a Dissenting Statement. That Statement was in the following terms:

> The committee's report is, for the very large part, a product of consensus amongst the committee membership. There is, however, one aspect of the committee report on which the members of the committee did not reach consensus.
>
> We dissent on the decision by the majority in relation to committee comment on page 72, not to include additional commentary, reflective of the evidence before the committee regarding the unique jurisdiction of the Industrial Relations Commission. That evidence raised concerns that amalgamation could pose a threat to its critical and historic role in regional areas and in oversighting crucial parts of the state economy, such as its hospitals, police, the public service and railways.
>
> Evidence, for instance from the Hunter Business Chamber (the Newcastle Branch of the Industrial Relations Society), Unions NSW and others all detailed the likely dilution of industrial relations expertise and negative economic consequences for the Hunter of moving the IRC into a consolidated tribunal. The majority cited no evidence to justify dismissing these concerns.
>
> The balance of the evidence before the committee was that the Industrial Relations Commission is a unique jurisdiction that must be very carefully considered in any more detailed review of tribunals here

> in NSW. It is unique in that it is the only tribunal that deals with wide ranging industrial disputes that can affect key sectors of the economy, together with the making of new rights through industrial awards. It does this whilst also exercising judicial powers, a factor not found in any other tribunal reviewed by the committee.
>
> In its century long history, the Industrial Relations Commission has developed a distinct set of skills and a well-recognised institutional capacity that is not found in any other tribunal that was reviewed by the committee. This allows the Industrial Relations Commission to effectively maintain a public sector awards system; co-operatively and competently resolve complex industrial disputes; and address broader issues that go beyond the immediate interests of the parties before it, such as the public interest in an efficient and productive State economy, equal remuneration, non-discrimination and industrial democracy.
>
> In submitting this dissenting report we recognise that it is not a matter the subject of a substantive recommendation from the committee. Nevertheless, it is a matter that we considered of sufficient importance to warrant this brief dissenting report.

Seventeen of the eighteen submissions referring to the Commission indicated strong support for a continuing role for the Commission and maintenance of its current powers and functions. The Committee I think, reading the report, placed fairly heavy reliance on super tribunals in other states to justify one in NSW and certainly it was entitled to do that. There are good models in the other states, there is no doubt about that, but no other state - none - has the Industrial Relations Commission as part of the State's super tribunal.

The stakeholders described the current tribunal system as complex and bewildering. No stakeholder described the Commission as complex and bewildering. The Committee considered that amalgamating the tribunals would improve access to justice. There was no complaint at all about difficult access to the Commission, indeed the submissions made quite the opposite point including in rural and regional areas.

But, nevertheless, if the view is taken by the Parliament that the Commission should be part of a super tribunal, there are a number of considerations I think for the expert panel. Will the hybrid nature of the Commission, in which it exercises both judicial, arbitral and conciliation powers, be retained in order to maintain the effectiveness of the Commission?

It was a very strong and very common point amongst those who made submissions about the Commission that the hybrid nature of the Commission had been enormously effective for nearly 100 years, and that there was a very good argument to retain it – will it be retained? Will the Commission's current powers and functions be retained across the 27 pieces of legislation that we administer? What will be the system of appeals? Will it be an internal appeal mechanism? Will it be one that involves appeals going off to the Supreme Court? How will six judges – because we have a judge retiring at the end of this year and I imagine this is not going to be put in place before then – how will six judges of Supreme Court rank be accommodated? Will appointments to the Industrial Relations Division of the Super Tribunal be full time?

The idea that we would have sessional members managing industrial relations matters does not seem to me to be the appropriate way to go. One of the great advantages in dealing with industrial disputes – particularly collective disputes – is the fact that members of the Commission have continuity. They know the industries, they know the people in the industries, and to have sessional members come in on an ad hoc basis to be confronted with a collective industrial dispute – I cannot imagine how that would work. What will be the timeline for implementing a super tribunal, given that 70% of the Commission's judges' work will be gone by the end of this year? I cannot imagine a super tribunal being ready to go by the end of 2013. What steps is the government going to take to provide judges with work pending the implementation of a super tribunal? There has been no indication to me of that being a consideration at all on the part of the relevant Ministers.

There are a host of other considerations that I won't go through this afternoon. Will Commissioners, for example, retain their status as judicial officers for the purpose of the *Judicial Officers Act* and be subject to the authority of the Judicial Commission? There are all sorts of incidental issues that will have to be considered if we are to move to a Super Tribunal. But I think I should make my position clear: I do not support the idea of the Commission becoming part of a Super Tribunal.

Associate Professor Matthew Groves, Monash University

My topic is Merits Appeals of Government Decisions which I will essentially get to at the end because one of the things that struck me about the report was that there was not really any discussion of the core function that this super tribunal was supposed to perform.

