Submission No 3

INQUIRY INTO OPPORTUNITIES TO CONSOLIDATE TRIBUNALS IN NSW

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Submission
To: Standing Committee on Law and Justice
From: Christopher Enright
Subject: Inquiry into Opportunities to Consolidate Tribunals in NSW
Date: 11 November 2011

Honourable Members of the Standing Committee on Law and Justice
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Submission
My submission is directed towards the operation of the proposed tribunal. I make two proposals:
1. Use law students to assist a person who brings a matter to the tribunal by preparing a documented case in electronic form that the person can submit to the tribunal.
2. Resist the temptation to follow the road that other tribunals take in abolishing pleadings. Instead institute a simple system of pleading that makes it clear early in the life of a matter the terms of each party's case and the issues that arise in the case.

The details of these proposals can be found in an article that I have written and published on my website: Christopher Enright (2011) 'Enhancing the Performance of Tribunals', 11 November 2011, Maitland Press, www.legalskills.com.au

I attach a copy of this article to my submission.

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I authorise the New South Wales Government to use and reproduce the article 'Enhancing the Performance of Tribunals' in any manner that it judges to be appropriate in relation to its current Inquiry into Opportunities to Consolidate Tribunals in NSW and for any other purpose that is reasonably related to that inquiry.

Yours faithfully

Christopher Enright

Enhancing the Performance of Tribunals

Christopher Enright

www.legalskills.com.au

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Contents

Summary

This is a proposal for enhancing the performance of tribunals. There are two key proposals, which are connected:
(1) Using specially trained law students as low cost legal workers to provide legal aid for otherwise unrepresented parties by preparing their case in documented form.
(2) Using a simple system of pleading identify the issues and organise the material in the case at the outset.

Low Cost Legal Workers

There is potentially a low cost but effective form of legal competence available from law students. Many are already working, often in menial jobs. This scheme would offer them part time legal employment in providing legal aid to parties before their tribunal. They would need selective training beforehand; this training could count towards their ultimate professional qualification (law degree, practical legal training course and practical experience). The law students would prepare a party's case in documentary form for the party to file in the tribunal. In this way the party is represented in that they have a professionally prepared case but without the cost of having a fully qualified lawyer in attendance on them to prepare their case then come to the tribunal to mediate it or to argue it.

Simple and Effective System of Pleading

Many tribunals do not require pleadings. That is the road to perdition. Contrary to this entrenched practice, this proposal put forward a simple but very logical system of pleadings. It is easy to use and provides a clear and readable account of a case and the issues in the case. The idea is to do this pleading at the outset. As the law students working for a party assemble and organise the party's case they prepare the relevant pleadings. Once the pleadings are done the pleadings provide a framework for organising the information, and do so from the start of the case. This framework that organises the information provides benefits that accrue at the commencement of the case and continue right through even to the finish of the case (since the framework of information that the pleadings set up can be used by the tribunal to write its judgment).

Section 1. Introduction

This article sets out proposals for enhancing the performance of tribunals. It sets out the proposals briefly and in broad terms. It does not attempt to go into details at this stage since there is no point. The important thing now is to assess the idea in a broad way to decide at the very least if they are worth investigating further.

There is a further point. It will be obvious to a reader that for any government to consider this proposal it needs to discuss the proposal with other bodies who will be involved in some way. These include the tribunal in question (if it already established), and the bodies who represent solicitors and barristers (such as the NSW Law Society and the NSW Bar Association), and the university schools within the jurisdiction that provide law degrees and practical legal training.

Section 2. Legal Aid

Introduction

There is potentially a cheap type of legal aid available in the form of law students. Many law students are working at menial jobs to support themselves while they study. This raises the possibility that they could be lured into legal aid work by better salary and conditions and the prospect of practical experience. The proposal for this utilises the principle that underlies layering. It is a waste of resources to have overqualified people doing a job. In economic terms the best approach is to have people to do a job where the people doing a task have the lowest level of skill that is possible where they can still perform the task competently.

In this context, which involves consideration of tribunal reform, the article promotes this form of legal aid as a means of facilitating the work of a tribunal. However, in principle this form of legal aid could also benefit litigants in court cases as well.

Training of Students

Law students in this scheme would require the following training:

(1) Students need to have completed appropriate subjects in their Bachelor of Laws degree. There are three categories of subjects:

(i) Legal ethics.

