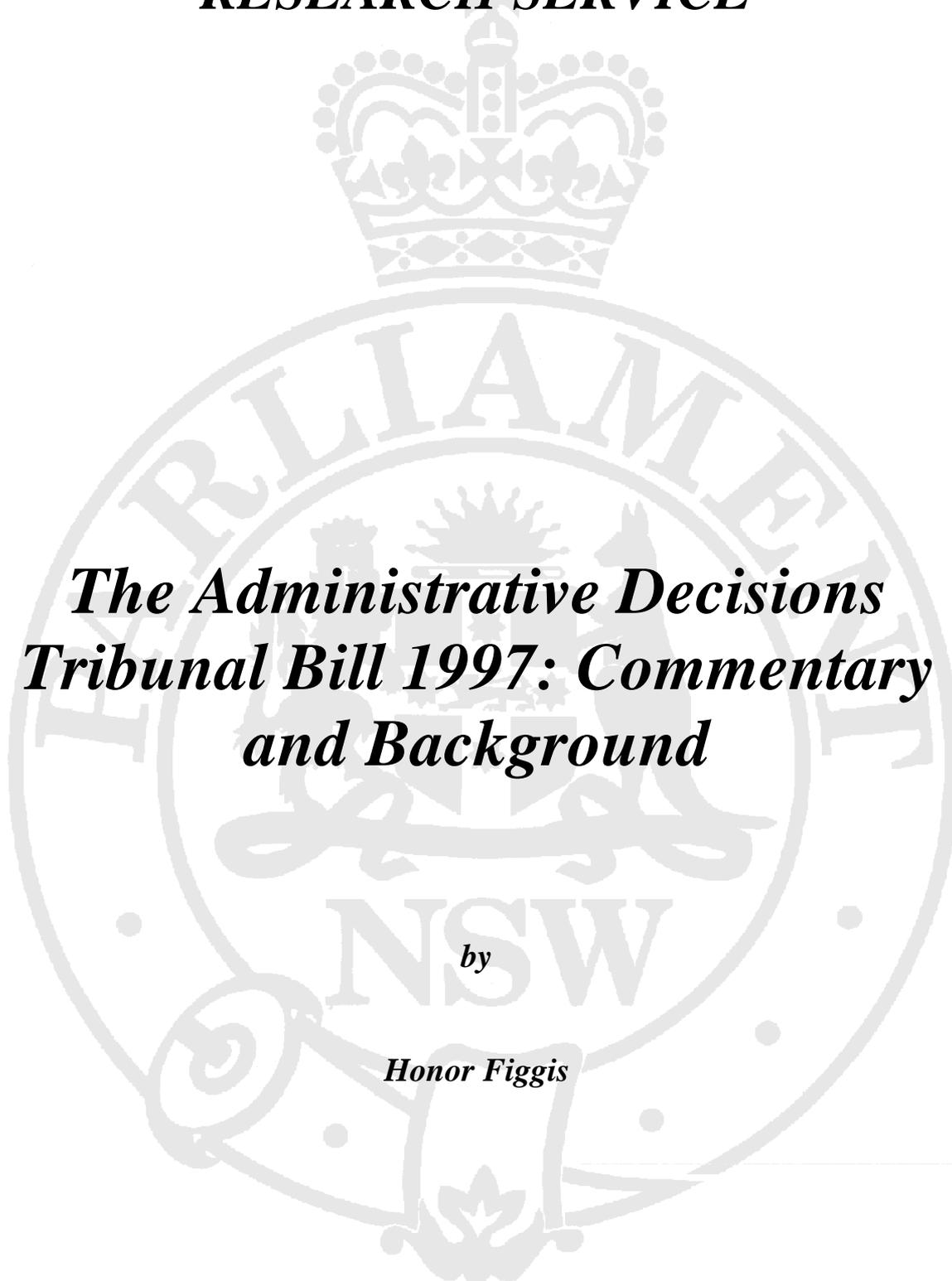


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***The Administrative Decisions
Tribunal Bill 1997: Commentary
and Background***

by

Honor Figgis

Briefing Paper No 10/97

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EXECUTIVE SUMMARY

- The Administrative Decisions Tribunal Bill 1997 establishes an *Administrative Decisions Tribunal* (ADT), that will have jurisdiction to review the merits of administrative decisions, and to vary or set aside a decision that is not the correct or preferable decision in the circumstances. The ADT will also have jurisdiction to make some original decisions adjudicating disputes between persons, or between persons and professional bodies. Jurisdiction is conferred on the ADT by the cognate Administrative Decisions Legislation Amendment Bill 1997 (p 4).
- The ADT Bill creates a *scheme of review* for persons who are adversely affected by a range of government decisions. The essence of the scheme is that a person affected by a decision may request reasons for the decision from the administrator. If dissatisfied with the reasons, the person can apply for the decision to be reviewed internally. If the person is still aggrieved after internal review, he or she can apply to an independent tribunal, the Administrative Decisions Tribunal (ADT) for review. A decision of the ADT as to the merits of the original decision may be appealed to an Appeal Panel of the ADT. A decision of the Appeal Panel may be appealed to the Supreme Court on a question of law (pp 9-11).
- The ADT will initially consist of 4 divisions: a *General Division*, a *Community Services Division*, a *Legal Services Division* and an *Equal Opportunity Division*. It will eventually have jurisdiction in a wide range of fields to hear appeals from on the merits of administrative decisions, and to make some original adjudicative decisions. The Government will undertake a review of almost all administrative decisions that may be made in New South Wales to determine which ones should be reviewable on their merits (pp 19-27).
- The briefing paper looks at some of the *main features* of the proposed ADT - its structure, procedures, provision for legal representation of parties, the circumstances where the ADT must give effect to government policy, the membership of the tribunal, and the relationship between the ADT and the Ombudsman (pp 10-18).
- The briefing paper discusses the proposed review and original *jurisdiction* of the ADT, and some possible criteria for determining its future jurisdiction. The extent of the possible jurisdiction for the ADT indicates that it may become an umbrella tribunal - a single tribunal determining a wide range of disputes between individuals and government, between individuals, and between individuals and professional bodies (pp 19-27). This will make the ADT an unusual tribunal compared with the administrative appeals tribunals established in other jurisdictions.
- Some implications of the ADT for the future role of the New South Wales *court*

system are considered (pp 29-30).

1. INTRODUCTION

This briefing paper gives an overview of the main features of the Administrative Decisions Tribunal Bill 1997 (ADT Bill), and some commentary and background to the Bill. It also discusses the jurisdiction conferred on the proposed Administrative Decisions Tribunal by the cognate Administrative Decisions Legislation Amendment Bill 1997. A general description of administrative appeals tribunals, and some advantages and disadvantages of such tribunals, is found in an earlier briefing paper, *An Administrative Appeals Tribunal for New South Wales*.¹

The Administrative Decisions Tribunal Bill contains several measures designed to ensure that government decisions affecting individuals are made openly and are well-founded. The proposed measures are:

- A requirement for administrators making decisions under various statutes to notify persons of decisions affecting them and of any review rights they might have, and to provide reasons for their decisions on request.
- A system for decisions of administrators to be reviewed internally within a government department or agency on request.
- An independent tribunal, the Administrative Decisions Tribunal (ADT), that will have the power to review decisions made by administrators under various statutes to ensure that the correct or preferable decision is made. The ADT will also make some original decisions as the primary decision-maker, including adjudicating some disputes between private parties.

The ADT Bill creates a scheme of review for persons who are adversely affected by a range of government decisions. The essence of the scheme is:

- a person affected by a decision may request reasons for the decision;
- if dissatisfied with the reasons, the person can apply for the decision to be reviewed internally;
- if the person is still aggrieved after internal review, he or she can apply to the ADT for review;
- a decision of the ADT as to the merits of the original decision may be appealed to an Appeal Panel of the ADT;
- a decision of the Appeal Panel may be appealed to the Supreme Court on a question of law.

¹ H Figgis, *An Administrative Appeals Tribunal for New South Wales*, New South Wales Parliamentary Library Briefing Paper No 14/96.

The Administrative Decisions Legislation Amendment Bill merges into the ADT several tribunals that currently hear applications for merits review, and other tribunals that adjudicate disputes between individuals or between individuals and their professional bodies.