The first thing that strikes me is the notion of precisely what is being consolidated. In Victoria particularly we take the view that VCAT is a world leader and it essentially was in its day but I think this also pre-supposes that there is a particular notion of a super tribunal. VCAT is one possible example of such a tribunal. It has always been and will always be quite different to whatever ends up being created in New South Wales because, for example, we do not have a separate land and environment court. VCAT has long had a planning division which essentially does what the New South Wales Land and Environment Court does. So, if there is an NCAT, it will probably have at least one striking difference to VCAT.

I do not think many people in Victoria would concede that consolidation of planning and environment matters within VCAT has improved or enhanced that jurisdiction. I think it is fair to say that the New South Wales Land and Environment Court – particularly in view of the special nature of planning and development decisions in New South Wales – really is a leader in its field. It is difficult to see how consolidating that planning and environmental expertise would be enhanced by its inclusion within a super tribunal. The Land and Environment Court seems fine as it is.

The other thing to note of course is that VCAT has never had an industrial relations jurisdiction because Jeff Kennett legislated away most or all of that in his time by the referral of powers to the Commonwealth. Industrial relations was therefore simply never something that fell within the Victorian tribunal framework and I was interested to hear the last speaker refer to this wider notion of the suggestion in the Legislative Council's report that makes perfect sense within the VCAT model simply because there is no Industrial Relations Commission jurisdiction. This difference between Victoria and New South Wales is similar to that taken in planning and environmental issues because it seems natural within one's own jurisdiction but quite different to what an outsider might expect within a single enhanced tribunal.

So there are several things that come out of this notion of a CAT whatever it is; the first is that there is potentially a fairly flexible approach to any model of a consolidated tribunal and I think we can see that this is what the ARC proposed at the federal level in its Better Decisions Report. That, necessarily for constitutional reasons, did not include a civil division.

I think the other thing we need to mention in all of this is that *Kirk* has made clear that tribunals will always be subject to supervisory review by the courts. What *Kirk* said about tribunals was not surprising because the High Court had been saying those sorts of things at the federal level about supervisory review over federal tribunals for a long time. Whatever we end up with in New South Wales will be emphatically subject to the Supreme Court and the Court of Appeal.

What is unusual and could be quite important in *Kirk* is that one of the many throw away lines in that case was in paragraph 69, where the High Court essentially said 'well, we anticipate that there will be some level of difference between tribunals at the federal and state level'. This is interesting because the position of federal and state superior courts is aligned but there is an anticipation of continued difference in state and federal tribunals. One immediate consequence of that is that tribunals like VCAT can have powers which are clearly unconstitutional at the federal level. VCAT can make self-enforcing orders of the type that were declared unconstitutional in *Brandy* and more generally exercise judicial powers that would be prohibited in a federal tribunal.

There are all sorts of quirky differences between various tribunals at the federal and state level. What I am not sure about and I see as a major sticking point is any sort of notion such as that referred to by Justice Boland about merging judicial and arbitral and other functions in what may be called a tribunal but is somehow a unique blend of all of them.

The licence that *Kirk* gave to divergence between federal and state tribunals, should not necessarily be taken as a signal to allow that kind of innovation. If there is one recent lesson that we can take from the High Court in recent times it is from *Lane v Morrison*, in which in the Australian Military Court the Federal Parliament designated that Court as a superior court of record and essentially said 'it's this kind of creature because we say it is'. The High Court held otherwise and declared the operative provisions of the Military Court legislation invalid.

To transfer that logic to this occasion, I think it would be a grave mistake for the New South Wales Parliament to think along the lines of the privative clause that was read narrowly in s 157. It would be a grave mistake of the Parliament to think that the words that it enacted actually meant what they said before the High Court, because the High Court might take quite a different view for constitutional reasons. So the extent to which some unusual changes could be made in industrial relations and survive constitutional muster is a difficult issue.

In 1998, VCAT basically collapsed all of the Victorian tribunals into one; this was not a particularly radical step. We had had a Victorian AAT for over a decade so VCAT was the natural successor. The other reason that I think VCAT was fairly well received was that it was preceded by a very intelligent discussion paper about two years earlier, so there was a lengthy and informed timeframe.

It introduced some sensible reforms, the first of which was that we have a single procedural statute which governs all of our tribunals. One of the unnoticed advantages of VCAT is that there is a single test of appeal. There is procedural uniformity and simplicity. We do not have divergence between the various jurisdictions in the test for standing, in the procedural powers, or in the question for appeal; there is essentially a single legislative test that applies to everything. This is particularly useful for the profession as I was reminded when I tried to understand some recent Court of Appeal of New South Wales decisions on the scope of the appeal provisions in the CTTT jurisdiction. One benefit of this is the relatively small number of appeals to the Court of Appeal over procedural issues.

The other benefit of VCAT is that we have a single building, a single registry, a single form; there is uniformity in terms of where to go.

Probably one of the greatest downsides of VCAT was resources. VCAT was part of a cost cutting exercise so, while there was useful legislative reform in the single statute, VCAT was placed in a small, cramped and out dated building which, over a decade later, is even less suited and less able to manage its jurisdiction.

