

**REPORT OF PROCEEDINGS BEFORE**

**COMMITTEE ON THE OFFICE OF THE OMBUDSMAN  
AND THE POLICE INTEGRITY COMMISSION**

**INQUIRY INTO THE JURISDICTION AND OPERATION OF  
THE ADMINISTRATIVE DECISIONS TRIBUNAL**

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**At Sydney on 19 October 2001**

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**The Committee met at 10.00 a.m.**

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**PRESENT**

**Mr P. G. Lynch (Chair)**

**Legislative Council**

**Legislative Assembly**

**The Hon. Deirdre Grusovin**

**The Hon. R. H. Colless**

**Mr M. J. Kerr**

**KEVIN PATRICK O'CONNOR**, President, Administrative Appeals Tribunal, 111 Elizabeth Street, Sydney, on former oath:

**CHAIR:** Could you please state your full name and professional address?

**Judge O'CONNOR:** Kevin Patrick O'Connor, 111 Elizabeth Street, Sydney.

**CHAIR:** Would you state your occupation and the capacity in which you are appearing before the Committee?

**Judge O'CONNOR:** I am a judge, and appear before the Committee as President of the Administrative Decisions Tribunal.

**CHAIR:** Do you want to make an opening statement and table the final submission?

**Judge O'CONNOR:** Yes. I have prepared a text which is in the nature of an opening statement and a final submission. Is that acceptable?

**CHAIR:** Yes, that makes perfect sense to me.

**Judge O'CONNOR:** You have a copy of it. I may not refer to every paragraph but I will just take you through it. Since I met the Committee on 17 November 2000, the Committee has released its discussion paper, March 2001, and received further submissions. I have read the transcript of oral evidence given to the Committee on 21 August 2001 by Justice Murray Kellam, President, Victorian Civil and Administrative Tribunal [VCAT], and Mr Nick O'Neill, President, Guardianship Tribunal, on the last occasion. In my opinion, perhaps the major policy development affecting the issues canvassed by the Committee is the discussion paper that has been released in the United Kingdom. That was the report of the review of tribunals by Sir Andrew Leggatt to the Government, entitled "Tribunals for Users, One System, One Service", which was published in March 2001, and was the subject of an official consultation paper in August 2001.

You may be aware that that review, in fact, visited Australia for one week about a year ago, if I remember correctly, and looked at the Commonwealth and principal State arrangements in respect of tribunals. At the moment there are inquiries in relation to the greater integration of tribunals in Western Australia and Queensland, and in New South Wales there has been a new super-tribunal created in the Fair Trading portfolio, the Consumer, Trader and Tenancy Tribunal.

The Commonwealth Administrative Review Council recently hosted in Sydney a preliminary meeting with a cross-section of heads of major tribunals to discuss the establishment of a Council of Australian Tribunals. That body is seen as providing a forum for the development of common approaches and the sharing of experience and resources as between tribunals across the country on matters such as training and education of members, codes of conduct, appraisal systems and use of technology.

As would be well known to the Committee, I am a firm advocate of many of the key principles of organisation reflected in the VCAT structure and reflected in the recommendations of the United Kingdom Leggatt report. Sophisticated integration of small tribunals clearly delivers efficiencies for their operation and more generally for users. There is a more difficult question when dealing with large-volume tribunals, to which I refer again later in these comments.

While the Administrative Decisions Tribunal's case-load is relatively small as compared to, say, the Residential Tribunal in New South Wales or the Commonwealth Social Security Appeals Tribunal, it is, in contrast to those examples, an instance of several disparate and technically demanding areas of jurisdiction being housed in a single structure using divisions as a means of maintaining any necessary specialisation.

In my opinion, the Leggatt report from the United Kingdom is a very forward-thinking document. It advocates an organisational model for the delivery of tribunal services that goes beyond anything found in Australia. It advocates a new executive agency, the Tribunals Service, separate

from the existing agency administering court services in the United Kingdom, the Lord Chancellor's Department, which is broadly equivalent to the Attorney General's departments found in Australia.

In Australia tribunal services are managed by a wide range of departments. Health departments typically manage tribunals such as the health professions disciplinary tribunals and the Mental Health Review Tribunals. Industrial Relations departments often manage industrial tribunals. Consumer Affairs/Fair Trading departments typically manage consumer claims, home building and residential tenancies tribunals. Attorney General's departments administer the courts and administrative review and Equal Opportunity tribunals.

In the Australian governmental environment, it would, in my view, be preferable for all or most tribunals, whether amalgamated or not, to be supported by a single tribunals service, for the reasons so well articulated in the Leggatt report. In the Australian Government context that would mean that the responsible portfolio should be that of the Attorney General.

While some tribunals in Victoria still stand outside VCAT, principally the Professional Discipline tribunals, Victoria is the only Australian jurisdiction to have adopted a tribunals service model, in my view with clear positive results. Those results were reflected in the comments made by Justice Kellam to the Committee on 21 August. Clearly the recognition that one department should specialise in serving the needs of tribunals was aided by the combining of small Ministries into larger Ministries that occurred in the early days of the Kennett Government in Victoria, and has been continued by the Bracks Government. There the Justice portfolio restructure, bringing together the old Fair Trading Department and the Attorney General's Department facilitated the creation of VCAT and the establishment of a single, administrative infrastructure.