2. **BACKGROUND TO THE BILL**

2.1 *The need for review of administrative decisions*

During this century the scope of government regulation has greatly expanded. The extent of administrative powers in New South Wales was noted by the Minister in the Second Reading speech on the ADT Bill:

The breadth of administrative decisions made in New South Wales is enormous and usually underestimated. It encompasses a wide range of discretions and decisions affecting all facets of business and personal rights. Such decisions are made by Ministers, public officials or bodies, including semi-independent bodies and boards, specialist tribunals and courts.²

It is inevitable that some of the enormous number of decisions and determinations made by administrators will be incorrect or inadequate. Good public administration requires, among other matters, that persons adversely affected by government decisions should be able to question the action simply, cheaply, and quickly, using procedures which are fair, impartial and wherever possible, open.³ However, at the present time in New South Wales, there is no comprehensive, coherent system for obtaining review of the merits of a decision.

There are currently three avenues to challenge a government decision. These are:

- (a) *statutory review*: appeal to a review body under a right provided by statute;
- (b) *judicial review*: court proceedings to challenge the legality of a decision; and
- (c) *Parliament*: aggrieved citizens can seek redress through Parliament. Although this procedure is not a review in the strict sense of administrative law, it was traditionally relied upon as one of the individual's safeguards against arbitrary or unlawful administrative action.⁴

It is also possible to request the Ombudsman to investigate the actions of government bodies, under the *Ombudsman Act* 1974. However, the Ombudsman can only make

² Hon P Whelan, *NSWPD* (proof LA), 29/5/97 p 73.

³ New South Wales Law Reform Commission, *Report on the Right of Appeal from Decisions of Administrative Tribunals and Officers*, LRC 16, February 1973 p 10; Commonwealth of Australia, Access to Justice Advisory Committee (Sackville Report), *Access to Justice: An Action Plan* Canberra AGPS 1994; Hon P Whelan, *NSWPD* (proof LA), 29/5/97 p 73.

⁴ For more information on parliamentary review, see H Figgis, *An Administrative Appeals Tribunal for New South Wales*, n 1 pp 8-9.

reports and recommendations; he or she cannot provide remedies.

Of the three avenues of review, *statutory review on the merits* of a decision is generally the most accessible and effective avenue for persons to challenge decisions.⁵ In New South Wales there are several kinds of statutory review. The nature and scope of any right of review, and the identity of the reviewer, depend on the particular statute authorising review. In some cases, review may only be allowed on very limited grounds, while in other cases full merits review may be available. Full merits review involves the reviewer examining all the relevant evidence and the reasons for the decisions, hearing the arguments of the parties, and determining in place of the original decision maker what the correct or preferable decision is in the circumstances. Merits review is only available if a statute provides for a right of review: there is no right at common law for a person adversely affected by a decision to have the merits of the decision reviewed.

The availability of statutory review varies widely in New South Wales. While many decisions are not subject to review at all, others can be reviewed internally within the government agency that made the decision, and others can be reviewed by an external body. There is a wide range of specialised tribunals, commissions, boards, and panels which review administrative decisions. Some decisions can be reviewed on their merits by the Local, District or Supreme Courts. The various review bodies usually have their own powers, procedures and infrastructure.

Judicial review of decisions by the Supreme Court is more limited than merits review. The Administrative Division of the Supreme Court of New South Wales has an inherent power to review government decisions to determine their *legality*. Judicial review does not involve any reconsideration of the *merits* of the official action. The grounds for judicial review of administrative action are narrow, and in some cases their scope is uncertain.⁶

The limitations of judicial review, and the arbitrary availability of merits review were recognised by the Minister in the Second Reading Speech for the ADT Bill:

While at present judicial review of administrative decisions is available to determine the lawfulness of the conduct of the decision-maker there is no clearly identifiable avenue for administrative appeals on the merits of decisions.

There is some limited merit review available in relation to certain specific decision through specialist bodies but for the most part administrative decisions are only amenable to judicial review through the Supreme Court. The limited scope and nature of judicial review makes the process uninviting to persons who are aggrieved with a decision which may affect them. The cost and time delays

⁵ See *ibid* pp 5-9.

⁶ More information on the grounds of judicial review is contained in H Figgis, *An Administrative Appeals Tribunal for New South Wales*, n 1, pp 7-8.

associated with matters in the Supreme Court also tends to deter potential litigants. Clearly there is a need to provide a mechanism for administrative appeals on the merits of a decision and for those appeals to be conducted in an open and accessible form, guided by principles of natural justice.⁷

2.2 *Tribunals in New South Wales*

A large number of tribunals have been established in New South Wales over the past decades. These tribunals have been specialist bodies introduced to deal with a variety of issues as particular needs have arisen.⁸

Tribunals have been established to determine two basic kinds of matters:

- administrative disputes between persons and the government; and
- disputes between private persons.

Traditionally it was the role of the courts to determine disputes between citizens, and to provide judicial review of administrative decisions, while tribunals as part of the executive arm of government reviewed the merits of decisions. However, as problems of access to the courts have worsened, governments have introduced tribunals to determine some disputes between individuals (for example, the Equal Opportunity Tribunal, or the Residential Tenancies Tribunal).

The system of tribunals in New South Wales has developed in a piecemeal fashion over the years in response to needs arising from time to time, rather than under a comprehensive plan. Robinson's *New South Wales Administrative Law*⁹ reported that in 1996 there were in the order of 75 tribunals and state adjudicatory bodies in New South Wales. These bodies exercise a range of functions and powers, including: dispute resolution; licensing; discipline; investigation; protection; compensation; entitlement to benefits; revenue; advisory; criminal; and appeals in relation to the some of the above. In addition to these boards and tribunals are the statutory merits review functions undertaken by the Supreme Court, the District Court and the Local Courts in NSW. See Appendix A for a list of some New South Wales tribunals.

2.3 *Administrative law reform in New South Wales*

In 1973 the New South Wales Law Reform Commission, in a report on rights of appeal from administrative decisions, recommended that a Public Administration Tribunal be

⁷ Hon P Whelan, *NSWPD* (proof LA), 29/5/97 p 73.

⁸ *Tribunals in the Department of Justice: A Principled Approach*, Discussion Paper, Victorian Attorney-General's Department, October 1996.

⁹ Looseleaf service published by LBC Information Services, 1996, [10-160].

constituted to hear appeals against official actions. The Commission also recommended that more rights of appeal should be granted.¹⁰ The Commission observed that:

There is no apparent system in selecting the bodies which can hear appeals against official actions. In some cases the body is an existing authority, tribunal or court; in other cases a new body is constituted... The exact number of persons who may determine appeals is not known to us but it must be some hundreds... There should, in our view, be only two classes of bodies dealing with appeals against official action: a limited number of specialist bodies and the proposed Tribunal.¹¹

The Law Reform Commission also recommended the appointment of an Ombudsman and a Commissioner for Public Administration, and the establishment of an Advisory Council on Public Administration. The Office of Ombudsman was established in 1974 to investigate complaints about the conduct of public authorities.¹²

The Law Reform Commission's proposal for a Public Administration Tribunal was supported by the Review of New South Wales Government Administration Interim Report in 1977 and Further Report in 1982.¹³ In 1988 the New South Wales Tax Task Force recommended establishing a Taxation Appeals Administrative Tribunal.¹⁴

In 1989 a Discussion Paper by the New South Wales Attorney-General's Department recommended establishing an Administrative Appeals Tribunal to review administrative decisions on their merits.¹⁵ The Discussion Paper observed that:

The advantage we see is in the potential of an AAT to draw together and absorb a large range of disparate legislation under which reviewable administrative decisions are made. It could be used to rationalise the system of administrative review and would thus play an important role in stemming the further proliferation of tribunals.¹⁶

¹⁰ New South Wales Law Reform Commission, n 3. The Commission prepared a draft Public Administration Tribunal Bill, annexed to the report.

¹¹ Ibid para 155.

¹² *Ombudsman Act 1974*

¹³ P Wilenski, *Review of New South Wales Government Administration: Directions for Change*, Interim Report, 1977 para 20.16 ; P Wilenski, *Review of New South Wales Government Administration: Unfinished Agenda*, Further Report, 1982 pp 56- 61.

¹⁴ New South Wales Tax Task Force *Review of the State Tax System* August 1988 p 194.

¹⁵ Hon JRA Dowd, *Discussion Paper on Civil Procedure* NSW Attorney-General's Department December 1989 p 18.

¹⁶ Ibid p 20.