(ii) Subject that relate to the general operation of the tribunal. Some obvious possibilities are administrative law, the law of evidence, and the law of

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tribunals (covering the details of the relevant tribunals such as the Commonwealth Administrative Appeals Tribunal and the proposed New South Wales equivalent).

(iii) Subjects that cover the substantive work of the tribunal. Two obvious examples are tenancy law and consumer law.

(2) Students need to have done the appropriate subjects in their practical legal training (PLT) course. The obvious subjects are those that cover interviewing clients, file management and office procedure and management. Given that the students would not yet be formally enrolled in the PLT course the idea would be to have these subjects offered as a miscellaneous subject that students would receive credit for if and when they enrolled in the PLT course.

Role of Students

Students would obviously work under supervision. The role of students would be to do the following:

(1) Interview and take statements from a party to a case in the tribunal

(2) Interview and take statements from the witnesses of a party.

(3) Request the party to obtain other forms of evidence such as photographs.

(4) Prepare the party's case for them in a documented and organised form so that the party can submit it to the tribunal. The details of a party's case are set out in their pleadings. See Section 4 Pleadings.

Rationale

The overall idea is that the law students prepare a party's case in documentary form. The party then lodges their documented case with the tribunal.

The economic reasoning is that providing legal aid by means of live personal representation is labour intensive and thus costly. By contrast, providing legal assistance in the form of preparation of an organised and documented case for a party incurs much less cost and can still be reasonably effective. And needless to say, this proposal does not preclude the possibility of some representation before the tribunal where there is a special need for it.

Section 3. Duties of Parties

One of the platforms on which to create an effective and efficient tribunal system is to reduce the excesses of adversarialism.[1] Some jurisdictions have already done this with their courts.[2] Here the article proposes that governments

1. Enright, Christopher (2011) 'Tactical Adversarialism and Protective Adversarialism'

2. See, for example, *Federal Court of Australia Act 1976* s37M.

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should do a similar thing in relation to tribunals. A simple way to accomplish this is to impose duties on the parties and their representatives.

General Duty

There should be a general duty on parties, with a corresponding duty on their representatives, to make their best endeavours to ensure that the case proceeds as efficiently, as expeditiously and as effective as is reasonably possible.

Duty of Cooperation

There should be a specific duty on parties and their representatives to cooperate with the other party and the tribunal regarding the proceedings.

Duty of Disclosure

There should be a specific duty on parties and their representatives to make full disclosure to the other party of law, facts, evidence, information or material that they possess or know the existence of that is relevant to the case.

Application of Duties

These duties apply to a party regardless as to whether carrying out the duty will be, or may be, favourable or unfavourable to that party's case. The aim is to ensure that each party is properly set up to present their case and that the tribunal has before it the fullest possible material, information and evidence.

Exception

There should be an exception to these duties. This exception is that a party is not bound by one of these duties where there is good reason to be exempt. In these circumstances the party should disclose to a relevant member of the tribunal in confidence the details of their non compliance and their reasons for non compliance.

Section 4. Pleadings

Introduction

There is a tendency for tribunals to not require formal pleadings so that parties are not obliged to set out their case in pleadings. The problem is that dispensing with pleadings is truly a step in the wrong direction. It is implicitly absolving parties from any duty to describe and explain their case clearly and simply to the other party and to the tribunal. This is hardly a recipe for low cost and high quality justice.

Tendency Towards Abolishing Pleadings

Abolition of pleadings seems to be justified by the desire to run the tribunal in

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an informal manner so that it not intimidating to the persons who come before it. For example s33(1)(b) of the *Administrative Appeals Tribunal Act 1975* (Cth) provides that 'the proceeding shall be conducted with as little formality and technicality, and with as much expedition, as the requirements of this Act and of every other relevant enactment and a proper consideration of the matters before the Tribunal permit'. In the same vein s98(1)(d) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) provides that the Tribunal 'must conduct each proceeding with as little formality and technicality, and determine each proceeding with as much speed, as the requirements of this Act and the enabling enactment and a proper consideration of the matters before it permit'.

Problem With Abolishing Pleadings

A proper system of pleadings (as is proposed below) brings at least three consequences that are each an advantage to proceedings by reducing cost and delay at all stages of the proceedings:

(1) Description of Each Party's Case. Pleadings describe the case that each party will present.

(2) Identification of Issues. Pleadings identify the issues in the case early in the proceedings and do so simply and precisely.

(3) Framework for Organising Information. Pleadings set up a framework for organising the information in the case, in this way enabling the parties and the tribunal to be efficient in presenting and deciding the case. Any case generates documented information. Even a small case will generate a significant amount. Large cases can generate very large amounts.

