Submission No 38

INQUIRY INTO OPPORTUNITIES TO CONSOLIDATE TRIBUNALS IN NSW

Organisation: Administrative Decisions Tribunal NSW

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Administrative Decisions Tribunal
New South Wales

The Hon. David Clarke MLC
Committee Chair
Standing Committee on Law and Justice
Legislative Council
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Mr Clarke

I welcome the present Inquiry into opportunities to consolidate Tribunals in NSW.

This submission is divided into two parts:

(A) Background, and general comments on the terms of reference.

(B) Comments on the options proposed in the issues paper.

I most favour a general consolidation of tribunals (Option 3) for similar reasons to those canvassed in the issues paper.

Yours sincerely

Judge Kevin O'Connor, AM
President

25 November 2011

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LEGISLATIVE COUNCIL STANDING COMMITTEE ON LAW AND JUSTICE

INQUIRY INTO OPPORTUNITIES TO CONSOLIDATE TRIBUNALS IN NSW

Submission from: PRESIDENT, ADMINISTRATIVE DECISIONS TRIBUNAL

Date: 25 November 2011

(A) BACKGROUND AND GENERAL COMMENTS ON THE TERMS OF REFERENCE

Some Background in relation to the ADT

1. The ADT commenced operation in 1998, in the same year as the first of Australia's super tribunals, the Victorian Civil and Administrative Tribunal (VCAT).

2. The NSW Parliament had in mind that the ADT be the first stage of a plan that would lead to a NSW super tribunal similar to the Victorian one. When introducing the bill for the creation of the ADT, the Attorney General (the late Hon. J Shaw QC) envisaged a staged growth of the ADT and a broad amalgamation of tribunals. He received strong support from the shadow Attorney General (Hon. John Hannaford) his predecessor as Attorney General.

3. The ADT is a small tribunal measured by volume – in the year 2010/11 we had 934 filings (864, first instance; 70, appeal; budget $3.9m). Though having a small file load as compared to many other NSW tribunals, the ADT is the only tribunal in the State with the diversity of legal subject matter that is seen in the interstate super tribunals.

4. It has six Divisions and an Appeal Panel. Using the descriptions used in some of the interstate tribunals to divide their business streams, the ADT's areas of jurisdiction could be described as:

- *'Administrative'* (the merits review of government administrative decisions (or 'administrative appeals'), i.e. the General Division in respect of most of its workload; the Revenue Division and the Community Services Division);
- *'Civil'* (Retail Leases);
- *'Professional Discipline'* (Legal Services Division, and the lists of the General Division dealing with accredited certifiers, veterinary surgeons and architects);
- *'Protective'* or *'Human Rights'* (Equal Opportunity Division, the Guardianship and Protected Estates List of the General Division).

5. This structure clearly provides the building blocks for a NSW super tribunal.

6. The ADT's main division in terms of workload is the General Division (40% of the intake). It covers such areas as occupational licensing (mainly public passenger transport licences, building and trade licences, security industry licences and firearms licences; information law (freedom of information and protection of personal data); and certain professional discipline categories (mainly veterinary surgeons and accredited certifiers).

7. In most of our work there is a public agency on one side (or a private body exercising public power such as the Bar Council) opposed to an individual on the other side. Private parties are seen on both sides in two jurisdictions, i.e. retail leases, and anti-discrimination. In most of our cases, we have legal representation on one side (for the agency) with a self-representing litigant in person on the other side.

The General Subject of Super Tribunals

8. We now have in Australia four super tribunals – VCAT, the Queensland Civil and Administrative Tribunal (QCAT), the Western Australian State Administrative Tribunal (WA SAT) and the Australian Capital Territory Civil and Administrative Tribunal (ACAT).

9. Further, there has been sweeping reform of tribunal structures in the United Kingdom. These reforms were based on the Leggett report (*Tribunals for Users – One System, One Service*, published in 2001). This report deals with all the key issues that face a government embarking on consolidation of tribunal functions, especially the critical issue of independence from government in the performance of the judicial function. The author, Lord Leggett, a retired judge who had sat in the House of Lords, visited Australian as part of his inquiry. His tour included a visit to the ADT and observing one of our Appeal Panel hearings.

10. The UK reforms became law in 2007. They created a two-tier Tribunal system: a first-tier Tribunal; and an Upper Tribunal. The Upper Tribunal primarily, but not exclusively, reviews and decides appeals from the first-tier Tribunal. The UK tribunal system has over a million filings a year, and, at inception, brought together into a Tribunals Service over 3000 registry staff. Each tier is divided into 'Chambers', within which there are Lists. The structure is intended to be adaptable, both as to procedure and membership.

11. My last sustained discussion of the general subject of 'super tribunals' is found in two papers I delivered in 2006-2007, the first was given in the ACT (in the context of its lead-up work to the creation of the ACT super tribunal) and the second in NSW, in the latter case noting the inaction in this State.

12. They are short papers, and provide my views on the many of the issues before the Committee. I will set out here the final comments in the second paper:

> Broadly speaking, I think that the case for merger outweighs the case for maintaining stand-alone specialist tribunals that work in a single statutory environment. New South Wales has moved down the path of separate multi-jurisdictional tribunals with the creation of the CTTT and the ADT. Conceivably, there could be a further collapsing of the number of separate tribunals in NSW with:

- Professional Discipline Tribunals housed together, perhaps as was suggested by the Parliamentary Committee in 2002, as a Division of the ADT,

- a Protective Tribunal having separate guardianship and mental health streams,

and, perhaps more problematically,

- a Personal Injuries Compensation Tribunal (a proposal to that effect put forward by a Legislative Council Committee in December 2005 was rejected by the Government in its response issued in July 2006).

To move beyond this level of integration to the creation of a super tribunal, as I see it there needs to be –

- commitment in government to locating the tribunal functions of government in the one portfolio,

- the creation of a separate specialist administrative agency to service the new structure (as in the UK and de facto in Victoria),

- attention given to adjacent support structures relating to appointment, training, complaints and discipline, and

- finally and most of all, an appropriate budgetary commitment.

While these are all significant challenges, I have three principal reasons for favouring substantial merger of tribunal functions, whether or not they go as far as a super tribunal in the VCAT or UK sense:

- the benefit to the community of having a common entry point to the tribunal system, even though necessarily there will be several pathways after that point,

- the benefit to revenue that flows from the efficiencies that can be achieved through common platforms and processes, and

- the professional benefits to members and to staff that can be achieved through having a larger organisational environment, with the diversity of approaches that will bring to the culture of the tribunal.

These factors should all contribute to an improvement in the 'delivery of quality administrative justice' as compared to stand-alone, single statute tribunals.

13. The interstate super tribunals all provide good models for the creation of a NSW super tribunal.

14. The potential disadvantages of merger can be summarised, I think, under two headings:

(i) loss of the specialist features of the incoming jurisdiction; and

(ii) fear of reduction of the budget and status of the incoming jurisdiction, thereby diminishing the quality of the outcomes it previously delivered.

15. Both are very important matters. Any recommendation for merger must carefully address them. I have looked at these issues in some detail in the two papers attached.

16. ***Loss of Specialist Features.*** The key response is to use machinery that retains the specialist features that are of value in the incoming tribunal. For example, all of super tribunals have separate Divisions, Lists or (in the UK) 'Chambers'.

- In Victoria, VCAT (86,890 filings; budget $37.9m) has three Divisions – Civil, Administrative and Human Rights. Then there are Lists within the Divisions. Civil has 7 lists, Administrative 6 and Human Rights 4, so there is a total of 17 lists.

- In Queensland, QCAT (30,032 filings; budget $18.7m) has three Divisions – Civil (4 lists), Administrative and Disciplinary (2 lists), and Human Rights (4 lists), a total of 10 lists. Interestingly there is also a separate division for Alternative Dispute Resolution. Queensland has, in addition, an Appeals tier.

