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

REPORT ON THE JURISDICTION AND OPERATION OF THE ADMINISTRATIVE DECISIONS TRIBUNAL

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Table of Contents

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Chairman's Foreword

This is the final report by the Committee on the review of the jurisdiction and operation of the Administrative Decisions Tribunal (ADT), pursuant to s.146 of the *Administrative Decisions Tribunal Act 1997.*

The Committee conducted the inquiry in two phases and reported to the Parliament on the first stage in a discussion paper, which contained a range of proposals aimed at expanding the jurisdiction of the ADT to the full extent intended by the Parliament. Issues relating to the operation of the ADT, put to the Committee in submissions and evidence, also were discussed in the report. The operational proposals suggested by the Committee dealt with the role of the Rule Committee, representation of applicants, alternative dispute resolution, mediation, tribunal membership and resources.

The Committee is pleased to report that the proposals it made in relation to the ADT's operations were supported by the ADT and, wherever possible, were implemented. A number of the proposals requiring legislative action have been put forward as recommendations in this final report. The Committee's examination of operational issues was directed at ensuring:

- that the ADT's proceedings are informal, flexible and free from excessive legalism;
- that mediation and alternative dispute resolution are actively used, where appropriate;
- that there is adequate access for, and assistance to, applicants;
- consistent and transparent decision-making;
- there is adequate consultation of user groups in the ADT's rule-making process;
- a strong core full-time membership;
- appropriate panel composition and specialisation;
- open and transparent selection and appointment of tribunal members;
- improved standards of professional development and training for tribunal members; and
- adequate resources for the ADT to perform its functions.

These aims were set against the need to balance the ADT's independence and accountability.

As a result of the support given to the Committee's operational proposals, the second stage of the inquiry focussed on outstanding jurisdictional issues. Following the distribution of the discussion paper, the Committee held a second phase of public hearings at which evidence was taken from the President of the Victorian Civil and Administrative Tribunal and the President of the New South Wales Guardianship Tribunal, culminating in final evidence from the President of the Administrative Decisions Tribunal.

On the basis of the submissions received and evidence taken, the Committee remains of the view that the ADT's jurisdiction requires further consolidation if it is to realise its full potential as an integrated tribunal. It was clear at the time of the ADT's establishment, that the Parliament intended that a staged integration of tribunals into the ADT should occur. In relation to the external review of administrative decisions, the Committee notes that a systematic approach to identifying merits reviewable decisions does not appear to have occurred.

This report reiterates the proposals contained in the discussion paper for:

- the introduction of legislation to merge separate tribunals with the ADT, unless such inclusion can be demonstrated to be inappropriate or impractical;
- development of explicit criteria to determine administrative decisions which should fall within the ADT's external merits review jurisdiction;
- recognition of a presumption that all administrative decisions provided for under new legislation, which meet the criteria, should be subject to external merits review by the ADT.

The report also recommends the creation of an Administrative Review Advisory Council (ARAC): an independent body to provide advice on the development of the ADT and to generally oversight the administrative law system in New South Wales. Pending the introduction of legislation to establish the ARAC, the Committee has recommended that the Attorney General undertake the functions proposed for ARAC, with the assistance of a Working Group comprising the same membership as that proposed for the ARAC.

A full assessment of the potential for merging existing tribunals into the ADT will involve an examination of tribunals across a range of portfolio areas. Consequently, the Committee has recommended that, pending the establishment and appointment of the ARAC, the Law Reform Commission should review this issue.

I would like to thank those individuals and organisations who made submissions or gave evidence to the Committee's inquiry, the Members of the Committee and the staff of the Secretariat, for their participation and assistance during the review.

Paul Lynch MP
Chairman

Conduct of the Inquiry

On 8 June 2000, the Parliament of New South Wales referred to the Committee on the Office of the Ombudsman and the Police Integrity Commission an inquiry into the operation and jurisdiction of the New South Wales Administrative Decisions Tribunal (ADT), pursuant to s.146 of the *Administrative Decisions Tribunal Act 1997*. The Committee was required to report to both Houses of the Parliament on the results of its inquiry as soon as practicable after the expiry of 18 months from the establishment of the ADT. The Committee conducted the inquiry in two phases, a discussion phase and final evidence, reporting to the Parliament at the end of each phase.

Stage 1: Discussion

The discussion phase of the inquiry commenced with a public call for submissions on 1 July 2000. A list of the submissions received is attached at Appendix 1.

On 11 October 2000, the Committee resolved to explore further the issues raised in submissions and took evidence from the following individuals at a public hearing held on 17 November 2000:

Judge Kevin O'Connor	President NSW Administrative Decisions Tribunal
John North	President Law Society of New South Wales
Gregory Kirk Amanda Cornwall	Principal Solicitor Senior Policy Officer Public Interest Advocacy Centre
Christopher Puplick Angelene Falk	President Senior Legal Officer Anti-Discrimination Board of New South Wales
Alan Robertson SC Peter Garling SC	Barrister Barrister - representing the New South Wales Bar Association and NSW Bar Council

The Committee subsequently reported on this part of the inquiry by issuing a discussion paper to interested persons, appropriate departments and other relevant bodies. The ongoing conduct of the inquiry and the need to obtain further evidence was determined in light of the submissions made in response to the discussion paper. This approach to the conduct of the inquiry was intended to promote fuller debate of the issues raised in submissions as well as other issues relating to the operation and jurisdiction of the ADT.

Discussion Paper – The discussion paper comprised three major sections dealing with the ADT's jurisdiction, operation, and the measurement and review of its performance. It gave an outline of the major issues which the Committee considered central to the inquiry and focussed on priority areas. The Committee did not take an exhaustive approach by discussing all the issues raised in submissions and evidence.

Following distribution of the Discussion Paper to all Ministers, tribunals, the authors of submissions, previous witnesses, relevant departments and statutory offices, and interest groups[1], the Committee received responses from:

- The Administrative Decisions Tribunal
- The Guardianship Tribunal
- The Independent Pricing and Regulatory Tribunal
- The New South Wales Thoroughbred Racing Board, Harness Racing New South Wales and The New South Wales Greyhound Racing Authority (joint submission)
- The Local Government Pecuniary Interest Tribunal
- The Victorian Civil and Administrative Tribunal.

After considering the responses, the Committee formed the view that further evidence was needed on issues relevant to the ADT's jurisdiction, in particular, proposals to extend jurisdiction. A public hearing was held on 21 August 2001, at which the Committee took evidence from Justice Murray Kellam, President of the Victorian Civil and Administrative Tribunal and Mr Nick O'Neill, President of the Guardianship Tribunal of New South Wales.

Stage 2: Final evidence

Judge O'Connor, President of the NSW ADT, gave his final evidence to the Committee at a public hearing on 19 October 2001. At this stage of the inquiry, Judge O'Connor had the benefit of receiving copies of submissions to the review, previous evidence, the discussion paper and responses made to it. This hearing concluded the evidentiary phase of the inquiry.

The report on the final phase of the inquiry into the jurisdiction and operation of the ADT is divided into five chapters. The first chapter deals with the origins of the ADT and the development of its current jurisdiction. The second chapter covers recent tribunal development in comparative jurisdictions. For ease of reference, Chapter 3 deals with the first phase of the Committee's inquiry and recounts evidence taken at this early stage and major sections of the discussion paper. Chapter 4 involves an examination of the discussion paper proposals concerning the ADT's jurisdiction. It outlines key responses and evidence on the proposals and concludes with the Committee's comments and recommendations. Operational issues are dealt with in the fifth and final chapter of the report which gives the Committee's conclusions and recommendations on this aspect of the inquiry.

[1] See Appendix 2 for a full mailing list for the Discussion Paper.

Chapter 1

BACKGROUND

Introduction

At the time of the formation of the ADT in 1997, the then Attorney General, the Hon. J.W. Shaw, QC, MLC, indicated that in the following eighteen month period the Government would review all administrative decisions made under State legislation to determine which should be reviewable by the ADT. Such a comprehensive review of administrative decisions appropriate for review by the ADT has yet to occur. Currently, NSW continues to have a large number of tribunals, and statutory adjudicative and review bodies, that operate separately and independently of the ADT. Furthermore, there has been no assessment of the suitability of these bodies for integration into the ADT.

1.1 Origins of the ADT

In 1973, the NSW Law Reform Commission, in a report entitled *Rights of Appeal from Decisions of Administrative Tribunals and Officers*, recommended that a Public Administration Tribunal be established to hear administrative appeals in NSW. The recommendation was prompted by the apparent piecemeal development of a variety of tribunals in NSW to deal with a variety of issues, with no apparent comprehensive plan for their development. The Commission observed:

> To us, a fragmented administrative appeals system is undesirable: there is little chance of any unifying influence entering the administrative process and decisions must lack consistency. 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.[2]

The Law Reform Commission also recommended the appointment of an Ombudsman's office and a Commissioner for Public Administration, together with the establishment of an Advisory Council on Public Administration. The Office of the Ombudsman was established in 1974 under the *Ombudsman Act 1974* to investigate complaints about the conduct of public authorities.

In 1977, the *Review of New South Wales Government Administration: Directions for Change*, the so-called Wilenski report, supported the Law Reform Commission's proposal for a Public Administration Tribunal.[3] Subsequently, Dr Wilenski reiterated this recommendation in his further report of 1982, *Review of New South Wales Government: Unfinished Agenda*.[4]

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2 NSW Law Reform Commission, *Report on the Rights of Appeal from Decisions of Administrative Tribunals and Officers*, (LRC 16 February 1973), p.69.

3 P.Wilenski, *Review of New South Wales Government Administration: Directions for Change*, Interim Report, 1977, para 20.16.

4 P.Wilenski, *Review of New South Wales Government Administration: Unfinished Agenda*, Further Report, 1982, p.194.

In 1989, a discussion paper released by the NSW Attorney General's Department entitled *Discussion Paper on Civil Procedure* recommended establishing an Administrative Appeals Tribunal (AAT) to review administrative decisions on their merits. The discussion paper observed:

> The advantages 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.[5]

The *Administrative Decisions Tribunal Bill* was introduced to the NSW Legislative Assembly on 29 May 1997. Following passage through the Parliament, the Bill received Royal Assent on 10 July 1997 and the ADT commenced operations on 6 October 1998. The ADT's jurisdiction has developed incrementally with the General, Equal Opportunity and Legal Services Divisions starting operations on the date of commencement, followed by the Community Services Division on 1 January 1999, the Retail Leases Division on 1 March 1999 and the Revenue Division[6] on 1 July 2001.[7]

1.2 The ADT's Jurisdiction

The ADT's jurisdiction can be divided into two areas:

1. Original Jurisdiction, which involves making a decision in the first instance in relation to a matter in dispute; and
2. Review Jurisdiction, which involves the external review on the merits of classes of administrative decisions as provided for in the enabling legislation under which the original decision is made.

Original Jurisdiction

The original jurisdiction of the ADT was established primarily through the merger and transfer of jurisdiction to the ADT of a number of pre-existing tribunals: the Equal Opportunity Tribunal, the Legal Services Tribunal, the Boxing Appeals Tribunal, the Veterinary Surgeons Disciplinary Tribunal, the Community Services Appeal Tribunal and the Schools Appeal Tribunal. Consideration was also given to the integration of a further 21 tribunals.[8] Further legislation, commencing on 1 March 1999, transferred to the ADT the Commercial Tribunal's jurisdiction in relation to applications for review of licensing decisions made by the Director General, Department of Fair Trading, and retail leases disputes arising under the Retail Leases Act 1994. The Consumer Credit Code jurisdiction of the Commercial Tribunal was transferred to the former Fair Trading Tribunal.

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5 J.Dowd, *Discussion Paper on Civil Procedure*, (NSW Attorney General's Department, December 1989), p.20.

6 The *Administrative Decisions Tribunal Legislation Amendment (Revenue) Act 2000* provided for the establishment of a Revenue Division which commenced on 1 July 2001, to review decisions of the Chief Commissioner of State Revenue, subject to certain exceptions.

7 The *Administrative Decisions Tribunal Legislation Further Amendment Act 1998* provided for the establishment of the Occupational Regulation Division and the allocation of the ADT's functions under a range of statutes to the new Division. However, the relevant sections of the Act have not been proclaimed to commence and the General Division currently deals with occupation regulation matters for which the ADT has jurisdiction e.g. review of security industry licensing.

8 The Hon. J.W. Shaw, QC, MLC Second Reading LC Hansard, 27 June 1997, p.11281.

In his second reading speech to the Legislative Council on 27 June 1997, the Hon. J.W. Shaw, QC, MLC, the then Attorney General, gave the following reason for the view that it was 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.
>
> This creates, at the very least, an impression of lack of independence which is sometimes all too real. It gives little confidence to an aggrieved person whose matter is being dealt with by the tribunals.
>
> 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.[9]

He specifically noted that the ADT would not replace all existing tribunals, on the grounds that a number 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', to ensure consistency of administrative decision making and the application of procedural fairness principles to the decision making and review processes.[10]

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9 ibid, pp.11281-2.

10 ibid, p.11282.

In the area of professional disciplinary matters, the Attorney General referred to the proposed Legal Services Division of the ADT and stated that:

> As further professional disciplinary tribunals are merged with the ADT, it is proposed to develop generic procedures for professional disciplinary matters as a separate chapter of the *ADT Bill* to maximise a consistency of approach to essentially similar matters.[11]

At present the ADT's original decisions jurisdiction can be basically divided into the civil claims work of the Equal Opportunity and Retail Leases Division and professional discipline proceedings, that is, the Legal Services Division (for legal practitioners and licensed conveyancers) and the General Division (in respect of veterinary surgeons).

Review Jurisdiction

The review jurisdiction of the ADT involves the relevant division of the ADT reconsidering an administrator's decision based on all the material on which the administrator has relied, the administrator's statement of reasons for the decision, and any further submissions and relevant evidence. The ADT may affirm the administrator's decision if it is held to have been correct. However, if the ADT considers the administrator's decision to have been wrong, it may vary the decision or set it aside. A decision that is set aside may be remitted to the administrator for reconsideration in light of the ADT's views. Appendix 3 provides a list of the ADT's enabling legislation and legislation conferring jurisdiction. The divisions of the ADT involved in external merits review include the General Division, the Community Services Division and the Revenue Division.

Despite the wide range of categories of reviewable decisions cited in the Minister's second reading speech, the ADT has advised that only a relatively small proportion of the 72 or more acts which confer jurisdiction on the ADT have given rise, in practice, to applications for review. The principal categories of review applications to date relate to: security industry licensing; passenger transport licensing; commercial fishing licensing; refusals under the *Freedom of Information Act*; pawnbroker and second hand dealer licensing; driving suspensions following alcohol readings exceeding the prescribed limit; school registration disputes; and decisions as to funding of community service providers.[12]

Judge O'Connor gave evidence to the Committee that, although the Community Services, Agriculture, Transport and Attorney General's portfolios are represented in the schedule of jurisdictions under the *ADT Act*, portfolios that have significant administrative decisions remain outside the ADT's jurisdiction. He noted that the *ADT Act* does not provide the same level of comprehensive coverage as is found under the legislation establishing the Commonwealth Administrative Appeals Tribunal or the Victorian Civil and Administrative Tribunal.[13]

When introducing the *ADT Bill* into the Legislative Council in June 1997, the then Attorney General, the Hon. J.W. Shaw, QC, MLC, indicated that in the following eighteen month period the Government would review all administrative decisions which are made under State legislation to determine which should be reviewable by the ADT.

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11 ibid.

12 ADT Submission op.cit. para.13.

13 Evidence 17/11/00.

The following categories were given as a guide:

1. The granting or refusal to grant a licence, permit, registration, authority or approval for an activity or item.
2. Suspension, termination, revocation or cancellation of a licence, permit or authority.
3. Service of a notice directing or requiring the doing of an act or the ceasing to do of an act in order to comply with a legislative requirement.
4. Determination of an entitlement or eligibility for a (financial or like) benefit or assistance.
5. Satisfying of safety or other standards.
6. Exclusion of persons from property, places or institutions.
7. Determination of an entitlement to moneys.
8. Remittance of penalties, interest, debts or fees.
9. Consenting to, or refusal of consent, and the imposition of conditions relating to lending guarantees, or leasing.
10. The selection or appointment of receivers or administrators.
11. The acquisition, disposal or dealing with property.
12. Certification or refusal to certify matters.
13. The protection of vulnerable persons.[14]

These categories were described as 'indicative for the purpose of assisting in identifying decisions amenable to inclusion in the jurisdiction of the ADT'. The list was considered neither exhaustive nor prescriptive of matters for inclusion.[15]

[14] The Hon. J.W. Shaw, QC, MLC Second Reading LC Hansard, 27/06/97 p.11279-80.
[15] ibid, p.11280.

Chapter 2

COMPARATIVE JURISDICTIONS

This chapter provides a brief overview of current developments in tribunals and tribunal services within Australia, the United Kingdom and Canada. Of particular relevance to the Committee's review of the ADT is the general trend towards rationalisation of tribunals and standardisation of tribunal services. The Committee also observed an increased focus on tribunal governance.

2.1 The Victorian Civil and Administrative Tribunal

In October 1996, the Victorian Department of Justice released a discussion paper entitled *Tribunals in the Department of Justice: A Principled Approach* for public comment. The paper proposed an improvement to the tribunal system in Victoria through the creation of a large, judicially-led amalgam of tribunals. This would have many benefits, including improved access to justice, a streamlining of the administrative structures of tribunals, the introduction of common procedures for all matters, and the more efficient use of tribunal resources.