Basis of Proposed Pleadings

Here the article sets out a method of pleading. It possesses two advantages – it is highly effective and it is very simple. This method of pleading is founded on four propositions.

Proposition 1. Relationship of Law and Facts

The elements of a legal rule define the class of facts that are material facts for a case that arises under the rule.

Proposition 2. Visibility of the Relationship

It is usually clear whether a fact falls within an element because the relationship between the fact and the element is highly visible.

Proposition 3. Elements as a Check List

The elements of a legal rule that underlies a case constitute a checklist for determining whether the facts in a case fall within, or satisfy, the legal rule. This is so because a legal rule applies to a set of facts when each element is satisfied by a material fact within the set.

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Proposition 4. Importance of Evidence

Pleadings should refer to evidence, at least in summary form. There are two reasons for this. It demonstrates that each party has reasonable ground for their allegation. It guides the tribunal at the hearing.

Method of Pleading

This article now sets out a simple method of pleadings. It is based on model for litigation developed by one of the authors.[3] There are two aspects to pleadings:

(1) Pleading in relation to the ordinary elements of the operative legal rule (being the legal rule under which the dispute arises).

(2) Pleading in relation to a discretionary power, which obviously is relevant only when the operative legal rule incorporate a discretionary power.

Pleadings: Electronic Documents

It greatly facilitates the work of the tribunal if documents are filed with the tribunal in electronic form.

Pleadings: Elements of the Rules

Introduction

This proposed system of pleading has three parts:

(1) Plaintiff's Pleadings

(2) Defendant's Pleadings

(3) Amalgamated Statement of Facts

Plaintiff's Pleadings

Setting Out the Case

The plaintiff's suggested pleadings consist of four items:

(1) Statement of Elements. The plaintiff sets out the elements of the cause of action.

(2) Statement of Facts. The plaintiff sets out a statement of the key facts. This statement has numbered paragraphs.

(3) Statement of Evidence. The plaintiff sets out a brief statement of the evidence that they possess to prove the material facts. The plaintiff can amplify this statement when it becomes relevant, for example in mediation proceedings or in the process of preparing for trial.

(4) Statement of Case. In their statement of case the plaintiff lists the elements of the cause of action. They then indicate the fact or facts that satisfy each element. They note the number or numbers of the paragraph(s) in the statement of facts where each material fact is stated.

3. Christopher Enright (2011) 'A Model for Litigation' Maitland Press: Armidale

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Request to the Defendant

At the end of the statement of their case the plaintiff makes a request of the defendant:

(1) Defendant's Case. State your case using the same framework.

(2) Agreement or Disagreement. Indicate if you agree or disagree with the statement of the elements, the statement of facts and the statement of case. If you disagree please indicate the alternative version that you propose.

Defendant's Pleadings

The defendant's pleadings at this stage consist of four items:

(1) Statement of Elements. The defendant indicates if they agree or disagree with the plaintiff's formulation of the elements. If they disagree they need to indicate their version of the elements.

(2) Statement of Facts. The defendant give their statement of facts, which must cover the same ground as the plaintiff, even if it goes beyond that.

(3) Statement of Evidence. The defendant sets out a brief statement of the evidence that they possess to prove the disputed material facts. The defendant can amplify this statement when it becomes relevant, for example in mediation proceedings or in the process of preparing for trial.

(4) Statement of Case. In their statement of case the defendant lists the elements of the cause of action. They then respond to the plaintiff's case in the following way.

(i) Agreement. They indicate the elements in relation to which they agree with the plaintiff's case.

(ii) Disagreement. They indicate the elements in relation to which they disagree with the plaintiff's case. For these elements they describe briefly their version of the facts and cite the place in their statement of facts where those facts are set out in more detail.

Amalgamated Statement of Facts

There is an advantage in requiring the parties to conclude the pleadings by amalgamating their individual statements of facts into one consolidated statement:

(1) Agreed Facts. Where the parties agree on facts that statement just states the facts.

(2) Disputed Facts. Where the parties dispute a fact the statement notes the disagreement then states each party's versions of the facts.

(3) Reference to Evidence. If the facts are material, or in some other way are crucial, the statement outlines the evidence that is available to prove each version and cities the location of the evidence in the Statement of Evidence (which is explained below).

(4) Numbered Paragraphs. The Statement would have numbered paragraphs to facilitate reference to it.