- In WA, the SAT (6,327 filings; budget $16.2m) has four Divisions as follows, with the following number of Lists – Commercial and Civil (7), Development and Resources (7), Human Rights (3) and Vocational Regulation (1) – a total of 18 lists.

- In the ACT, the ACAT is, of course, serving a small population, It has 10 lists and an Appeal Panel. There are no business statistics on its web site.

17. A difficulty that is hard to overcome is the loss of 'brand identity' or 'name recognition' for the jurisdiction absorbed into the super tribunal. I would suspect more people in NSW in 1998 had heard of an Equal Opportunity Tribunal than have ever heard of the Equal Opportunity Divisions of the ADT.

18. Thus, it may be that, in the initial period of the operation of a super tribunal, there would need to be some emphasis on promoting community awareness of the range of matters that a new super tribunal can address.

19. The leadership of the super tribunal must, I think, mould the organisation in a way that has the good features of a common corporate culture, but at the same time respects the specialist aspects of the incoming jurisdictions. Care must be shown in rolling out one-size-fits-all practice and procedure models. The major super tribunals now operating in Australia all provide for appropriate differentiation.

20. ***Adequacy of Resources.*** Merger will allow for a leaner senior structure both on the judicial side and the administrative support side than is seen in the present scatter of tribunals in NSW.

21. It is highly desirable that the key business elements, and in particular the leadership group, legal and administrative, be housed at the one location. There may need to be new funding supplied for that. In Victoria in 1998 VCAT was set up in the way I recommend. It had an eight-storey city building as its headquarters adjacent to the legal precinct of the CBD. The building was purpose fitted out, and included a number of innovative features (e.g. remote digital recording of proceedings, instant provision of typed directions). Most of its hearing load was discharged from that building. It now has, as well, a network of regional offices. I understand the same approach has been followed in WA and Queensland.

Specific Comments on the Terms of Reference

That the Committee inquire into and report on opportunities to consolidate Tribunals in NSW, and in particular:

1. *have regard to the 2002 Report of the Committee on the Ombudsman and Police Integrity Commission into the Administrative Decisions Tribunal and arrangements that are in place in other jurisdictions, such as the Victorian Civil and Administrative Tribunal.*

22. The 2002 report had 10 recommendations. The recommendations were modest ones, and were not acted upon. A form of Government response was provided in the NSW Attorney General's Department's paper of June 2007, *Review of the Administrative Decisions Tribunal Act 1997*. One of the members of the 2002 Committee (Hon J Hatzistergos) later served as Attorney General from 2007-2011, but again there was no action.

23. ***Professional Discipline Division.*** The 2002 report's principal recommendation was for consideration of the merger into the ADT of the various disciplinary tribunals that lay outside the ADT, and the creation of a separate professional disciplinary division.

24. In my view, an integrated professional discipline jurisdiction (whether a free standing Tribunal or a Division of the ADT) remains desirable. For the reasons I canvassed in 2002, and which were endorsed by that report, I think improved levels of consistency of approach and a greater level of judicial strength could be brought to an integrated professional discipline system.

25. The jurisdiction would be headed, as I see it, by a serving or retired Supreme Court judge or equivalent. It would then draw on deputies who might be other judges, used on an ad hoc basis, or senior members who served in the former tribunals. The presiding member would sit with one member of the regulated profession (with provision for a second professional member where that is desirable), plus a member representing the interests of consumers of professional services. The consumer representatives might move between professional discipline lists.

26. One of the issues that arises once a professional discipline jurisdiction is being discussed is whether to co-locate it with an occupational regulation jurisdiction. While both these areas involve the person's ability to continue in an occupation for which a public registration, licence or certificate is required, historically these two areas have tended to be kept separate. The language of 'professional misconduct' is at the heart of professional discipline. The language of 'fitness', 'competence' and 'integrity' is at the heart of occupational and vocational regulation.

27. In the ADT we have a wide occupational regulation jurisdiction, in such areas as passenger bus and taxi driver authorities, the various building trades categories, the security guards industry and the related area of firearms licensing. We would normally hear these cases with just one member, rather than a panel, reflecting to some extent the lack of complexity usually involved.

28. We do not give to them the level of resources that is seen traditionally in professional discipline cases. If the two areas were to be run within the one overall list, care would need to be taken to maintain appropriate levels of differentiation in practice cognisant of the differing levels of complexity.

29. ***Coherent Policy for Conferral of Review Jurisdiction.*** The 2002 Report had a number of useful recommendations seeking to have developed in NSW a coherent policy for the conferral of merits review jurisdictions on the Tribunal. Those proposals were never picked up.

30. To this day, the ADT is sometimes not 'brought into the loop' when conferrals of jurisdiction are being considered, and this is true sometimes of the Attorney General's department. The ADT has little or no awareness of those occasions where a statutory discretion has been created which should in principle be reviewable by the ADT but a decision is taken not to do that.

31. Funds should always follow function. In that regard, I have often seen reluctance on the administrative side of the ADT to take on a proposed merits review jurisdiction, for fear that we will receive no additional funding.

32. A mature system for the conferral of merits review would work to a coherent policy, and the coherent policy would include reference to the need to address funding implications.

33. Not even the 2002 report's recommendation that the President and Deputy Presidents of the ADT have responsibility for directing the professional

development and training of tribunal members has been picked up. The failure to act on this recommendation has its explanation in the funding environment of the ADT. The ADT has no budget sufficient to cover an ongoing, sophisticated professional development program.

34. The ADT's professional standards, in relation to case management, the conduct of hearings and the quality of the reasons given for decision is, I hope and think, strong. This has been largely due to the quality of performance of the key members of the ADT, ably assisted by the Registry.

35. If there is to be a move to a larger, integrated tribunal it is essential that there be a firm commitment to the importance of ongoing professional development, and appropriate funding provided.

2. *In conducting the inquiry consider the following issues:*

a) opportunities to reform, consolidate or transfer functions between tribunals which exercise decision-making, arbitral or similar functions in relation to employment, workplace, occupational, professional or other related disputes or matters, having regard to:

i. the content and forecast workload for the Industrial Relations Commission (including the Commission in Court Session) as a result of recent changes such as National OHS legislation and the Commonwealth Fair Work Act;

ii. the current and forecast workload of other Tribunals (such as the Administrative Decisions Tribunal and health disciplinary Tribunals); and

iii. opportunities to make tribunals quicker, cheaper and more effective.

36. It is apparent that there is an immediate problem over what to do to keep the State industrial judges, commissioners and registry staff fully occupied.

37. In principle individual employment disputes could be part of a broader tribunal business environment sitting alongside a professional discipline stream and an occupational regulation stream.

38. As to the workload of the ADT, this year's figure, given earlier (864 plus 70, total 934) is below the peak year of 2006-2007, which was 1104.

39. A positive aspect of the ADT is that it has a mix of permanent, full time judicial members (two) and numerous part-time judicial members (many of them lawyers of great eminence, including retired judges).

40. If significant mergers were to occur, the new merged tribunal would necessarily have to have a structure in which there were many full-time members, along with gradation in their ranks and allocation policies that have regard to the complexity of the work they are asked to do (as is seen in the interstate models). Members who have previously sat in relatively narrow-cast specialist tribunals will have the opportunity to deploy their skills over a

wider variety of work. This will enhance the quality of their work experience, and also contribute to the strengthening of their legal skills. For example in the Victorian tribunal some of the senior members hold assignments to all 17 lists.

41. In any merged tribunal, I would see value in maintaining a reasonably significant component of part-time members, for various reasons, one being to have the ability to access the highly specialist lawyer (as is seen for example in State taxation) and to have a greater ability to manage ebbs and flows in workload.

b) options that would be available in relation to the Industrial Relations Commission in Court Session, should the Commission's arbitral functions be consolidated with or transferred to other bodies;

42. My comments on this issue appear below when I discuss the specific options in Part (B) of this submission.

c) the jurisdiction and operation of the Consumer Trader and Tenancy Tribunal, with particular regard to:

i. its effectiveness in providing fast, informal, flexible process for resolving consumer disputes;

ii. the appropriateness of matters within its jurisdiction, having regard to the quantum and types of claim and the CTTT procedure;

iii. the rights of appeal available from CTTT decisions.