There are many aspects of the Leggatt report that I strongly endorse: its emphasis on tribunals being set up and run as places where a person can confidently go without a lawyer and find their way effectively through its requirements and processes; the need for government to identify those tribunal jurisdictions where the degree of complexity is such the above goal can not be achieved, and then to ensure that legal or other assistance services can be accessed; the need to resource programs for ongoing member education and development; the need for tribunals to develop appraisal systems; the need for more secure terms of appointment of reasonable length for members, especially full-time ones, accompanied by credible and transparent procedures for appointment, non-renewal or early termination; the recognition of members and aspiring tribunal members as a resource to be developed through co-ordinated education and training programs; the need for an orderly complaints system that does not admit of political interference; the fundamental importance of good information technology infrastructure to the effective performance of tribunals, both in their registry administration, and in supporting the legal research needs of members; and the need, as mentioned, for a dedicated, professional tribunals service to underpin the achievement of those goals.

I will now offer some comments on the comments of Justice Kellam and Mr O'Neill. I am familiar with many aspects of the operation of VCAT to which Justice Kellam referred. An important practical one is the differentiation in case management and computer infrastructure systems employed there between those systems needed for high-volume areas and those appropriate to smaller volume areas, which roughly reflect the difference between claims that can be dealt with in a summary way, versus more technical and complex claims. I am very interested in the dual-computer environment.

I found interesting Justice Kellam's reference to VCAT as the fourth partner with the Magistrates Court and the two superior courts, the County Court and the Supreme Court, in the delivery of justice services in Victoria and the direct linkages through selective cross-appointment to each of the partners. There are six cross-appointed magistrates, four cross-appointed County Court judges, two of whom are full-time, and a cross-appointed Supreme Court judge, Justice Kellam, as President). The idea of partnership brings a level of coherence to where the tribunal function falls within the overall framework of institutions for resolving disputes that has often been missing from the discussion.

The committee's discussion paper raised the possibility of greater integration of disciplinary tribunals into the ADT. I had expressed support for that proposition in my presentation to the committee last November. I saw it as an integration that could either be achieved through having a specialist division of the ADT or a free-standing disciplinary tribunal. I agree with Justice Kellam that

disciplinary tribunals, whatever profession they are dealing with, are applying the same standards for the protection of the public. That in itself supports the case for integration so that disparate approaches to common questions are avoided. I see such a division or free-standing tribunal as having judges as presiding members, replicating, in particular, the present practice in the Medical Tribunal, and the government's preferred approach to serious legal professional disciplinary cases.

Mr O'Neill reiterated the case for the separate, specialist tribunal. The case he makes has been the one that has commended itself to government in the past. That case is under pressure now for a range of reasons. There seem to be obvious economies in bringing together back-of-office services. The file management and claims processing aspects of tribunal operations are relatively similar whatever the specific category of dispute or application. The front-of-office services—information provision, assistance to parties, advice as to status of matters—similarly can for the most part be brought together. I agree that special considerations apply in the management of these services for categories of users, such as persons with disability, children and situations in which the issues in dispute arise within family contexts such as guardianship and administration issues. The case in favour of integration seems to me to be very strong in the case of relatively small tribunals, often with a minuscule registry and a handful of part-time members.

Large, specialist tribunals are in a somewhat different situation. The Guardianship Tribunal is closer to that end of the spectrum. Such a tribunal may well have a good ethos, good operating procedures and good resources and see amalgamation as a danger, with the possibility that a lowest common denominator approach will prevail when absorbed into the larger structure. This is a serious issue. The most-heard concern in the context of amalgamations, and I have seen two major amalgamations in the past three years in the Fair Trading portfolio, is the fear that the incoming volume area will swamp the other categories of business; and give rise to a one-size-fits-all approach to management of the case load; and staff and member failure to see the vital differences between categories of business.

A good understanding is needed on the part of the leadership of the large, merged tribunal to ensure that appropriate levels of differentiation and specialisation are maintained.

Mr O'Neill spoke of the danger of relegalisation of tribunals flowing from amalgamation; for example, by the introduction of judges at the top. He also referred to allowing hearings to be conducted only by lawyers as also involving relegalisation. It is the case, as is reflected in the Guardianship Tribunal, that most tribunal statutes require that the presiding member be a lawyer. Ultimately, all tribunals must conduct themselves according to law, which in this context is a combination of the specific requirements of statute and the common law, especially as it applies to fact-finding and natural justice. The Supreme Court remains the superintendent of good practice in tribunals through its judicial review role. So a degree of legalisation tribunals is inevitable.

What Mr O'Neill is worried about importing into tribunal work, I believe, is an uncritical cast of mind often found among lawyers as to the innate virtue and superiority of the practices and procedures, and the strict observance of the rules of evidence, found in courts, especially the higher courts. In my experience, most of the lawyers interested in sitting in tribunals disavow such views, and are often quite concerned not to allow the traditional practices to take hold. Where that is not the case, it is a management task for the heads of the tribunal to see that the court room culture does not break out in tribunals. In the ADT, for example, I have had to intercede with one of my lawyers to stop directions being issued that required parties to file appeal books of the kind seen in the Court of Appeal when preparing their appeal to an appeal panel. So I understand their point.