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Statement of Evidence

Parties should prepare a statement of evidence:
(1) This would include the statements of all witnesses.
(2) This would include a reference to and adequate description of all other types of evidence that the party will produce.
(3) This statement needs to indicate the material facts that the evidence is capable of proving.
(4) This statement needs to be organised in some way and to have some system of labelling to facilitate references to it.
(5) One option is to have this statement initially indicate the evidence in outline. If the case has to go to mediation or to a hearing then the statement would indicate the evidence in more detail or in full detail.

Advantages of Pleadings

This method of pleading has several advantages:
(1) It is simple to use.
(2) It creates structured pleadings that are easy to read and understand.
(3) It forces out the issue early in the case.
(4) It provides a template for organising the information.
(5) It facilitates the party's presentation of their case.
(5) It facilitates the tribunal's hearing the case.
(6) It facilitates formulation of the judgment. The amalgamated statement of facts is the core of the text of any judgment.

Pleadings: Discretionary Powers

Some cases that come before the tribunal will involve the tribunal's exercising a discretionary power that is conferred by the legal rule that is at the basis of the dispute between the parties. There is a detailed account of how to organise and thus plead a discretionary power in another publication[4] so a summary will suffice here:
(1) Treat the discretion as an extra element of the rule. One can do this on the basis that the tribunal must exercise the discretion in favour of the applicant for the applicant to win the case, so in this sense at least the discretion functions as an element.
(2) As a matter of logic a tribunal or other decision maker should exercise a discretion in one way in preference to all others on the basis that the chosen way represents the best achievable outcome.
(3) To make a decision in this way it is necessary to have some device for measuring outcomes to determine which is best. The legal device for this comprises the legal criteria that a decision maker must heed when exercising a

4. Christopher Enright (2011) *Legal Method* Maitland Press: Armidale, Chapter 26 Model for Exercising Discretions

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discretion. These criteria constitute the currency in which the alternative outcomes are valued. That said, though, valuation of outcomes is not an exact science.

(4) The tribunal needs to identify the criteria that are relevant for making the decision.

(5) The tribunal should endeavour to grade the criteria to determine their relative importance, which in turn determines the weight that they carry.

(6) The tribunal has to take evidence to establish which criteria are operative in the case and to what degree. For example if 'employment experience' is a relevant criterion, the tribunal needs to consider evidence to establish whether the applicant has been employed. If the applicant has been employed it is then necessary to establish the nature and duration of that employment.

(7) The tribunal then aggregates all the criteria that press for the decision to be made one way and then aggregates all the criteria that press for the decision to be made in the other way.

(8) The tribunal determines which case is stronger. It does this to answer the key questions: should it exercise the discretion in favour of the applicant or the respondent?

(9) Having determined how it should proceed (in the manner just described) the tribunal makes its decision to implement that determination.

Section 5. Advantages of the Proposed System

The advantages of this proposed system are as follows:

(1) Law Students. Law students provide a low cost form of labour. They assist parties to the tribunal. They assist the work of the tribunal by preparing a documented case for a party whom they represent. At the same time law students earn income and gain valuable supervised practical experience in working with law.

(2) Parties. While the otherwise unrepresented parties do not obtain personal representation they do have receive a written version of their case which they can submit to the tribunal and which has been prepared by someone who is legally competent.

(3) Tribunal. The system of pleading provides a comprehensive statement of the case, it identifies the issues from the start and it organises information right from the start. In this way it facilitates every task that the parties or the tribunal perform – organising the case, negotiating a settlement of the case, presenting the case, hearing the case and writing the judgment. It drives the government dollar further by helping the tribunal to be more effective and more efficient.

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Section 6. References

Christopher Enright (2011) 'A Model for Litigation' Maitland Press: Armidale
Christopher Enright (2011) *Legal Method* Maitland Press: Armidale
Enright, Christopher (2011) 'Tactical Adversarialism and Protective Adversarialism', 1st edition, 11 November 2011, Maitland Press: Armidale www.legalskills.com.au

Section 7. Author

Christopher Enright is a former law lecturer. He is now a legal writer and proprietor of the legal publishing firm Maitland Press. His publications include:

* *Early Steps for Organising and Settling a Case: Commonwealth, New South Wales and Victoria* (2011) Maitland Press: Armidale
* *Federal Administrative Law* (2002) Federation Press: Sydney
* *Legal Method* (2011) Maitland Press: Armidale
* *Legal Reasoning* (2011) Maitland Press: Armidale
* *Proof of Facts* (2011) Maitland Press: Armidale

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