43. All the super tribunals have as a major business category consumer claims. WA does not include the further usual category of residential tenancy claims. They are a major component of the Queensland and Victorian tribunals.

44. CTTT spans both of those areas. In any NSW super tribunal that absorbed the CTTT the old CTTT workload would obviously become the dominant category. To illustrate, in Victoria CTTT-equivalent work is 80% of its business. Similarly in Queensland, CTTT-equivalent work is 66% of its business.

45. I would prefer not to comment on most of the issues raised under this heading. They are operational ones best addressed by the CTTT and users of CTTT services.

46. I will make some general comments on classification of claims, and rights of appeal.

47. *Classification of Claims.* The challenge tribunal administration constantly faces is how to manage the available resources so that they reach the most appropriate cases. Any case however small on its face can generate difficult

legal questions. Similarly persistent litigants can magnify the conduct of a small case so that it becomes a major drain on resources and the time of senior members and staff.

48. I think it is inevitable that amount limits will be used to restrict hearing and appeal rights for cases that are about money. It is more difficult to define the limits in cases that are not so much about money but involve issues of status, dignity or reputation (as in anti-discrimination or say a privacy case about the disclosure of personal information).

49. *Rights of Appeal.* The issue of rights of appeal looms large in examining tribunal arrangements and especially in proposals for amalgamation.

50. The ADT scheme has, I think, worked well. Our Appeal Panel is relatively informal and low cost, and produces decisions of good quality. The Appeal Panel has as its presiding member either the President or one of the Deputy Presidents. The Appeal Panel has been instrumental in developing a consistent and disciplined case law in the ADT. We encounter very little criticism along the lines that our first instance decisions are inconsistent or lack coherence.

51. This feature of the ADT is also found in the newer super tribunal arrangements. Both QCAT and ACAT have an appeal tier. As noted earlier, the UK system has a comprehensive appeal tier. In Victoria, the ten year review of VCAT called for the creation of an internal appeal tier. It was seen as desirable to help avoid the problem of inconsistent approaches to the same or similar questions by members.

52. The prevailing view today, as I see it, is that super tribunals should include an internal appeal tier.

53. The ADT's appeal structure is, I think, neater than the one the CTTT works under. As the recent case law in NSW shows, there has been – what I see as – an unseemly clash between the Supreme Court and the District Court over the scope of CTTT appeal rights and their interrelationship with judicial review rights. It has been resolved to some degree by the High Court decision in *Kostas v HIA Insurance Services Pty Limited* [2010] HCA 32 (29 September 2010).

54. This inquiry presents an opportunity to simplify the terms of the various statutory formulations defining appeal rights from tribunals, and to consider having a uniform approach as to the forum to which appeals should go.

(B) COMMENTS ON THE OPTIONS

Option 1 – Employment and Professional Services Commission

55. This option has three features. One, it provides a single location for all NSW professional discipline tribunals. In that it way it responds to the 2002 Parliamentary report, though the preferred course there was to locate the tribunals in a professional discipline division of the ADT. Two, it provides a continuing location for the non-judicial functions of the Industrial Relations Commission. Three, it transfers the Equal Opportunity Division of the ADT (not 'Anti-discrimination Division', as it is called in the paper) to the proposed EPSC.

56. The advantages and disadvantages of the proposal are well summarised in the issues paper. The primary advantages listed there are common to any form of integration of judicial or quasi-judicial functions. They are not distinctive to this model.

57. I think this is the least attractive of the various options.

58. I agree that the professional discipline tribunal function should be housed in a single place, but this should be as a division of a consolidated multi-jurisdiction tribunal. My estimate is that the professional discipline division or tribunal would have about 150-200 filings a year (around 50 legal profession, around 50 medical profession, around 30 nurses and midwives, around 50 across the other health professions, veterinary practitioners, architects, accredited certifiers and the like).

59. This proposal, if pursued, would have the effect of housing the function in what would be still a small, relatively narrowly focussed tribunal structure. The synergies that can be achieved by having it as a division of a larger tribunal would not be obtained.

60. Given its background as the lower tier of the IRC, there is a likelihood that the EPSC would operate in the model of the IRC, a 'court' model. It might not have the less formal style usually seen in tribunals.

61. The text does not spell out explicitly whether the occupational regulation functions of the ADT would be transferred in addition to the professional discipline and equal opportunity functions.

62. If that is intended, then the result would be that the ADT as we have known it would be reduced in its business by about 40%: professional discipline filings in 2010-11 were 39; occupational regulation filings were 200; and equal opportunity filings were 128.

63. The ADT would become a very small tribunal. It seems to me better to build on the ADT model rather than diminish it in the way suggested in order

to find a way to leave the IRC intact at the non-judicial level.

64. Creation of the EPSC would add another tribunal to the landscape, and is hardly consistent with the general thrust of the reference which is to promote reduction of the number of tribunals, and their consolidation.

65. The benefits of having the professional discipline jurisdiction in a 'wide span' tribunal structure is, I consider, seen in the experience of the ADT.

66. The ADT has been the location for the legal profession discipline jurisdiction since 1998. The membership of the Legal Services Division includes a number of very eminent lawyers. We have been able to use them as a resource for other parts of our work. A number of them have been prepared to sit in other jurisdictions, especially in the Retail Leases Division, the Equal Opportunity Division and the Revenue Division. This is a good example of how people suited to dealing with the difficult demands of professional discipline cases may well also be suited, if agreeable, to working in other areas of business of the Tribunal that draws on their high-level skills.

67. For somewhat similar reasons I would not like to see the Equal Opportunity Division leave the ADT. It has, I think, a good history of achievement in stating, applying and developing anti-discrimination law in NSW. It sits comfortably in the environment of the ADT.

68. There is an obvious affinity between the goals of anti-discrimination law (redress of disadvantage for vulnerable populations) and work done in other areas of the ADT. For example the present head of the Equal Opportunity Division also heads the Guardianship and Protected Estates list in the ADT. Many of the non-judicial members who sit on panels in the EOD also sit on panels in the Community Services Division and serve in Appeal Panels dealing with appeals against guardianship orders.

69. The ability to use members flexibly in the ways outlined would be hampered were they to be moved to an EPSC.

70. Moreover, I think the standing and identity of the equal opportunity jurisdiction in NSW would be diminished by being moved into an ESPC with a business name that focuses on employment issues.

71. While many anti-discrimination cases have an employment context, there are many that do not. Our statistics for the last year show that 58% of our complaints related to areas of public life other than employment, such as education, and the provision of goods and services.

72. It is important, I believe, to promote the idea that freedom from sex, racial and other types of unlawful discrimination is a right of the individual that applies across the public life of the community, not just employment. A move of the kind proposed would diminish that understanding.

73. A similar point is made in the issues paper in relation to the loss of understanding that might affect the professional discipline function. Professional discipline has the core purpose of public protection. It is more than an 'employment' issue.

Option 2A – Rename the ADT the NSW Employment and Administrative Tribunal ('NEAT')

74. In this option, as I understand it, the ADT gets a new name and acronym (NEAT) but otherwise the ADT's statutory scheme remains intact, six Divisions, an Appeal Panel etc. To that is to be added, as I read the option, an Employment Division and a separate Professional Discipline Division.

75. So the ADT would in effect increase to seven Divisions, with the Professional Discipline Division subsuming both the Legal Services Division and the professional discipline lists attached to the General Division; and having added the various medical and health professional discipline jurisdictions. The Professional Discipline Division and the Employment Division would become major operational elements of the rebadged ADT.

