**Submission No 12**

# INQUIRY INTO OPPORTUNITIES TO CONSOLIDATE TRIBUNALS IN NSW

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# ARPRA Submission: Inquiry into opportunities to consolidate tribunals in NSW

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ARPRA is pleased to have been given the opportunity to comment on the NSW Standing Committee on Law and Justice's discussion paper, "INQUIRY INTO OPPORTUNITIES TO CONSOLIDATE TRIBUNALS IN NSW".

There is a flurry of activity in relation to tribunals at present. Amalgamation is the buzzword. We seek to ensure that NSW tribunals remain equitable, accessible, independent, just and able to respond to the specific needs of applicants. These priorities are consistent with those expressed by Jon Stanhope as the ACT Attorney-General in 2004 in an address to the Council of Australasian Tribunals. In this address, he stated that 'The justice system should not only be accountable, but should be built on the principles of equity and accessibility.

[1]

We are concerned to ensure that the proposed reforms are not exclusively in the name of 'efficiency' but have the broader objective of improving access to justice for users.

In particular, little analysis is provided as to the likely impact of the proposed changes, either on specific tribunals or on tribunal users. Further analysis is required to identify the strengths and weaknesses of the existing system to ensure that any proposed change retains these strengths and addresses weaknesses. Finally, we stress the importance of consultation with tribunal users during the review process, on the basis that:

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…the starting point for tribunals to ensure accessible and equitable service delivery is to consult with current and potential users about their needs.

While we accept that the consolidated administration of the tribunals may have real benefits for users – with one-stop information and access points and streamlined forms and procedures – we are concerned about the loss of flexibility and specialisation that may result. Efforts must be made to preserve the unique tribunal environments and cultures that currently exist, in so far as these cater to the specific needs of tribunal users and ensure the informal and flexible resolution of disputes.

The tribunal should be constituted so as to ensure that it is not simply a generalist jurisdiction where any case could be considered by any member' and will include specialists, priority systems for urgent cases and have the capacity to convene at particular locations. However, it is unclear what the cultural impact of amalgamation will be and whether tribunals will be able to maintain their distinct cultures and approaches. We stress the importance of good leadership in the implementation of the reforms, to ensure that the process is undertaken with the best interests of users in mind.

We also emphasise the importance of recruiting tribunal members from both within and outside the court system, so as to facilitate the creation of a distinctly different tribunal culture. The differences between each of the tribunals reflect their ability to deal with cases in a targeted way. It also means that tribunals have the skills to be sensitive to the

complexities of every case, however big or small. After the creation of VCAT in Victoria there became concern of a systemic change in the tribunal's culture.

Within the community sector, there was a sense that the tribunal needed to get back to its roots. It was intended to provide quick, cheap and efficient justice for the general public. Yet many people think it has become too formal, with lawyers, expert witnesses and advocates dominating proceedings. It was often said the tribunal had allowed 'creeping legalism' to occur.

ARPRA believes that by following the other states amalgamation processes, and by adopting the same structure of appointing a Supreme Court justice as the president, we will simply be creating a court structure that will no doubt be more legalistic, less user friendly, harder to access and will cost much more. In QCAT's case, it is well known that its creation hasn't reduced costs at all.

Our counterparts in Queensland have some horrible stories about access and navigating the "super tribunal" structure. We would certainly not want to go down that path.
The basic premise of tribunals is to provide accessibility to justice and affordability. Moreover the specialist divisions in the CTTT could be lost forever and traversing the Residential Parks Act in an amalgamated tribunal may indeed see the number of applications reduced, not because the number of disputes is reduced, but because the tribunal process has become flawed and generic.

**Access and location**

The 2001 UK Leggatt Report on tribunals, which recommended the amalgamation of some 70 tribunals, highlighted the benefits to users in the following terms:

[3]
Any citizen who wished to appeal to a tribunal would only have to submit the appeal, confident in the knowledge that one system handled all disputes, and could be relied upon to allocate it to the right tribunal. This would be a considerable advance in clarity and simplicity for users and their advisers. The single system would enable a coherent, user-focussed approach to the provision of information…

We note that the establishment of VCAT was seen as an opportunity to improve access to justice, by, for example, facilitating the use of technology and increasing alternative dispute resolution programs.