Subsequently, in 1998, the Victorian Government passed the *Victorian Civil and Administrative Tribunal Act 1998*, amalgamating 14 independently operated boards and tribunals in Victoria to form the Victorian Civil and Administrative Tribunal (VCAT). VCAT encompassed the jurisdiction of the former:

- Administrative Appeals Tribunal;
- the Anti-Discrimination Tribunal;
- the Credit Tribunal;
- the Domestic Building Tribunal;
- the Estate Agents Disciplinary and Licensing Appeals Tribunal;
- the Guardianship and Administration Board;
- the Residential Tenancies Tribunal; and
- the Small Claims Tribunal.

VCAT also assumed the licensing appeals function and the inquiry and disciplinary functions of the Motor Car Traders Licensing Authority, the Prostitution Control Board and the Travel Agents Licensing Authority, together with the licensing appeals and disciplinary functions of the Liquor Control Commission.

Since 1998, the VCAT has assumed jurisdiction to hear and determine disputes under a range of additional acts relating to retail tenancies, fair trading, registration of Chinese medicine, privacy, registration of psychologists and the first home owners grant.

The tribunal has judicial leadership. Its President is a Supreme Court Judge and it has two Vice Presidents, each County Court Judges. It is divided into two divisions, a Civil Division and an Administrative Division, each headed by one of the Vice-Presidents. Each of the judges and each member of the tribunal has a fixed five year term of office.

The members, many of whom are sessional, are from a range of professions including lawyers, doctors, accountants, engineers, planners, academics and so on.[16]

In a paper entitled "Developments in Administrative Tribunals in the Last Two Years", the President of VCAT, the Hon Justice Kellam, indicated his belief that the amalgamation has brought many benefits.

Firstly, Justice Kellam suggested that VCAT is far more independent than many of the individual tribunals were in the past. In particular, each member has a five year term, funded from VCAT's own independent budget, with selection based on merit. In addition, Justice Kellam noted that the Tribunal had instant access to the Attorney General of the day:

> This is a significant issue in terms of budget and other issues of principle which affect the Tribunal. I understand that many of the constituent parts of VCAT when they were individual tribunals had real difficulty communicating with the government of the day. One example of the increased status of the Tribunal is that the President of VCAT sits on a Court Consultative Council with the Chief Justice, the President of the Court of Appeal, the Chief Judge of the County Court, the Chief Magistrate, the Attorney General and the Head of the Department of Justice. Access to such consultative bodies was not available to smaller tribunals.[17]

Secondly, Justice Kellam has indicated his belief that VCAT has achieved substantial improvement in processes and efficiency. For example, he argued that formerly separate members from separate tribunals sat in a provincial centre at the same time, incurring separate transport and accommodation costs. However, with the formation of the VCAT, a number of members can now sit across jurisdictions, avoiding the need to send separate tribunal members to separate hearings.[18]

Thirdly, Justice Kellam noted that VCAT has established a Professional Development and Training Committee, which helps organise training for members on issues such as ethics, decision-writing, cultural differences and mediation. The VCAT budget includes specific funding for training. Justice Kellam continued:

> The issue of professional training and development is a significant one. The development and maintenance of community respect for Tribunal decisions is closely related to that issue. I believe that resources for adequate professional development are more likely to be provided in the circumstances of VCAT than to the numerous smaller tribunals which existed previously.[19]

Fourthly, Justice Kellam suggested that the range of skills and experience brought together under VCAT has allowed for cross fertilisation of management and hearing culture across lists, and allows members to broaden their experience and knowledge, providing greater career flexibility and job satisfaction.[20]

Finally, Justice Kellam argued that VCAT has bought substantial benefits to the public. Not only is there the ease provided by having access to a single tribunal when making

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16 The Hon Justice Kellam, "Developments in Administrative Tribunals in the Last Two Years", A Paper presented at the Public Law Weekend at the Centre for International and Public Law, (Canberra, 11 November 2000), pp.5-7.

17 Ibid, pp.8-9.

18 Ibid, pp.9-10.

19 Ibid, pp.10-11.

20 Ibid, p.11.

an application, but the ability of members to sit across various issues has increased the access of rural and regional Victorians, in particular, to the tribunal.[21]

2.2 The Commonwealth Administrative Appeals Tribunal

In 1971, the Kerr Committee Report[22] recommended the establishment of a general Commonwealth Administrative Appeals Tribunal. The Government accepted this recommendation, and formed the Commonwealth Administrative Appeals Tribunal (AAT) under the *Administrative Appeals Tribunal Act 1975*. This act also established the Administrative Review Council (ARC) to oversee the Commonwealth administrative law system.

In 1993, the Government requested that the ARC conduct a review of the Commonwealth Tribunal System, including the AAT. Concern had been raised that the growing number of tribunals afforded the opportunity for the development of disparate, if not conflicting, practices and procedures in the review of administrative decisions. In addition, there were some concerns regarding differences in terms and conditions of appointments to tribunals.

In September 1995, the ARC tabled the results of its review in a report entitled *Better Decisions: Review of Commonwealth Merits Review Tribunals*. The ARC recommended that the existing range of specialist tribunals and the AAT should be united as a single review tribunal comprising a number of specialist divisions to hear first-tier review cases. In addition, the report recommended that there be a single Review Division of the Commonwealth AAT to review all cases that raise a substantial question of law.[23]

Eighteen months later in March 1997, the Attorney General announced the Government's intention to amalgamate the various separate Commonwealth specialist tribunals into the Commonwealth AAT. Subsequently, in September 1997, the Attorney General also referred amended terms of reference to the Australian Law Reform Commission (ALRC) for a further review of the structure and management of federal tribunals.

The ALRC presented its subsequent report, *Managing Justice: A Review of the Federal Civil Justice System* in January 2000,[24] again making a number of recommendations similar to *Better Decisions* in relation to the practices, procedures and case management in federal merit review tribunals.

On 28 June 2000, the Government introduced the *Administrative Review Tribunal Bill 2000* into the House of Representatives. The purpose of the Bill was to establish the Commonwealth Administrative Review Tribunal, to replace various tribunals such as the AAT, the Social Security Appeals Tribunal, and the Migration Review Tribunal. The Bill also proposed reestablishing the ARC.

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21 Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, (1995), pp.12-13.

22 Parliamentary Paper No.144 of 1971. The Kerr Committee was established in 1968 to examine the available methods of review of Federal Government decisions.

23 Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, op.cit. p.142.

24 www.austlii.edu.au/other/alrc/publications

The Senate Legal and Constitutional Legislation Committee subsequently conducted an inquiry into the provisions of the *Administrative Review Tribunal Bill 2000* and cognitive bills. While most witnesses to the inquiry supported the proposal for amalgamation of tribunals, there were concerns expressed about the possibility of adverse effects on the quality of administrative review. In particular, it was claimed that the anticipated efficiencies and cost savings would be gained at the expense of:

1. Lack of independence of the proposed ART from government agencies;
2. Loss of multi-member/multi-skilled review panels;
3. Reduced quality of review;
4. Loss of two-tiered external review;
5. Reduced procedural fairness; and
6. Restriction on consumer representation despite increased participation of government agencies.

Subsequently, the *Administrative Review Tribunal Bill 2000* and cognitive bills were rejected in the Senate on 26 February 2001. In the Senate Committee report on the Bills, the Opposition and minor parties noted that they support the merging of separate administrative review tribunals, and the recommendations of the *Better Decisions* Report. At the same time, however, they indicated their belief that the bills before the Senate placed too great emphasis on achieving efficiencies and cost savings, at the expense of an efficient and fair merit review system.[25]

The Committee understands that the Federal Government has not taken any further steps since the rejection of the *Administrative Review Tribunal Bill 2000* in the Senate.

2.3 Review of the Criminal and Civil Justice System in Western Australia

In September 1997, the former WA Attorney General requested that the Law Reform Commission of WA conduct a review of the criminal and civil justice system in Western Australia. The report of the Law Reform Commission of Western Australia, entitled *Review of the Criminal and Civil Justice System in Western Australia*, was published in September 1999.

In its report, the Law Reform Commission recommended a Western Australian Civil and Administrative Tribunal (WACAT) should be established to amalgamate the adjudicative functions of existing boards and tribunals, except in industrial relations and workcover areas.

Furthermore, it was recommended that the WACAT's jurisdiction should extend beyond administrative review or appeals to other adjudicative functions currently determined by tribunals, boards and lower civil courts, including the Small Claims Tribunals, the Commercial Tribunal, the Residential Tenancies Tribunal and the Small Disputes Division of the Local Court.

[25] *Inquiry into the Provisions of the Administrative Review Tribunal Bill 2000 and The Provisions of the Administrative Review Tribunal (Consequential and Transitional Provisions).* www.aph.gov.au/senate/committee/legcon_ctte/

The Law Reform Commission also proposed that administrative decisions of boards and tribunals should be the subject of internal review by the WACAT, rather than a court.[26]

The Committee understands that the recommendations of the Law Reform Commission have been accepted in full by the Western Australia Government, and are currently the subject of further review by the Policy and Legislation Division of the Ministry of Justice. This includes the specific implementation of the WACAT, possibly involving the merger of over 40 boards and tribunals.

2.4 The Council of Australasian Tribunals

In June 2002, the Council of Australasian Tribunals (COAT) was established to provide an informal forum for tribunals from Australia and New Zealand to examine and compare ideas, working methods, organisation and management, member training and support programs.[27]

The proposal for a body of this type originated with the Commonwealth Administrative Review Council (ARC) and also was supported by the Australian Law Reform Commission.[28] It was further developed and endorsed by a meeting of Commonwealth, State and Territory tribunals heads, convened by the ARC on 3 October 2001. The proposal was discussed at the Tribunals Conference of the Australian Institute of Judicial Administration where the inaugural meeting of COAT was held on 6 June 2002. It was agreed at the meeting that membership of the body should be expanded to include tribunals from New Zealand.

The objects of the Council, as outlined in its constitution, are:

a. to establish a national network of Tribunals and a national register of Tribunal members;

b. to establish a national network for members of Tribunals to consult and discuss areas of concern or interest and common experiences;

c. to provide training and support for members of Tribunals, particularly of smaller Tribunals which may not have the resources to undertake such activities alone;

d. to provide a forum for the exchange of information and opinions on aspects of Tribunals and Tribunal practices and procedures;

e. to develop best practice or model procedural rules based on collective experience of what works;

f. to develop standards of behaviour and conduct for members of Tribunals;

g. to develop performance standards for Tribunals;

h. to develop support systems for Tribunals, including case management and IT systems;

i. to provide advice to governments on Tribunal requirements;

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26 Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia: Project Summary*, September 1999, pp.82-83.

27 www.coat.gov.au

28 see Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report No.39 (1995) and Australian Law Reform Commission *Managing Justice: A review of the federal civil justice system*, Report No.89 (2000).

j. to publish and encourage the publication of papers, articles and commentaries about Tribunals and Tribunal practices and procedures;

k. to promote lectures, seminars and conferences about Tribunals and Tribunal practices and procedures;

l. to make and disseminate reports, commentaries and submissions on aspects of Tribunals and Tribunal practices and procedures; and

m. to co-operate with institutions of academic learning, and with other persons having an interest in Tribunals and Tribunal practices and procedures, in promoting the objects referred to in paragraphs (a) to (l).[29]

Membership of COAT is open to all Commonwealth, State and Territory, and New Zealand tribunals, and is determined by a process of "guided self selection" and COAT's objectives rather than strict eligibility criteria. The original COAT Constitution broadly defined eligible tribunals to be:

> Any Commonwealth, State or Territory body whose primary function involves the determination of disputes, including administrative review, party/party disputes and disciplinary applications but which in carrying out this function is not acting as a court.

COAT is constituted by a National Council (of the Executive and member tribunals), state and territory chapters, and a New Zealand chapter. During its first year an Interim Executive will operate in the absence of the chapters.[30] The first Chair of COAT is the Hon. Justice Kellam and the secretariat for COAT is provided by the Chair's registry.

2.5 The Leggatt Report (United Kingdom)

In March 2000, the UK Government commissioned a review of the tribunal system to be conducted by a team of experts, chaired by Sir Andrew Leggatt (formerly a Lord Justice of Appeal). The last review of UK tribunals had occurred in 1957.

The terms of reference for the review were:

> To review the delivery of justice through tribunals other than ordinary courts of law, constituted under an Act of Parliament by a Minister of the Crown or for the purposes of a Minister's functions; in resolving disputes, whether between citizens and the state, or between other parties, to ensure that:
>
> There are fair, timely, proportionate and effective arrangements for handling those disputes, within an effective framework for decision-making which encourages the systematic development of the area of law concerned, and which forms a coherent structure, together with the superior courts, for the delivery of administrative justice;
>
> The administrative and practical arrangements for supporting those decision-making procedures meet the requirements of the European Convention on Human Rights for independence and impartiality;
>
> There are adequate arrangements for improving people's knowledge and understanding of their rights and responsibilities in relation to such disputes, and that tribunals and other bodies function in a way which makes those rights and responsibilities a reality;
>
> The arrangements for the funding and management of tribunals and other bodies by Government departments are efficient, effective and economical; and pay due regard

29 www.coat.gov.au

30 ibid.

> both to judicial independence, and to ministerial responsibility for the administration of public funds;
>
> Performance standards for tribunals are coherent, consistent, and public; and effective measures for monitoring and enforcing those standards are established; and
>
> Tribunals overall constitute a coherent structure for the delivery of administrative justice.
>
> The review may examine, insofar as it considers it necessary, administrative and regulatory bodies which also make judicial decisions as part of their functions.[31]

The review report, entitled *Tribunals for Users: One System, One Service* (the Leggatt Report)[32], was received in March 2001 and recommended a far-reaching program of modernisation and rationalisation of tribunals in the UK. It is relevant that the review team travelled to Australia "to inspect at first-hand the only tribunal system in any common law jurisdiction that is in important respects well in advance of our own".[33] Consequently, certain recommendations in the Leggatt Report reflect aspects of tribunal development in Australia, for example, the amalgamation of tribunals and monitoring administrative law systems.

The principal recommendation of the Leggatt Report was the staged rationalisation of the seventy existing tribunals in England and Wales, which are concerned with disputes between citizen and state and disputes between parties, into an integrated tribunal system. In support of the system, the Leggatt Report recommended the formation of a common administrative service, the Tribunal Service:

> There is only one way to achieve independence and coherence: to have all the tribunals supported by a Tribunal Service, that is, a common administrative service. It would raise their status, while preserving their distinctness from the courts. In the medium term it would yield considerable economies of scale, particularly in relation to the provision of premises for all tribunals, common basic training, and the use of IT. It would also bring greater administrative efficiency, a single point of contact for users, improved geographical distribution of tribunal centres, common standards, an enhanced corporate image, greater prospects of job satisfaction, a better relationship between members and administrative staff, and improved career patterns for both on account of the size and coherence of the Tribunal Service.[34]

On the issue of amalgamation, the Report concluded:

> Combining the administration of different tribunals will provide the basis for a relationship between them. But that association cannot properly be called a Tribunals System until true coherence has been established by bringing within one organisation without discrimination all those tribunals which are concerned with disputes between citizen and state (in the guise of either central or local government) and those which are concerned with disputes between parties. Only so will tribunals acquire a collective standing to match that of the Court System and a collective power to fulfil the needs of users in the way that was originally intended.[35]

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31 www.lcd.gov.uk; www.tribunals-review.org.uk

32 Report of the Review of Tribunals by Sir Andrew Leggatt, *Tribunals for Users, One System, One Service,* March 2001.

33 ibid, p.2.

34 ibid, p.6.

35 ibid, p.7.

Within the Tribunal System, the Leggatt Report recommended that tribunals be grouped by subject matter into readily identifiable divisions: education, finance, health and social services, immigration, land and valuation, social security and pensions, transport, regulatory and employment. To entertain appeals from the tribunals in each division, it was further recommended that corresponding appellate tribunals be established in an appellate division. It was envisaged that:

> Within any Division tribunals could remain more or less autonomous in much the same way as do the constituent parts of the Australian Administrative Review Tribunal. It is important to retain the expertise of members; but it is important too to improve their flexibility.[36]

In relation to tribunals dealing with party and party disputes the Leggatt Report recommended a move away from increasingly complex and formal proceedings. The differing nature of party and party tribunals was recognised but the conclusion drawn was that an integrated tribunal system should be able to accommodate the specific nature of such proceedings:

> Employment Tribunals are party and party tribunals, which for some time past have been acquiring the complexity and formality of Labour Courts, and losing their original user-friendliness. It is a trend that must be reversed; and the eligibility for legal aid, to which, if they were courts, users would become entitled, would increase the involvement of lawyers and the formality they bring with them. What has rendered them successful has been the composition of the tribunal, the absence of fees and the proximity of ACAS. So Employment Tribunals, like other tribunals, should be administered by the Tribunals Service. But because they are not true administrative tribunals, and some of their practices are importantly different, it might detract from the coherence of the Tribunals System if Employment Tribunals were to be administered in the same way as all the rest. They and other party and party tribunals should therefore be administered by a separate section of the Tribunals Service with its own head.[37]

Strong emphasis was placed upon the importance of a tribunal's independence from its sponsoring department:

> It has been suggested that there is virtue in keeping the policy of a department and the administration of the tribunal through which it is implemented under the control of the department. The contrary is true. The very fact that a department is responsible for the policy and the legislation, under which cases are brought in the tribunal it sponsors, leads users to suppose that the tribunal is part of the same enterprise as its sponsoring department. Encroachment on independence takes other forms. When the salaries and allowances of tribunal members are determined and paid by the department, and it also appoints the lay members, their relationship with the department is discomfiting, and they wish to be relieved of it. The department may also fund an agency which provides the administrative services for the tribunal. The department may make the procedural rules for the tribunal, and under them may have power to intervene in cases to which it is not a party. In some cases the department by its Secretary of State may even be a party to proceedings before the tribunal. Not surprisingly challenges have already been brought against tribunal decisions in reliance on Art. 6(1) of the ECHR. Irrespective of whether they are successful, the apparent dependence of a tribunal on its sponsoring department is indefensible.[38]

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36 ibid.