In the same year the freedom of information legislation was enacted to increase public access to government information.¹⁷

3. **REASONS FOR DECISIONS**

At common law an administrator is not obliged to give any reasons for a decision. The ADT Bill imposes a duty on administrators to give reasons for decisions that the ADT has jurisdiction under an enactment to review. The ADT Bill does not impose a general duty to give reasons for all decisions.¹⁸

If an administrator makes a reviewable decision, and if an affected person requests reasons for the decision, the administrator must prepare a written statement of reasons setting out the findings of fact, the applicable law, and the reasoning processes that led the administrator to the decision (clause 49). However, the regulations to the ADT Bill may exclude any class of reviewable decisions from the requirement to give reasons. The rationale for a right to obtain reasons was explained by the Minister in the Second Reading speech:

An essential element of good administration is the need to ensure that reasons are given for administrative decisions. The supply of reasons for decision will give people dealing with government departments and agencies an assurance that decisions are made rationally, taking into account only the relevant considerations. This will ensure that decisions can be seen to have been lawfully made and also reduce the likelihood of appeals on the merits of the decision.

The obligation to provide reasons for decisions reached in the exercise of public powers is essential to ensuring accountability. It is likely to cause a decision maker to consider carefully the grounds upon which a decision is made and ensure that proper process and policies are applied. However, the most important result of requiring reasons to be given for decisions is that it allows an individual affected by a decision to understand the reasons for that decision.¹⁹

The New South Wales Law Reform Commission in 1973 recommended against providing a right for persons affected by a decision to obtain reasons:

A requirement that reasons be given where practicable is sound and productive of good effects. In cases involving licences needed for livelihood purposes, the

¹⁷ *Freedom of Information Act 1989*.

¹⁸ In contrast, the Commonwealth *Administrative Decision (Judicial Review) Act 1977* s 13 provides a right to reasons for all decisions of an administrative character made under a Commonwealth enactment, with specified exceptions.

¹⁹ Hon P Whelan, *NSWPD* (proof LA), 29/5/97 p 74.

absence of reasons can give rise to hardship or feelings of hardship. But to impose a general requirement to this effect must so add to work loads and so interfere with the efficiency of public authorities that the disadvantages of adopting such a course of action must outweigh the advantages.²⁰

4. INTERNAL REVIEW OF DECISIONS

Internal review involves review of a decision within the same government agency that made the original decision. Currently in New South Wales internal review is available under some statutes, but there is no general procedure for internal review. The benefit of internal review is that it allows wrongly made decisions to be corrected quickly and cheaply.

The ADT Bill creates a system for internal review of certain administrative decisions (clause 53). A person who is affected by a decision that the ADT has jurisdiction under an enactment to review may apply to have the decision reviewed on the merits within the same government agency. The person conducting the review of the decision will be substantially independent of the original decision maker and will be able to consider further relevant material submitted by the applicant. The internal reviewer will be required to supply a statement of reasons for his or her decisions. If, after internal review, the affected person is still dissatisfied with the decision, he or she may apply to the ADT for review. Regulations may exclude any class of reviewable decisions from internal review.

The Commonwealth Administrative Review Council in its *Better Decisions* Report recognised the potential benefits of internal review. However, it also observed that internal review can act as a barrier to access to independent merits review, adding another layer to the review process and causing delay and possibly cost. The ARC concluded that government agencies should be encouraged to provide internal review of their decisions, provided it is relatively timely, is not subject to an application fee, is undertaken by internal review officers who are sufficiently independent of the initial decision maker, and involves an appropriate level of personal contact between internal review officers and applicants.²¹

5. THE ADMINISTRATIVE DECISIONS TRIBUNAL

5.1 Overview

The proposed Administrative Decisions Tribunal will be a general administrative review tribunal, structured along the lines of the administrative appeals tribunals established in the Commonwealth, Australian Capital Territory and Victoria. The ADT will have

²⁰ New South Wales Law Reform Commission, n 3, para 176.

²¹ Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report No 39, 1995 p 126.

two main functions:

- to review some decisions made by administrators affecting persons; and
- to make original decisions in some areas.

The ADT will initially consist of 4 divisions: a General Division, a Community Services Division, a Legal Services Division and an Equal Opportunity Division. It will eventually have jurisdiction in a wide range of fields to hear appeals on the merits of administrative decisions, and to make some original adjudicative decisions. The ADT will form part of the executive government, not the judicial arm of government; it will not be independent from the executive in the same way that the courts are. However, administrative tribunals such as the proposed ADT operate in a court-like manner, as if they were independent of the executive.

The powers and functions of the ADT in hearing any particular application will depend on the statute that provides for the ADT to make or review the decision. The ADT will follow the rules of procedural fairness. It will hear all the relevant evidence and give every party a reasonable opportunity to present their case and make submissions (clauses 70 and 73).

In the ADT's review jurisdiction, it will make findings of fact, apply the relevant law, and then make the decision that is correct or preferable in the circumstances (clause 63). The ADT will "stand in the shoes" of the original decision maker - it will make its decisions as if it were the original decision maker, and may exercise the powers and discretions that were available to the original decision maker. On review of a decision, the ADT may: affirm the decision; vary it; set it aside and make a decision in substitution; or set it aside and remit the matter for reconsideration by the original administrator (clause 63).

In making an original decision, the ADT has such functions as are conferred or imposed on it by the enactment under which the application is brought (clause 45). The original jurisdiction of the ADT is likely to come from the merger of existing tribunals that make original decisions into the ADT, such as the Equal Opportunity Tribunal.

A decision of the ADT may be appealed if:

- it is an original decision made under an enactment which provides expressly that the decision may be appealed to an appeal tribunal; or
- it is a review of a reviewable decision.

If the ADT makes a decision that may be appealed, a party may appeal to an Appeal Panel of the ADT on any question of law, and if the Appeal Panel permits, on the merits of the decision (clause 113). An Appeal Panel is constituted by three members: the President or a Deputy President, a judicial member and a non-judicial member (clause 24). A decision of an Appeal Panel of the ADT may be appealed to the Supreme Court

on a question of law (clause 119).

5.2 *Structure of the ADT*

The proposed Administrative Decisions Tribunal will be an independent, general tribunal. It will be headed by a President, with Deputy Presidents for each division. The ADT will consist of 4 divisions to begin with: a General Division, a Community Services Division, an Equal Opportunity Division and a Legal Services Division. These divisions absorb the jurisdiction of a number of existing tribunals, which are to be abolished: the Boxing Appeals Tribunal, the School Appeals Tribunal, the Veterinary Surgeons Disciplinary Tribunal, the Community Services Appeals Tribunal, the Legal Services Tribunal and the Equal Opportunity Tribunal.

The Government could have introduced a comprehensive merits review system by other means than a single, general tribunal. Other options for administrative review have been canvassed in Australia,²² such as:

- a separate Administrative Court;
- an Administrative Division of an existing court;
- rationalisation of existing specialist tribunals; or
- giving the Ombudsman power to make and enforce decisions.

In Australia, a general administrative tribunal has become the norm for a comprehensive merits review system. The Commonwealth, Victoria and the ACT have all opted for a single administrative appeals tribunal.²³ Reports on administrative law reform in Western Australia²⁴ and Queensland²⁵ have also recommended a single general tribunal as

²² For example, at the Commonwealth level, the Committee on Administrative Discretions (Bland Committee), *Final Report of the Committee on Administrative Discretions*, Canberra AGPS, 1973 and the Administrative Review Committee (Kerr Committee), *Report* Canberra AGPS, 1971.

²³ *Administrative Appeals Tribunal Act 1975* (Cth); *Administrative Appeals Tribunal Act 1989* (ACT); *Administrative Appeals Tribunal Act 1984* (Vic).

²⁴ WA Law Reform Commission, *Report on Review of Administrative Decisions: Part 1 - Appeals* Project No 26 (1982); G A Kennedy, R D Wilson and P F Brinsden, *Report of the Royal Commission into Certain Commercial Activities of the Government Part II* (WA Inc Report), 1992; Commission on Government (Western Australia), *Report No 4*, July 1996.

²⁵ G E Fitzgerald, Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, *Report*, 1989; Electoral and Administrative Review Commission, *Report on Review of Appeals from Administrative Decisions*, August 1993; Parliamentary Committee for Electoral and Administrative Review, *Report on Review of Appeals from Administrative Decisions*, Report No.25, May 1995.

preferable to other merits review structures. South Australia is the only state which provides significant merits review reforms by means of its court system.²⁶

More divisions are likely to be added to the ADT as its jurisdiction is expanded; for example, a Taxation Division, or an Environmental and Planning Division. A Professional

Conduct Division of some kind is possible, as the Government has indicated its intention to integrate further professional disciplinary tribunals into the ADT.²⁷

The Victorian AAT has four divisions: General, Taxation, Planning, and Land Valuation.²⁸ The ACT Administrative Appeals Tribunal has a General Division and a Land and Planning Division. The proposed Western Australian administrative review tribunal would have three divisions: General, Taxation, and Environmental Planning and Development Control.