However there have emerged large and widespread problems with the establishment of VCAT. Similar issues have arisen with QCAT.

In the President's Review of VCAT, Hon. Justice Kevin Bell wrote in his report of the 30 November 2009:

[4]
"There was strong criticism that the tribunal was not accessible to people and businesses in outer-suburban Melbourne and country Victoria. The travel and other costs, and the inconvenience, of getting to the city, or waiting for a circuit, were emphasised. It was said that many people, including those in CALD and Koori communities, had no knowledge of VCAT at all. There was strong support for on-site views and hearings where appropriate, as in planning and other similar cases."

"Distance is an access barrier that operates to produce unequal access to justice. It is very difficult for people in outer-suburban Melbourne and country Victoria to access the tribunal. For people in these areas, every step in commencing or defending, up to finalising and enforcing the outcome of a proceeding, involves potentially great and sometimes prohibitive cost and inconvenience. Even attending the tribunal for a short hearing may involve day-before departures and overnight accommodation costs, very early-morning rises, long travel times, childcare arrangements, taking time off work, driving and parking in the city and, generally, the unknown."

"Coming to the city is not an easy experience for some people in the community. It may mean lifts, other people in suits, waiting rooms with large numbers of people, a different manner of speaking, not knowing how to behave and what is expected of you and, generally, feeling out of your depth. Some people who function perfectly well in their own locality do not function as well in the city. It is harder to find sources of advice in outer-suburban and country areas."

"People living within easy access to the CBD do not have to overcome these problems, at least not to the same extent. I think it is very likely many people in outer-suburban Melbourne and country Victoria who are simply forgoing their rights – 'lumping it' – due to access difficulties of this kind. Circuit sittings in the country and regular sittings in suburban Magistrates' Courts are welcome, and should be expanded as a temporary measure, but do and cannot sufficiently address this problem."

In NSW, the CTTT regularly organises either local court houses or community based facilities to provide the closest possible venue for hearings. In the residential parks division, most applications will come from those areas outside of a registry hearing room area.

ARPRA has found the tribunal to be very helpful in looking at the hearing locations for those applicants. 86.4% of applicants are over the age of 65 and long distance travel for some is not an option.

We also support the proposal for legislation to provide for the reference of disputes, where appropriate, to alternative dispute resolution without recourse to the tribunal and encourage increased use of this mechanism in appropriate cases. Decisions as to the location and design of any amalgamated tribunal should be informed by consideration of the intimidation potentially caused by a court-like environment.

Fundamentally, decisions about the location and model of the hearing room should be made informed by the needs of the client base, specifically having regard to the need for confidentiality and privacy (providing, for example, a number of 'front ends') and a quiet or retreat area.

We remind the standing committee that tribunal charters be developed containing access and equity commitments to address issues such as 'community education, translation services, flexible hours of service, language and communications issues for non-English speakers, accessible hearing rooms, accommodating persons with a physical disability, culturally sensitive practices, the needs of Indigenous Australians and so on.'

Careful consideration also needs to be given to self-represented litigants, who should not be treated as the 'exception' but the rule – that is, 'the Tribunal should design all of its processes and procedures from the outset on a new assumption – that all parties will be self-represented.'

In addition, tribunal members should be trained in the importance of carefully explaining the hearing process to users at relevant points in the proceedings. Further, consideration should also be given to enhancing support and advocacy services for tribunal users.

We also have concerns that whilst a "super tribunal" may work well in the metropolitan regions, in regional areas the amalgamation of all tribunals could prove to be disastrous. In the Consumer Trader and Tenancy Tribunal's Residential Parks Division for example, there is a real need for specific and targeted knowledge by a tribunal member.

Regional areas often have very different needs than that of metropolitan areas and it is our belief that a super one stop tribunal shop may not fit the unique needs of the regional areas in NSW.

We understand that a similar process has been undertaken in Victoria, with the Victorian Civil and Administrative Tribunal. A number of concerns have been identified in the above discussion with this proposal, related to:
- the loss of specialisation, defined broadly;
- the potential loss of flexibility;
- the challenge of preserving separate tribunal cultures;
- the loss of some specific tribunal functions; and
- potential delays in the internal review process.