76. The NEAT option avoids the 'break up' of the ADT, and the reduction of the present ADT to a very small business centre. It provides for the incorporation of the expertise and experience of ADT members (and staff) into a new structure.

77. I would prefer it as against Option 1 for those reasons, and partly because it is closer to the business model recommended by the 2002 report.

78. This approach offers a clean break with the old IRC. It is better than Option 1 in that it brings the professional discipline and employment divisions into a broader and more diverse legal environment. There will no doubt be personnel and staff from the IRC who are versatile and could be used across many divisions of NEAT.

79. The option refers to the problem of how to use the judges of the IRC. It has in mind that they might become part of an Employment List at the Supreme Court, and hear appeals from the Employment Division of NEAT. It seems to me that this is an issue ultimately for the Attorney General and the Chief Justice. I do not have any views to offer.

80. In the ADT most first-instance decisions are appealable to the Appeal Panel. The major exception relates to professional discipline. In the early years of the ADT professional discipline decisions were appealable to the Appeal Panel. I did not see much utility in that right of appeal. Invariably practitioners who had been struck off and lost an internal appeal would appeal again to the Supreme Court. I recommended that the right of internal appeal to the ADT be removed from professional discipline. The proposal in the issues paper that appeals against Employment Division decision go direct to the Supreme Court is consistent with this outlook.

81. So far as the name is concerned, if there is to be a multi-part name (as presently proposed) then I think Professional or Professional Discipline should be incorporated to give a clearer picture of what it does. I do not like the idea of professional discipline being in effect incorporated into the description 'employment' for the same reason as that canvassed by the issues paper in respect of Option 1.

82. If a multi-part name is not used, I would simply stick with 'Administrative Decisions Tribunal'. The name has become well established in NSW, and I think it is widely understood now that the term 'administrative decisions' simply describes its main category of business not every category of business.

Option 2B – As for Option 2A, except that an Employment and Professional Discipline Division would be created consolidating employment and professional discipline functions

83. I think this option should not be preferred over Option 2A if that is the choice. Inevitably if there was to be one Division of the kind described it would have to be divided into three lists – an employment list, a professional discipline list and an occupational regulation list. Each has different dynamics and different principles. In my view there is nothing to be gained.

Option 3 – Create a comprehensive Civil and Administrative Tribunal (NCAT)

84. This is the option that I think delivers the most benefit for the people of NSW.

85. I am strongly of the view that whatever happens front of house in terms of particular tribunals being amalgamated, there should be a common back of house service for NSW, as is seen in the UK – a 'Tribunals Service'.

86. Every Tribunal can make a claim that it has something distinctive to offer, some need for special and separate procedures, and some need therefore to be left separate. The real challenge is to work out how there can be broad-based integration of services and resources while identifying and retaining the distinctive characteristics of the incoming tribunals that benefit the public.

87. It is apparent that the VCAT model has involved an all-points amalgamation (with virtually no exceptions). VCAT even extends to an area not actively discussed in NSW, the racing appeals jurisdiction.

88. The raw figures would suggest that VCAT is great value for money. It has a strong membership, with a significant complement of full time members, many of whom are now long term, very experienced, and versatile.

89. The CTTT, in particular, already has quite a footprint in NSW. That infrastructure provides a good basis for the development of a tribunals service. According to its annual report, it has 5 Sydney registries and 3

country ones (Wollongong, Newcastle, Tamworth). There is also the courts footprint. In Victoria, VCAT has the use of hearing rooms at 10 suburban centres in Melbourne (3 separate from the magistrates court, and 7 at magistrates courts) and at 28 country locations (all in association with courts), and finally four hospital locations.

90. The UK experience is, I think, very instructive. There a tribunal system with over a million filings is backed by a Tribunals Service which at its inception had 3000 staff. Any person or body wishing to start a case in a tribunal enters the system via the Tribunals Service and the streaming of the case starts after that. The UK system has relatively clearly differentiated jurisdictions all under common senior judicial leadership.

91. The system is closely linked in to the oversight arrangements that apply to complaints against judges, to appointments of judges, and to the training and professional development of judges. In many critical aspects, the members of tribunals are treated the same as judges. There are differences around tenure and remuneration.

92. In Victoria, VCAT is fully integrated into general systems that involve the judiciary. For example, the Judicial College of Victoria provides education and training to members of VCAT. The head of VCAT sits on all the key justice system councils along with the heads of the Supreme, County and Magistrates Courts. The tribunal sector is seen as the fourth arm of the justice system of the State.

93. In NSW, the Judicial Commission has no role in relation to the professional development of Tribunal members, nor any role in relation to the handling of complaints against Tribunal members. Oversight and consultation structures in the justice system of NSW do not include a representative of the Tribunals sector.

94. One of the striking features of the Victorian arrangements is the significant involvement of County Court judges in the business of VCAT. The latest annual report of VCAT shows 14 County Court judges as having cross-appointments to VCAT. My understanding is that three serve full time for a fixed period, and the others are used on an ad hoc basis with the co-operation of the Chief Judge of the County Court. In NSW there is no cross-involvement between District Court judges and the general Tribunal system, other than for judges appointed exclusively to the Tribunal system as applies to myself and the head of the Workers Compensation Commission. (The one exception is the Medical Tribunal which is in essence a branch of the District Court.) In any tribunal consolidation proposal steps should be taken to open up the possibility of cross-appointments in the style of VCAT.

95. In the papers I gave in 2006 and 2007 (attached) I referred to the 'Tribunal clusters' that can be seen in NSW. I will not repeat that material here. However a staggered approach might bring together these clusters into single structures with some immediately becoming Divisions of NCAT and others being brought in over time.

96. Two 'clusters' that receive little attention in the paper are the Statutory Insurance cluster dealing essentially with claims for personal injury (the Workers Compensation Commission and the Motor Accidents Authority); and the Planning and Environment cluster.

97. So far as Planning and Environment is concerned, two of Australia's super tribunals do have a major planning and environment stream – VCAT and the WA SAT. It has seemed to me that there is no strong case for the superior court status that this function occupies in NSW, nor the consequence that a bench can only have judges. Multi-disciplinary benches could be used if the function was reposed in a tribunal.

98. I note that the Attorney General signalled some interest in this issue in a paper in August 2011. He noted the fact that the predominant merits review jurisdiction in NSW is not the ADT but the Land and Environment Court (600 filings versus 900 filings).

99. *Portfolio Arrangements.* If an integrated tribunals service and structure is to be developed, presumably the portfolio responsibility will be given to the Attorney General.

100. I would warn, based on my experience as head of the ADT, that the history and culture of the Attorney General's department (DAGJ) is that of a 'Courts Services' department. Until the arrival of the Guardianship Tribunal a few months ago, the ADT was the only tribunal (in the true sense) that it serviced. DAGJ staff are understandably heavily focussed on the court system, and in particular the management of the criminal jurisdiction. I think there are many different demands involved in organising and running tribunals, and implementing the values that underpin their creation, as compared to those that apply to courts especially criminal courts.

101. I think it is critical that any Tribunals Service not be merged into the Courts Service of the department, though there would need to be liaison and co-operation between the two. It should operate as a separate unit at least for say the first five years of any new super tribunal arrangements. There would also need to be consideration given to the extent to which NCAT has budget and managerial autonomy, as is seen in Victoria and the Commonwealth.

102. Apart from the above issues there are many important machinery issues and equity issues that need to be addressed in any merger. They include: appointment practices; the length of terms of appointment especially for full-time (career) members; the management of renewal of appointments; complaint systems; regular and independent review of remuneration; appraisal of performance; and professional development.