5.3 *Procedures*

The proposed ADT will be 'quasi-judicial' in nature. The ADT will be like a court in that it will be independent from influence by the government (although forming part of the executive). It is to follow the rules of procedural fairness; it is to be impartial, and to ensure that each party is given an opportunity to present its case and to make submissions. The president will be a judge and some other members will be legally qualified, perhaps with judicial experience.

Unlike a court, the ADT will be able to inquire into matters and inform itself on any matter as it sees fit, subject to the rules of procedural fairness (clause 73). The ability to investigate matters on its own behalf moves the ADT away from the adversarial model of the courts towards an inquisitorial method. The ADT may call any witness of its own motion, and examine or cross-examine any witness, and compel any witness to answer or provide information (clause 83). The ADT is also under a duty to ensure that every party is given a reasonable opportunity to present their case and to make submissions (clause 70). The ADT is not bound by the rules of evidence. It is to act with as little formality as the circumstances of the case permit, and according to equity, good

²⁶ Since 1994 the District Court of South Australia has had an Administrative and Disciplinary Division: *District Court Act 1991 (SA)*. The Court has appeal jurisdiction over a range of matters, with a focus on disciplinary appeals affecting certain occupations. See P Johnston, 'Recent Developments Concerning Tribunals in Australia' (1996) 24 *Federal Law Review* 323.

²⁷ Hon P Whelan, *NSWPD (LA proof) 29/5/97* p 76.

²⁸ There are proposals for the Victorian AAT to be substantially expanded, and renamed the Victorian Civil and Administrative Tribunal. The new tribunal would have eight divisions: General, Licensing, Land and Environment, Taxation Appeals, Consumer Division., Domestic Buildings, Anti-Discrimination, and Guardianship and Administration: *Tribunals in the Department of Justice: A Principled Approach*, n 7.

conscience and the substantial merits of the case without regard to technicalities or legal forms. It is to act as quickly as is practicable, and it may require evidence or argument to be presented in writing. If there is an oral hearing, the ADT may require the presentation of the respective cases of the parties to be limited to the periods of time that are reasonably necessary for the fair and adequate presentation of the cases (clause 73).

One of the arguments against amalgamating specialist review tribunals is that general review tribunals with legally trained members can become too court-like and formal.²⁹ The Government has addressed this problem in the ADT Bill, as explained by the Minister in the Second Reading speech:

I have taken account of the criticism which has been levelled against the Commonwealth and Victorian tribunals that despite legislative prescriptions for informality and flexibility the actual hearings have become formal and adversarial. To overcome such problems the New South Wales ADT will have a rules committee which includes community and stakeholder representation to ensure that the procedures do not become stultified. This is a unique proposal in the common law world and has the potential to be a significant model for future developments of tribunals so as to ensure that the tribunal meets the needs for which it is established.³⁰

In order to maintain the flexibility of the ADT, rules can be tailored to particular divisions, rather than applying to the whole ADT (clauses 90-98).

The ADT Bill also encourages the parties to resolve disputes without a formal determination by the ADT. Provision is made for *preliminary conferences* with the parties (clause 74). If the parties agree, their matter can be referred to mediation or neutral evaluation of disputes.³¹

5.4 *Legal representation*

Under the ADT Bill parties can appear before the ADT without representation, or they may be represented by an agent (which includes but is not limited to a lawyer) (clause 71). The ADT may appoint a person to represent an 'incapacitated person' (as defined in clause 71(7)). However, the ADT has the power to order that the parties may not be represented by an agent of a particular class for the purpose of presentation of oral submissions to it. This provision allows the ADT to prevent a party's lawyer making oral

²⁹ See H Figgis, *An Administrative Appeals Tribunal for New South Wales*, n 1, pp 27-28.

³⁰ Hon P Whelan, *NSWPD* (LA proof) 29/5/97 p 74.

³¹ Mediation is defined as a structured negotiation process in which the mediator, as a neutral and independent party, assists the parties to a dispute to achieve their own resolution of the dispute. Neutral evaluation is defined as a process of evaluation of a dispute in which the neutral evaluator seeks to identify and reduce the issues of fact and law that are in dispute.

submissions in a hearing.

In making such an order, the ADT is to have regard to the complexity of the matter and whether it involves a question of law; whether each party has the capacity to present the party's case by oral submissions without representation; the stage that the proceedings have reached, the type of proceedings, and such other matters as it considers relevant.

It has been argued that barring lawyers from representing parties will prevent proceedings becoming too complex and adversarial, and too costly.³² As an alternative to legal representation, the government could establish a statutory office of government counsel, an independent officer to assist tribunals.³³

Those in favour of allowing legal representation argue that the absence of lawyers may limit the ability of applicants to put forward their best possible case. The Commonwealth Administrative Review Council has taken the view that a general bar on legal representation is irrational and unfair. 'If there is a problem with certain practices that affect complexity, cost and formality, then any solution should address those problems directly, regardless of who engages in them.'³⁴

5.5 *Review of government policy*

One of the chief arguments against an independent tribunal reviewing government decisions is that such tribunals are not responsible to the government agency whose decisions they are reviewing. Independent review breaks the chain of accountability from the government agency through the relevant Minister to Parliament. Governments often develop policies to be applied by departments in making decisions. An independent tribunal's determination of the 'correct or preferable' decision in a particular case may be at odds with the decision that would result from applying government policy.

On the other hand, it is argued that tribunals should be able to depart from government

³² B Lagan, 'State v the public: New way of settling disputes', *Sydney Morning Herald* 13/5/97; Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report No 39, 1995, 3.180; Commission on Government (Western Australia), *Report No 4*, July 1996 p 165.

³³ P Johnston, 'Recent Developments Concerning Tribunals in Australia' (1996) 24 *Federal Law Review* 323 p 339.

³⁴ Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report No 39, 1995, 3.183.

policy if applying it would produce an unreasonable result.³⁵ Criticism of policy by tribunals can have an important effect in shaping or improving policies, or their application. At the Commonwealth level, the federal AAT must take existing government policy into account, but it may refuse to apply it if to do so would not lead to the ‘correct and preferable decision’ in the circumstances. However, in the interests of consistency in administrative decision making and respect for the policy of elected representatives, the AAT would not depart from government policies, particularly ‘core’ policies formed at a Ministerial rather than a departmental level, without cogent reasons.³⁶

Another approach is to require the independent tribunal to give effect to high-level government policy. This was the position of the 1982 New South Wales Review of Government Administration:

The Tribunal should not have the power to review *government policy* where it is made in accordance with law. It should be required to give effect to, rather than simply have regard to, such policy.... [This] is in accord with the principle that in a democracy, final responsibility for policy should be with the Government; where a bad (but not illegal) individual decision results from proper adherence by officials to bad government policy, the remedy should be political and not by way of a Tribunal. However, any statement of government policy, to ensure that it has been considered by Ministers, should be transferred to the Tribunal not by the relevant Minister ... but by the Premier after endorsement by Cabinet with subsequent tabling in Parliament.³⁷

Following this approach, the Victorian AAT must apply a statement of policy certified by the relevant Minister (to the extent that the policy is within power), where certain conditions are satisfied.³⁸ The conditions are that:

- the Minister certifies in writing that there was in existence at the time of making the decision a statement of policy applying to the decision;
- the AAT is satisfied that at the time of making the decision the applicant was aware of the statement of policy, *or* persons could have reasonably been expected to be aware of the statement, *or* the statement had been published in the Government Gazette; and

³⁵ Ibid para 2.17.

³⁶ *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634.

³⁷ P Wilenski, *Review of New South Wales Government Administration: Unfinished Agenda*, Further Report, 1982 p 59.

³⁸ *Administrative Appeals Tribunal Act 1984* (Vic) s 25(3).

- the decision maker stated in the reasons for the decision that he or she relied on the statement of policy in making the decision.

The New South Wales Government's approach is along the lines of the Victorian provisions. The ADT Bill provides that the ADT must give effect to any relevant government policy in reviewing an administrative decision, except to the extent that the policy is contrary to law (clause 64). The Premier or any other Minister may certify in writing that a particular policy is or was Government policy in relation to a matter. Unlike Victoria, there are no conditions as to awareness or availability of the policy at the time the original decision was made.