37 ibid, pp.7-8.

38 ibid, p.8.

It was proposed that the Tribunal Service should be overseen by the UK Council of Tribunals, with functions similar to those of the Commonwealth Administrative Review Council. The UK Council of Tribunals would be responsible for monitoring training of chairmen and members, proposals for procedural change, the development of IT and accessibility. It should be consulted on recruitment criteria, and would have specific statutory authority to consult on legislation. The Council would report to the relevant Ministers and appropriate Select Committee.[39] The Review team concluded that:

> In the longer term, like the Administrative Review Council in Australia, the Council should be made responsible for upholding the system of administrative justice and keeping it under review, for monitoring developments in administrative law, and for making recommendations to the Lord Chancellor about improvements that might be made to the system. To assist users through the system, the Council should be required to ensure that the various mechanisms for redressing the grievances of members of the public work together coherently and efficiently. Joined up government demands no less. Finally, the Council should be enabled to commission research into the operation of administrative justice both in the UK and abroad.[40]

The Leggatt Report was published by the UK Government in August 2001 for consultation, and the conclusions drawn by the Government following the consultation were to be announced in Summer 2002.[41] At the time of preparation of this report, the UK Government had not responded to the Leggatt Report. In the interim, a number of modernisation options were being researched and developed and would be subject to recommendations when the Government issues its response.[42]

2.6 British Columbia (Canada)

On 27 July 2001 the Government of British Columbia commenced a comprehensive review of the province's administrative justice system, which incorporates over 60 administrative justice agencies.

The review in British Columbia draws on recent developments in the administrative justice systems of larger Canadian provinces such as Ontario and Quebec (which has an integrated administrative tribunal). The Attorney General is the Minister responsible for the Administrative Justice Project, the objectives of which are:

- to review the mandates of the province's administrative justice agencies to ensure they are relevant to a modern and efficient economy;
- to make recommendations to government to eliminate overlapping jurisdictions, multiple proceedings, costs, delays and uncertain outcomes by evaluating dispute resolution institutions and mechanisms;
- to make recommendations to government to streamline administrative procedures and reduce unnecessary overlap and duplication by examining substantive legal principles and practices with respect to standards of review for administrative agencies, including the use of privative clauses, evidentiary requirements and the grounds for and number and type of reviews and appeals;

39 ibid, p.11.
40 www.tribunals-review.org.uk, Leggatt Report, para.7.54.
41 *Tribunals for Users: Consultation Paper about the Report of the Review of Tribunals by Sir Andrew Leggatt, August 2001* (CP 13/2001), www.lcd.gov.uk
42 Advice from the Lord Chancellor's Department, 13.9.02.

- to reassess government's role in the human rights area as an impartial adjudicator and advocate for complainants;
- to introduce transparent policy guidelines for Cabinet and ministerial appointments to administrative agencies;
- to create an informational data base on administrative agency reform in common law jurisdictions;
- to define government's ongoing obligations to independent administrative agencies and establish a framework, process and guidelines for future institutional assessments
- to define government's ongoing obligations with respect to core competency and training programs for agency appointees;
- to introduce performance measures and an accountability framework for administrative agencies, including recommendations for improving regional access to agency programs and services, where practicable.[43]

Following an initial consultation phase, the project produced and released a number of discussion papers on administrative justice issues, workplace tribunals, human rights and agency appointments policy. A White Paper, entitled *On Balance: Guiding Principles for Administrative Justice Reform in British Columbia*, and several white paper reports dealing with issues of jurisdiction, dispute resolution, independence and accountability, essential tribunal powers and procedures, were released in July 2002. Responses are due by 15 November 2002.

The White Paper proposes a two-year program of systemic reform of the administrative justice system of British Columbia, and is aimed at strengthening the independence and accountability of administrative tribunals, and fostering tribunal informality, accessibility and efficiency.

Key recommendations contained in the White paper focus on:

- a framework for tribunal governance and accountability including:
  - the establishment of an administrative justice office within the Ministry of the Attorney General to improve government's capacity to address matters such as administrative justice issues, policy development, legislative reform, and organisational change;
  - the development of guidelines for the design, review and assessment of administrative processes;
  - the development of an operational model for tribunal governance that is appropriate to the context and circumstances of the particular jurisdiction within which the tribunals operate;
  - the clarification of the role of the tribunal chair's statutory powers, authority and responsibility for matters such as the management of the tribunal, and the allocation of members or panels.
- development of a policy framework, by a special advisory body with the Ministry of the Attorney General, for model statutory powers legislation setting out a range of powers that could be selectively applied to each administrative tribunal, as

[43] www.gov.ba.ca/ajp

appropriate (administrative tribunals would establish their own rules of practice and procedure and issue practice directions);

- implementing an open, transparent and merit based recruitment and appointment processes;
- introducing consistent terms and conditions of appointment across tribunals;
- standard of review on judicial review or statutory appeals to the court;
- establishment of a modern and relevant framework for ongoing operational relationships between administrative tribunals and government.[44]

[44] Administrative Justice Project *On Balance: Guiding Principles for Administrative Justice Reform in British Columbia*, July 2002.

Chapter 3

COMMITTEE INQUIRY: FIRST STAGE

3.1 Initial Evidence to the Committee Inquiry

Initial submissions and evidence to the inquiry supported the view that scope exists for further development of the ADT through a more systematic, proactive approach to conferring of jurisdiction. This chapter refers to evidence and submissions from the Discussion Paper dealing with concerns were raised about the need to extend both the ADT's original and review jurisdiction.

It is apparent to the Committee that, as Judge O'Connor has stated, the ADT's current jurisdiction derives largely from responsibilities originally distributed across the courts and tribunals attached to the Attorney General's portfolio.[45] This situation poses the question as to whether there are tribunals and bodies in other portfolios which should be merged with the ADT. Judge O'Connor submitted that:

> A major policy question is whether there are tribunals in other portfolios whose responsibilities should be housed within the ADT structure. Should there be a policy statement as to what kind of departmental and ministerial decisions should be subject to external review, and then a thorough examination to see what decisions are amenable to external review and which ones are not, and whether that is reasonable in terms of the principles stated.[46]

The Committee also heard evidence from Judge O'Connor that extensions to the ADT's original jurisdiction were likely to be more debatable than extensions to its merits review jurisdiction. However, he emphasised that the ADT exercises both types of jurisdiction, as does the VCAT:

> The general principle upon which the General Division of the ADT is founded is that it should be the lead forum in NSW for the external review of administrative decisions affecting citizens. Proposals for new jurisdiction should first be tested by reference to that principle. If the proposal is not one connected with the review of administrative decisions, then what is being sought is new original jurisdiction for the ADT analogous to that presently exercised in the EOD, LSD and RLD. There is greater room for policy argument, I feel, on whether the ADT is the most suitable forum for new original jurisdictions. Nonetheless the VCAT model in Victoria represents a significant endorsement by one Parliament of the proposition that an umbrella Tribunal structure can house a strong external merits review jurisdiction and an array of original Tribunal jurisdictions.[47]

Judge O'Connor also gave evidence in support of a presumption that external review to the ADT should apply in relation to administrative decisions 'which are in the nature of decisions that affect citizens in an individual way, as distinct from generic decisions that affect individuals'.[48] He told the Committee:

> I certainly think the policy that was reflected in the legislation was that there should, in a sense, be a one-stop shop for external merits review of administrative decisions, and that that should be a reasonably sophisticated and specialist operation, hopefully with

45 Judge O'Connor, tabled comments 17/11/00.
46 ibid.
47 ibid.
48 Evidence 17/11/00.

> relatively informal procedures and ones that enable the case to be properly analysed in a manner which is insightful as to the balance between the interests of citizens and the interests of good administration.
>
> So, if that is the kind of thinking that underlies that aspect of the tribunal's legislation, then I would certainly see it as appropriate for there to be a kind of a 'why not' approach to new conferral of external review jurisdiction. . . .[49]

Similar views were expressed in the submission and evidence of the NSW Law Society which called for an examination of the progress made towards conferring jurisdiction on the ADT as originally intended by the Government. The Law Society considered that the ADT's jurisdiction needed enhancement and the President of the Law Society, Mr John North, gave evidence that:

> The pace of conferring jurisdiction needs attention to overcome resistance to change. Arguments for retaining merits review within agencies risk claims for breach of natural justice as processes continue to be seen as unfair.[50]

In the view of the Law Society, conferring jurisdiction on the ADT in respect of the range of review and appeal provisions of NSW statutes gives 'the opportunity to provide for consistency and fairness in matters for review or appeal'. The process of review and appeal should be the same across statutes as the 'issue is the review or appeal on the merits of decisions made'[51] and there should be a strong case made for any exceptions to be made to the ADT's review jurisdiction. At the time of writing the submission, the Law Society also supported extending the ADT's original jurisdiction to include the Fair Trading Tribunal, since merged with the Residential Tribunal.[52]

The principle of broad rights to bring an appeal is a position also maintained by the Administrative Review Council (ARC) which stated in its guidelines on identifying merits reviewable decisions that:

> As a matter of principle, the Council believes that an administrative decision that will, or is likely to, affect the interests of a person should be subject to merits review.
> . . .
> The Council prefers a broad approach to the identification of merits reviewable decisions. If an administrative decision is likely to have an effect on the interests of any person, in the absence of good reason, that decision should ordinarily be open to be reviewed on its merits.
>
> If a more restrictive approach is adopted, there is a risk of denying an opportunity for review to someone whose interests have been adversely affected by a decision. Further, there is a risk of losing the broader and beneficial effects that merits review is intended to have on the overall quality of government decision-making.
>
> The Council's approach is intended to be sufficiently broad to include decisions that affect intellectual and spiritual interests, and not merely property, financial or physical interests.[53]

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49 Evidence 17/11/00.
50 ibid.
51 ibid.
52 ibid.
53 ARC, *What decisions should be subject to merits review?*, July 1999, paras.2.1, 2.4-2.6.

Suggestions for specific extensions to the ADT's jurisdiction were received from the Public Interest Advocacy Centre (PIAC), which submitted that the jurisdiction of the ADT should be extended to include merits review of the following decisions:

- public housing decisions, including housing applications, eligibility for priority housing with the Department of Housing, rehousing applications, housing assistance, and tenancy management;
- decisions not already reviewable by the Community Services Division of the ADT, for example, boarding house licensing decisions;
- decisions of the Guardianship Board.[54]
- environment and planning decisions;
- merits review of prisoner security classification decisions and parole decisions;
- disciplinary decisions in government schools.[55]

The PIAC also referred to proposals to allow appeals to the ADT on questions of law from decisions of the Guardianship Board, the Protective Commissioner, the Public Guardian and the Mental Health Review Tribunal.

The Committee did not take evidence specifically on the PIAC proposals which crossed a number of portfolio areas, including housing, planning, guardianship and other matters within the Community Services portfolio.

General support for the need to extend the ADT's jurisdiction was given by Elizabeth Ellis, Faculty of Law, Wollongong University, who submitted that:

> A relatively small number of new review rights have been created since 1997 when legislation to establish the Tribunal was introduced. It is difficult to obtain information about the creation of new review rights and not easy to discern a coherent policy where new rights have been created. Such findings are at odds with the Act's statutory objectives and the government's expressed commitment to administrative law reform when the original ADT legislation was introduced.[56]

Ms Ellis also found that the number of new review rights invoked in review applications to the ADT has been limited.[57]

On the question of whether the ADT's current professional discipline jurisdiction should be expanded, Judge O'Connor told the Committee that he saw merit in 'the proposition that there be some form of coordinated professional discipline tribunal environment'. He acknowledged the more adversarial nature of proceedings in relation to professional

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54 PIAC submission, dated 30/8/00. The Public Bodies Review Committee of the Legislative Assembly is currently conducting an inquiry into the Office of the Protective Commissioner and the Office of the Public Guardian. The terms of reference for the inquiry include an examination of the effectiveness of complaint mechanisms within the Office of the Protective Commissioner and the Office of the Public Guardian, and the Auditor General's proposal for a simpler, quicker and cheaper means of obtaining external review of the decisions of OPC and OPG. The Committee recommended: Recommendation 17: That the Administrative Decisions Tribunal of New South Wales be the first point of external appeal from decisions of the Public Guardian and the Protective Commissioner. *Report of the Public Bodies Review Committee, Personal Effects: A Review of the Offices of the Public Guardian and the Protective Commissioner, October 2001.*

55 ibid, pp.3-5.

56 Elizabeth Ellis, Faculty of Law, Wollongong University, submission dated 17/8/00.

57 ibid.

disciplinary matters, but did not envisage such procedural differences to be a stumbling block to expanding the ADT's jurisdiction in this area:[58]

> **Judge O'CONNOR:** . . . I accept the thrust of those initial comments which is to the effect that professional discipline practices and procedures may need to be differentiated more greatly than is necessary in other parts of the tribunal from the mainstream provisions as to practices and procedure, but I have not seen the issues that have been raised as really fundamental when it comes to effecting appropriate adjustments.[59]

There appeared to Judge O'Connor to be:

> . . . a case to be made for consumer members sitting across professions rather than being seen as somehow specialists to a particular profession because, presumably, what you are looking at in the discipline of a registered practitioner from a consumer's point of view is the quality of service and the standards of practice vis-a-vis consumers who can present before any of these professions at any time.[60]

When questioned about the advantages of having professional conduct matters determined by a tribunal like the ADT, Judge O'Connor stated:

> The ADT is a multidivisional tribunal. It provides some possibility for the cross-use of presiding members. It enables that work to be done in a better environment from the point of view of resources. If I can just take that point a bit further, the old Legal Services Tribunal had three registry staff to handle about 40 filings a year. It seems to me that was disproportionate and you are getting better value for money if you put quite small jurisdictions into multi-jurisdictional structures and then obviously you have got to have appropriate segmentation in the practices and work arrangements of the tribunal so there is not a loss of quality of services to the incoming jurisdiction. . . .[61]

3.2 The Committee's Discussion Paper Proposals

3.2.1 Expanding the ADT's original and review jurisdiction

The Committee noted in its Discussion Paper that:

> It appears to the Committee that the original impetus which led to the merging of tribunals and the establishment of the ADT has since declined, and there seems to be no apparent intention to proceed with a systematic integration of existing tribunals, as foreshadowed in the Minister's second reading speech on the original legislation. In particular, there has been no further progress in integrating professional disciplinary tribunals into the ADT.
>
> It is probably neither practical nor appropriate to embark upon a program of complete integration of all existing State tribunals into the ADT. However, it is the opinion of the Committee that a comprehensive assessment of the scope for further merging of existing tribunals in New South Wales into the ADT was intended to be a consequence of the ADT's establishment. Indeed, without such evaluation many of the problems of fragmentation which prompted the establishment of the ADT will remain, and the full benefits of rationalisation and standardisation will be only partly realised.
>
> In the area of external merits review of administrative decisions, the Committee has not been advised of any efforts to formulate, on a systematic basis, criteria for determining

58 Evidence 17/11/00.
59 ibid.
60 ibid.
61 ibid.

which decisions that should fall within the reviewable decision jurisdiction of an ADT. Consequently, it is difficult to envisage how or on what basis the jurisdiction of the ADT is expected to expand so as to achieve optimum efficiency and effectiveness in improving the quality of administrative decision-making. The Committee considers that it was the intention of the Parliament that there should be a comprehensive approach to administrative review, and this intention would imply a full assessment of matters that should be reviewable.[62]

Consequently, the Committee made the following proposals:

1. Legislation should be brought forward to merge separate tribunals with the ADT, unless there are clear reasons why such inclusion would be inappropriate or impractical, with particular consideration being given to merging all professional disciplinary tribunals with the ADT.
2. Explicit criteria for determining administrative decisions which should appropriately fall within the external merits review jurisdiction of the ADT should be developed by the Attorney General's Department in consultation with the ADT. The Attorney General's Department should consult all departments and agencies to identify administrative decisions which currently meet the criteria and should therefore be subject to external merits review by the ADT.
3. There should be a presumption in future that all administrative decisions provided for under new legislation, which meet the criteria developed by the Attorney General's Department and the ADT, should be subject to external merits review by the ADT.

The Committee also noted in its Discussion Paper that it is difficult to obtain a definitive listing of all the tribunals operating in New South Wales.[63] However, the Committee suggested a list of tribunals operating in New South Wales that could be considered for merging with the ADT, as follows:

Chiropractors and Osteopaths Tribunal

Coal Compensation Review Tribunal

Contract of Carriage Tribunal

Fair Trading Tribunal

Government and Related Employees Appeal Tribunal

Greyhound Racing Appeals Tribunal*

Guardianship Tribunal*

Harness Racing Appeals Tribunal*

Independent Pricing and Regulatory Tribunal*

Local Government Pecuniary Interest Tribunal*

Marine Appeals Tribunal

Medical Tribunal

Mental Health Review Tribunal

Nurses Tribunal

62 Discussion Paper p.12.

63 The Council of Australasian Tribunals has produced a list of its tribunal members. However, the list does not include some of the tribunals identified by the committee. This needs further clarification.