**Conclusions**

The Law Reform Commission of Western Australia recommended the WACAT to amalgamate all that State's boards and tribunals because this had been done in Victoria and because of the recent establishment of the New South Wales ADT.
Another reason was that an earlier report had identified that there were 360 different appeal provisions to 54 appeal bodies in Western Australia.

What is missing from the reports and discussion papers, including the recent Parliamentary discussion paper in New South Wales is any consideration of the purpose for which tribunals were established in the first place and the value of them as separate organisations.

Also, the arguments for amalgamation are slender. They seem to amount to no more than that there are too many tribunals and that it will be financially more efficient if they are amalgamated. That efficiency is assumed in the reports recommending amalgamation. It is not demonstrated in them.

In these circumstances it seems appropriate to consider the range of reasons why tribunals were set up in the first place and their value within society as identifiable and separate bodies able to respond with practices and procedures appropriate to the matters they are authorised to investigate and/or determine.

There may be a case for amalgamating tribunals with similar roles and small workloads. However, there are serious reasons for not interfering with the structure of tribunals which have substantial workloads simply to effect a policy of amalgamation. If a tribunal with a substantial workload is not operating effectively, the answer is to identify its problems and deal with them, not amalgamate it with one or more other tribunals and infect them with its malaise.

Tribunals are not all of one kind. They were set up for a range of different reasons and to achieve a range of different goals.

ARPRA NSW believes tribunals need to be different from one another in order to carry out their different roles and jurisdictions through different processes and through the agency of the different kinds of expertise and experience to be found among their different memberships.

One of the key considerations in the political discussion, lobbying and policy development which leads to the enactment of legislation creating tribunals is an appreciation that courts, as they have developed, are not always the most efficient and effective places to determine issues which need to be determined in a formal and legally effective way.

The need for tribunals to develop in different ways is apparent from the kind of jurisdiction they must exercise. In one division there may be different procedures designed specifically for the workload. In each division within the CTTT, there are vastly different workloads and to apply a one size fits all, may lead to procedural unfairness.

The loss of identity or recognisability of the merged tribunals is another problem adversely affecting accessibility. Tribunals are here to stay. They were set up to be different from courts. They need to be allowed to continue in that way and to be different from one another.

They ain't broke. They don't need to be fixed. Unity brought about by merger or amalgamation brings about not only diseconomies of large scale but the very real risk of stifling the development of Tribunals.

[5] Jarrod Diamond made the point very well in his book, *Guns, Germs and Steel*, when he talks about China's "chronic unity" as an explanation of its failure to develop in contrast with Europe and its "chronic disunity".

[6] The better way to deal with the matter is to take up the words confected for Chairman Mao.

"Let a hundred flowers bloom. Let a hundred schools of thought contend. "
And, unlike Chairman Mao, let them continue to do so.

The CTTT is truly a "peoples" Tribunal, covering a wide variety of disputes on property chattels, goods purchases etc with a low cost of entry particularly for pensioners, and conducting its affairs without the need for legal representation . It may be unique in this respect from all the other tribunals.

Any effort to dilute the very real advantages of the CTTT for the average citizen would be a step back in history.

We trust that these concerns, and the call for further information and analysis, will be seriously considered in the review process. ARPRA is also willing and able to participate in any public hearing.

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ARPRA

## References

[1] Jon Stanhope MLA, 'Future Directions for Tribunals in our Territory', *Paper presented at a Council of Australasian Tribunals/Australian Institute of Administrative Law Seminar on 20 July 2004,* published in *AIAL Forum,* Issue 43, at 35- 39.

[2] Gabriel Fleming, 'Barrier-Free Justice': Access and equity service commitments in tribunals', *Australian Law Reform Commission,* Reform Issue 84 Autumn 2004, at 29-32.

[3] Sir A Leggatt, *Tribunals for Users One System, One Service: Report of the Review of Tribunals* (2001) para 3.8, accessed at: http://www.tribunals-review.org.uk/leggatthtm/leg-00.htm

[4] http://www.vcatreview.com.au/presidents-report

[5] Diamond, Jarrod, *Guns, Germs and Steel*, New York, WW Norton and Company Inc. 1997, at page 414. See also pages 409 - 417.

[6] Snow, Edgar, *Red China Today - the other side of the river,* Almondsworth, Penguin Books Ltd, 1971, at page 373.