The ADT may have regard to any other policy applied by the administrator in relation to the matter concerned, except to the extent that the policy is contrary to Government policy or law. The effect of the provisions is that the ADT *must* give effect to policies approved at a ministerial level, and *may* give effect to lower level or departmental policies.

5.6 Tribunal membership

The membership of the ADT will be a mix of legally qualified members, some of them judicial officers, and non-legal members with relevant knowledge and expertise. The ADT will consist of a President, Deputy Presidents, judicial members and non-judicial members. The President will head the ADT, with Deputy Presidents in each division. The President will be a judge of the Supreme Court, District Court, Land and Environment Court or a Judicial Member of the Industrial Relations Commission. The Deputy President and judicial members will be a judicial officers or legal practitioners of at least 7 years standing (clause 17).³⁹ A non-judicial member must have special knowledge or skill in relation to any class of matters in respect of which the ADT has jurisdiction.

It is generally considered that administrative review tribunals should not be comprised only of legally trained members, but should include members with a wide range of knowledge and experience. This can be achieved both by ensuring that the ADT membership is drawn from a wide base of qualified persons, and by provision in the ADT Bill for special appointments to be made for particular functions. For example, the ADT Bill provides that where the ADT reviews certain decisions under the *Public Health Act* 1991, the ADT is to be constituted by 3 members, one of whom is a medical practitioner with experience in public health matters. The ADT may be assisted by expert assessors appointed by the Minister.

It has been argued that in some matters legally qualified members are not necessary, and

³⁹ However, the Minister stated in the Second Reading Speech that the President will be a judge of the Supreme Court or court of equivalent status, and the Deputy Presidents will be judges of the District Court or court of equivalent status: Hon P Whelan, *NSWPD* (LA proof) 29/5/97 p 76.

may unnecessarily increase the formality and legality of tribunal proceedings:

A case remains for a different composition of a tribunal and the discretionary exclusion of legal representation in high-volume, predominantly factual jurisdictions, provided further external review mechanisms are in place. In those cases, properly trained non-lawyers are quite capable of carrying out the functions of issue analysis and marshalling of facts.⁴⁰

The ADT can be constituted by one or more members. The President or the head of the relevant Division will decide which members are to constitute the ADT in any particular proceedings, having regard to factors such as the complexity or public importance of the proceedings, and any need for special expertise. While it is common in administrative tribunals for three members to sit as the tribunal, financial pressures may result in one-member tribunals becoming common. It has been argued that there is potential for a decline in the quality of tribunal decisions where tribunals are predominantly made by one, or two, rather than three, tribunal members, particularly if only a legally qualified member constitutes the tribunal.⁴¹

The Minister stated in the Second Reading Speech that where an existing jurisdiction has been brought into the ADT which requires a community representative on the panel then that will continue to be the case.⁴²

5.7 *Relationship between ADT and Ombudsman*

The proposed ADT and the New South Wales Ombudsman are both avenues of complaint against government decisions, although their functions are quite different. A person aggrieved by a decision may take a complaint to both the ADT and the Ombudsman, or may take it to one body when it would be better dealt with by the other. The Minister commented in the Second Reading speech that:

In many respects the jurisdiction of the Ombudsman and the ADT is complementary. In its review jurisdiction the ADT will examine the merits of a particular decision, while the Ombudsman is more concerned with system issues arising from the decision making process. Clearly there is scope for a close working relationship between the offices.⁴³

In order to avoid needless duplication or matters 'falling through the cracks', the

⁴⁰ P Johnston, 'Recent Developments Concerning Tribunals in Australia', n 32, p 339.

⁴¹ J Disney, 'The ARC's *Better Decisions* Report: For Better or for Worse, For Richer or for Poorer', paper presented at the conference *The AAT - Twenty Years Forward*, Canberra 1-2 July 1996, quoted in P Johnston, *ibid* p 329.

⁴² Hon P Whelan, *NSWPD* (LA proof), 29/5/97 p 76.

⁴³ *Ibid* p 75.

Government has introduced procedures in the ADT Bill to allow the ADT and the Ombudsman to consult and cross-refer matters. The President of the ADT and the Ombudsman may enter into various arrangements relating to :

- (a) referral of matters by the ADT to the Ombudsman where it considers that it would be more appropriate for the Ombudsman to deal with the matter;
- (b) referral of matters by the Ombudsman to the ADT where the Ombudsman considers that it would be more appropriate for the ADT to deal with it;
- (c) matters that are the subject of an application to the ADT and that are also the subject of a complaint, inquiry, investigation or other action under the Ombudsman Act 1974; and
- (d) the co-operative exercise of the respective functions of the ADT and Ombudsman.

6 *JURISDICTION OF THE ADMINISTRATIVE DECISIONS TRIBUNAL*

6.1 *Overview*

The ADT will have two kinds of jurisdiction:

- (a) reviewing some decisions made by public bodies or officials; and
- (b) making some original decisions.

The ADT will have jurisdiction to make or review a particular decision if the relevant statute confers the decision-making or review power on the ADT. The initial jurisdiction of the ADT is conferred by the cognate Administrative Decisions Legislation Amendment Bill 1997. The Bill abolishes several tribunals and transfers their functions to the ADT. It also enables the ADT to exercise certain jurisdiction presently exercised by courts in relation to administrative decisions.

The jurisdiction of the ADT is organised into four division. The *General Division* will hear matters formerly heard by the Boxing Appeals Tribunal, the Schools Appeals Tribunal, and the Veterinary Surgeons Disciplinary Tribunal. In addition, the General Division will hear some matters formerly reviewed by the Local, Court, the District Court, the Supreme Court and the Industrial Relations Commission.

The *Community Services Division* will hear matters formerly heard by the Community Services Appeals Tribunal. The Community Services Appeals Tribunal reviews decisions relating to the provision of community services.

The *Equal Opportunity Division* will hear matters formerly heard by the Equal Opportunity Tribunal. The Equal Opportunity Tribunal currently has the power to inquire into complaints that the anti-discrimination provisions in the *Anti-Discrimination Act 1977* have been contravened.

The *Legal Services Division* will hear matters formerly heard by the Legal Services Tribunal. The Legal Services Tribunal hears complaints against legal practitioners and conveyancers regarding unsatisfactory professional conduct or professional misconduct.

The jurisdiction of the proposed ADT diverges significantly in several ways from the administrative appeal tribunal model adopted in the Commonwealth, the Australian Capital Territory and Victoria. The first major difference is that the ADT is not confined to reviewing administrative decisions - it will also make original decisions. This difference in functions is reflected in the name 'Administrative *Decisions* Tribunal', rather than 'Administrative *Appeals* Tribunal'.

The ADT also differs from other administrative appeals tribunals in that in its original decisions jurisdiction it will determine some disputes between individuals (for example, in the Equal Opportunity Division), and between individuals and professional bodies

(for example, in the Legal Services Division). The existing administrative appeals tribunals in other jurisdictions only review the merits of government decisions; they do not adjudicate disputes between individuals.

Another distinctive measure was foreshadowed in the Second Reading speech when the Minister indicated that the Government is likely to give the ADT concurrent jurisdiction with the courts to undertake judicial review of administrative decisions (see p 27). The ADT will then have the power to determine whether administrators have acted within the law in making a particular decision, as well as being able to determine whether an administrator has made the correct or preferable decision.

6.2 *Review of administrative decisions*

The primary function of the ADT will be to review the merits of a range of reviewable administrative decisions. The ADT will have jurisdiction to review a decision where an enactment provides for review to the ADT.

The Administrative Decisions Legislation Bill 1997 confers a disparate but significant initial jurisdiction on the ADT. Several review tribunals are abolished and their jurisdictions transferred to the ADT. Many other decisions that are currently reviewed by the Local Court, the District Court, the Supreme Court or the Industrial Relations Commission will now be reviewed by the ADT (for example, decisions as to access to government information under the *Freedom of Information Act* 1989 that can currently be reviewed by the District Court will be reviewed by the ADT).

The Administrative Decisions Legislation Amendment Bill 1997 is only the first stage in the process of conferring jurisdiction on the ADT. The Minister in the Second Reading speech foreshadowed that over the next 18 months the Attorney-General will be bringing forward further bills to extend the jurisdiction of the tribunal.⁴⁴ He also stated that the Government was considering integrating a further 21 tribunals into the ADT.⁴⁵

It is clear that the Government is considering a very broad review jurisdiction for the ADT. The Minister in the Second Reading Speech stated that the Government will be reviewing all administrative decisions which are made or required to be made under State legislation to determine which decisions should be amenable to review. He listed a range of categories of decision-making powers that may be within the jurisdiction of the ADT, stating that 'These categories are indicative for the purpose of assisting in identifying decisions which may be amenable to inclusion in the jurisdiction of the ADT. This list is not exhaustive but neither is it prescriptive of matters to be included, which must be subject to general exclusions'. The list covers almost every kind of

⁴⁴ Hon P Whelan, *NSWPD* (LA proof) 29 May 1997 p 73.