*Denotes that a written submission was made in response to the Discussion Paper.

Racing Appeals Tribunal*

Remuneration Tribunals including the Statutory and Other Offices Remuneration Tribunal and Local Government Remuneration Tribunal

Transport Appeal Boards

Residential Tribunal

Victims Compensation Tribunal

Since publication of the Discussion Paper, the former Fair Trading and Residential Tribunals have been merged to form the new Consumer, Trader & Tenancy Tribunal.[64] This merger followed a review conducted by the Department of Fair Trading. However, as at the finalisation of this report, no state tribunals or similar bodies have been merged into the ADT.

3.2.2 Long term development

In the longer term, the Committee proposed that an Administrative Review Standing Committee should have an ongoing role in monitoring the progress made in expanding both the original and review jurisdiction of the ADT:

4. The proposed Administrative Review Standing Committee should monitor the progress achieved in merging existing tribunals with the ADT and also have an ongoing role in the further review and development of criteria for defining the appropriate extent of the ADT's merits review jurisdiction.

The proposed advisory body would be modelled on the Commonwealth Administrative Review Council (ARC) and would perform similar functions. The Discussion Paper noted that the ARC is established under Part V of the *Administrative Appeals Tribunal Act 1975* and that its membership comprises a President, the Commonwealth Ombudsman holding office under the *Ombudsman Act 1976*, the President of the Australian Law Reform Commission, and no fewer than 3 or more than 10 other members, who are appointed on a part-time basis. ARC members are appointed for a maximum three-year period but are eligible for re-appointment. They may also be appointed for the duration of a specific project.

The Council's functions under the *Administrative Appeals Tribunal Act*: are wide-ranging and include the following:

s.51(1)

(aa) to keep the Commonwealth administrative law system under review, monitor developments in administrative law and recommend to the Minister improvements that might be made to the system; and

(ab) to inquire into the adequacy of the procedures used by authorities of the Commonwealth and other persons who exercise administrative discretions or make administrative decisions, and consult with and advise them about those procedures, for the purpose of ensuring that the discretions are exercised, or the decisions are made, in a just and equitable manner; and

*Denotes a written submission was made in response to the Discussion Paper.

64 Established under the *Consumer, Trader and Tenancy Tribunal Act 2001*, which commenced in part on the date of assent (21/10/01) and by proclamation on 25 February 2002.

(a) to ascertain, and keep under review, the classes of administrative decisions that are not the subject of review by a court, tribunal or other body; and

(b) to make recommendations to the Minister as to whether any of those classes of decisions should be the subject of review by a court, tribunal or other body and, if so, as to the appropriate court, tribunal or other body to make that review; and

(c) to inquire into the adequacy of the law and practice relating to the review by courts of administrative decisions and to make recommendations to the Minister as to any improvements that might be made in that law or practice; and

(d) to inquire into:

  (i) the qualification required for membership of authorities of the Commonwealth, and the qualifications required by other persons, engaged in the review of administrative decisions; and

  (ii) the extent of the jurisdiction to review administrative decisions that is conferred on those authorities and other persons; and

  (iii) the adequacy of the procedures used by those authorities and other persons in the exercise of that jurisdiction; and

  (iv) to consult with and advise those authorities and other persons about the procedures used by them as mentioned in subparagraph (iii) and recommend to the Minister any improvements that might be made in respect of any of the matters referred to in subparagraphs (i), (ii) and (iii); and

(e) to make recommendations to the Minister as to the manner in which tribunals engaged in the review of administrative decisions should be constituted; and

(f) to make recommendations to the Minister as to the desirability of administrative decisions that are the subject of review by tribunals other than the Administrative Appeals Tribunal being made the subject of review by the Administrative Appeals Tribunal; and

(g) to facilitate the training of members of authorities of the Commonwealth and other persons in exercising administrative discretions or making administrative decisions; and

(h) to promote knowledge about the Commonwealth administrative law system; and

(i) to consider, and report to the Minister on, matters referred to the Council by the Minister.

The Council reports to the Minister who must present each of the Council's reports to Parliament. It must also produce an annual report on the operations of the Council for tabling in the Parliament. The ARC provides reports and letters of advice to the Attorney General who generally tables the reports in Parliament.

The Committee was interested particularly in the advisory role played by the ARC on administrative law issues. The ARC makes submissions to Parliamentary Committees and advises the Government and government bodies on legislation and proposals with administrative review implications. One of its stated priorities is to raise community awareness of administrative review, for example, through publications such as the journal *Administrative Review*. Projects undertaken by the ARC include: an assessment of internal review of agency decisions (with a view to developing a best practice guide), and an examination of the ethical responsibilities, accountability and personal and professional standards of merits review tribunal members (with the aim of developing a

code of conduct). It also has published guidelines on the classes of decisions that should be subject to merits review and the preparation of statements of reasons.[65]

The value of this advisory role is supported by the findings of a review of the ARC conducted by the Senate Legal and Constitutional Committee in 1997. The Senate Committee concluded that "the evidence received by the Committee supports the view that the Administrative Review Council has been an effective body, providing useful and timely advice on administrative review matters". It considered that "there is a continuing need for the Commonwealth Government to receive advice and recommendations on administrative review and decision-making, and to promote a comprehensive, affordable and cost-effective administrative law system". The Senate Committee recommended that the ARC "should remain as a separate and permanent body, provided that it is making a significant contribution towards an affordable and cost-effective system of administrative decision-making and review".[66]

Evidence received during the initial stages of the review of the ADT supported the proposal to establish a type of ARC or equivalent body in New South Wales. Evidence was taken from Mr Alan Robertson SC, previously a member of the ARC, who described the ARC as "a standing law reform body... designed to keep the Commonwealth administrative law system under review".[67] He also highlighted similarities in the development of the administrative law system at Commonwealth level and in New South Wales. The ARC was established at the commencement of the Commonwealth system, partly with the purpose of monitoring the new system and its development.[68]

Mr Robertson considered that the complexity of the administrative law system, both in a technical sense and in terms of its breadth, was another factor supporting the case for a standing law reform committee to take an overall look at the system.[69] As well, the Government's direct interest In the administrative law system, often as a participant in a dispute, favoured the establishment of a standing law reform committee which could offer independent expert oversight of the administrative law system not available through a government department, such as the Attorney General's Department.

Mr Robertson translated the membership of the Commonwealth ARC into a State context, suggesting a broad range membership for a similar body in New South Wales, namely, the President of the ADT, the Director-General of the Attorney's General's Department, a representative of the District Court, the judge in charge of the Administrative Law Division in the Supreme Court, an academic, a practitioner, and one or two representatives of users groups. In his view, the presence of departmental heads on the Commonwealth ARC gave the Council a useful source of advice on the feasibility of its proposals. However, he did warn that inclusion of these particular members in the ARC led to a tendency for the body "to perhaps become to some extent a captive of the senior bureaucrats".[70] Not wanting to overstate the issue, Mr Robertson indicated that he considered there to be a "fine line" between having the necessary input of experienced and senior officials, as to the feasibility of reform, and insufficient innovation in the standing law reform committee's proposals.[71] Such a committee would

65 http://law.gov.au/aghome/other/arc
66 www.aph.gov.au/senate/committee/legcon_ctte/arc/index.htm
67 Evidence, 17/11/00.
68 ibid.
69 ibid.
70 ibid.
71 ibid.

have an educational and a training role for agencies throughout the government system and, if operating with mainly part-time members, would not be too expensive.

Judge O'Connor also supported a body like the Administrative Review Council and gave evidence that:

> **Judge O'CONNOR:** I think there is some value because that body actually fulfils some of the professional services needs that I have alluded to already. It is a body within the Commonwealth environment that does do systemic work on issues of administrative review that would be of value to the political process, to the Parliament, and then it does other work which is in the nature of assisting tribunals in the education of members and the conduct of conferences and the preparation and release of good quality publications and newsletters. All of these things add to the quality of the professional environment at the practical level in tribunals, and I think they do a lot of good work in that area. So they are the arguments in favour of a facility of that kind. They give systemic advice to the Minister and the Parliament and they give more specific assistance to tribunals. They are not the total answer on the issues I have raised but they certainly make a contribution.[72]

The Discussion Paper indicated that the Committee had concluded there may be merit in establishing a standing committee in New South Wales to perform functions analogous to those of the Commonwealth ARC. The Committee particularly considered the establishment of such a body at an early stage of the ADT's operation to have the potential to enhance the ADT's future development. It was proposed in the Discussion Paper that such a body would be able to monitor and give expert advice on jurisdictional issues, such as criteria for determining the classes of reviewable administrative decisions which would appropriately fall within the ADT's jurisdiction, the assessment of tribunals and similar bodies in New South Wales which could be merged into the ADT, and the undertaking of regular review of the operational efficiency and effectiveness of the ADT.

The Committee concluded that the establishment of an independent body, with an ongoing role in the oversight of the administrative law system in New South Wales, may help to achieve a coordinated, consistent approach to policy making in this area. Such a body also would help to overcome some of the factors affecting conferral of jurisdiction on the ADT, especially where jurisdiction ranged across Ministerial portfolios. The Committee did not consider the level of funding which would be necessary to sufficiently fund and resource the proposed committee to be prohibitive.

Accordingly, the Committee proposed:

16. The *ADT Act* should be amended to provide for the establishment of an Administrative Review Standing Committee with the following functions:

    a. to further develop explicit criteria for determining the classes of administrative decisions which would appropriately fall within the ADT's external merits review jurisdiction;

    b. ongoing review of the ADT's jurisdiction with particular focus on the assessment of tribunals and similar bodies in New South Wales, for the purpose of recommending whether they can appropriately be merged with the ADT;

[72] ibid.

c. to regularly assess, evaluate and report on the operational efficiency of the ADT, its effectiveness and performance;

d. oversight of the administrative law system in New South Wales, performing functions analogous to those of the Administrative Review Council under Part V of the *Administrative Appeals Tribunal Act 1975* (Clth).

Further discussion of Proposal 16 and the responses to it can be found at Chapters 4.2 and 4.3.1.

Chapter 4

COMMITTEE INQUIRY: SECOND STAGE

4.1 Response to the proposed merger of tribunals into the ADT

Following the publication of the Discussion Paper, the Committee received responses from the ADT, the Guardianship Tribunal, the Independent Pricing and Regulatory Tribunal, Harness Racing New South Wales, the Thoroughbred Racing Board and the Greyhound Racing Authority (joint submission), the Local Government Pecuniary Interest Tribunal and the Victorian Civil and Administrative Tribunal. The Committee also took further evidence in hearings from Justice Kellam, President of VCAT, Mr O'Neill, President of the NSW Guardianship Tribunal, and Judge O'Connor.

A number of issues were raised in this supplementary material in relation to the merging of existing tribunals and the proposed extension of the jurisdiction of the ADT. The following issues are discussed below:

1. The different functions and conduct of tribunals
2. The expertise of tribunal members
3. Public recognition and access to tribunals
4. Appointment of tribunal members and training
5. Economies of scale

4.1.1 The Different Functions and Conduct of Tribunals

One of the arguments advanced in opposition to the Committee's proposal to extend the ADT's jurisdiction through the further amalgamation of tribunals was that the differing roles and functions of tribunals could not be adequately accommodated in an expanded ADT.

The President of the NSW Guardianship Tribunal, Mr O'Neill, suggested that the differing roles and functions of tribunals mitigated against consolidation of the ADT's jurisdiction and that the diversity and different practices of various tribunals is in fact their strength. It enables them to ensure that they deal with their separate jurisdictions 'in the most effective and appropriate way'. He had made a similar argument in *Tribunals – They Need to be Different*, a paper delivered to the Australian Institute of Judicial Administration's fourth Tribunals Conference in 2001, in which he noted that tribunals are established for a range of different reasons to achieve different goals, and that, accordingly, they should operate separately.[73]

In support of this argument, the Guardianship Tribunal submission compared its work with the work of the Residential Tribunal. In 1999/2000, the Residential Tribunal received 46,737 new applications, requiring a large number of hearings. By comparison, in 1999/2000, the Guardianship Tribunal received only 3,966 new applications, requiring 3,658 hearings and 931 sittings. According to the Guardianship Tribunal submission:

[73] N.O'Neill, *Tribunals – They Need to be Different*, Paper delivered to the fourth AIJA Tribunal's Conference on 8 June 2001, pp.4-6.

> Just these statistics show that the Guardianship Tribunal and the Residential Tribunal do operate very differently. The Residential Tribunal deals with a large number of matters at most of its sittings while the Guardianship Tribunal deals with comparatively few. However, the issues it must consider are much more complex and the determination the Tribunal makes is likely to have a much more profound impact on the life of the subject of the application. . . .
>
> These two examples show very different court-substitute tribunals with very substantial caseloads. They both have well-established and appropriate ways of dealing with the particular matters they are empowered to hear and determine. However, the way they go about hearings and determining the matters coming to them are very different. To join them together and to expect them to act in a similar way would be to deny the reality of the different kinds of problems facing them and the different ways it is appropriate to resolve those problems.[74]

The submission drew a similar distinction between the Guardianship Tribunal and the Mental Health Review Tribunal, the role of which is to review, at regular intervals, the basis on which people are held in psychiatric institutions in NSW. It also mentioned the case of the Statutory and Other Officers Remuneration Tribunal, which if merged with the ADT, would be required to make determinations on the remuneration of staff of the ADT.[75]

Mr O'Neill reiterated these distinctions in evidence to the Committee on 21 August 1991, and argued that they make the case for merging of existing NSW tribunals with the ADT and extension of the ADT's original jurisdiction doubtful:

> One of the problems that exists – I am aware that VCAT has kept some of the differences – is that there is very great pressure on tribunals when they are amalgamated to adopt a particular approach. It is one of the initial recommendations, if you like, or one of the proposals that the Committee put out in its discussion paper, that is, the idea of going down this track of developing sameness. I think that if that occurred it would be a great shame because a tribunal would lose its ability to operate in a way it needs to carry out its particular and different functions.[76]

Ultimately, Mr O'Neill considered that the further development of the ADT should be towards an expanded jurisdiction to review administrative decisions, claiming that this was Parliament's intention.[77] The Guardianship Tribunal argued that the ADT's review jurisdiction should be strengthened, possibly through the merger of some disciplinary tribunals into the ADT, but that tribunals that exercise original jurisdiction should not be merged with the ADT. It advocated the continuation of most large tribunals in NSW as separate entities.[78] Accordingly, the Guardianship Tribunal recommended in its submission that before any merger of individual tribunals or groups of tribunals into the ADT occurred, there should be a 'genuine social and financial cost benefit analysis' of such a proposal.[79]

In evidence Mr O'Neill went further and recommended that instead of merging tribunals, there should be better co-operation between tribunals, perhaps under a committee or

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74 Guardianship Tribunal Submission, p.4.
75 Ibid, pp.4-5.
76 Evidence, 21 August 2001, p.20.
77 21 August 2001.
78 Guardianship Tribunal Submission, pp.1-3.
79 Ibid, p.6.

council of tribunals.[80] However, if there were to be a merger of tribunals, he indicated that it would be possible to preserve the specialist skills currently held by members of the Guardianship Tribunal, so long as its present statute was preserved in similar terms under the new arrangements.[81]

The Independent Pricing and Regulatory Tribunal (IPART) submitted that the government had been at pains in the *IPART Act* to maintain the tribunal's independence, and that any amalgamation would undermine perceptions of IPART's independence in exercising its functions.[82]

Contrary to these views, Justice Kellam and Judge O'Connor both acknowledged in evidence to the Committee that tribunals do have different roles and functions. At the same time, however, they held that tribunals should form a partnership in the delivery of justice services along with the courts, and that the formation of a unified tribunal service brings coherence to the tribunal function within the overall framework of institutions for resolving disputes. Such a service allows for direct links to the courts to be made through the selective cross-appointment of partners.

For example, Justice Kellam commented that VCAT is the fourth partner in the delivery of justice services in Victoria along with the Magistrates Court, the County Court and the Supreme Court. VCAT employs six cross-appointed magistrates, four cross-appointed County Court judges, and a cross appointed Supreme Court Judge, Justice Kellam.[83] According to Judge O'Connor, the equal partnership idea, as distinct from VCAT being a junior partner or subordinate tier, was valuable and "brings a level of coherence to where the tribunal function falls within the overall framework of institutions for resolving disputes that has often been missing from the discussion".[84]

Another argument advanced in opposition to expanding the ADT's jurisdiction through further amalgamation of tribunals was that tribunals need to be different in their conduct of hearings. While some tribunals emphasise mediation and conciliation of disputes, others, particularly disciplinary tribunals, adopt adversarial procedures, with lawyers to present the cases of both sides, and the quality of evidence subject to constant review. Mr O'Neill suggested that these two kinds of tribunals need to operate very differently in carrying out their jurisdictional functions.[85]

Mr O'Neill also argued that tribunals in NSW differ significantly in the layout of hearing rooms and the use of technology. In particular, hearing rooms can be laid out to be friendly and promote mediation and conciliation, while others can be laid out more formally and adversarially. Equally, some tribunals need to be able to conduct telephone hearings, videoconferencing and so on, whereas others tend to rely on face to face hearings.[86] He repeated this concern in relation to the conduct of guardianship hearings by the VCAT:

> … in Melbourne, they sit a step up and with barriers between them and people. They sit with a single member, usually a lawyer, and that is not the model that exists in NSW. We

80 Evidence, 21 August 2001.
81 ibid.
82 Independent Pricing and Regulatory Tribunal Submission, pp.1-2.
83 Evidence, 21 August 2001, p.2.
84 Evidence 19 October 2001.
85 N.O'Neill, *Tribunals – They Need to be Different*, pp.11-12.
86 Ibid, pp.12-13.