**CHAIR:** The only people who would lose from that are the bookbinders who prepared the appeal books.

**Judge O'CONNOR:** Mr O'Neill put the case strongly for retention of expert and community members. Clearly the presence of leading members of a profession is a vital component of professional discipline hearings. They have two roles; first, to inform the tribunal as to contemporary standards of practice, and, second, to interpret and explain the technical evidence as for example in veterinary surgeons discipline cases. The ADT and the Guardianship Tribunal have persons experienced in dealing with the clients of community services when sitting in the Community Services

Division. We always have a psychologist on the panel. The ADT uses three-member panels in the Equal Opportunity Division and they include two community members.

As for equal opportunity, as I have noted, I think, in the earlier submissions, I have not been convinced that a panel of three is needed in most cases. I was a hearing commissioner in the federal equal opportunity cases when the jurisdiction was with the Human Rights and Equal Opportunity Commission. Only occasionally did we sit with three-member panels. Most of the business was handled by a lawyer sitting alone. I do not believe that that approach in that organisation gave rise to any derogation from the values of tribunals and the values of equal opportunity legislation or undue formality. The bonus we got was some decisions of very high quality from leading Queen's Counsel and retired judges.

Towards the end of his submissions Mr O'Neill made some comments on general aspects of VCAT that he was inclined not to prefer. He also referred, in that regard, to specific aspects of VCAT's guardianship jurisdiction. I will not comment on specific aspects of VCAT's guardianship jurisdiction.

As to the general aspects, he mentioned the architecture of VCAT's hearing rooms and the nature of their remote area services. I agree with Mr O'Neill on the need for hearing room designs that are even-plane and that avoid the structure of the courtroom. I have tried to move in that direction when I have had the opportunity. But often tribunals find themselves working in spaces of the old style.

I agree with Mr O'Neill that one should look at the breadth of facilities available in a country town, including conference type meeting rooms. In the case of the ADT, we tend to use courtrooms in country towns, not because we see them as ideal, but simply because the staffing and security infrastructure is readily found there and there are no booking fees. I also prefer, especially for the type of work a guardianship tribunal does, to engage in face-to-face hearings rather than using remote links. I mention in passing that only in the last four years in New South Wales has there been a new fit-out of the Residential Tribunal. It adopted the courtroom look with elevated benches. You cannot win, no matter how hard you try. I think it is a serious issue.

I agree in general with Mr O'Neill that the lawyer members of tribunals have a strong sense of independence, are conscious of their duty to deal with matters impartially according to law, and are not easily able to be influenced. I believe that there is a cocktail of circumstances in play today that he does not refer to, and which were referred to persuasively by Justice Kellam and are given great weight by the Leggatt report. We now see governments making short-term appointments, three-year terms being commonplace in New South Wales, including for full-time members. I consider that there is a strong case for much longer terms. I also favour the five-year to seven-year span, to which Justice Kellam refers.

We should be moving, especially with amalgamations, to seeking to develop tribunal membership as a later-career new career path. The same propositions apply to actively used part-time members. Many of them give a significant part of their work time to tribunals. There needs to be much greater transparency and objectivity in the process of appointing tribunal members. Mr O'Neill's arrangements in that regard appear to me to be relatively good ones. There is plainly a danger of tribunal members being affected in their decisions, consciously or unconsciously, by the presence of government parties in hearings who, in turn, have a say in their appointments.

There needs to be at least a senior cadre of members who have long terms, or judges with tenure, to deploy in cases of high sensitivity to government. In the Fair Trading Tribunal we see the less than desirable situation of the Director-General of Fair Trading and the Fair Trading Administration Corporation, the statutory insurer, being a party frequently, with members depending in part on the director-general's view of them for reappointment. I give that as a specific example. You could multiply that example.

Those are my formal comments. I am happy, obviously, to respond to any questions. I hope that I have touched base with issues in which you are interested.

**CHAIR:** You have covered a range of the things in which we are interested. For the record, that written submission will be received in evidence and included as part of the transcript. I refer to the amalgamation issue and wish to clear up one thing. It would not have occurred to me that you would want to include the planning functions of the Land and Environment Court in any sort of expanded ADT. Justice Kellam said in his evidence that the only part of the VCAT structure about which he was a little uncertain was the planning part because it was so different from everything else. Is that a general perspective that you would share?

**Judge O'CONNOR:** Up to a point. I think he is alluding, to some extent, to the fact that it is the political lightning rod of tribunal work in Victoria. I have no doubt that the lightning rod in New South Wales is the home building jurisdiction of FTT. To the extent that you have a lightning rod jurisdiction, that is not in itself an argument for putting it outside a tribunal framework. I would be inclined to reserve on that question. It is 3,000 claims, I think, in an 86,000 claim structure in the case of Victoria, of which 60,000 claims are residential tenancies. Even if you take that 60,000 out, as 3 versus 26, obviously it gets a disproportionate amount of public attention.