⁴⁵ *Ibid* p 75. See Appendix A for a list of some existing New South Wales tribunals.

administrative decision in New South Wales:⁴⁶

- the granting or refusing to grant a licence, permit, registration, authority or approval for an activity or item;
- suspension, termination, revocation or cancellation of a licence, permit or authority;
- service of a notice directing or requiring the doing of an act or the ceasing to do an act in order to comply with the legislation;
- determination of an entitlement or eligibility for a (financial or like) benefit or assistance;
- requiring satisfaction of safety or other standards;
- exclusion of persons from property, places or institutions;
- determination of an entitlement to moneys;
- remittance of penalties, interest, debts or fees;
- consenting or refusing consent to, and imposing conditions relating to, lending, guarantees, or leasing,
- the selection of or appointment of receivers or administrators;
- the acquisition or disposal of, or dealing with, property;
- certification or refusal to certify matters; and
- the protection of vulnerable persons.

The question of which administrative decisions should be reviewable on the merits has generated a great deal of discussion in reports on reform of administrative systems. The Queensland Electoral and Administrative Review Commission observed that ‘To avoid having decisions for merits review being selected at random, or based on the whim of agencies or as the result of lobbying of interest groups, it is essential that there be developed guidelines for selecting the types of decisions for merits review.’⁴⁷

⁴⁶ Ibid pp 73-74. These areas are largely consistent with the ten categories of decision-making power identified by the Queensland Electoral and Administrative Review Commission in its *Report on Review of Appeals from Administrative Decisions* August 1993.

⁴⁷ Electoral and Administrative Review Commission, *Report on Review of Appeals from Administrative Decisions*, Queensland, August 1993 6.117.

The Commonwealth Administrative Review Council's *prima facie* test for determining whether a decision made in the exercise of a statutory decision-making power is appropriate for review on the merits was whether the decision will, or is likely to, affect the interests of a person.⁴⁸ The ARC has prepared detailed guidelines to be used as a basis for determining which Commonwealth administrative decisions are suitable for merits review.⁴⁹ The Queensland Electoral and Administrative Review Commission also developed guidelines in relation to reviewability of Queensland administrative decisions.⁵⁰ The Western Australian Commission on Government has identified certain categories of decisions that it considers should be excluded from administrative review.⁵¹ Among the decisions which the various reports and commentators⁵² have suggested should *not* be reviewable are the following:

- policy decisions having a high political content;
- decisions that require extensive inquiry (such as inquiries or consultations involving many persons or public participation);
- decisions involving sensitive political issues which are likely to be scrutinised by Parliament;
- 'polycentric' decisions (that is, decisions relating to the allocation of a finite fund or resource, where review would have a substantial effect on persons other than the individual parties; for example, if a decision refusing a place under a quota system was overturned on review and the applicant was granted a place, another person would lose their place);
- decisions of a preliminary or procedural nature;
- decision for which no appropriate remedy can be given (such as emergency decisions, or decisions having effect for only a limited period of time, or decisions which cannot be reversed);
- decisions involving a discretion to impose a penal sanction, or of a law

⁴⁸ Administrative Review Council, *Seventeenth Annual Report 1992-1993*.

⁴⁹ *Ibid.*

⁵⁰ Electoral and Administrative Review Commission, *Report on Review of Appeals from Administrative Decisions*, Queensland, August 1993 6.215. The Queensland Legislative Assembly Parliamentary Committee for Electoral and Administrative Review disagreed with the jurisdiction proposed by EARC and recommended a more limited initial jurisdiction: *Report on Review of Appeals from Administrative Decisions*, May 1995 pp 21-46.

⁵¹ Commission on Government (Western Australia), *Report No 4*, July 1996 para 6.3.4.

⁵² See D O'Brien, "Tribunals and Public Policy: What Decisions Are Suitable for Review" (1989) No.58 *Canberra Bulletin of Public Administration* 86 p 93.

enforcement nature;

- decisions of a technical or expert nature (such as whether a particular drug should be administered to a particular patient);
- decisions by government business enterprises in relation to their commercial activities undertaken in a market where there is real competition;
- decisions where a right of appeal would too seriously impede the purpose of a statute;
- decisions involving the commencement of civil or criminal proceedings; and
- decisions relating to management of the public sector.

The general conclusion is that the appropriate jurisdiction of an administrative review tribunal can only be established by experience.⁵³

A supplementary question is who should decide which decisions will be reviewable? In some jurisdictions the task is given to an independent body. For example, the Commonwealth Administrative Review Council's functions including recommending as to which classes of administrative decisions should be reviewable. Others prefer to leave it to Parliament (in effect, to Cabinet) to determine which decisions should be reviewable.⁵⁴

In his review of New South Wales government administration, Peter Wilenski recommended that an Advisory Council on Public Administration should be established, its functions to include advising the government on matters such as the classes of administrative decisions which should progressively fall within the jurisdiction of the proposed Public Administration Tribunal.⁵⁵ He went on to suggest that because many public authorities will be reluctant to subject themselves to review, the Premier or Cabinet should have the ultimate determination of what the jurisdiction of the ADT will be.

6.3 Original decisions

An 'original decision' is a decision of the ADT made in relation to a matter over which it has jurisdiction to act as the primary decision-maker. The enactment which confers jurisdiction on the ADT can confer particular functions in relation to the decision on the

⁵³ P Wilenski, *Review of New South Wales Government Administration: Unfinished Agenda*, n 36, p 58.

⁵⁴ Commission on Government (Western Australia), *Report No 4*, July 1996 p 143.

⁵⁵ P Wilenski, *Review of New South Wales Government Administration: Unfinished Agenda*, n 36, 1982 p 61.

ADT. When making original decisions the procedures of the ADT will be governed largely by the principal Act.

When an application for a decision is made, the ADT will determine the application in accordance with the enactment conferring jurisdiction on it. If an enactment provides for appeal, a party to the application may appeal from the original decision to an Appeal Panel of the ADT. A decision of the Appeal Panel may be appealed to the Supreme Court on a question of law.

The initial original jurisdiction of the ADT arises from the integration of the Legal Services Tribunal, the Equal Opportunity Tribunal and the Veterinary Surgeons Disciplinary Tribunal into the ADT. The Equal Opportunity Tribunal inquires into complaints of contraventions of the provisions in the *Anti-Discrimination Act 1977* (NSW) prohibiting discrimination and vilification. The Legal Services Tribunal hears complaints against legal practitioners and conveyancers regarding unsatisfactory professional conduct or professional misconduct. The Veterinary Surgeons Disciplinary Tribunal inquires into complaints against veterinary surgeons.

On the basis of the Second Reading speech for the ADT Bill, further original jurisdiction for the ADT is likely to come from the integration of other adjudicative, and particularly professional disciplinary tribunals, into the ADT.⁵⁶ The Minister stated that the Government is considering integrating another 21 tribunals into the ADT, and that it is proposed to develop generic procedures for professional disciplinary matters as further professional tribunals are merged with the ADT.⁵⁷ The Minister in the Second Reading Speech explained the purpose of the ADT's original jurisdiction:

It is important that I place on record the reason why the Government believes that it is both necessary and appropriate to merge tribunals into the ADT. The growth of tribunals has fragmented responsibility for determining legal rights, leading to a lack of consistency and in some cases arbitrary decision making. It may also lead to poor resource allocation in relation to decision making. The variations in tribunals as to functions, operation and constitution are enormous. The criticisms which are made of tribunals are therefore general and do not apply to all tribunals. However, it is appropriate for me to set out some of the Government's concerns with the operation and proliferation of tribunals which justify the proposal to rationalise these bodies. Of significant concern is the fact that tribunals often exist within government departments and agencies in circumstances where clear conflict of interests may arise. In some cases the department which administers a tribunal may also have a role in prosecuting or defending a matter in the tribunal.

⁵⁶ See Appendix A for a list of some New South Wales tribunals bodies.

⁵⁷ Hon P Whelan, *NSWPD* (LA proof), 29/5/97 p 76.