> think ours is far better in terms of the tribunal being more able to understand the issue and make an appropriate decision.[87]

Judge O'Connor acknowledged that the ADT currently has a diverse membership, with a large number of part-time members, and that accordingly, there has to be a coordinated and sophisticated effort to educate members that it is often not appropriate for tribunals to operate in an adversarial manner. Judge O'Connor agreed that tribunal hearing rooms need to be designed in a way that avoided the structure of a courtroom, but noted that in some cases, tribunals inevitably find themselves working in old style adversarial type spaces.[88]

In Victoria the differing jurisdictions of the tribunals which had been amalgamated to form the VCAT had been retained as lists within VCAT and operated under their own enabling legislation. While some refinement of processes had occurred, Justice Kellam considered that there had not been an enormous change. He gave evidence that:

> I think if you went and sat in a guardianship hearing today and saw a video of it five years ago you would see little difference. In terms of the dedicated approach to specific areas of jurisdiction, I do not think we have changed things but we have been able to modify application forms so that they are basically common across the jurisdictions. In my view that means that we have been able to make the tribunal more accessible to people because it is all on a web site. These common application forms are in every Magistrate's court, in the libraries and all over the State. That is the system of accessibility of the tribunal. In terms of the actual procedures in some areas I think we have not changed a lot.[89]

Judge O'Connor also emphasised the ADT's ability to deal with a range of differing tribunal functions:

> While the Administrative Decisions Tribunal's case-load is relatively small as compared to, say, the Residential Tribunal in New South Wales or the Commonwealth Social Security Appeals Tribunal, it is, in contrast to those examples, an instance of several disparate and technically demanding areas of jurisdiction being housed in a single structure using divisions as a means of maintaining any necessary specialisation.[90]

A fuller discussion of the ADT's operations occurs in Chapter 5.

With regard to the suggestion that amalgamation poses the risk that different tribunals would be merged together, maintaining their separate identities but gaining nothing more than a new title. The committee notes this does not appear to have been borne out by the VCAT experience. According to Justice Kellam, a successful amalgamation is a matter of balancing the specialty expertise of the individual tribunal against the benefits of a unified tribunal:

> I think there is a balance. One criticism of VCAT before it commenced—and perhaps in some quarters since—was that it would just derogate down to the lowest common denominator and that you would have all these people making decisions, some in areas about which they know nothing, so we have had to walk the balance and this is one of the reasons why we have lists. In fact, our rules have our membership allocated to the list by me. If you are a member of VCAT you are a member of the tribunal but you do not

87 Evidence, 21 August 2001.
88 Evidence, 19 October 2001.
89 Evidence, 21 August 2001.
90 ibid.

> have a licence to sit in every jurisdiction but you are allocated to a list. So some of our members, for instance, our planners do not sit anywhere else but in planning. Others, our lawyers, might sit in guardianship and a variety of other places so you have got to balance it. You have got to try to maintain the specialty expertise of the individual tribunal and, at the same time, use the benefits of a big organisation. I think we have done a lot more than just amalgamate a set of tribunals under the one umbrella.[91]

Additional perceived benefits of an amalgamated tribunal included cross-fertilisation of skills, improved public access and greater resources. Similarly, Judge O'Connor gave evidence that "sophisticated integration of small tribunals clearly delivers efficiencies for the operation and more generally for users".[92] The VCAT's jurisdiction had continued to expand following its establishment, to include retail tenancies and an increased number of disciplinary business regulation and professional regulation functions.[93]

Justice Kellam identified the success of a large, multi-division tribunal to be a function of judicial leadership as much as size.[94] This view was shared by Judge O'Connor who considered that:

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

Judge O'Connor was not persuaded by the argument that the ADT was not intended to perform any court-substitute functions. In his opinion that argument reflected the Commonwealth division between judicial and administrative review functions and overlooked the realities of the new South Wales administrative law system. Judge O'Connor gave evidence that:

> It seems to me that it is a mistaken perspective about the reality on the ground in State administration, where disputes of a variety of characters present themselves that warrant relatively informal and speedy attention, and tribunal structures are quite appropriate to do that. I would not have seen it as necessary to adopt within a State business framework the Commonwealth Constitution's strict division between judicial and administrative functions.

Although the ADT's title focuses on administrative decisions, Judge O'Connor did not consider that this should dictate the tribunal's jurisdiction and restrict it to the exercise of a review, as distinct from an original, jurisdiction. Essentially the Tribunals' jurisdiction should be whatever categories of dispute in the community warrant a certain type of handling in a tribunal.[95] In fact the ADT currently exercises both an original and review jurisdiction.

However, Judge O'Connor did acknowledge that the question of amalgamation becomes more difficult when dealing with large-volume tribunals. He told the Committee:

> Mr O'Neill reiterated the case for the separate, specialist tribunal. The case he makes has been the one that has commended itself to government in the past. That case is under pressure now for a range of reasons. There seem to be obvious economies in

91 ibid.
92 Evidence, 19 October 2001.
93 ibid.
94 Evidence, 21 August 2001.
95 Evidence 19 October 2001.

> bringing together back-of-office services. The file management and claims processing aspects of tribunal operations are relatively similar whatever the specific category of dispute or application. The front-of-office services—information provision, assistance to parties, advice as to status of matters—similarly can for the most part be brought together. I agree that special considerations apply in the management of these services for categories of users, such as persons with disability, children and situations in which the issues in dispute arise within family contexts such as guardianship and administration issues. The case in favour of integration seems to me to be very strong in the case of relatively small tribunals, often with a minuscule registry and a handful of part-time members.
>
> Large, specialist tribunals are in a somewhat different situation. The Guardianship Tribunal is closer to that end of the spectrum. Such a tribunal may well have a good ethos, good operating procedures and good resources and see amalgamation as a danger, with the possibility that a lowest common denominator approach will prevail when absorbed into the larger structure. This is a serious issue. The most-heard concern in the context of amalgamations, and I have seen two major amalgamations in the past three years in the Fair Trading portfolio, is the fear that the incoming volume area will swamp the other categories of business; and give rise to a one-size-fits-all approach to management of the case load; and staff and member failure to see the vital differences between categories of business.[96]

In Judge O'Connor's view the best way to proceed towards expanding the ADT's jurisdiction was to consolidate common services and amalgamate smaller tribunals that would benefit from the scale of the ADT. He would proceed as follows:

> I suppose what I would tend to do is proceed conceptually. That is always my inclination. So, I would be looking for a conceptually consistent category and bring those small tribunals across together. So, if it happens to be professional discipline, you would be working on that as a category and then may be there is some other category that you can identify that indicates there is a cluster of tribunals connected with that category. So, I would be much more inclined to proceed on a categorical base. You can obviously see a categorical link between community services, mental health review, guardianship and administration, and there could be a couple of other tribunals. If you were thinking they ought to be brought into a closer structure, you would be dealing with them in a categorical way and you would proceed on that basis.[97]

The Committee notes that Ms Caroline Needham, the Divisional Head of Legal Services Division of the ADT, expressed the view that "considerations of consistency, particularly as to the nature of the sanctions for the various types of professional misconduct, dictate that the professions should be dealt with by a single tribunal with the requisite areas of specialisation". However, Ms Needham considered that because "professional disciplinary matters are inherently very different from other kinds of matters administered by the Administrative Decisions Tribunal, they would be better dealt with by a separate tribunal". Alternatively, Ms Needham suggested that "all disciplinary matters be allocated to the same division of the ADT administered by a full time Head of Division".[98]

Judge O'Connor preferred a professional disciplinary division of the ADT and indicated:

> A case can be made, obviously, for bringing together professional discipline functions into a separate tribunal, but I think the same concerns that give rise to that proposition can be

96 Evidence 19 October 2001.
97 ibid.
98 ADT response to the Discussion paper, 27 April 2001.

addressed by an appropriately organised division with appropriate leadership. I personally think there is some value to a professional discipline division in having a bit of cross-pollination that goes with life in a broader tribunal.

Judge O'Connor agreed with Justice Kellam's interpretation that disciplinary matters were essentially the same. Justice Kellam stated:

> . . . I think that disciplinary matters, as a matter of law, are clearly the same, be it doctors, nurses, solicitors, barristers; it is the same law. You are applying the same standards for the protection of the public.[99]

In Judge O'Connor's view:

> The Committee's discussion paper raised the possibility of greater integration of disciplinary tribunals into the ADT. I had expressed support for that proposition in my presentation to the committee last November. I saw it as an integration that could either be achieved through having a specialist division of the ADT or a free-standing disciplinary tribunal. I agree with Justice Kellam that disciplinary tribunals, whatever profession they are dealing with, are applying the same standards for the protection of the public. That in itself supports the case for integration so that disparate approaches to common questions are avoided. I see such a division or free-standing tribunal as having judges as presiding members, replicating, in particular, the present practice in the Medical Tribunal, and the government's preferred approach to serious legal professional disciplinary cases.[100]

In the long term, Judge O'Connor, reiterated that the integration of NSW tribunals into the ADT and an expansion of the ADT's jurisdiction would entail significant micro and macro efficiencies, and that the public interest is served by consistency in the conduct of tribunal functions.[101] He identified the type of tribunal system proposed in the Leggatt Report as the way forward for tribunal development, noting the particular implications of this approach for the Administrative Decisions Tribunal:

> There are many aspects of the Leggatt report that I strongly endorse: its emphasis on tribunals being set up and run as places where a person can confidently go without a lawyer and find their way effectively through its requirements and processes; the need for government to identify those tribunal jurisdictions where the degree of complexity is such the above goal can not be achieved, and then to ensure that legal or other assistance services can be accessed; the need to resource programs for ongoing member education and development; the need for tribunals to develop appraisal systems; the need for more secure terms of appointment of reasonable length for members, especially full-time ones, accompanied by credible and transparent procedures for appointment, non-renewal or early termination; the recognition of members and aspiring tribunal members as a resource to be developed through co-ordinated education and training programs; the need for an orderly complaints system that does not admit of political interference; the fundamental importance of good information technology infrastructure to the effective performance of tribunals, both in their registry administration, and in supporting the legal research needs of members; and the need, as mentioned, for a dedicated, professional tribunals service to underpin the achievement of those goals.[102]

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99 Evidence, 21 August 2001.
100 Evidence, 19 October 2001.
101 ADT Supplementary Submission, p.1.
102 Evidence 19 October 2001; ADT submission dated 27 April 2001.

4.1.2 The Expertise of Tribunal Members

In supplementary submissions, a number of tribunals highlighted that their members have particular skills or knowledge relevant only to their tribunal, which could potentially be lost if they were amalgamated into the ADT. For example, the IPART indicated that staff of the tribunal have specialist economic analysis skills that precluded any synergies from amalgamation into the ADT.[103] Similarly, the joint written submission from Harness Racing New South Wales, the Greyhound Racing Authority and the Thoroughbred Racing Board argued that they have very specialised knowledge that would be lost if the ADT's jurisdiction was expanded to encompass their role:

> The matters which come before the Tribunals are matters peculiar to racing and often require a knowledge of the intricacies of racing. … A great number of matters handled by Tribunals on appeal require determination on the basis of the accepted norms in the industry, accepted practices in the industry and the attributes and abilities of the animals concerned. In greyhound racing for example a greyhound may be suspended for fighting or failing to chase the lure. What constitutes fighting or failing to chase can often only be determined by scrutiny of video evidence by experienced and expert persons. In harness and thoroughbred racing drivers and jockeys may be charged with failing to take every opportunity available to win or achieve the best result possible. Again determination of those issues requires judicial officers and assessors expert and experienced in racing matters.[104]

The Committee also received a written submission from Mr Officer QC on behalf of the Pecuniary Interest Tribunal. Mr Officer emphasised that the Tribunal has developed a high level of expertise in its particular area, with a detailed knowledge of the working of local councils and specialist knowledge of local government and planning laws:

> I consider it essential that the confidence of the public and local government industry in the enforcement of pecuniary interest offences be maintained through this independent Tribunal which is working most effectively.[105]

In response to concerns that amalgamation had led to a decline in expertise within VCAT, Justice Kellam gave evidence that amalgamation had conversely allowed cross-fertilisation of skills and knowledge between members of the merged tribunals. While some individual members are allocated only to one list within VCAT, like the planning list, others sit on a variety of lists and can bring their skills and knowledge to different tribunals. Thus, for example, former members of the Residential Tenancy Tribunal had moved to also sit on other lists such as domestic buildings, retail tenancy and guardianship, and have in turn moved within the VCAT structure, breaking down these perceived divisions. Similarly, the deputy presidents in charge of lists have been required to move between lists.[106]

That said, Justice Kellam indicated that he has been particularly vigilant in the allocation of VCAT members to new lists, attempting to ensure that people are not allocated to a list unless they have the required capacity and expertise.[107] Justice Kellam also gave evidence that the retraining and moving of members between lists had overcome perceptions of a hierarchy between tribunals that had existed prior to the formation of

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103 Independent Pricing and Regulatory Tribunal Submission, pp.1-2.

104 Joint Submission by Harness Racing New South Wales, the Greyhound Racing Authority and the Thoroughbred Racing Board, pp.1-2.

105 The Local Government Pecuniary Interest Tribunal Submission, p.2.

106 Evidence, 21 August 2001.

107 Evidence, 21 August 2001.

VCAT. While some members moved between the civil and administrative divisions, generally, the movement of members was between jurisdictions within either the civil or administrative division. Justice Kellam agreed with the suggestion that a wider career path would attract a better standard, or calibre, of members. In Justice Kellam's view:

> . . . the opportunity to work in a variety of different areas, and I think to some degree the more certainty of reappointment if you do your job well in a larger organisation, is attracting a better class of applicant.[108]

In addition to concerns relating to a loss of expertise, Mr O'Neill also claimed that the merger of tribunals could lead to a 'legalisation' of the tribunal system. He gave evidence that tribunals were set up partly to move away from court-based systems that are conducted through a lawyer, and suggested:

> …that if you have judicial leadership [of a merged ADT], this represents an element of recapture of the system by the lawyers. It will lead to the inevitable relegalisation of such tribunals.

In particular, Mr O'Neill suggested that 'relegalisation' would be at the expense of tribunals such as the Guardianship Tribunal, which relies on professional members who are experts with experience in the assessment and treatment of people with disabilities. Accordingly, Mr O'Neill favoured the Guardianship Tribunal retaining its current jurisdiction outside of the ADT. However, if it were to be merged with the ADT, he argued that the statute should preserve the membership of the current three-person Guardianship Tribunal panels, which sit with two non-legal experts.[109]

In his evidence to the Committee on 19 October 2001, Judge O'Connor acknowledged the need to retain expert and community members on tribunal panels, both to inform the tribunal as to contemporary standards of practice, and to interpret and explain the technical evidence tendered. In particular, Judge O'Connor noted that the ADT uses three-member panels in the Equal Opportunity Division as does the Guardianship Tribunal.[110]

Judge O'Connor also addressed the issue of 'relegalisation' of tribunals. He observed:

> What Mr O'Neill is worried about importing into tribunal work, I believe, is an uncritical cast of mind often found among lawyers as to the innate virtue and superiority of the practices and procedures, and the strict observance of the rules of evidence, found in courts, especially the higher courts. In my experience, most of the lawyers interested in tribunals disavow such views, and are often quite concerned not to allow the traditional practices to take hold.[111]

However, Judge O'Connor acknowledged that it is the responsibility of management to ensure that a court room culture does not break out in tribunals. He cited the example in the ADT where he had had to intercede with an individual lawyer to stop the issue of directions requiring parties to file appeal books of the kind seen in the Court of Appeal.[112]

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108 ibid.
109 ibid.
110 Evidence, 19 October 2001.
111 ibid.
112 ibid.