My view would be that we should look at the categories of business. My understanding is that the Land and Environment Court has six lists. It may be that some of those functions are amenable to the tribunal environment and that others are more appropriate for a quasi-court environment. One might think, for example, that penalty proceedings should be in a quasi-court environment. But once you put part of the business in one environment, why not put all the business in that environment? Those are the issues that you get into.

I would not be totally negative to the proposition because, as some of you may know, I was a senior officer in the Victorian Attorney General's Department when we created the Victorian Administrative Appeals Tribunal. We consciously brought the Planning Appeals Board, as I think it was called then, inside the structure of the new AAT. It did function within the new AAT structure, I think relatively uncontroversially for most of the years afterwards. I would be inclined to reserve on that question. It is quite typical to organise planning appeals in places like the United Kingdom within tribunal frameworks.

I am not looking for the jurisdiction of the Land and Environment Court. I am just saying that I think it can be an open question.

**Mrs GRUSOVIN:** I want to canvass a problem that we have in relation to tribunals and courts. When we finally get a tribunal, which is hard enough, it ends up being a quasi-court. In 1988 I was intimately involved in attempts to set up the Residential Tenancies Tribunal, which was all about getting evictions and all those matters out of the Local Court system. At that time there was great opposition from the Attorney General and the issue did not get up before the change of government. However, it was then addressed by the incoming Coalition Government. Despite having gone through all the trials of setting up the tribunal, we ended up with referees who were more pompous or equally pompous than anyone in a court situation. The emphasis was on mediation, arbitration and face-to-face hearings across the table rather than a courtroom situation. Once they got out on the circuit they loved those country courtrooms because they could play judges. I suppose it was hard enough to get it out of the system. How do we ensure, if we do what you are suggesting, that we will not go back to that court situation?

**Judge O'CONNOR:** It is very difficult. I suppose I have become quite interested in this issue of effective infrastructure in recent years. There are considerations that are quite evident in your comments that I think I value and that you value that, to some extent, have to be radiated from a single business environment. Whether it is a policy committee or an administrative department there must be some real thinking about those issues that you canvassed and there must be a co-ordinated and sophisticated attempt to impart those values to the diverse population of members you deal with. Tribunals, as you know, in State environments, for the most part depend heavily on part-time membership. I am not wishing to be unduly critical of that, but it does present a lot of problems in managing the development of an ethos and the sharing of an ethos.

I think we have to look at our stock as falling into categories. The two elements that I would concentrate on in a more sophisticated infrastructure are obviously full-time members, but also the people who are essentially part-time career tribunal members—there are stacks of them—holding four

and five appointments between Commonwealth and State tribunals. Some of them obviously have these values you are describing, but others need a bit of work. Then I think you have to more or less virtually let go very occasional part-time members, just as an allocation of resources judgment, and offer them the opportunity to take advantage of whatever education scheme you are offering, but maybe on a less involved basis because the unit costs of servicing are so great compared to the amount of activity in which they engage.

**Mrs GRUSOVIN:** Could I just tease you out on one other interesting point you made in your recommendation that perhaps we should be looking at a latter career path. Again, that would be on the basis of giving more permanency to people who have had more experience?

**Judge O'CONNOR:** Yes. There is no doubt that there are mid-career professionals who are not just lawyers who would make very good tribunal members. I have noted in the paper that it is commonplace in tribunal statutes to require that lawyers preside but I am not committed to that. I think it is a mixture of personal skills and appropriate educational support. We have some very good non-judicial—lay—members on the Equal Opportunity Tribunal who, I know from the past experience in major Commonwealth tribunals, could easily sit and determine our cases without causing any risk to the legal firmament. One should look strategically at that as an opportunity. We know there are many people who prefer at a point in their career a fractional, full-time type work environment and tribunals can fairly readily offer that, it seems to me.

**The Hon. RICK COLLESS:** There is always a community participant in the Land and Environment Court. Do you see the tribunal situation working in that same vein and, if so, what sort of educational and qualification experience should people have if they were to undertake those sorts of duties?

**Judge O'CONNOR:** I think the question of the qualifications of the community member is a neat question. What you tend to see in the multimember structures is that the community member should have some kind of affinity with the subject matter that is the subject matter of the tribunal. In the planning context I presume the community member is someone who represents a community perspective but has enough acumen to understand planning documentation and so on. However, the risk you then run, which I have encountered on occasions, is a community member is kind of too close to the industry that is the subject of the inquiry. This is probably not an entirely fair example but in the olden days on disciplinary tribunals the local clergyman or member of an ethics committee used to sit there as the community member and they were almost part of the professional milieu from which the person under notice came.

It is a tricky question. The view I have tended to have in the context of an integrated professional disciplinary structure is that you would be looking for community members who were really from what I would call a consumer background, that is, they had been active in consumer protection issues rather than, as we see at the moment in the veterinary statutes that I deal with, a community representative who is representative of users of veterinary services—I would not go for that—but a person who can make an articulate and intelligent contribution from a broad consumer perspective.