103. I am happy to expand on these comments at the Committee's public hearings if desired.

Judge Kevin O'Connor, AM
President, Administrative Decisions Tribunal of NSW

ATTACHMENTS

(1) 2006 Paper

(2) 2007 Paper

ATTACHMENT 1

2006 PAPER

AIAL FORUM No. 51

MERGING TRIBUNALS: SOME REFLECTIONS

*Kevin O'Connor AM**

I am happy to share with you today some of my experiences and thoughts on the subject of appropriate tribunal structures and measures designed to increase efficiency and cost-effectiveness, the issues being examined in the review being undertaken by the ACT Department of Justice & Community Services. I have read with interest the speech given by your Chief Minister on this subject in 2004.[1]

I have had two exposures to this subject, as head of the Fair Trading Tribunal of New South Wales (FTT) between 1999 and 2001 and as head of the Administrative Decisions Tribunal of New South Wales (ADT) from 1998 to the present.

In contrast to the position that now prevails in Victoria and Western Australia, there remain several separate major tribunals in NSW – in order of volume, the Consumer Trader and Tenancy Tribunal (the CTTT, 60,000 filings a year, of which 45,000 are residential tenancies filings), the Mental Health Review Tribunal (9,000 matters a year), the Guardianship Tribunal (7,000 matters a year) and the ADT (1,100 filings a year). The Land and Environment Court, which has Supreme Court status, deals with planning matters – a jurisdiction typically located in tribunals in other jurisdictions (2,600 filings).

For comparison, the Victorian Civil and Administrative Tribunal (VCAT) (which covers all the jurisdictions mentioned except for mental health) had 89,000 applications for the year ending 30 June 2006 (66,000 being residential tenancies filings). One interesting difference in the case of the new WA State Administrative Tribunal is the fact that residential tenancies was kept separate and left with the Local Courts, having regard to the scale of the State and for reasons of accessibility.

Disadvantages of merger

The main criticism that is made of amalgamation of tribunals has to do with the risk of loss of a specialised, fine-tuned response to the community need that the tribunal was created to address. This view was rejected by a NSW Parliamentary Committee which examined the jurisdiction and operation of the ADT and looked more generally at merger issues. It reported in 2002.[2]

The criticism has some other strands to it. One goes to a common feature of tribunals as they have been created in the past – the multi-member bench combining legally-trained and community members. Some critics see the multi-member bench as the defining characteristic of a tribunal and the one that marks it out as different from a court. The lay members often, as you know, have specialist expertise.

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* *Paper presented at a Council of Australasian Tribunals/Australian Institute of Administrative Law Seminar, 22 September 2006 by HH Kevin O'Connor AM, President, NSW Administrative Decisions Tribunal*

I am not as wedded to the need for universal or near-universal multi-member benches. In my view there are categories of work in tribunals that can safely be left, at least most of the time, to a single member.

There is one major exception – professional discipline. Here the bench at final hearing should be multi-member and comprise a legally trained head, a member of high standing and integrity from the relevant profession and a community member, ideally with a consumer protection background. There should be provision for the addition of a second professional member if the complexity of the competence issues raised by the case warrants it.

My attitude that single member benches will often be sufficient is conditioned significantly by my experience as an occasional hearing commissioner with the federal Human Rights and Equal Opportunity Commission in the period 1989-1996 (when I was a member of the Commission as Privacy Commissioner). In my view, HREOC dealt with cases arising under the federal anti-discrimination legislation in an exemplary way, using well-qualified hearing commissioners who sat alone. There was a listing discretion allowing for multi-member panels, and this was exercised for some cases that were of a landmark kind (especially in the disability discrimination area). The reasons of the late 1970s that led governments to prescribe multi-member benches in equal opportunity matters are not, in my view, as relevant today. Similar arguments can be mounted, it seems to me, in relation to other jurisdictions including the protective jurisdictions.

Statutes can, it seems to me, give guidance as to the kinds of cases where it might be appropriate to have multi-member panels without prescribing them across the board. This approach, obviously, will produce savings and efficiencies as compared to an approach which mandates multi-member panels.

There is a risk in an amalgamated tribunal environment that there will be a loss of identity and status for the pre-existing separate tribunal. In the case of the ADT, I witnessed this sense of loss especially on the part of some of the members and staff that had been responsible for the work of the Legal Services Tribunal. There were also sentiments of this kind, not so widely shared, among members and staff of the former Equal Opportunity Tribunal. There is, no doubt, I think, that some loss of profile affects tribunals of the kind I have mentioned in the event of amalgamation.

Attention has to be given by the amalgamated tribunal to dealing with this change. Publicity materials, internet sites and the like have to seek to maintain clarity as to what matters can be brought to the Tribunal. Internal arrangements must ensure that appropriate separation of identity, culture and practice is maintained.

Advantages of merger

The major positive for the community in an amalgamated tribunals service is the common point-of-entry. The United Kingdom development is very interesting in that the creation of the common point-of-entry has been the first initiative. The amalgamation of the hearing tribunals themselves is being left to a later stage of the process. So we see a Tribunals Service being created, separate from the Courts Service, with over 3,000 staff and offices all over the country.

The benefits that can be achieved through common infrastructure, common electronic platforms, co-ordinating training and the like are obvious.

Most of the affected members, especially the lawyer members, in my experience, have welcomed integration of tribunals, with the prospect that they might be given the opportunity to work across a variety of jurisdictions. In the case of the ADT, we have members who

previously only did legal profession discipline work also sitting in retail leases cases and revenue cases. They enjoy the diversity of work. We have members in the General Division who sit on freedom of information matters, privacy matters, occupational licensing matters and guardianship matters (we have a review jurisdiction in relation to decisions of the Public Guardian and the Protective Commissioner). Some of them also sit in the Equal Opportunity Division.

Portfolio location

In my view it is highly desirable that large, amalgamated tribunals be housed in the Attorney General's (AG) or Justice portfolio.

Historically, the Attorney General's portfolio has had as its primary responsibility within government the administration and management of courts. There is, in my view, a much stronger tradition of understanding and practice in the Attorney General's portfolio in relation to such matters as the need to respect and uphold the judicial and decision-making independence of judicial bodies, including tribunals.

As you know, the process choices of courts and tribunals must also answer to the law as it has been developed in the higher courts in relation to procedural fairness. Sometimes procedural fairness requirements are at odds with the views of public service administrators as to the appropriate process. These matters have to be addressed in the setting of budgets and the provision of appropriate registry and member support facilities. In my view, this set of dilemmas is well understood in the Attorney General's portfolios within which I have had substantial experience (Victoria, the Commonwealth and NSW).

The AG's portfolios usually have well-developed protocols in place around such matters as representations by disappointed parties to the Minister and the Department over the handling and outcome of cases. In my view, these conventions are not as well understood in the non-AG's portfolios of government.

It is no surprise to me to see that the major reforms now taking place in the UK provide for the housing of the integrated tribunals structure in the Justice portfolio – the Department of Constitutional Affairs. This is the choice that has been made in Victoria and WA.

Another danger that can be avoided by having tribunals, whether amalgamated or not, housed in the one portfolio is disparity of treatment of tribunal functionaries in relation to remuneration and other conditions, whether they are members or registry staff. In New South Wales, there are variations across portfolios in members' fees and in the remuneration paid to senior registry personnel. Disparities should be avoided in relation to Tribunal members and registry staff that cannot be explained in differences in complexity or gravity of the work.

Judge head of merged tribunals

This has been the pattern in Victoria, WA, the UK and, in the instance of the Commonwealth, the AAT. In NSW there are judge heads at the ADT and for the Medical Tribunal (both District Court). The Land and Environment Court (LEC) has Supreme Court status and a judge head. The LEC has a number of other full-time judge members.

Having a judge head assists, I think, in conveying to the public that a significant level of practical independence from Government is present in the organisation. In the case of the ADT, I have as full-time Deputy, another judicial officer who is a magistrate. In addition a number of the Divisions have judge heads – the magistrate is head of the Equal Opportunity Division, and acting judges head the Legal Services Division and the Retail Leases Division.