4.1.3 Public Recognition and Access to Tribunals

Justice Kellam suggested in evidence that the higher profile of VCAT has led to greater public recognition and use of the administrative appeals system in Victoria. For example, he cited the case of the old Small Claims Tribunal, which prior to the formation of the VCAT was hearing about 2,500 cases a year in contrast to VCAT which hears about 5000 small claims cases a year. Justice Kellam acknowledged this partly reflected changes in legislation, but also suggested it resulted from better recognition of and accessibility to VCAT.[113]

In addition, Justice Kellam suggested that the greater size and resources of VCAT had allowed it to attend up to 30 per cent more hearing venues in rural areas than was previously the case for the old individual tribunals.[114] This figure included access through videoconferencing and telephone conferencing. VCAT also had utilised sessional magistrates of VCAT, when sitting as magistrates in country towns, to deal with VCAT matters, thereby improving waiting times for rural applicants. Increased visits to regional areas was facilitated further by utilising one member to hear a range of matters, for example, small claims and residential matters and possibly guardianship matters.[115]

Mr O'Neill noted that the Guardianship Tribunal has operated for 12 years, in which time it has put a lot of effort into community education promoting its role, and working with other bodies such as the Public Guardian, the Benevolent Society and the Alzheimer's Association.[116] He also gave evidence that the Guardianship Tribunal has the resources to visit all the major rural areas of NSW at least every 6-8 weeks, and that approximately 30 per cent of hearings are conducted outside of Sydney. The tribunal can deal with matters more quickly through telephone or videoconferencing facilities.[117]

The Committee notes that at present, the ADT receives comparatively few applications from rural areas, and rarely sits in the regions.[118]

4.1.4 Appointment of Tribunal Members and Training

In evidence to the Committee, Justice Kellam advised that the Victorian Government has settled on five-year tenured terms for members of VCAT, which has given job security to its members. In addition, the President of VCAT now has a memorandum of understanding with the Attorney General about the appointment and reappointment of members based on merit, whereas previously appointments and reappointments to tribunals were determined by the Attorney General's department, with the potential for political overtones. Also, the pay structure of the tribunals has been rationalised from over 15 different pay levels amongst the old tribunals to set pay points for members, senior members and deputy presidents, thus creating greater equality than previously existed.[119]

113 Evidence, 21 August 2001.
114 ibid.
115 ibid.
116 ibid.
117 ibid.
118 Evidence, 19 October 2001.
119 Evidence, 21 August 2001.

By contrast, in evidence on 19 October 2001, Judge O'Connor noted that it is now commonplace for appointments to tribunals in NSW to be short-term for a period of three years. He argued that this is detrimental to the tribunal system in NSW:

> We should be moving, especially with amalgamations, to seeking to develop tribunal membership as a later-career new career path. … There needs to be much greater transparency and objectivity in the process of appointing tribunal members. …There is plainly a danger of tribunal members being affected in their decisions, consciously or unconsciously, by the presence of government parties in hearings who, in turn, have a say in their appointment.

Accordingly, Judge O'Connor favoured the appointment of at least a senior cadre of members to the ADT with long terms of five-to-seven year appointments, or five year renewable appointments for a maximum term of ten years, thereby, giving career structure and predictability, and removing the tension and morale issues surrounding reappointment periods.[120] He proposed a set merit selection process for tribunals similar to the public service, starting with advertisements calling for expressions of interest, proceeding through a merit assessment, and ending with a recommendation to the Minister.[121] Judge O'Connor further indicated that at the moment in NSW, there is a plethora of different pay levels for different tribunals.[122]

VCAT has made full use of its part-time membership. It has 38 full-time members and approximately 150 part-time members. Justice Kellam stated that the capacity to use female members had been a significant advantage of VCAT's part-time membership, and had been a good source of highly skilled lawyers working part-time for VCAT, which would not have been available if the focus had been on full-time membership. Forty per cent of VCAT members are women, which reflected that part-time membership is very attractive to women barristers at certain stages of their careers.[123]

The Committee notes that Justice Kellam attached considerable importance to the judicial leadership of VCAT and the status of his position as President, which he believes has provided him with constant and ready access to the Minister. As discussed before, the President of VCAT sits on a Court Consultative Council with the Chief Justice, the President of the Court of Appeal, the Chief Judge of the County Court, the Chief Magistrate, the Attorney General and the Head of the Department of Justice. Justice Kellam noted that access to such consultative bodies was not available to smaller tribunals. Justice Kellam emphasised the benefits of judicial leadership being tenured.

Justice Kellam also gave evidence that VCAT has considerable resources in its budget to conduct both internal and external training, and that he is supported in doing so by statutory provision.[124] Section 30 of the *Victorian Civil and Administrative Tribunal Act 1998* provides that the President and Vice Presidents "are responsible for the management of the administrative affairs of the Tribunal and for directing the professional development and training of members". Multi-skilling had been sponsored through rotation of members and deputy presidents. Registry staff also were rotated in order that they would be capable of operating in several jurisdictions.[125]

120 Evidence, 19 October 2001.
121 ibid.
122 ibid.
123 Evidence, 21 August 2001.
124 ibid.
125 ibid.

Mr O'Neill argued in a supplementary submission to the Committee, on behalf of the Guardianship Tribunal, that the Guardianship Tribunal has already achieved many of the benefits of the VCAT, as highlighted by Justice Kellam. In particular, he indicated his view that the recruitment process of Guardianship Tribunal members has guaranteed a high quality membership with expertise in a range of relevant disciplines. He also argued that the President of the Guardianship Tribunal has had appropriate access to all six Ministers responsible for the tribunal since its inception in 1989. [126]

Mr O'Neill considered that amalgamation of tribunals with the ADT posed the risk that the tribunal systems would become a new career for lawyers at the expense of community and other tribunal members. He indicated his concerns against a background of training initiatives taken by the Guardianship Tribunal since 1989 specifically for its members:

> We have three half-day and one full-day training each year for members. We have up to four half-day extra training for our presiding members – that is needs based. We have a well established system of training. One concern I have about proposals for amalgamation – and in a sense this occurs in VCAT – is that the tribunal system can finish up being a new career for lawyers. Risks would be associated with that, particularly if the ethos develops that it is the lawyers who know it all and the role of other expert members is devalued.[127]

Mr O'Neill further argued that while all tribunal members have certain common skills such as applying the rules of natural justice and procedural fairness, and operating within jurisdictions, they also have specific skills and knowledge appropriate to their Tribunal that are of limited value to the members of other tribunals. Accordingly, training courses often need to be specific to individual tribunals.

4.1.5 Economies of Scale

Justice Kellam gave evidence that there have been a number of economies arising from the formation of VCAT. For example, VCAT inherited 7 different computer systems on its formation, which have now been rationalised to two. Similarly, VCAT had modified application forms so that they are basically consistent across the jurisdictions, and written in plain English. In addition, an online application process had been developed for registering applications for residential tenancy disputes. Given that up to 20 per cent of non-online applications are wrong and have to be sent back for correction, the error proof online system had saved significant administrative effort.[128]

Reflecting these various cost savings, Justice Kellam also gave evidence that the cost per case handled by VCAT is dropping each year, although clearly it has to be ensured that this is not accompanied by a drop in standards too.[129]

Mr O'Neill claimed that infrequently used tribunals are inefficient users of scarce resources, but at the same time, argued that amalgamation of large tribunals into the ADT would be likely to create diseconomies of its own:

> Drawing the tribunals together would be an extremely difficult matter, bringing with it all the diseconomies of large scale. The different elements of an amalgamated tribunal would

126 Guardianship Tribunal Supplementary Submission, p.1.
127 Evidence, 21 August 2001.
128 ibid.
129 ibid.

> still have to continue to act very differently from one another in order to exercise their jurisdictions in appropriate ways. This reality would be in tension with the natural managerial tendency to reduce differences and make one size fit all. The likelihood of internal rebellions and insurrections must be high with the component parts of the merger pulling against rather than together with one another.[130]

The Guardianship Tribunal also questioned whether administrative efficiencies would result from merger of existing tribunals and an expansion of the ADT's jurisdiction:

> It is extremely doubtful that any rigorous analysis would show any value in drawing the tribunals together under one umbrella organisation. The loss of identity, and the separate efficient and effective ways of handling business together with the different organisational spirits and ethos developed in separate tribunals is a high price to pay. The differing ways of doing things but still meeting the essential criterion of fairness is one of the strengths and not a weakness of the present arrangements. Merging tribunals into one mass will stifle the development of more effective practices and procedures.[131]

At a cost level, Mr O'Neill put a view that the cost of the Guardianship Tribunal moving from its current premises in the inner city suburb of Balmain into a common ADT building would be approximately $1 million. That expense was said to incorporate the cost of breaking the tribunal's current lease, reorganising hearing rooms, accommodating new staffing arrangements and so forth.[132]

Similarly, the Independent Pricing and Regulatory Tribunal (IPART) indicated that the opportunities for economies of scale through its amalgamation with the ADT are negligible, on the basis that IPART already outsources the bulk of its support functions including payroll, finance and IT.

Judge O'Connor supported Justice Kellam when he appeared before the Committee on 19 October 2001. He commented that there are obvious economies to be achieved from the merging of existing NSW tribunals into the ADT, such as standardising file management and claims processing, which are reasonably similar whatever the category of dispute or application. Information provision, assistance to parties, and advice on the status of matters also can often be brought together, despite some considerations that arise for categories of users such as the disabled, children and so on.[133] He was particularly interested in the "dual-computer environment" of VCAT based on the different case management and computer infrastructure systems for high and low volume areas.

The ADT is a small volume tribunal and Judge O'Connor saw the benefits of IT to be greatest in relation to tribunal organisation rather than access for applicants:

> This is a critical issue. The synergies you get from good IT are more in the back-of-office functions that I described. I think you must be careful—this is the point that you are getting at—with IT dependence in what I call the front-of-office relationship. By and large, you are not dealing with populations who are comfortable with IT or who have resources such as home Internet connections and that kind of thing. I think you must be careful in your front-of-office approach to IT. I do not think you want to create a business

130 Mr O'Neill, *Tribunals – They Need to be Different*, A paper to the fourth AIJA Tribunal's Conference 8th June 2001 p.14.

131 Guardianship Tribunal Submission, p.5.

132 Evidence, 21 August 2001.

133 Evidence, 19 October 2001.

> environment that will advantage the big firms that can lodge via IT. I do not think that is part of the world of tribunals.

Judge O'Connor also considered "the case in favour of integration to be very strong in the case of relatively small tribunals, often with a minuscule registry and a handful of part-time members".[134] At the same time, however, he acknowledged that larger tribunals, such as the Guardianship Tribunal, may well have good operating procedures and good resources, and that the most commonly expressed concern is the risk of being forced into a one-size-fits-all approach to management of the case load and a failure on the part of members to see the vital differences between categories of business.[135]

4.2 Response to the proposed Administrative Review Standing Committee

In his written submission dated 27 April 2001, Judge O'Connor, indicated his understanding that the proposed Administrative Review Standing Committee would be similar to the Commonwealth Administrative Review Council (ARC). He strongly supported the formation of such a body so far as the following proposed functions are concerned, that is:

a. to further develop explicit criteria for determining the classes of administrative decisions which would appropriately fall within the ADT's external merits review jurisdiction;

b. ongoing review of the ADT's jurisdiction with particular focus on the assessment of tribunals and similar bodies in New South Wales, for the purpose of recommending whether they can appropriately be merged with the ADT;

c. oversight of the administrative law system in New South Wales, performing functions analogous to those of the Administrative Review Council under Part V of the *Administrative Appeals Tribunal Act 1975* (Clth).

However, Judge O'Connor expressed some reservations on the proposal for such a body: 'to regularly assess, evaluate and report on the operational efficiency of the ADT, its effectiveness and performance'. Judge O'Connor indicated that this role may overlap with the role normally performed by the portfolio Minister, the Attorney General, and the Department in relation to matters of budget and the like:

> The ARC does not have any role in relation to issues of operational efficiency, effectiveness and performance. My understanding is that those issues are handled within the Department/Minister environment. In making these comments I see a distinction between being concerned with detailed issues of budget and management on the one hand and being concerned on the other with the procedures and practice of the Tribunal in relation to its handling of applications and case disposal. The latter is a reasonable matter for a Standing Committee to have an interest in, but I see some difficulties in it having any charter which might permit it to probe more deeply into the operational environment.[136]

In relation to the possible composition of the proposed Standing Committee, Judge O'Connor indicated that it should emulate the composition of the ARC. The ARC has at

134 ibid.
135 ibid.
136 ADT Supplementary Submission, pp.4-5.

least six members: a President, two ex officio members (the Ombudsman and the President of the Law Reform Commission), and at least three members with special qualifications. A person appointed in the special qualifications category must have:

(a) extensive experience at a high level in industry, commerce, public administration, industrial relations, the practice of a profession or the service of a government of an authority or a government; or

(b) extensive knowledge of administrative law or public administration; or

(c) direct experience, or direct knowledge, of the needs of people, or groups of people, significantly affected by government decisions.

Based on the ARC model, Judge O'Connor suggested that an appropriate structure for the Administrative Review Standing Committee could be a President, ex officio membership from the Ombudsman's Office, the President of the NSW Law Reform Commission, the President of the ADT, and at least three further members with at least one from each of the categories outlined above used in the Commonwealth ARC.

Judge O'Connor also gave evidence that the ARC type body and the Council of Tribunals have quite distinct functions:

> They belong to slightly different business environments. The proposal you were putting forward was one that I think was in the nature of an advisory body to the Minister, for example, and to the Government, focusing on State tribunals and State legislation. That is a relatively specialist activity. Obviously you need to have officers attending a body like that who know the detail of the jurisdictions that are being given to tribunals and can understand the particulars of the issues that might come up. That seems to be a more focused institution.
>
> The Council on Australian Tribunals is a new professional association stimulated by the Administrative Review Council at the Commonwealth level. It offers great advantages to tribunal heads from around the country because we can compare what we are doing with each other, develop new education systems and so on, and talk about issues such as who has the best IT and the like. Obviously you would like to think that government officers would interest themselves in that organisation as well, otherwise some of these discussions cannot really be had effectively. So at this stage the Council on Australian Tribunals in embryo is akin to the Australian Institute of Judicial Administration. It is more like that kind of body.
>
> There is a place for the concept you are referring to because it really has a separate role.

The Committee also notes that in evidence to the Committee on 21 August 2001, Justice Kellam of the VCAT indicated that a VCAT council, similar to the ARC, had been proposed in Victoria at the time of the formation of VCAT, but was not achieved for political reasons. Justice Kellam noted that one of the benefits of such a council would be a formalisation of the system for selecting and making recommendations for appointment to the tribunal.[137]

[137] Evidence, 21 August 2001.

4.3 Conclusion

Expansion and amalgamation

In its discussion paper of March 2001, the Committee noted that the original impetus that led to the merging of tribunals and the establishment of the ADT has since declined, and that there seems to be no apparent intention to proceed with a systematic integration of existing tribunals into the ADT, as foreshadowed in the Minister's second reading speech on the original ADT legislation.

Since the release of the Discussion Paper in March 2001, there has been no further merger of existing tribunals into the ADT. However, some amalgamation of tribunals has occurred. For instance, the Fair Trading Tribunal and the Residential Tribunals were abolished and a new "super consumer tribunal", called the Consumer, Trader and Tenancy Tribunal was established, commencing operations in February 2002. The creation of this new tribunal progressed the rationalisation of separate tribunals which had begun with the establishment of the Fair Trading and Residential Tribunals. With the exception of two separate tenancy divisions, the Consumer, Trader and Tenancy Tribunal has retained the pre-existing divisions of the former tribunals. Single member or two or three person panels are used, depending on the nature of the matter in dispute.[138]

Like the VCAT, the new Consumer, Trader and Tenancy Tribunal serves as a working example of a "super tribunal" that has retained the former structure of the merging tribunals and their panel composition. Greater insight into the effectiveness and efficiency of the Consumer, Trader and Tenancy Tribunal will be available after it has been operating for a longer period of time. In the absence of any other "super tribunals" in New South Wales, the Committee has utilised the VCAT as a working model of a multi-division "super tribunal".

The Committee has benefited from the additional submissions and evidence that it has received since March 2001, including evidence from the president of the VCAT, Justice Kellam. On the basis of this information, the Committee reiterates its view that there are potentially significant advantages to be gained from integrating of existing tribunals in NSW into the ADT and from expanding the ADT's review jurisdiction. The Committee considers that:

- While existing NSW tribunals have often very different functions and means of operating, there is the opportunity to benefit from a greater integration and coherence of tribunal operations in the delivery of arbitral and quasi-judicial services in NSW while, where appropriate, preserving the existing rules and procedures through the establishment of separate lists within a larger ADT.
- Expanding the jurisdiction of the ADT will elevate its prominence and status, and facilitate the role of tribunals as an equal component along with the courts in dispute solving.
- Consistency of tribunal decision-making would be better served in a multi-division tribunal where unity of approach can be fostered.

[138] LA Hansard, Second reading speech, Consumer, Trader and Tenancy Tribunal Bill, 19 September 2001.

- The merger of tribunals would enable tribunal members to broaden their skills and knowledge, and potentially to sit on other tribunals. Tribunal members would have greater variety and flexibility in their work environment and this would lead to improvements in the delivery of tribunal services generally.
- In terms of access, there is the potential for greater public recognition, and use, of the tribunal system generally arising from the merger of existing tribunals into the ADT. In turn, the greater resources of an expanded ADT may allow the tribunal to offer access to people in more locations than is currently the case.
- An expanded and integrated ADT would benefit from secure terms of appointment of reasonable length for tribunal members, especially full-time members, accompanied by credible and transparent appointment procedures, and a rationalised pay structure. An expanded ADT also would have the potential to provide better funded training program for ADT members.
- There are economies of scale to be achieved from the integration of existing tribunals, especially small tribunals, into the ADT. They include economies achieved by standardising file management and claims processing, information provision, assistance to parties, and advice on the status of matters.

Given these considerations, the Committee restates its position, that a comprehensive assessment of the scope for further merging existing NSW tribunals into the ADT should be undertaken, as was intended to be a consequence of the ADT's establishment. While it may not be practical for NSW to adopt the VCAT model in its entirety, it is obvious to the Committee that possibilities for further integration of tribunals into the ADT exist.