It is an interesting question and when you go to areas like equal opportunity, in the early days with which I was associated in the 1970s, the general view was you would not put aged, middle-class white judges in charge of these issues. You had various broad-minded and more socially aware people sitting on the tribunal almost like a guardian against that possibility and it worked, I think. However, in Victoria they ended up with five people sitting on the tribunal—one plus four. I would argue that nowadays you can take the risk and punt it with one. Social insights have moved on a little from those days. I do not know whether that helps you but I think it is quite an interesting question.

**CHAIR:** Going back to the sorts of points you made in response to Mrs Grusovin, it seems to me logically that developing an infrastructure that had full-time members and that training could really only flow from a much larger tribunal and that you really do you need amalgamation from those sorts of perspectives for that to be implemented?

**Judge O'CONNOR:** I think on balance that is right. The alternative is to have this Tribunal Service, an agency of some kind or a branch of some department that accepts there will still be a

number of flowers in the garden but we still should see a number of aspects of their operation as common. I am sure you can as I can identify a dozen people in Sydney as sitting on four or five tribunals across three or four portfolios of government and they are not treated as being engaged in a function for which there are like needs even though they happen to move between tribunals.

**CHAIR:** The concern I have about the tribunal's service model, the Leggatt report proposal, is that that essentially allows all those little empires out there now to be maintained.

**Judge O'CONNOR:** Yes.

**CHAIR:** And everything must change so that everything can remain the same. People say we have a wonderful tribunal service model but in fact nothing has changed. I do not know if there is an answer to that but it seems to me that is the danger of the Leggatt model.

**Judge O'CONNOR:** That is an interesting comment. I do not necessarily disagree with that but I suppose what I saw as the value of it is that it was a recognition, if not a complete recognition, of the need for a more coherent approach to the common needs of tribunals and tribunal members and users, in particular.

**Mrs GRUSOVIN:** Would you say that that would really require a change in the recognition that we need a different culture in terms of a tribunal service that will not be just a duplication of what we already have?

**Judge O'CONNOR:** Their argument on the portfolio location or the nature of the structure was similar to the point you made earlier. They [the Leggatt inquiry] kept it outside the equivalent of the Attorney General's Department because they were concerned about the court culture coming to dominate the tribunal service. That was their position. They in a sense acknowledged that you want to maintain the user orientation as your primary value at all times.

**Mrs GRUSOVIN:** How do you do it?

**Judge O'CONNOR:** That the tribunal should be capable of being used by users without legal assistance and that at the end of the day there are categories of work. I think we probably accept that that is probably not achievable. There is a large amount of tribunal business where that ought to be achievable but it needs resourcing. They allude to that. It needs resourcing in terms of up-front assistance to people through information services or giving advice through advisory personnel. It also needs to identify the areas where ADR and mediation are real diversionary possibilities and those areas that are potentially of low value and you are better off getting it to hearing quickly. There is a tendency to think that ADR or mediation is the answer to all forms of legal dispute. I do not think it is. There is a class of business where it is in everybody's interest to bring it to finality through a formal hearing quickly.

**CHAIR:** Going back to the amalgamation or expansion of the tribunal's jurisdiction, assuming that is a positive thing, as I think our discussion paper did, how do you do it? Where do you start? Do you start with the smaller tribunals? In your comments today you said there was a stronger case for doing it with the smaller tribunals. Is that the place to start?

**Judge O'CONNOR:** In principle I think so. If you take the view, as I think is implied by some of your comments, that the better place from which to roll out some of these common services I am talking about is from within the structure of the tribunal you are forced, as your logic suggests, to bring the smaller tribunals into some form of amalgamated structure and then provide the services that otherwise the scale of that tribunal would not have enjoyed.

I suppose what I would tend to do is proceed conceptually. That is always my inclination. So, I would be looking for a conceptually consistent category and bring those small tribunals across together. So, if it happens to be professional discipline, you would be working on that as a category and then may be there is some other category that you can identify that indicates there is a cluster of tribunals connected with that category. So, I would be much more inclined to proceed on a categorical base. You can obviously see a categorical link between community services, mental health review, guardianship and administration, and there could be a couple of other tribunals. If you were thinking



they ought to be brought into a closer structure, you would be dealing with them in a categorical way and you would proceed on that basis.

**CHAIR:** I note the Divisional Head of Legal Services Needham made some comments about what she thinks ought to happen. Do you have a view about that?

**Judge O'CONNOR:** Yes. I included those in my last comments to you. I think it is probably obvious that I do not fully support what has been said there. A case can be made, obviously, for bringing together professional discipline functions into a separate tribunal, but I think the same concerns that give rise to that proposition can be addressed by an appropriately organised division with appropriate leadership. I personally think there is some value to a professional discipline division in having a bit of cross-pollination that goes with life in a broader tribunal. It was the legal services division that wanted the appeal books. So I intervened. It is a sensitive area. I do not want to underplay the sensitivity of the handling of legal profession discipline work, but I do not think there is any fundamental case that you can make. Is that the only matter you wanted me to comment on?