This creates, at the very least, an impression of lack of independence which is some times all too real. It gives little confidence to an aggrieved person whose matter is being dealt with by the tribunal. Tribunals often do not have a commitment to or capacity to apply principles of natural justice. Indeed, it could be suggested that the extensive judicial attention to setting out rules of procedural fairness has been, at least in part, a response to the manner in which proceedings are often conducted in tribunals. The corollary to this is that tribunals may become arbitrary in their approach. The difficulty and cost of obtaining judicial review and the fact that they are not bound by their own precedents does little to generate consistency and coherence in decision making.

It must also be questioned whether the resources currently allocated to tribunals is an efficient use of government funds. Each tribunal tends to have its own infrastructure and administrative support. This has resulted in duplication of hearing rooms which may often go unused for significant periods and duplication of facilities in the form of registries and research and executive support. The proliferation of tribunals is not only an inefficient application of resources. It may also be inequitable for litigants between one tribunal and another as a result of different application fees and time frames for dealing with matters depending on how well the tribunal is resourced.⁵⁸

The ADT will be an unusual tribunal, in that one umbrella body will undertake both administrative review of decisions, and adjudication of disputes between private parties, and between individuals and professional bodies. However, there is some movement in Victoria towards a 'super-tribunal' - a single tribunal that decide a wide range of matters, not simply administrative merits review. A discussion paper has proposed greatly expanding the Victorian AAT and renaming it the Victorian Civil and Administrative Tribunal. The new tribunal would have eight divisions covering areas such as domestic buildings, anti-discrimination and consumer disputes as well as review of administrative decisions.⁵⁹

As the original jurisdiction of the ADT may expand to include determining a range of disputes between individuals, questions will arise as to which matters should be heard by specialist tribunals, which by a general tribunal, and which by the courts.

Arguments have been advanced against the wholesale amalgamation of existing specialised tribunals into a general tribunal. It has been said that there are some specialised tribunals with functions that are not readily compatible with the operation of general tribunals. There is a spectrum in tribunals from those that are largely court-like in nature (members who are legally trained, often judges, conducting formal oral hearings with legally represented applicants and applying the rules of procedural fairness) to those that are more informal and inquisitorial in nature. This latter kind of

⁵⁸ Ibid p 75-76.

⁵⁹ *Tribunals in the Department of Justice: A Principled Approach*, n 7.

tribunal has been described as more ‘functionally and subject-matter oriented’,⁶⁰ and includes guardianship boards and some professional review bodies. If the functions of such bodies are absorbed into a general, legally-oriented tribunal, they may lose the advantages of flexibility and informality that enable them to operate with sensitivity.⁶¹

This concern may be addressed by the capacity for each division to develop appropriate procedures. The Minister stated in his Second Reading speech that:

The tribunal will operate in different divisions and it will be possible for the divisions to operate relatively autonomously, with different rules and procedures which are appropriate to the functions exercised by each division. Even within divisions, the rules and procedures may vary depending on the nature of the particular matter before the tribunal.⁶²

The Minister in his Second Reading speech stated that there are some tribunals whose functions may not be suited to the ADT:

I do not suggest that the ADT will replace all existing tribunals. Clearly a number of tribunals have jurisdiction in relation to matters which do not come within the definition of administrative decisions. However, where there is a clear justification to retain a specialist tribunal it may be appropriate to provide that the ADT act as the appellate body. This again will ensure consistency in approach to administrative decisions and the application of the principles of procedural fairness to the decision making and review process....

Which disputes between individuals should be heard by the courts, and which are suitable for adjudication by tribunals? A Victorian discussion paper on consolidation of tribunals identified several factors that to be considered in allocating jurisdiction between courts and tribunals:⁶³

- *Extent of jurisdiction* - the advantages of tribunals are most evident when the amount of money in dispute is relatively small.
- *Volume of cases* - a high volume jurisdiction might indicate the need for a tribunal in order to achieve the expeditious disposition of cases.
- *Need for informality* - in some jurisdictions informality is essential because of the nature of the jurisdiction (for example, guardianship boards).

⁶⁰ P Johnston, ‘Recent Developments Concerning Tribunals in Australia’; n 32, p 324.

⁶¹ Ibid p 338.

⁶² Hon P Whelan, *NSWPD* (LA proof), 29/5/97 p 74.

⁶³ *Tribunals in the Department of Justice: A Principled Approach*, n 7.

- *Need for specialist expertise* - a tribunal may provide better access to specialist expertise for particular classes of cases.

6.4 Outsourced government services and government business enterprises

The role of administrative review is under contention where government services have been outsourced. Governments are increasingly contracting out the provision of services. When government provides a service directly to the public, a recipient of that service who is dissatisfied with some aspect of service delivery may have one or more administrative law remedies available. These may include the right to complain to an Ombudsman or the right to have the action reviewed by a court or tribunal. Private sector service recipients may no longer have access to administrative review when that service is contracted out.

Should decisions of private service providers carrying out government services be subject to some form of administrative review? The Commonwealth Administrative Review Council is currently examining whether the concepts and objectives of administrative law should be applied where government services are not delivered directly but are contracted out for delivery by the private sector and, if so, how those objectives should be achieved.⁶⁴

The question also arises as to the application of administrative law to the commercial activities of governments. The Commonwealth Administrative Review Council has concluded that Commonwealth administrative law statutes should prima facie apply to bodies that are government-controlled, including government business enterprises, but that government business enterprises should be exempt from the operation of Commonwealth administrative law statutes in relation to their commercial activities undertaken in a market where there is real competition.⁶⁵

7. CONCURRENT JUDICIAL REVIEW

There are situations where an administrative decision could be challenged both on its merits and as to its legality. For example, a decision that ignored an important piece of evidence may not be the correct or preferable decision; it may also be illegal as an improper exercise of the decision making power, for failing to take into account a relevant consideration. At present the legality of government decisions is determined by means of judicial review in the Supreme Court.

It now appears that the proposed ADT is to be given power to undertake judicial

⁶⁴ Administrative Review Council, *Twentieth Annual Report 1995-1996*

⁶⁵ Administrative Review Council, *Government business enterprises and Commonwealth administrative law*, Report No. 38, 1995

review.⁶⁶ This would allow the ADT to determine whether an administrator acted lawfully in making a decision, as well as whether the administrator reached the correct or preferable decision. The benefits of judicial review by the ADT were said by the Minister to be:⁶⁷

- it allows the tribunal in judicial review proceedings to focus on the substance of an applicant's grievance free of technical issues as to the availability of common law remedies;
- it provides for an array of flexible remedial powers; and
- by prescribing the most important grounds of review in summary form and reasonably comprehensive language, it has educational and presentational advantages for administrators and citizens, as to the matters that would render an administrative decision contrary to the law.

The Minister continued:

A further additional benefit is that the jurisdiction of the tribunal can be guided by developments in common law. The judiciary in Australia, and indeed throughout the common law world, has been active in recent years in expanding the scope of judicial review of administrative decisions and in setting principles of procedural fairness which govern the decision making process. It is essential to ensure that the jurisdiction of the ADT can be guided by such developments. It will also permit an additional option to provide for certain matters not considered suitable for merit review to nevertheless be reviewable in the ADT as a cheaper and quicker review mechanism than going to the Supreme Court.⁶⁸

The Second Reading speech indicates that the Government is considering codifying the law relating to judicial review for the purposes of judicial review by the ADT, as an alternative to common law judicial review by the Supreme Court. As indicated above, the grounds for judicial review have been developed case by case by the courts, initially in the United Kingdom and then in Australia, and the common law is complex and often uncertain. The New South Wales Law Reform Commission stated that: “the law relating to judicial review is complex, technical and lacking in consistency”.⁶⁹

The Commonwealth and Queensland have enacted legislation codifying the grounds of

⁶⁶ For a brief overview of judicial review, see H Figgis, *An Administrative Appeals Tribunal for New South Wales*, n 1.

⁶⁷ Hon P Whelan, *NSWPD* (LA proof), 29/5/96 p 75.

⁶⁸ Hon P Whelan, *NSWPD*, 29/5/97.

⁶⁹ New South Wales Law Reform Commission n 3 p 29.

judicial review.⁷⁰ The *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5 sets out those grounds, summarised as follows:

- (a) the rules of natural justice were breached;
- (b) procedures required by law were not observed;
- (c) the decision-maker did not have jurisdiction to make the decision;
- (d) the decision was not authorised by the relevant enactment;
- (e) the making of the decision was an improper exercise of power;
- (f) the decision involved an error of law;
- (g) the decision was induced or affected by fraud;
- (h) there was no evidence or other material to justify the making of the decision;
- (i) the decision was otherwise contrary to law.