The Revenue Division is headed by a Senior Counsel and I head the General Division. So it can be seen, I think, in these arrangements, that the key members of the Tribunal are likely to be seen as people possessing real independence.

Appointment and renewal of members

Perhaps the most contentious issues in the operation today of tribunals in Australia surrounds the appointment and renewal of members of tribunals.

Non-renewal is the most critical issue. Rumours abound in the world of tribunals that certain non-renewals of highly regarded, full-time members in recent years were for no better reason than that the particular minister found their decisions on matters affecting the particular government to be unwelcome.

As it happens, at the ADT non-renewal is not such a prominent issue, for the practical reason that the only full-time members are both judicial officers with tenure - myself, a judge, and my deputy, a magistrate. With two exceptions, our part-time judicial members and non-judicial members are used on an occasional basis. So they are not very concerned, in terms of financial impact and their career, over whether they are renewed or not. Nor have there been any non-renewals of a controversial kind.

On the other hand, when I was at the FTT there were 8 full-time members and, as well, several part-time members whose principal occupation was working for the FTT. (The successor CTTT, bringing together the FTT and the Residential Tenancies Tribunal has many more full-time members.) The full-time and key part-time members of the FTT were often lawyers who had given up other careers to become tribunal members. Age-wise they were commonly in their 40s or early 50s, with 15 or more years post-admission experience and at a point in their career where if they were not renewed they might have considerable difficulty in finding other equivalent rewarding and satisfying work. They dealt with cases which sometimes involved the portfolio Department as a party, and there was a risk that they might be intimidated in how they dealt with cases involving the Department by the prospect of non-renewal.

The renewal process needs, in my view, to be much more transparent than it has been in the past. Permanence and continuity should be fostered in the case of legal members and other members who are appointed because of their professional expertise. It seems to me similar considerations apply to fractional full-time members, or part-time members who give a high proportion of their time to the work of the tribunal. The issues are not so pressing in the case of sessional members who are called up only on an occasional basis.

In my view, if a member has been appointed to a full-time post and performs satisfactorily (by reference to measures that are known to the member and ultimately interpreted by someone of credible independence, perhaps a retired tribunal head) the government should be obliged to reappoint.

If there is a downturn in the business of the tribunal, or a restructure, as occurs in the case of a merger, there should be clear protocols over dealing with existing members, especially the full-time members and the significantly-involved part-time members. They should be continued at the same level unless there are proven performance grounds for non-continuation. If for budgetary reasons, it is decided to continue with a lesser number of members, those that are not reappointed should receive some compensation by way of exit package, honouring the principle that such appointments are ordinarily intended to be renewed. In the instance of the changeover from the FTT to the CTTT there were no exit packages for non-renewed full-time members. Their terms were simply allowed to expire.

It seems to me there can be a greater margin of flexibility allowed in relation to the appointment process than is allowed in the renewal process – but basic practices such as public calls for expressions of interest for members should be followed in connection with high-volume areas of work, followed by selection interviews leading to a recommendation. On the other hand, it remains desirable, I think, to allow to continue the traditional system of confidential invitations being extended in order to obtain individuals of particular distinction (say, a retired judge) or to meet a need in a highly specialist or complex area.

Administration of tribunal

The administrative arrangements, as I discern it, in the case of the Commonwealth AAT and the WA and Victorian super-tribunals, involve conferral of ultimate administrative and management responsibility on the judge head. Below the judge head, there is a CEO who has overall responsibility for the running of the registry functions. These organisations run separately from the portfolio Department, though obviously, they must continue to deal with it in relation to budget allocations and some infrastructure issues.

The NSW AG's model is a different one with the Registry functions of courts and tribunals being administered directly by the Department. That means that the Registrar of the Tribunal has a dual reporting line to the Department and the head of jurisdiction, the required one being to the senior officers of the Department.

The head of jurisdiction, under this model, must therefore liaise with the head of the Department over issues that might involve a difference of view, and at times the Registrar or CEO may find themselves in a difficult situation. These are merely, of course, introductory comments to a difficult and contentious discussion.

As for my own situation, the ADT is a small tribunal. It has 12 registry staff. It does not have the scale, as I see it, to warrant separation of the management function from the AG's Department. I suspect any amalgamation in the ACT, given the population differences between NSW and the ACT, is likely to produce a tribunal with a relatively small number of registry staff. In my view, it is desirable in dealing with small units of staffing to have the staff connected to a broader institutional structure so that they have ready access to promotion and other work opportunities.

Registry structure

The ADT does its business through a single registry. We rotate the staff through different aspects of operation every few months – counter and public enquiries work, initial registration of matters, listing and co-ordination of members for hearing, issuance and registration of orders, publication of decisions (including uploading to the internet). We do not have sub-registries matching the Divisions. We have not seen that as appropriate given the smallness of the number of staff, and the ease with which the staff can share knowledge with each other as to the differences in procedure and practice that we do have for different classes of business.

In bigger more high volume tribunals, it seems to me to be inevitable that one would have sub-registries. For example, if there was a mega-tribunal in NSW, there would at the least I think be sub-registries for residential tenancies, home building claims, retail lease claims, consumer claims, professional discipline, merits review and protective matters.

Appeal panel within the merged tribunal

A unique feature, I think, of the ADT as compared to other merged tribunals in Australia and the Commonwealth AAT is that it has an appellate tier. Most Divisional decisions are

appealable to the Appeal Panel. In addition the Appeal Panel has an external appeals jurisdiction, and has been given jurisdiction to hear appeals in relation to guardianship and estate management orders (orders usually made by the Guardianship Tribunal, and sometimes by the Mental Health Review Tribunal and Magistrates). For the year ending 30 June 2006, we had filed 82 internal appeals and 17 external appeals.

Initially, I was not convinced of the desirability of an internal appeal tier. I tended to the view that tribunals should, essentially, be trial-type bodies, with appeals going out to the courts. I was also concerned that the introduction of an appeal tier created another way station on the way to finality. In the instance of merits review matters, it is usual for the agency to have dealt with the matter twice (original decision, internal review decision). We have had cases that have gone to the primary level of the Tribunal, the Appeal Panel level and then to both tiers of the Supreme Court. This is excessive on any view.

With the exception of the professional discipline area, I think the Appeal Panel has proved to be useful. The Appeal Panel operates in a low cost and informal way, as compared to the situation that might apply if an appeal had to be taken to the Supreme Court. Many matters have been resolved at the Appeal Panel level and the rate of further appeal to the Supreme Court is low.

The right of appeal to the Appeal Panel has now been removed in the case of legal profession discipline matters. I have asked that it be removed in respect of the other discipline jurisdictions we have. To avoid double-handling by the Supreme Court of legal profession discipline matters, I try to list a judge member (by which I mean a judge of District Court status not a magistrate) to sit at trial level in serious cases, so that any appeal will, by virtue of provisions in the Supreme Court Act, go to the Court of Appeal. I try to do the same wherever possible with the Appeal Panel.

Costs awards

One of the usual characteristics of tribunal legislation is that the courts' costs-follow the-event rule is not applied. In the ADT the rule basically is that each party bears their own costs unless there are 'special circumstances' that warrant an order. Merely losing has not been seen by the ADT as sufficient to provide a 'special circumstance'.

I have, for some time, been an advocate of tribunal statutes taking a more fine-tuned approach to the costs issue. While I agree with the 'special circumstances' philosophy, I think the statute should give reasonably detailed guidance as to the kind of conduct that might attract a costs order and deal with issues such as offers of compromise that were better than the final orders made against the offeror. We have a commercial civil disputes jurisdiction – retail leases disputes – and the pressure has been consistent there from successful parties for there to be an automatic order for costs. Some of the Retail Leases Division decisions have tended to give weight to the contention that because of the 'commercial' character of this litigation there should perhaps be a greater preparedness to award costs. But we have remained firm that a costs-follow-the-event philosophy is not to be embraced. While either party to a lease can initiate proceedings, the usual pattern is retail shop lessee-in-difficulty bringing proceedings (to retain possession, or alleging some form of misconduct that has damaged their business) against a lessor, who usually is a major shopping centre owner.