The Committee notes the comments of Judge O'Connor that if amalgamation of tribunals into the ADT is to proceed, then it should be done on a "categorical" basis so that categories of tribunals could be bought across at the same time. Judge O'Connor identified a categorical link between community services, mental health review and guardianship as one instance. On the issue of further integration of disciplinary tribunals, the Committee considers that there is a case for the establishment of a separate division of the ADT, to be presided over by judicial members. The Committee agrees with Judge O'Connor that a disciplinary division of the ADT, with appropriate leadership and organisation, is preferable to the creation of a separate disciplinary tribunal.

The Committee notes that the Guardianship Tribunal has recommended a 'genuine social and financial cost benefit analysis' of the merging of individual tribunals into the ADT. However, the Committee considers that while such a proposal may be a useful first step towards making the changes necessary for the ADT to realise its full potential, the results of such analysis may not be conclusive. It also may lead to the perception that only small tribunals should be integrated with the ADT. On the face of it, an integrated ADT should be able to advance economies of scale and shared resources.

In principle, the Committee cannot see any reason for larger tribunals such as the Guardianship Tribunal to be excluded from amalgamation with the ADT. The Committee considers that the feasibility of any proposal to amalgamate an existing tribunal with the ADT is determined by a range of factors, including whether the necessary infrastructure and management can be put in place to underpin a new "super tribunal". The overriding

consideration is whether the jurisdiction proposed to be conferred on the ADT, either review or original, is appropriate and whether it would result in effective tribunalship in the area concerned.

In the context of its current inquiry, the Committee continues to support the proposals advanced in the Discussion Paper, and recommends that:

Recommendation 1

Legislation should be brought forward to merge separate tribunals with the ADT, unless there are clear reasons why such inclusion would be inappropriate or impractical, with particular consideration being given to merging all professional disciplinary tribunals with the ADT, as part of a separate professional disciplinary division.

Recommendation 2

a. Explicit criteria for determining those classes of administrative decisions which would appropriately fall within the external merits review jurisdiction of the ADT should be developed by the Attorney General, in consultation with the ADT, in the first instance, as an interim measure pending the establishment of an Administrative Review Advisory Council.

b. The Attorney General's Department should consult all departments and agencies to identify those classes of administrative decisions which currently meet such criteria and which should, therefore, be subject to external merits review by the ADT, having regard to the work done by the Commonwealth Administrative Review Council in this area.

c. Legislation should be introduced to confer review jurisdiction on the ADT in respect of those decisions which currently meet the agreed external review criteria.

Recommendation 3

There should be a presumption in future that all classes of administrative decisions provided for under new legislation, so long as they meet the criteria developed by the Attorney General should be subject to external merits review by the ADT.

4.3.1 Mechanisms for further development

The Committee believes that one of the possible impediments to achieving progress in merging existing tribunals into the ADT may have been the lack of a body to promote and advance consolidation of the ADT's jurisdiction. To fill this gap, the Committee recommends that an Administrative Review Standing Committee, as proposed in the Discussion Paper, be established. However, the Committee considers that this advisory body should be termed more appropriately an Administrative Review Advisory Council (ARAC), so as to avoid confusion between the advisory body and standing committees of the Parliament. The Committee considers that it is particularly important to stress that the proposed Administrative Review Advisory Council should be an independent body, as is the case with the Commonwealth Administrative Review Council.

The Committee accepts the comments of Judge O'Connor that such a body should have the following functions:

a. to further develop explicit criteria for determining the classes of administrative decisions which would appropriately fall within the ADT's external merits review jurisdiction;

b. ongoing review of the ADT's jurisdiction with particular focus on the assessment of tribunals and similar bodies in New South Wales, for the purpose of recommending whether they can appropriately be merged with the ADT;

c. oversight of the administrative law system in New South Wales, performing functions analogous to those of the Administrative Review Council under Part V of the *Administrative Appeals Tribunal Act 1975* (Clth).

Judge O'Connor indicated to the Committee that he does not favour such a body having power 'to regularly assess, evaluate and report on the operational efficiency of the ADT, its effectiveness and performance', as suggested by the Committee in the Discussion Paper. He drew a distinction between detailed issues of budget and management, as opposed to procedures and practice of the Tribunal in relation to its handling of applications and case disposals. Judge O'Connor considered the latter to be a reasonable matter for an advisory body to have an interest in but he perceived some difficulties in permitting such a body to examine in detail the ADT's operational environment. The Committee accepts this position.

Finally, in relation to the composition of the proposed Administrative Review Advisory Council, the Committee agrees with Judge O'Connor that it should emulate the composition of the Commonwealth ARC. The membership of the ARC comprises a President, two ex officio members (the Ombudsman and the President of the Australian Law Reform Commission), and at least three members with special qualifications.

Based on the ARC model, an appropriate structure for the NSW Administrative Review Advisory Committee could be a President, ex officio membership from the Ombudsman's Office, the President of the NSW Law Reform Commission, the President of the ADT, and a minimum of three further members with at least one from each of the categories outlined above as used in the Commonwealth ARC.

Further to the proposals contained in the Discussion Paper, the Committee recommends that:

Recommendation 4

The *ADT Act* should be amended to provide for the establishment of an Administrative Review Advisory Council with the following functions:

a. to further develop explicit criteria for determining the classes of administrative decisions which would appropriately fall within the ADT's external merits review jurisdiction;

b. ongoing review of the ADT's jurisdiction with particular focus on the assessment of tribunals and similar bodies in New South Wales, for the purpose of recommending whether they can appropriately be merged with the ADT;

c. oversight of the administrative law system in New South Wales, through performing functions analogous to those of the Administrative Review Council under Part V of the *Administrative Appeals Tribunal Act 1975* (Clth).

The Committee further recommends that the proposed Administrative Review Advisory Council, where necessary, should be able to make general observations and provide advice on the practices and procedures of the ADT in relation to its handling of applications and case disposals.[139] The ADT should continue to report to the Attorney General on matters of operational efficiency, effectiveness and performance, and relevant information should be included in the ADT's Annual Report.

Recommendation 5

The proposed Administrative Review Advisory Council should, in particular, monitor the progress achieved in merging existing tribunals with the ADT and also have an ongoing role in the further review and development of criteria for defining the appropriate extent of the ADT's merits review jurisdiction.

Recommendation 6

The membership of the proposed Administrative Review Advisory Council should comprise a President, two ex officio members (the Ombudsman and the President of the Law Reform Commission), and at least three members with special qualifications.

A person appointed in the special qualifications category should have:

a. extensive experience at a high level in industry, commerce, public administration, industrial relations, the practice of a profession or the service of a government or of an authority of a government;
b. or extensive knowledge of administrative law or public administration;
c. or direct experience, or direct knowledge, of the needs of people, or groups of people, significantly affected by government decisions.

Recommendation 7

7a. The proposed Administrative Review Advisory Council should report to the Attorney General, who in turn should present each of the Council's reports to Parliament within fifteen sitting days of receiving the report.

7b. The proposed Administrative Review Advisory Council should prepare an annual report on its operations to the Attorney General for tabling in Parliament.

[139] see Chapter 5 for further discussion and recommendations.

Interim measures

It is a matter of concern to the Committee that, particularly in the absence of the establishment and appointment of the proposed Administrative Review Advisory Council, further expansion and consolidation of the ADT's jurisdiction may not occur. Consequently, the Committee recommends that:

Recommendation 8

8a Pending the establishment of the proposed Administrative Review Advisory Council (ARAC), the Attorney General should assume responsibility for the performance of the functions recommended for ARAC.

8b The Committee further recommends that to assist the Attorney General in this role the proposed membership of the ARAC should be convened as a Working Group, pending the establishment of the ARAC.

8c The NSW Law Reform Commission (LRC) conduct a review of existing tribunals and similar bodies in New South Wales, with a particular focus on disciplinary tribunals, to determine whether it is feasible and appropriate to merge them with the ADT.

8d The Committee further recommends that the LRC report to the Attorney General on the outcome of the review and that the Attorney General table the report in Parliament upon its receipt.

The Committee makes these recommendations having regard to the progress of the ADT's development, which has proceeded on an ad hoc rather than a systematic, coherent basis. The recommendation for a Working Group is put forward to provide a catalyst for further development without delay. Unlike the proposed ARAC, a Working Group can be established on an administrative rather than statutory basis. However, the Committee does not regard a Working Group as a substitute for the ARAC. Nor does the Committee consider that the implementation of Recommendation 2, that is the formulation by the Attorney General of explicit criteria for determining those classes of administrative decisions which should fall within the ADT's jurisdiction, should await the establishment of either the ARAC or the interim Working Group. The development of such criteria is an exercise which could commence immediately, particularly having regard to the work already done in this area by the Commonwealth Administrative Review Council.

It would be of particular concern to the Committee if the Working Group proposal was adopted as an alternative to the establishment of the ARAC. Such a course would be unsatisfactory particularly because of the reliance of the Working Group on the Attorney General and the Attorney General's Department. The proposed Administrative Review Advisory Council is envisaged as a relatively independent advisory body, accountable to the Attorney General, but free from political influence and departmental involvement.

With regard to the need for an assessment of those separate tribunals which could appropriately be merged with the ADT, particularly professional disciplinary tribunals, the Committee considers that the NSW Law Reform Commission should undertake an immediate review. Such a review could be conducted without awaiting legislation for the proposed ARAC and the appointment of its members. The Committee originally envisaged that it was most appropriate for this function to be performed by the

proposed ARAC as an independent, advisory body. However, given the period which is likely to be needed to establish the ARAC, the Committee has recommended that in the interim the LRC conduct the review. In the Committee's view the LRC would be able to inquire into tribunals across portfolios and would bring an objective, independent view to the assessment. Following its creation, the ARAC would assume responsibility for the ongoing review of the ADT's jurisdiction, including the scope for further amalgamation of tribunals with the ADT.

Appointment of Tribunal Members

The Committee was prompted by evidence received in the first stage of the inquiry, to propose that the *ADT Act* be amended to provide for some full-time members and that the appropriate resources be provided. Judge O'Connor has since indicated his support for a greater emphasis on full-time membership and advised that legislative amendment may not be necessary to secure this proposal as the *ADT Act* already makes provision for the appointment of full-time tribunal members. Deputy President Hennessy was appointed in March 2001 on a full-time basis exclusively to perform ADT work.

During the second stage of the inquiry, the Committee heard evidence in favour of the longer terms for the Tribunal's members, with renewable appointments for periods of five to seven years. This proposal was made in the interest of greater career structure and predictability. Support also was expressed for merit selection processes to be adopted in relation to the appointment of members of the ADT, including public advertisement of positions and merit assessment.

In addition , the Committee took evidence that VCAT has benefited from fully utilising its part-time membership, which is attractive to women barristers at certain stages of their careers. As a result VCAT obtained a valuable source of highly skilled lawyers working part-time which would not have been available if the focus was on full-time membership.

It is the opinion of the Committee that the selection and appointment of tribunal members is an area which requires further development and improvement. The Committee supports merit selection, increased numbers of full-time members appointed for longer terms, and full utilisation of part-time membership. Judge O'Connor has indicated that the number of full-time appointments may be increased administratively without the need for legislative amendment.

Tribunal leadership and the professional development of Tribunal Members

Evidence and submissions to the Committee have underscored the importance of tribunal leadership to the efficient and effective operation of a multi-divisional, "super tribunal" exercising both original and review jurisdiction. In particular, the Committee has noted that the professional development of tribunal members and the appropriate allocation of members to Divisions and lists are critical functions in respect of which the President and other senior members of the ADT should be conferred responsibility by statute.

The Committee considers that in any expansion of the ADT's jurisdiction, especially amalgamation of other tribunals, the VCAT experience will be invaluable. The Committee is particularly concerned to ensure that the focus given to professional development of VCAT's tribunal members should be replicated in an expanded ADT.

Towards this end, the Committee recommends that the statutory functions of the President and Deputy Presidents of the NSW ADT should be amended along the lines of s.30 of the *Victorian Civil and Administrative Tribunal Act 1998* to include responsibility for directing the professional development and training of members, in addition to directing the business of the Tribunal. By making such amendment, the Committee intends that the value of professional development of tribunal members will be clearly recognised as a factor critical to the success of the ADT, and against which the ADT should report and for which adequate funding should be made available.

Recommendation 9

The statutory functions of the President and Deputy Presidents of the NSW ADT should be amended, in terms similar to s.30 of the *Victorian Civil and Administrative Tribunal Act 1998,* to include responsibility for directing the professional development and training of tribunal members.

Chapter 5

OPERATIONS

5.1 Discussion Paper proposals and the responses

The Committee's examination of the operation of the ADT was influenced by a number of factors in tribunal operation identified in reports of the Australian Law Reform Commission. The Committee noted that:

> The Australian Law Reform Commission identified several factors influencing the procedures used by tribunals, including:
>
> - the resources available to tribunals and their decision makers (for example, whether a tribunal has the resources to conduct its own investigations, the number of tribunal members and the tribunal's caseload)
> - the personal preferences of tribunal decision makers and the membership and 'culture of the tribunal (for example, lawyer members may be more comfortable with courtroom based procedure)
> - the nature of the case (for example, the complexity of the questions of fact, law or credit raised by the case and whether there is a further level of review available)
> - factors relevant to the parties (for example, their level of relevant knowledge and experience and the nature and extent of their representation in the proceedings, if any)
> - decisions or dicta of appeal or review courts concerning alternative adjudicative or dispute resolution processes.[140]
>
> The ALRC also highlighted a recommendation by the Administrative Review Council that:
>
> > Review tribunals should have sufficient powers and discretions to enable them to pursue whatever techniques and processes best serve their objectives, including techniques associated with an active investigative approach.[141]

Reference also was made to the comments of the then Attorney General when introducing the *ADT Bill* that the ADT would be able to adapt its procedures to the circumstances of applications and that the different divisions of the ADT would be able "to operate relatively autonomously, with different rules and procedures which are appropriate to the functions exercised by each division." He also anticipated that there would be variations in the rules and procedures used within a division depending on the nature of the matter under consideration.[142]

The Committee concluded:

> It is evident to the Committee that the operation of the ADT differs significantly between its original and review jurisdiction. Proceedings in the divisions involved in the original jurisdiction of the ADT tend to be more adversarial and reliant on the fact-finding methods used in courts, e.g. formal receipt and testing of evidence, whereas the practices and procedures used by the divisions involved in the ADT's merits review

140 Australian Law Reform Commission, *Issues Paper 24: Review of the adversarial system of litigation*, pp.3-4 (www.austlii.edu.au/au/other/alrc/publications/issues/24).

141 ibid, p.4; originally, Administrative Review Council Report No.39, *Better Decisions: Review of Commonwealth Merits review Tribunals*, AGPS Canberra 1995, rec.5.

142 The Hon. J.W. Shaw, QC, MLC Second Reading LC Hansard, 27/06/97, p.11280.

jurisdiction are more flexible and less like those employed by the courts. In the General Division "there is less need to test evidence and limited need to lead fresh evidence".[143]

The Committee examined several aspects of the ADT's operation, including the rules of the ADT, the role and functions of the Rule Committee, representation, alternative dispute resolution, tribunal membership and resources. Based on the submissions and evidence received in the first stage of the inquiry the Committee made several proposals, outlined below, which received general support from the ADT (for a fuller discussion of the Committee's findings see Chapter 3 of the Discussion Paper).

Discussion Paper Proposal	ADT Response
5. The Rule Committee of the ADT conduct a review of the rules of the Legal Services Division, involving consultation with representatives of the major users of this Division, in particular, the Office of the Legal Services Commissioner, the Bar Association and the Law Society. (p.21)	Proposal referred to the Rule Committee.
6. The Rule Committee examine the feasibility of amending the rules of the Legal Services Division to provide for a period of three months between the formal decision to take disciplinary proceedings against a practitioner and filing in the ADT. (p.22)	Proposal referred to the Rule Committee.
7. A consultative mechanism be put in place whereby the ADT will regularly consult with user groups, and periodically survey representative samples of users of the ADT, to identify any problems experienced in the operation of the ADT and possible procedural improvements. (p.22)	Proposal will be adopted through the greater use of the Rule Committee sub-committee structure. The sub-committees attach to each of the Division Heads, and have user representatives from the areas affected by the work of the Divisions. But it should be noted that any significant increase in the level of user group consultation has some resource implications. This is a Tribunal with relatively small case volumes in each of its jurisdictions, but it has a highly diverse group of users and organisations interested in its operations.
8. That the Rule Committee have an ongoing responsibility to consider: a. the scope for further standardisation of rules applying in the various divisions of the ADT; b. whether the rules are able to further encourage the use of alternative dispute resolution techniques; c. whether the rules provide the maximum appropriate support encouraging accessibility and informality of proceedings. (p.24)	Proposal consistent with the role of the Rule Committee and will be referred to them.
9. That consideration be given to implementing some form of duty solicitor scheme, limited to proceedings where a government agency is the respondent, on a pilot basis as a trial solution for resolving the issue of access to legal representation. (p.29)	Agreed. The present duty solicitor is specific to the Equal Opportunity Division and does not discriminate in relation to respondents.
10. That the proposed Administrative Review Standing Committee monitor the impact on the operation of the ADT of developments in respect of representation of parties. (p.29)	Agreed, though have concerns as to whether the external body should be of the kind proposed (see comment on Proposal 16).
11. That the *ADT Act* be amended to provide: a. the ADT is to be constituted for the purposes of any particular proceedings by 1, 2 or 3 members;	Agreed. This proposal has important resources and case management implication, and will I believe deliver important efficiencies. The consultation process referred to in an earlier proposal could be used to seek to

[143] ADT submission, para.75.