**CHAIR:** Yes. In your opening comments today you made some comments about Justice Kellam's view of VCAT as being a fourth tier and being in partnership with other levels of the judiciary. As I understand it, that included members from one level sitting at another level. Does it involve anything more than that? What does it actually mean?

**Judge O'CONNOR:** It is interesting that you use the word "tier" there. That is not the notion that I picked up so much. It is the word "partnership". I suppose I am affected by having heard him talk about his operation on other occasions. It interested me that it carries a notion of equality about it in the sense that there are four partners in the business structure of dispute resolution in that community. This is, in a sense, an equal partner. I thought that was reasonably important. My understanding is that he is routinely involved in those discussions that involve the heads of the other three tiers, and so on. It seems to me that is significant within that jurisdiction that VCAT is equally important, if not more important.

**CHAIR:** So, not tiers but partners?

**Judge O'CONNOR:** An institution and the three courts. I saw that as valuable and I think there is a degree of acceptance at this point—of VCAT in the Victorian environment—that would support that. It is not in a sense a junior partner or a subordinate tier. Obviously you have to be careful with these issues of cross-appointment. There are some people that you would not cross-appoint but I think they are careful about that. Then you get the dividend of the quality of experience that some of those judges and magistrates bring and also there is the cross-pollination, as I mentioned before, of them taking back into their business environments, hopefully, the good aspects of the operation of VCAT that can be translated into them. I see it more as a recognition of equality—that this is a very important service that we run—and it is just as important as what we do for the ordinary court structures.

**CHAIR:** One of the arguments that has been put to this Committee is that it is inappropriate to merge court-substitute tribunals with the ADT, as the jurisdiction does not relate to merits review of administrative decisions but entails original jurisdiction. Granted that the tribunal, it seems to me, already has both original and review jurisdictions, how do you think they have operated so far?

**Judge O'CONNOR:** That argument has two aspects to it. One, it overreacts to the Commonwealth tribunal environment. As you know, the tribunals at Commonwealth level have largely developed around this area of administrative review, that is review of decisions made in government. The judicial function is so defined under the Commonwealth Constitution that it is to be administered through courts. So, there has been a natural division in Commonwealth constitutional arrangements between the things courts do and the things tribunals do. It seems to me that it is a mistaken perspective about the reality on the ground in State administration, where disputes of a variety of characters present themselves that warrant relatively informal and speedy attention, and tribunal structures are quite appropriate to do that. I would not have seen it as necessary to adopt within a State business framework the Commonwealth Constitution's strict division between judicial and administrative functions. That is the first point.

The second point is much narrower. It comes from the title of this tribunal. The title focuses on administrative decisions. That is thought, in a sense, to dictate what the contents of the tribunal should be. Obviously the way they solved that in Victoria was to call it 'administrative and civil'. I know there was a proposal early on in respect of the ADT that spoke of it as an administrative, civil and professional tribunal. That is a working title that is around in the old papers. That was an attempt on that occasion to try to get over that perception. I cannot see there is anything fundamental in that argument. I never have seen it as a persuasive argument. I think you just put those categories of dispute in the community that warrant a certain type of handling in a tribunal.

**CHAIR:** How often does the ADT sit in the country or outside the metropolitan area?

**Judge O'CONNOR:** The ADT is a low-volume tribunal and we rarely sit in the country. We handle any cases that come from the country of a relatively low order, where the parties are happy to do it this way, by telephone. We occasionally sit in the country. I have sat in two or three country locations this year but it is a fairly rare event. We have had parties who are keen to come to the city or to go to a location other than the country area in which their problems have arisen. So, you get that extra aspect to country sittings. But it is not a high-volume tribunal and I think more than 90 per cent of the business would be handled in the city, but I can give you some statistics on that if you are interested. It would be very low at the moment.

**CHAIR:** Justice Kellam pointed out that prior to the VCAT's establishment there was a plethora of different pay levels for various tribunal members. Is that still the situation in New South Wales? Do a whole lot of different tribunal with different pay levels do essentially the same work?

**Judge O'CONNOR:** Yes. I think it is evening out a little, but the Fair Trading Tribunal and Residential Tribunal rates, for example, are lower than the ADT rate. I am trying to get the ADT rate upped at the moment but I have been told about the other rates. Then I was told about the Victorian rates. None of the rates are great if you use as your index the opportunity time that a practising lawyer loses by attending the tribunal. They are better if you use other indexes. That is an important issue. In the ADT we have standardised the rates of the incoming jurisdictions, except for Legal Services, which has a much higher rate and we simply do not recommend that it be increased. At some stage the others will catch up. There is a string of associated issues; it does not end with the daily rate but goes on to issues such as how much decision-writing time you allow, and so on.

**CHAIR:** Another interesting feature about Justice Kellam's evidence were his comments about a memorandum of understanding that he developed with the Victorian Government about the appointment and reappointment of members. Do you believe there is any virtue in adopting that sort of precedent in New South Wales?