So, one of the lessons to be learned from VCAT is that if you physically collapse the jurisdiction of a tribunal into a single forum, what can be problematic in a whole range of jurisdictions in little out of date ill fitted tribunals, can become worse in a single very bad building.

A completely different model called the *Adjudicative Tribunals Accountability Governance and Appointments Act* of 2009 from Ontario allows for the potential of cluster models; the interesting thing about the Ontario statute is that it essentially sets out a list of standards for all tribunals and at its very end there are a couple of provisions in which it allows the tribunals to be clustered. So it does not create a super tribunal but it does create a single set of standards with which all adjudicative tribunals have to comply. These include: every adjudicative tribunal shall develop a mandate and a mission statement.

The useful thing about this and other features of the Ontario model is that they provide a collective set of requirements for tribunals in that jurisdiction to articulate their key goals, performance standards and achievements. This informs the tribunals in question, their users, the government and the wider public.

In the Legislative Council report there was no clear articulation of what they wanted this NSW tribunal to do.

Another notable issue that was not covered by the Legislative Council report, but which has become a thorn in the side of VCAT, is the position of unrepresented parties. The original VCAT legislation did not anticipate the rise of unrepresented applicants, many of whom appear in quite complex matters. That is no criticism of the VCAT legislation because this problem arose due to a combination of factors, particularly the lack of legal aid or other assistance for those who cannot afford lawyers. It is possible that the creation of a single super tribunal with the simplified procedures of VCAT has played a role in the growth of unrepresented parties, if only because such a user friendly and simplified jurisdiction enables unrepresented people to appear relatively easily.

The issue has never been addressed with systematic legislative reform. It has instead been tackled by ongoing reform within VCAT and a surprising number of appeals to the Court of Appeal, which has expounded principles for hearings involving unrepresented people. From 2002 to 2009 there were a great number of cases in the trial division and the Court of Appeal about how to wrestle with unrepresented applicants.

One of the things that came out of the President's Review is that the Victorian Bar offered to make VCAT part of its duty barrister scheme. That was a commendable suggestion but one wonders why VCAT had to endure so much in the meantime. It beggars belief that that had to go on for 10 years and that many cases in the Supreme Court and Court of Appeal never gave rise to that suggestion. So, not only do unrepresented parties present great difficulties to VCAT but VCAT's response to a lot of these things is quite reactive. That is a problem of resourcing.

Many users complain about a 'clubby' atmosphere (see page 22 of the VCAT review report), but the planning division was singled out, where, it was said by many, if you are not one of the lawyers you seem to be on the outer. How do you balance dealing with litigants whom you only ever see once, and lawyers whom you see a lot? What is informality to a lawyer is invariably in-house to an unrepresented person.

VCAT performs a merits review function which, as in all other merits review tribunals, is not spelt out in the legislation. One of the astonishing things about the President's Review in VCAT is that for the first time that I can recall the head of the Tribunal explained why some

functions and some powers were suitable for merits review. He essentially said, 'this is how I think we should decide this action should be amenable to merits review'. The statement of the President on this issue is sensible and clear but I wonder why such criteria have not always existed.

I am surprised that VCAT had existed for over 10 years and neither the Victorian Government nor VCAT had developed an equivalent to the document that the Administrative Review Council has, which is the guidelines to decide whether or not something is suitable to merits review. There does not seem to have been any coherent or guiding principle by which VCAT was granted or denied jurisdiction. This issue is really down to the government because, while it was sensible for VCAT to articulate how and why things ought to be subject to merits review, one has to ask why successive governments have not been doing this by reference to transparent criteria for a long time.

My final point concerns the *Drake* and *Becker* issue that came out of the earlier policy cases in the AAT. VCAT is subject to a specific provision, section 57 of the VCAT Act, which says, 'if there is a policy, and if it is publically available, and if the applicant was aware of it, and if it was tendered, and if it was gazetted, and if it is relevant to the case, VCAT has to apply it'. In simple terms what that means is that there is the legislative override in VCAT of the *Drake* and *Becker* decisions. I have never been able to find a single recorded use of this provision.

At the Federal level the role of merits review tribunals in reviewing government policy á la *Drake* and *Becker* is one of their really important functions; or at least it was in the early merits review cases of migration decisions, which gave rise to a conception of merits review that allowed a level of independence in the review of decisions that were affected by a relevant government policy.

This issue seems to have been completely by-passed in VCAT and what we instead seem to have is essentially a simple, single adjudicative tribunal in which government policy is never questioned or tackled head-on. VCAT essentially functions as a low level court of summary administrative and civil jurisdiction without ever tackling the big government policy issues that might make the executive feel much more threatened. For that reason I think the government has always remained quite comfortable with VCAT but the extent to which it has challenged the government in its merits review function could be argued to be really quite narrow.