8. CONCLUSION

If the Administrative Decisions Tribunal Bill 1997 and its cognate legislation is passed, it will be a major reform of administrative law in New South Wales. For the first time there will be a program for systematic introduction of a right to reasons for administrative decisions, and a right to review of the merits of decisions by an independent tribunal. This, it could be argued, is an important development in providing open and accountable government. The consolidation and rationalisation of tribunals will hopefully also lead to greater consistency in decision making and a more efficient allocation of resources.

The proposed Administrative Decisions Tribunal is, however, more than an administrative review tribunal. The ADT will also have power to make some original decisions. In particular, it will have jurisdiction to determine some disputes between private parties and between individuals and professional disciplinary bodies. The Government is also proposing to enable the ADT to undertake judicial review of administrative decisions. These additional jurisdictions move the ADT towards becoming a general dispute-resolving body, a kind of 'super-tribunal'. This aspect of the ADT may increase as further jurisdictions are added to it. There is some movement in Australia towards establishing general tribunals with a wide range of review or decision-making powers. For example, in Victoria it has been proposed that the AAT be renamed the Victorian Civil and Administrative Tribunal, with a greatly expanded jurisdiction, including disputes between individuals.

The success of tribunals raises the question of the future role of the court system in New South Wales. The problems of court delay and expense are well known. If the ADT develops into a centralised, accessible tribunal with a wide jurisdiction to resolve administrative and other civil disputes, will it attract jurisdiction away from the courts? Will the courts eventually end up as the forum for large commercial and property

⁷⁰ *Administrative Decisions (Judicial Review) Act 1977* (Cth); *Judicial Review Act 1991* (Qld). See further H Figgis, *An Administrative Appeals Tribunal for New South Wales*, n 1, pp 28-29.

disputes and criminal matters? It has been pointed out that the very features which make tribunals attractive - speedy processes, minimal fees, informal procedures and rules of evidence, limits on legal representation - tend to limit the procedural safeguards developed by the courts to protect the rights of the parties.⁷¹ Further, tribunals form part of the executive government, not the judiciary, and so in theory are not as independent as are the courts. Where tribunals determine disputes between parties, the de facto separation of powers in New South Wales may be eroded. In the light of the *Kable*⁷² case, questions may arise as to the application of the principle of the separation of powers in New South Wales, and the effect of such a principle on the jurisdiction of tribunals to determine disputes between private parties.

However, the introduction of the ADT should provide relatively fast, accessible administrative review, and consolidate a range of existing tribunals. The creation of such a centralised tribunal mean that it is likely to become an important part of the administration of justice in New South Wales.

⁷¹ *Tribunals in the Department of Justice: A Principled Approach*, n 7, p 5.

⁷² *Kable v Director of Public Prosecutions (NSW)* (1996) 138 ALR 577. See G Griffith, *The Kable case: Implications for New South Wales*, Parliamentary Library Briefing Paper 27/96.

APPENDIX A

SOME NEW SOUTH WALES TRIBUNALS

- Appeal Panels under various enactments (eg *Industrial and Commercial Training Act 1989*)
- Agricultural Arbitration Committees (*Agricultural Tenancies Act 1990*)
- Boards of Review for under various enactments (eg *Stamp Duties Act 1920*; *Payroll Tax Act 1971*)
- Board of Reference Construction Safety (*Construction Safety Act 1912*)
- Board of Surveyors (*Surveyors Act 1929*)
- Boxing Appeals Tribunal (*Boxing and Wrestling Control Act 1986*)
- Building and Construction Industry Long Service Payments Committee (*Building and Construction Industry Long Service Leave Payments Act 1986*)
- Business Franchise Licence Fees (Petroleum Products) Appeals Tribunal (*Business Franchise Licences (Petroleum Products) Act 1987*)
- Business Franchise Licence Fees (Tobacco) Appeals Tribunal (*Business Franchise Licences (Tobacco) Act 1987*)
- Casino Control Authority (*Casino Control Act 1992*)
- Chiropractors and Osteopaths Tribunal (*Chiropractors and Osteopaths Act 1991*)
- Coal Compensation Board (*Coal Ownership (Restitution) Act 1990*)
- Commercial Tribunal (*Commercial Tribunal Act 1984*)
- Community Schemes Board (*Community Land Management Act 1989*)
- Community Services Appeals Tribunal (*Community Services (Complaints, Appeals and Monitoring) Act 1993*)
- Community Welfare Appeals Tribunal (*Community Welfare Act 1987*)
- Compensation Court (*Compensation Court Act 1984*)
- Consumer Claims Tribunal (*Consumer Claims Tribunals Act 1987*)
- Contract of Carriage Tribunal (*Industrial Relations Act 1996*)
- Disputes Committees under various enactments (eg *Motor Dealers Act 1974*)
- Dust Diseases Tribunal (*Dust Diseases Tribunal Act 1989*)
- Equal Opportunity Tribunal (*Anti-Discrimination Act 1977*)

- Fair Rents Board (*Landlord and Tenant (Amendment) Act 1948*)
- Gaming Tribunal (*Gaming and Betting Act 1912*)
- Government Pricing Tribunal (*Government Pricing Tribunal Act 1992*)
- Government and Related Employees Appeal Tribunal (*Government and Related Employees Appeal Tribunal Act 1980*)
- Greyhound Racing Control Board (*Greyhound Racing Authority Act 1985*)
- Guardianship Board (*Guardianship Act 1987*)
- Harness Racing Appeals Tribunal (*Harness Racing New South Wales Act 1977*)
- Health Care Complaints Commission (*Health Care Complaints Act 1993*)
- Homefund Advisory Panel (*Homefund Restructuring Act 1993*)
- Independent Commission Against Corruption (*Independent Commission Against Corruption Act 1988*)
- Independent Pricing and Regulatory Tribunal (*Independent Pricing and Regulatory Tribunal Act 1992*)
- Land and Environment Court (*Land and Environment Court Act 1979*)
- Legal Aid Review Committees (*Legal Aid Commission Act 1979*)
- Legal Services Tribunal (*Legal Profession Act 1987*)
- Licensing Court (*Liquor Act 1982*)
- Liquor Administration Board (*Liquor Act 1982*)
- Local Government Boundaries Commission (*Local Government Act 1993*)
- Local Government Grants Commission (*Local Government Act 1993*)
- Local Government Remuneration Tribunal (*Local Government Act 1993*)
- Local Government Pecuniary Interest Tribunal (*Local Government Act 1993*)
- Local Land Boards (*Crown Lands Act 1989; Western Lands Act 1901*)
- Marine Appeals Tribunal (*Commercial Vessels Act 1979*)
- Medical Tribunal (*Medical Practice Act 1992*)

- Mental Health Review Tribunal (*Mental Health Act 1990*)
- Motor Vehicle Repair Disputes Committee (*Motor Vehicle Repairs Act 1980*)
- New South Wales Crime Commission (*New South Wales Crime Commission Act 1985*)
- Nurses Tribunal (*Nurses Act 1991*)
- Parliamentary Remuneration Tribunal (*Parliamentary Remuneration Act 1989*)
- Parole Board (*Sentencing Act 1989*)
- Police Tribunal of New South Wales (*Police Service Act*)
- Property Services Council (*Property Services Council Act 1990*)
- Psychosurgery Review Board (*Mental Health Act 1990*)
- Racing Appeals Tribunal (*Racing Appeals Tribunal Act 1983*)
- Residential Tenancies Tribunal (*Residential Tenancies Act 1987*)
- Review Panels under various enactments (e.g. *Gas Supply Act 1996*, *Passenger Transport Act 1990*; *Animal Research Act 1985*)
- Schools Appeals Tribunal (*Education Reform Act 1990*)
- Share Management Fisheries Appeal Panel (*Fisheries Management Act 1994*)
- Statutory and Other Offices Remuneration Tribunal (*Statutory and Other Offices Remuneration Act 1975*)
- Strata Titles Board (*Strata Titles Act 1973*)
- Tow Truck Industry Council (*Tow Truck Act 1989*)
- Transport Appeal Boards (*Transport Appeal Boards Act 1980*)
- Veterinary Surgeons Disciplinary Tribunal (*Veterinary Surgeons Act 1986*)
- Victims Compensation Tribunal (*Victims Compensation Act 1987*)
- Wardens' Court (*Mining Act 1992*)