**Judge O'CONNOR:** Yes, I think it would be highly desirable if the usual method of appointment of tribunal members were orderly, starting with an advertisement calling for expressions of interest, proceeding through a process similar to the merit selection process in the public service and leading to a recommendation to the Minister. Ministers will obviously always wish to be able to do some off-list appointments. I am not against that; there are reasons why it can be desirable. However, it seems to me that the usual stream of appointment should occur via the process that I have described. That would obviously be managed more easily in larger tribunal structures, but it remains my view.

**CHAIR:** That is when you would want to deal with the question of the length of terms of tribunal members.

**Judge O'CONNOR:** There is anxiety about long terms: What do you do with the person who is a failure? I think that must be managed through some form of exit strategy that is built into the up-front appointment. If you move to my view that there should be greater recognition of this as a potential career, you cannot remove people in their mid-50s without any real justification after they have served on tribunals for 10 or 11 years. You ought to recognise that they should be able to continue. At the same time, you want to replenish the base. If you take the view that there is a finite time after which it is no longer appropriate for a person to sit on a tribunal, you should say up front to people, "This position has five-year terms. We normally renew for a second term but not after 10

years." That would give people some sort of predictability when it comes to organising their lives. It would get rid of the tension and morale issues surrounding reappointment periods.

**CHAIR:** The Leggatt report proposes a system of peer assessment for tribunal chairman and members. Do you have a view about that and its applicability to New South Wales?

**Judge O'CONNOR:** All of those strategies are good. They take a lot of thinking through—it is easier said than done. Monitoring and performance strategies are obviously good. The model that I have been interested in—I admit that I have not sought to deploy it at this stage—probably involves using to some extent respected retired people with a history of distinguished involvement in tribunals. I probably should not mention names, but I put in that category someone like Justice Mathews, who recently retired from full-time work in courts and on tribunals. I think people of her stature could provide a form of peer review of the top members, who could then develop a peer review strategy in respect of the ordinary members. A proposal along those lines was put before the Fair Trading Tribunal last year, but the resource implications of rolling it out were enormous. It meant taking people off active hearings to look at others on a relatively regular basis at some real cost.

**Mrs GRUSOVIN:** There would be long waiting lists and delays.

**Judge O'CONNOR:** Exactly. You simply could not justify that initiative. It is important somehow to give appropriate feedback to members, who by and large sit in isolation, about how they might improve their performance or even to engage in structured, comparative discussions about how they do it, how I do it and so on. It is an important issue, but it is difficult for tribunals because of the isolated environment in which members work most of the time.

**CHAIR:** Another interesting feature of the Leggatt report is its emphasis upon, and use of, information technology [IT]. Can you comment about the use of IT by the ADT in its operations? An associated issue—which I guess is one of my obsessions—goes to access to your structures by people who are not IT literate.

**Judge O'CONNOR:** The ADT is a small-volume tribunal. It has important jurisdictions, but each of them are small in volume. Therefore, its IT environment is simple. There is still a reasonable amount of manual handling and processing. A place that has real IT needs is the Fair Trading Tribunal where, as the department and the Minister well know, IT structure has been lamentable over the past three years. I hope that in the new structure that tribunal will be given the underpinning that is absolutely vital in respect of IT. The Residential Tribunal, which is the other part of the merger, has a more sophisticated IT infrastructure, so I think there is more hope.

This is a critical issue. The synergies you get from good IT are more in the back-of-office functions that I described. I think you must be careful—this is the point that you are getting at—with IT dependence in what I call the front-of-office relationship. By and large, you are not dealing with populations who are comfortable with IT or who have resources such as home Internet connections and that kind of thing. I think you must be careful in your front-of-office approach to IT. I do not think you want to create a business environment that will advantage the big firms that can lodge via IT. I do not think that is part of the world of tribunals. It might be part of the world of the Land and Environment Court because, presumably, mostly big firms appear before it on either side. They are my general comments on that matter.

**Mrs GRUSOVIN:** As you progress with implementing IT how do you overcome the problem of those people who are not comfortable with it—the many battlers involved in the system? How do you ensure that they are not cut off from access to other human beings? They do not have access to the Internet so they use the telephone, are told to press a series of buttons and probably do not speak to another person throughout the entire process. How do you deal with that?

**Judge O'CONNOR:** The ADT is still on a small scale. It is reasonably resourced and the registry staff are highly experienced and competent. They give very good one-to-one advice over the telephone. There are no special entry procedures.

**Mrs GRUSOVIN:** How will you maintain that?

**Judge O'CONNOR:** You must have some degree of commitment to the intensity of resources that that involves. If people in high-volume tribunals are to have enough time to give case-specific advice of a non-partisan manner—which is a difficulty in its own right—you must admit that you need a degree of resources to make that happen.

Then there are issues of training, competence and so on. But I think it is very important and it is at the back of these ideas about people being able to walk themselves through tribunals. It is a nerve-racking experience for people to be on their own in a tribunal. I think Leggatt sensibly emphasises the need for support services if you are going to make that a real possibility for people. We have the particular problems, as I think I have mentioned previously, in the ADT of most of the business being unrepresented on the applicant's side and represented on the respondent's side. You get that routinely in any environment, whether it be major corporations or government departments, where businesses are respondents. So that introduces its own extra difficulty.