I have seen the VCAT provisions as dealing well with the costs issue, though I probably would not be as fixed as those provisions are in relation to the procedures to be followed around offers of compromise.

Legal representation and agents

Limitations on legal representation are sometimes found in tribunal statutes. In my view legal representation should be allowed, perhaps with a 'reverse leave' provision – a right in the Tribunal to remove the legal representative. I am not convinced of the need to bar lawyers in, for example, small consumer claims. The respondent, especially if it is a corporation, will appear through an experienced officer, who sometimes will have legal qualifications. In my view, the bars on lawyers tend to disadvantage one-time applicants to a greater extent than respondents, who often are repeat participants with the advantage of experience in dealing with the tribunal.

Where a party seeks to appear through a lay representative, there should be a requirement to apply for leave to appear. There should also be some power in relation to managing persons who are introduced into the proceedings as McKenzie friends. In large, merged tribunals there may need to be provision for special classes of lay representatives to be allowed to appear as of right – such as building experts and planning experts, for those jurisdictions where typically professionals of this kind have appeared.

Litigants in person

In the ADT the typical paradigm is unrepresented applicant versus representative respondent. Some unrepresented persons have dysfunctions of various kinds. Some create great difficulties for the management of proceedings. Some are pursuing so many applications against a particular respondent that relations between the two sides are near or at breakdown. These experiences are, of course, common in many tribunals and the courts.

I think thought needs to be given to the kind of support or assistance structures that are available to registries and members, as well as the unrepresented party, to ameliorate these difficulties. There needs, I think, to be some form of duty solicitor or other type of assistance arrangements built into the structure. This kind of facility can, of course, be deployed in a relatively effective way in a larger tribunal environment.

Conclusion

I have sketched some of the issues that arise when considering the merger of tribunals. Tribunals have been seen by governments for the last hundred years as the preferred means for dealing with many types of disputes. Tribunals are seen as offering more practical and more flexible case-handling and decision-making procedures than the courts. They are often seen as the place to locate the primary determination of new legal rights (for example, the equal opportunity laws and appeals against administrative decisions). They have grown up ad hoc. In my view thoughtful merger can lead to significant gains in the professionalism, accessibility and independence of tribunals.

Endnotes

1 AIAL *Forum* No 43, 34
2 Parliament of New South Wales, Committee on the Office of The Ombudsman and the Police Integrity Commission, Report on the Jurisdiction of the Administrative Decisions Tribunal (November 2002), see esp. 42-44

ATTACHMENT 2

2007 PAPER

Council of Australasian Tribunals (NSW Chapter)
Annual Conference 2007

Friday 11 May 2007

Super Tribunals or Specialist Tribunals: is there a best model for the delivery of quality administrative justice

– Judge Kevin O'Connor AM
President, Administrative Decisions Tribunal of New South Wales

Today's presentation is to an extent in the nature of an update and supplement to a paper I presented in September 2006 in the Australian Capital Territory to a joint COAT/AIAL seminar (and is now published in AIAL Forum No 51 (November 2006) at p 33). The ACT Government is undertaking a review of tribunals with a view to considering their merger and the creation of a multi-jurisdiction tribunal. The seminar was held as part of that process.

The paper covered the following topics:

(1) Disadvantages of Mergers
(2) Advantages of Mergers

I then dealt with a number of issues of importance which can arise in both for specialist tribunals and merged tribunals, but tend to receive more attention when merger is being considered. These are:

(1) Portfolio Location
(2) Judge Head
(3) Appointment and Renewal of Members
(4) Administration of Tribunal
(5) Registry Structure
(6) Internal Appeal Tier
(7) Costs Awards
(8) Legal Representation and Agents
(9) Litigants in Person

I have attached the Canberra paper. I will not repeat all its contents here.

Today's audience includes, of course, members located in NSW from both State and Commonwealth tribunals. As this audience will be well aware, tribunals are confined in the Commonwealth context to the 'non-judicial' segment of Commonwealth administration. The Commonwealth bar does not apply to the same degree to State tribunal structures, with the result that 'non-judicial' decision-making and 'judicial' decision-making (using the Commonwealth Constitution's typology) can be housed in the one structure.

The topic to which I have been asked to speak today draws a distinction between a 'super tribunal' and a 'specialist tribunal'.

'Specialist' Tribunal. I associate the term 'specialist tribunal' with a tribunal that works in a closely confined area of law and the decision-making is governed, entirely or substantially, by a single statute.

There are a number of large, specialist tribunals in NSW. They include:

- the Mental Health Review Tribunal (9,000 filings in the last reporting year)
- the Guardianship Tribunal (7,000 filings)
- the Workers Compensation Commission (10,500 filings)
- the Motor Accidents Service of the Motor Accidents Authority (7,000 filings).

There is also a host of separate small 'specialist' professional discipline tribunals, most conspicuously in the health sector (for example, Medical, Nurses, Occupational Therapists, Psychologists, Dentists, Pharmacists, Physiotherapists, Chiropractors, Podiatrists, Optometrists). (A Parliamentary Committee in 2002 recommended that State professional discipline tribunals be transferred to a separate Professional Discipline Division of the ADT. There has been no action on that recommendation.) There are several public service discipline and promotion appeals tribunals.

'Multi-Jurisdiction' Tribunals. These are tribunals that do not have the singularity of identity found in specialist tribunals. They have numerous primary statutes to interpret and a variety of categories of dispute. They usually have List or Divisional arrangements. The Consumer, Trader and Tenancy Tribunal and the Administrative Decisions Tribunal both fit the description 'multi-jurisdictional' tribunals, though, measured by filings, they are vastly different in scale – CTTT 60,000; ADT 1,100.

The CTTT remains, essentially, a tribunal focused on consumer-trader and landlord-tenant issues. Most, if not all, disputes are of a private law character involving the application of a mix of common law principles derived mainly from the law of contract and statutory provisions oriented towards the protection of consumers against unfair dealing. The ADT has, arguably, a more diverse legal character in that it has a public law side and a private law side, together with an appeal tier that hears internal appeals and some external appeals.

At the Commonwealth level, I see the Administrative Appeals Tribunal as a large multi-jurisdictional tribunal (8,600 filings). There are, as you know, some major Commonwealth merits review tribunals that stand apart from the AAT; and might be described as specialist tribunals. The most prominent instance is the Migration Review Tribunal and Refugee Review Tribunal (a single organisation) (9,000 filings).

'Super Tribunal'. The term 'super tribunal', as I understand it, is used to describe a level of amalgamation of tribunals that goes further than what has occurred in New South Wales. It refers to a structure in which is housed all, or virtually all, of the tribunal functions of government.

The Victorian Civil and Administrative Tribunal (89,000 filings) is the paradigm example in Australia. It houses in the one organisation jurisdictions covered in New South Wales by the CTTT, the ADT, the Land and Environment Court and the Guardianship Tribunal. Its administrative review function includes the hearing of applications for review of traffic accident compensation decisions made by the transport accidents compensation agency. The main State tribunal functions which

stand outside the structure are workers compensation, mental health review and several original professional discipline jurisdictions.

The new Western Australian State Administrative Tribunal (WASAT) is best described, in my opinion, as a multi-jurisdictional tribunal. It does not have the degree of coverage to amount to a 'super tribunal'. In 05-06 it had 5,200 filings, and the principal categories were 'guardianship and administration' 2,400 and 'commercial tenancies (retail shops)', 1,500. WASAT does not include building contract disputes and residential tenancy disputes. I understand that the view was taken in WA that it was more practical and expedient, because of the spread of the State, to leave residential tenancy disputes where they had traditionally been – with the Local Court system.

