

Administrative Tribunals in Australia – Future Directions

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The growth of the tribunal system in Australia over the past 30 years has thrown up a range of issues to do with their constitution, membership, procedure, case management and funding. The responses to these issues have been shaped by a succession of independent inquiries and reports, by bodies such as the Administrative Review Council and the Australian Law Reform Commission.¹ Another pressure that has subtly shaped the Australian tribunal system but which has received less formal attention is judicial oversight of tribunal proceedings. This can occur in two ways: through an appeal process, usually on a question of law;² or through judicial review of a tribunal decision or proceeding.³ Judicial scrutiny through those processes has been as much about how tribunals should go about deciding issues as it has been about the substantive rules of law being applied by tribunals.

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

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

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

2 See, for example, *Administrative Appeals Tribunals Act 1975* (Cth), s 44.

3 See *Migration Act 1958* (Cth), Part 8. For an example of judicial review of AAT proceedings, see *Duncan v Fayle* (2004) 138 FCR 510.

4 See, for example, G Osborne, 'Inquisitorial Procedure in the Administrative Appeals Tribunal – A Comparative Perspective' (1982) 13 *Federal Law Review* 150; M Allars,

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