**CHAIR:** What has been the response of the rules committee to the proposals in our discussion paper?

**Judge O'CONNOR:** Good. We have instituted all those subcommittee arrangements. The external representatives have been pleased that there is a business structure that they can participate in and through which they can present their views. As I think I have said on previous occasions, we have always had committees in two or three of the busy areas—freedom of information, retail leases and equal opportunity—but this has given the thing a more formal basis. They have been happy about that. They have not been actively demanding that there be reconvening of meetings but I think the existence of the structure is important.

**CHAIR:** Has there been some discussion of standardisation of rules across the different divisions?

**Judge O'CONNOR:** Yes. They are sort of standard at the moment in the sense that the standard is that we do not have rules. So you have to watch that. We try to operate most of the procedures according to guidelines and information documents, and that is fairly flexible. We have avoided across-tribunal rules except for matters where they are unavoidable to do with summonses and service and things like that. The only area that has a raft of rules is the legal services division. What I would like to see in time is a stepping back from those rules and the development of what might be called professional discipline rules that would, hopefully, then be common to any professional discipline jurisdiction you are dealing with, with any additional special rules if needed for particular categories.

We have been fairly rule adverse, as I think I have mentioned previously, and there are pros and cons to that. There is an issue of transparency if you do not go down the rules route. We have the guidelines and the practice notes on the web site and available in a paper form which is distributed to the parties to the extent it is needed. We try to keep things as non-rules directed as possible. Most of the people are not interested in hearing about the rules. You try to give customised directions in particular cases or take customised approaches through case conferences.

**CHAIR:** One proposal the Committee made was to recommend the establishment of an ARC-type body. What are your views on that? Is the need for that perhaps obviated if the Council of Australian Tribunals is established?

**Judge O'CONNOR:** They belong to slightly different business environments. The proposal you were putting forward was one that I think was in the nature of an advisory body to the Minister, for example, and to the Government, focusing on State tribunals and State legislation. That is a relatively specialist activity. Obviously you need to have officers attending a body like that who know the detail of the jurisdictions that are being given to tribunals and can understand the particulars of the issues that might come up. That seems to be a more focused institution.

The Council on Australian Tribunals is a new professional association stimulated by the Administrative Review Council at the Commonwealth level. It offers great advantages to tribunal heads from around the country because we can compare what we are doing with each other, develop new education systems and so on, and talk about issues such as who has the best IT and the like.

Obviously you would like to think that government officers would interest themselves in that organisation as well, otherwise some of these discussions cannot really be had effectively. So at this stage the Council on Australian Tribunals in embryo is akin to the Australian Institute of Judicial Administration. It is more like that kind of body.

There is a place for the concept you are referring to because it really has a separate role.

**Mr KERR:** I must confess complete ignorance of the Leggatt report. Is it possible to get a copy of the report to Committee members? Can you tell us something about the background and qualifications of Sir Andrew Leggatt?

**Judge O'CONNOR:** I must say that when he visited I was not as familiar with them as I have become, because on the way out of the room I asked him what he did and he said, "I have just retired as a Judge of Appeal from the Privy Council." He could tell I was not reading the English law reports with the zeal that we used to in Australia. Since then I have discovered that he is an ex chairman of the United Kingdom Bar Council, a Lord Justice of Appeal, member of the House of Lords, and member of the Privy Council now retired. With what seems to be a background that might have led him in another direction, he has come up with quite a forward-thinking report.

**Mr KERR:** Are you aware of the present Chief Justice of Australia making any comments about tribunals and their role in the system?

**Judge O'CONNOR:** When the Chief Justice of Australia was the Chief Justice of New South Wales I think he expressed concern about the proliferation of tribunals. I guess a discussion like this is reflecting concern about possibly the proliferation of tribunals but from a different perspective to the one he was expressing. He was concerned that rights and claims that had previously been determined in courts were finding their way into structures that did not have such strong discipline or such an orderly structure and maybe lacked the competence in decision making. So you get these views around, but for some time leading judges, including Chief Justice Gleason, have been associated with those expressions of view. I do not entirely share them and I do not know whether he would hold those views today. I think there is a concern in the experienced legal community at times about what it sees in tribunals versus how things are handled in courts. The reality is that you cannot run most of these cases in the way they would be run in court at the costs that apply.

**Mr KERR:** On the more positive side, I notice that on page 5 of your written submission you say that that you have got a bonus with some decisions of a very high quality from leading Queens Counsel and retired judges. Who did you have in mind when you referred to those people?

**Judge O'CONNOR:** I suppose I had in mind someone who has become something of a political figure since. But we had Sir Ronald Wilson sitting as President of the tribunal at the time, and he gave very good decisions in human rights cases.

**Mr KERR:** Based on evidence?

**Judge O'CONNOR:** Yes. He was an experienced High Court Judge, and it really brought benefit to the decision making in the tribunal. We had a number of other retired judges. I think Worthington from Tasmania was another, and Susan Kiefel from Queensland became a judge afterwards. They were the sorts of people we had, and it helped.

**(The witness withdrew.)**

**(The Committee concluded at 11.12 a.m.)**