In the common law world, the other structure normally seen as a 'super tribunal' is that being created in the United Kingdom. This is the ultimate super tribunal development, bringing together all the major tribunals in a unitary system of government with a population more than double that of Australia's. (In a much smaller unitary jurisdiction, New Zealand, a similar development is under consideration.)

The UK tribunals have more than a million filings a year. They include the Asylum and Immigration Tribunal, the Employment Tribunals, the Information Tribunal, the Lands Tribunal, the Criminal Injuries Compensation Appeal Panel, the Social Security and Child Support Appeals Tribunal and the Transport Tribunal. A staged approach to integration is occurring. At present the registries attached to each of the separate UK tribunals are being combined into a single agency – the 'Tribunals Service' (3,000 staff affected). The agency is to be separate from the Courts Service and located, like the Courts Service, within the Department of Constitutional Affairs (the UK equivalent of our Attorney General's Department).

Behind the common entry point there will be separate pathways to the different tribunals which for the time being are to maintain a separate identity. In the longer term the intention is to reduce the number of separate tribunals, moving to Divisional structures with an Appeal tier in line with the Leggatt report recommendations. To assist in the process of integration and harmonisation, the position of Senior President of Tribunals has been created. In addition, there are centralised mechanisms dealing with the appointment and renewal of tribunal members, as well as their training needs – the Judicial Appointments Commission and the Judicial Studies Board. The UK Council on Tribunals, which has existed for almost 50 years, is an umbrella policy advisory body that is also playing a co-ordination role in these developments.

What is the Best Fit?

As I noted in the conclusion to the attached paper:

> Tribunals have been seen by governments for the last hundred years as the preferred means for dealing with many types of disputes. Tribunals are seen as offering more practical and more flexible case-handling and decision-making procedures than the courts. They are often seen as the place to locate the primary determination of new legal rights (for example, the equal opportunity laws and appeals against administrative decisions). They have grown up ad hoc. In my view thoughtful merger can lead to significant gains in the professionalism, accessibility and independence of tribunals.

There has been a tendency on the part of those who advocate the maintenance of stand-alone, specialist tribunals to depict a multi-jurisdictional or a super tribunal as a place where the distinctive features that have contributed to the success of a specialist tribunal will be lost. This is an obvious possibility that must be carefully addressed in the design and operation of a multi-jurisdictional or super tribunal.

We now have several years' experience, in the case of VCAT, of a super tribunal that has had to deal with these concerns. As best I can tell from the distance of NSW but with the benefit of a close acquaintance with many of the senior members and staff of VCAT as a result of my connections with Victoria, it has worked well and it has addressed the concerns that I have noted satisfactorily through its Divisional and List structures, and its Sub-Registries.

Among the keys to the success of VCAT were:

- the strong policy planning that preceded its creation, drawing in particular on the experience derived from the operation of the State AAT between 1984 and 1998 and on the experience of a specialist tribunal opened in 1995 that had used a number of innovative procedures, the Victorian Domestic Building Tribunal,
- the budgetary support which accompanied its establishment, and
- the strong leadership from the founding President, Justice Kellam and the founding CEO, a highly experienced and much respected Courts administrator, John Ardlie, marked by such practices as having a firm policy on listing and adjournments.

Clearly, a merged tribunal must have a federated type of structure. It is important to provide the level of specialisation in listing, practice and procedure required by the complexity or gravity of each of its jurisdictions. It is important to differentiate, appropriately, in case management techniques and the use of alternative dispute resolution techniques. The structure must be able to respond quickly to urgent matters. In high volume lists, it is important to separate cases into streams ranging from 'summary' to 'complex'. There should be a careful exploration of the extent to which matters can be dealt with by default orders not requiring the attendance of the applicant party. My understanding, for example, is that residential tenancies jurisdictions routinely have a high rate of 'no shows' by respondent tenants, but there are differences in practice around the question of whether a formal hearing must be convened attended by the applicant landlord for the obtaining of an order.

One concern of the critics of merger that I have seen as having strength relates to the possibility that high volume categories of business may define the tone or style of the merged tribunal. In the case of VCAT, for example, 66% of its filings are residential tenancies filings. In the case of the CTTT, 75% of its filings are residential tenancies. The ADT is a small tribunal in volume terms, and we have not been exposed to this possibility.

The gravest danger to the success of a multi-jurisdictional tribunal or a 'super tribunal' is lack of budgetary support. In the case of VCAT, it was provided with a well-planned, well-located city building as its headquarters, which it then purpose-designed. It has visiting arrangements with courts across the State. Courts in more remote locations of the State have video conferencing facilities. Its fit-out included

the installation of a modern automated recording system. It is able to provide the parties at a directions hearing with an immediate typed version of directions.

Another concern of the critics of merger relates to the diminution of the use of multi-member panels. As I argue in the Canberra paper attached, in my view there are many situations where it is satisfactory to sit one member. There are other situations where it is highly desirable or essential that there be additional non-legal members, such as experts or community representatives. These matters can be dealt with in the governing statute, or by providing principles in the statute to guide the listing discretion.

At the Commonwealth level in Australia and in the UK there are structures outside the environment of major tribunals that contribute to their success. I have mentioned the UK Council on Tribunals. A somewhat similar role is played at Commonwealth level in Australia by the Commonwealth Administrative Review Council. There is no similar structure in NSW. (A recommendation of the 2002 Parliamentary Committee report in NSW was for the creation of a NSW equivalent to the Commonwealth Administrative Review Council. It has not been actioned.)

There are other aspects of the administrative arrangements in the UK that contribute to the success and standing of its tribunals. As noted earlier, the UK bodies which cover judicial training and judicial appointments also provide these services in respect of tribunals. There is a high degree of visible independence in the process of appointment of tribunal members in the UK.

In New South Wales, the Judicial Commission has disciplinary and education functions. Its disciplinary role covers judges and magistrates, and it has a seminar and conference program of some quality aimed at the courts. It has no mandate in respect of tribunals. Tribunals are not seen in New South Wales as a fourth 'arm' of the legal system in the way that is apparent in Victorian arrangements. In Victoria, meetings of, and with, heads of jurisdictions routinely involve the heads of the three courts and the President of VCAT.

Broadly speaking, I think that the case for merger outweighs the case for maintaining stand-alone specialist tribunals that work in a single statutory environment. New South Wales has moved down the path of separate multi-jurisdictional tribunals with the creation of the CTTT and the ADT. Conceivably, there could be a further collapsing of the number of separate tribunals in NSW with:

- Professional Discipline Tribunals housed together, perhaps as was suggested by the Parliamentary Committee in 2002, as a Division of the ADT,
- a Protective Tribunal having separate guardianship and mental health streams,

and, perhaps more problematically,

- a Personal Injuries Compensation Tribunal (a proposal to that effect put forward by a Legislative Council Committee in December 2005 was rejected by the Government in its response issued in July 2006).

To move beyond this level of integration to the creation of a super tribunal, as I see it there needs to be –

- commitment in government to locating the tribunal functions of government in the one portfolio,
- the creation of a separate specialist administrative agency to service the new structure (as in the UK and de facto in Victoria),
- attention given to adjacent support structures relating to appointment, training, complaints and discipline, and
- finally and most of all, an appropriate budgetary commitment.

While these are all significant challenges, I have three principal reasons for favouring substantial merger of tribunal functions, whether or not they go as far as a super tribunal in the VCAT or UK sense:

- the benefit to the community of having a common entry point to the tribunal system, even though necessarily there will be several pathways after that point,
- the benefit to revenue that flows from the efficiencies that can be achieved through common platforms and processes, and
- the professional benefits to members and to staff that can be achieved through having a larger organisational environment, with the diversity of approaches that will bring to the culture of the tribunal.

These factors should all contribute to an improvement in the 'delivery of quality administrative justice' as compared to stand-alone, single statute tribunals.