Discussion Paper Proposal	ADT Response
b. if a Tribunal panel is constituted at a proceeding by one member only, that member must be a legal practitioner; c. if a Tribunal panel is constituted by more than one member, at least one must be a legal practitioner; and d. the President, or relevant Divisional Head, determines how the ADT is to be constituted for the purposes of each proceeding. (p.36)	develop listing criteria that would guard against any loss of representatives or involvement of community members in important categories of work.
12. That the *ADT Act* be amended to provide for some full-time members of the ADT and that the appropriate resources be provided. (p.36)	The Act may not need amendment as this possibility is already provided for. There is now one full-time member devoted exclusively to ADT work, Deputy President Hennessy who commenced in that capacity in March 2001. I agree with the thrust of the proposal which is that there be a greater emphasis on full-time membership at the Tribunal.
13. That the *ADT Act* be amended to provide for the creation of a position of full-time Deputy President of the ADT. (p.36)	Agreed.
14. That an examination of the membership structure of the ADT be conducted, focussing on the extent of part-time membership, with particular reference to the Legal Services Division. (p.36)	Agreed.
15. That a review be conducted of the total resources available to the ADT to perform its full range of functions across all divisions, including in respect of research and library needs. (p.37)	Agreed.

During the second stage of the inquiry, discussion of the proposal for an expanded ADT, incorporating professional disciplinary and specialist tribunals, raised the following issues:

- the extent to which tribunal procedures between Divisions and across the ADT should be standardised; and
- the extent to which merging tribunals should retain their specific processes and procedures when merged into the ADT.

One of the main arguments put against expansion of the ADT's jurisdiction was the loss of expertise in specialist tribunals. The issue of specialisation, is discussed at sections 4.1.1 and 4.1.2 of the report. The Committee notes that both the VCAT and the ADT serve as working examples of multi-division tribunals, exercising a range of functions which individually could be classed as specialist in nature. The possible retention of existing tribunal panel structures and composition, including specialist and community tribunal members, may assist in effecting the amalgamation of separate tribunals into the ADT and are matters the Committee considers should be subject to the discretion of the ADT President or Divisional Head, in keeping with Recommendation 10.

The Discussion Paper notes that the practices and procedures applied in the various divisions of the ADT are those of the merging tribunals, which were retained as far as possible, and that the general practices and procedures of the ADT would gradually emerge and develop. Special jurisdictional practices would be maintained or developed

as appropriate.[144] Tribunal divisions can adopt their own procedures formally through rules and informally through directions or guidelines.[145] Judge O'Connor gave the following evidence on the ADT's approach to rule-making and the scope for future standardisation of rules in specialist divisions:

> Yes. They are sort of standard at the moment in the sense that the standard is that we do not have rules. So you have to watch that. We try to operate most of the procedures according to guidelines and information documents, and that is fairly flexible. We have avoided across-tribunal rules except for matters where they are unavoidable to do with summonses and service and things like that. The only area that has a raft of rules is the legal services division. What I would like to see in time is a stepping back from those rules and the development of what might be called professional discipline rules that would, hopefully, then be common to any professional discipline jurisdiction you are dealing with, with any additional special rules if needed for particular categories.
>
> We have been fairly rule adverse, as I think I have mentioned previously, and there are pros and cons to that. There is an issue of transparency if you do not go down the rules route. We have the guidelines and the practice notes on the web site and available in a paper form which is distributed to the parties to the extent it is needed. We try to keep things as non-rules directed as possible. Most of the people are not interested in hearing about the rules. You try to give customised directions in particular cases or take customised approaches through case conferences.

On the basis of the evidence and submissions put to it, the Committee is persuaded that expansion of the ADT's jurisdiction will lead to the adoption of appropriate rules in its various divisions. The Committee considers that the differing practices and procedures of the various component divisions of an expanded ADT can be retained or adapted using the ADT's existing flexible procedural approach. The Committee considers that there may be some scope for standardisation in certain operational areas, such as, the standardisation of application forms and the production of common rules in similar areas of jurisdiction.

The Committee also examined the role and functions of the Rule Committee as part of the Discussion Paper and the proposals made are outlined in the preceding table. As constituted under s.92 of the *ADT Act* the Rule Committee includes a number of Ministerial appointees, some of whom are nominated by the President of the ADT. The membership of each divisional rule sub-committee includes three individuals, not being members of the ADT, who represent community and other relevant special interests in the area of the Division's jurisdiction (s.97). The Discussion Paper proposals in relation to the Rule Committee reflect this Committee's initial assessment that the Rule Committee is under-utilised and may not be fulfilling the role envisaged for it.

In addition to the external input from non-ADT members of the Rule Committee and the divisional subcommittees, s.98 of the ADT Act provides for public consultation and rule review. Before making any rule of the ADT, the Rule Committee must ensure a draft of the rule is publicly exhibited for a period of at least two months and consider any written submissions made on the draft rule within that period. In the event that a rule is made expeditiously, on certification by the President, the rule is gazetted and the Rule Committee is to consider any written submissions made within two months of gazzettal.

144 ADT, *Annual Report 1998-9*, December 1999, p.27.
145 ibid, p.13.

As noted in the Discussion Paper, the Committee considers that the Rule Committee should always have regard to the views on procedural issues being expressed through the user groups. The Committee notes that the ADT's procedures are internally monitored and that the ADT has indicated that it intends to consult with user groups as part of this internal review process.[146] This is not to say that these views should be treated as overriding the primary responsibility of the Rule Committee which should be to ensure that the rules of the ADT promote the objectives of the legislation which established it.[147]

The second statutory function of the Rule Committee as specified at s.93(1)(b) is "to ensure that the rules it makes are as flexible and informal as possible". The Committee suggested in the Discussion paper that the Rule Committee "also could monitor the use of alternative dispute resolution techniques, mediation and preliminary conferences for resolving matters, particularly given the emphasis on flexibility of procedures and accessibility".[148]

Judge O'Connor has agreed to the Discussion Paper proposals and indicated that the ADT would adopt greater use of the Rule Committee sub-committee structure. In his final evidence Judge O'Connor advised:

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

The Committee further notes Judge O'Connor's comment that any significant increase in the level of user group consultation will have resource implications due to the highly diverse group of users and organisations interested in the operations of the ADT.

The ADT's recent initiatives appear to have strengthened the role performed by the Rule Committee and sub-committees. In addition to user group input in the internal review process, and the ADT's continued reporting on its operations to the Minister and by way of its Annual Report, the strengthened Rule Committee and sub-committees, should serve as sufficient mechanisms for external input into the ADT's operations.

In view of the level of agreement on the part of the ADT to the proposals, the Committee has no further comment to make on operational matters, except to recommend that the ADT should continue to report on any operational changes by way of its Annual Report.

With regard to the development of the ADT in the longer term, the Committee put forward the proposal that an Administrative Review Standing Committee should be established and, amongst its other proposed functions, should "regularly assess, evaluate and report on the operational efficiency of the ADT, its effectiveness and performance" (Proposal 16c). The ADT's opposition to Proposal 16c is discussed in section 4.3 of the report.

146 ibid.
147 Discussion Paper, p.23.
148 Discussion Paper, p.23.

Judge O'Connor drew a distinction between "detailed issues of budget and management" on the one hand and "procedures and practice of the Tribunal in relation to its handling of applications and case disposals" on the other. He considered the latter to be a reasonable matter for an advisory body to have an interest in. The Committee shares the concern expressed by Judge O'Connor that there would be difficulties in an advisory body "having any charter which might permit it to probe more deeply into the [ADT's] operational environment". Such an interpretation was not intended by the Committee.

The Committee did not envisage that the proposed advisory body would interfere with the independent operation of the ADT, nor with the appropriate administrative reporting arrangements between the responsible Minister and the ADT. Nevertheless, the Committee remains concerned that issues of efficiency and effectiveness will assume more significance in an expanded jurisdiction for the ADT and are matters on which the ADT should report in detail to the Attorney General, and as part of the ADT's Annual Report. The Committee remains of the view that the proposed Administrative Review Advisory Council would be in a position to bring informed opinions on general issues of practice and procedure and that its functions should include a general, limited role in providing advice on such matters (see Recommendation 4).

In summary, the operational proposals contained in the Discussion Paper where possible have largely been implemented by the ADT on an administrative basis. However, some of the proposals require legislative amendment if they are to proceed and the Committee recommends accordingly that:

Recommendation 10

That the *ADT Act* be amended to provide:

a. the ADT is to be constituted for the purposes of any particular proceedings by 1, 2 or 3 members;

b. if a Tribunal panel is constituted at a proceeding by one member only, that member must be a legal practitioner;

c. if a Tribunal panel is constituted by more than one member, at least one must be a legal practitioner; and

d. the President, or relevant Divisional Head, should determine how the ADT is to be constituted for the purposes of each proceeding.

Recommendation 11

In relation to Proposals 5-9, 12 and 14-15 of the Discussion Paper, which do not require legislative action, the Committee recommends that the ADT report on any initiatives taken towards implementing the proposals and related outcomes in its Annual Report.

Summary of Recommendations

Recommendation 1

Legislation should be brought forward to merge separate tribunals with the ADT, unless there are clear reasons why such inclusion would be inappropriate or impractical, with particular consideration being given to merging all professional disciplinary tribunals with the ADT, as part of a separate professional disciplinary division.

Recommendation 2

a. Explicit criteria for determining those classes of administrative decisions which would appropriately fall within the external merits review jurisdiction of the ADT should be developed by the Attorney General, in consultation with the ADT, in the first instance, as an interim measure pending the establishment of an Administrative Review Advisory Council.

b. The Attorney General's Department should consult all departments and agencies to identify those classes of administrative decisions which currently meet such criteria and which should, therefore, be subject to external merits review by the ADT, having regard to the work done by the Commonwealth Administrative Review Council in this area.

c. Legislation should be introduced to confer review jurisdiction on the ADT in respect of those decisions which currently meet the agreed external review criteria.

Recommendation 3

There should be a presumption in future that all classes of administrative decisions provided for under new legislation, so long as they meet the criteria developed by the Attorney General should be subject to external merits review by the ADT.

Recommendation 4

The *ADT Act* should be amended to provide for the establishment of an Administrative Review Advisory Council with the following functions:

a. to further develop explicit criteria for determining the classes of administrative decisions which would appropriately fall within the ADT's external merits review jurisdiction;

b. ongoing review of the ADT's jurisdiction with particular focus on the assessment of tribunals and similar bodies in New South Wales, for the purpose of recommending whether they can appropriately be merged with the ADT;

c. oversight of the administrative law system in New South Wales, through performing functions analogous to those of the Administrative Review Council under Part V of the *Administrative Appeals Tribunal Act 1975* (Clth).

The Committee further recommends that the proposed Administrative Review Advisory Council, where necessary, should be able to make general observations and provide

advice on the practices and procedures of the ADT in relation to its handling of applications and case disposals.[149] The ADT should continue to report to the Attorney General on matters of operational efficiency, effectiveness and performance, and relevant information should be included in the ADT's Annual Report.

Recommendation 5

The proposed Administrative Review Advisory Council should, in particular, monitor the progress achieved in merging existing tribunals with the ADT and also have an ongoing role in the further review and development of criteria for defining the appropriate extent of the ADT's merits review jurisdiction.

Recommendation 6

The membership of the proposed Administrative Review Advisory Council should comprise a President, two ex officio members (the Ombudsman and the President of the Law Reform Commission), and at least three members with special qualifications.

A person appointed in the special qualifications category should have:

d. extensive experience at a high level in industry, commerce, public administration, industrial relations, the practice of a profession or the service of a government or of an authority of a government;

e. or extensive knowledge of administrative law or public administration;

f. or direct experience, or direct knowledge, of the needs of people, or groups of people, significantly affected by government decisions.

Recommendation 7

7a. The proposed Administrative Review Advisory Council should report to the Attorney General, who in turn should present each of the Council's reports to Parliament within fifteen sitting days of receiving the report.

7b. The proposed Administrative Review Advisory Council should prepare an annual report on its operations to the Attorney General for tabling in Parliament.

Recommendation 8

8a Pending the establishment of the proposed Administrative Review Advisory Council (ARAC), the Attorney General should assume responsibility for the performance of the functions recommended for ARAC.

8b The Committee further recommends that to assist the Attorney General in this role the proposed membership of the ARAC should be convened as a Working

[149] see Chapter 5 for further discussion and recommendations.

Group, pending the establishment of the ARAC.

8c The NSW Law Reform Commission (LRC) conduct a review of existing tribunals and similar bodies in New South Wales, with a particular focus on disciplinary tribunals, to determine whether it is feasible and appropriate to merge them with the ADT.

8d The Committee further recommends that the LRC report to the Attorney General on the outcome of the review and that the Attorney General table the report in Parliament upon its receipt.

Recommendation 9

The statutory functions of the President and Deputy Presidents of the NSW ADT should be amended, in terms similar to s.30 of the *Victorian Civil and Administrative Tribunal Act 1998,* to include responsibility for directing the professional development and training of tribunal members.

Recommendation 10

That the *ADT Act* be amended to provide:

e. the ADT is to be constituted for the purposes of any particular proceedings by 1, 2 or 3 members;

f. if a Tribunal panel is constituted at a proceeding by one member only, that member must be a legal practitioner;

g. if a Tribunal panel is constituted by more than one member, at least one must be a legal practitioner; and

h. the President, or relevant Divisional Head, should determine how the ADT is to be constituted for the purposes of each proceeding.

Recommendation 11

In relation to Proposals 5-9, 12 and 14-15 of the Discussion Paper, which do not require legislative action, the Committee recommends that the ADT report on any initiatives taken towards implementing the proposals and related outcomes in its Annual Report.

Appendices

Appendix 1: List of Submissions

Appendix 2: Discussion Paper mailing list and Responses

Appendix 3: ADT's enabling Legislation and Legislation conferring jurisdiction

Appendix 1: List of Submissions

1. Office of the Legal Services Commissioner
   Steve Mark, Commissioner
   26/7/00

1b. Office of the Legal Services Commissioner
   Steve Mark, Commissioner
   8/11/00

2. Anti-Discrimination Board of New South Wales
   Chris Puplick, President
   31/7/00

3a. & 3b. Elizabeth Ellis, Lecturer
   Faculty of Law
   University of Wollongong
   17/8/00 & 1/9/00

4. Roads and Traffic Authority
   Paul Forward, Chief Executive
   24/8/00

5. Law Society of NSW
   John North, President
   18/8/00

6. NSW Bar Association
   Ruth McColl, President
   15/8/00

7. Cr. Emma Brooks Maher
   28/8/00
   A private submission.

8. Public Interest Advocacy Centre – original submission amended by letter 8/9
   Gregory Kirk, Principal Solicitor
   30/8/00

9. New South Wales Department of State and Regional Development
   Perce Butterworth, Executive Director
   Policy and Resources Division
   30/8/00

10. Enrights Solicitors
   Patrick T. Wills
   30/8/00

11. Minister for Agriculture
   Minister for Land and Water Conservation
   Richard Amery

12. Administrative Review Tribunal
President
Judge Kevin O’Connor

Appendix 2: Discussion Paper mailing list and Responses

Tribunals receiving Discussion Paper

Chiropractors and Osteopaths Tribunal

Coal Compensation Review Tribunal

Fair Trading Tribunal

Greyhound Racing Appeals Tribunal

Guardianship Tribunal

Harness Racing Appeals Tribunal

Independent Pricing and Regulatory Tribunal

Local Government Pecuniary Interest Tribunal

Local Government Remuneration Tribunal

Marine Appeals Tribunal

Medical Tribunal

Mental Health Review Tribunal

Nurses Tribunal

Racing Appeals Tribunal

Remuneration Tribunals

Residential Tribunal

Transport Appeals Board

Written responses received from:

The Administrative Decisions Tribunal

The Guardianship Tribunal

The Independent Pricing and Regulatory Tribunal

The New South Wales Thoroughbred Racing Board, Harness Racing New South Wales and The New South Wales Greyhound Racing Authority (joint submission)

The Local Government Pecuniary Interest Tribunal

The Victorian Civil and Administrative Tribunal.

Appendix 3: ADT's enabling Legislation and Legislation conferring jurisdiction

Taken from Lawlink NSW: Annual Report 2000-2001 (Appendix A: Legislation)

Principal legislation

Administrative Decisions Tribunal Act 1997

Administrative Decisions Tribunal (General) Regulation 1998

Administrative Decisions Tribunal Rules (Transitional) Regulation 1998

Primary statutes

Adoption Information Act 1990

Adoption of Children Act 1965

Agricultural Livestock (Disease Control Funding) Act 1998

Anti Discrimination Act 1977

Apiaries Act 1985

Architects Act 1921

Births, Deaths and Marriages Registration Act 1995

Boxing and Wrestling Control Act 1986

Charitable Fundraising Act 1991

Child Protection (Prohibited Employment) Act 1998

Children and Young Persons (Care and Protection) Act 1998

Community Justice Centres Act 1983

Community Services (Complaints, Appeals and Monitoring) Act 1993

Conveyancers Licensing Act 1995

Co-operative Housing and Starr-Bowkett Societies Act 1998

Dangerous Goods Act 1975

Disability Services Act 1993

Education Act 1990

Electricity Supply Act 1995

Employment Agents Act 1996

Entertainment Industry Act 1989

Environmental Planning and Assessment Act 1979

Factories, Shops and Industries Act 1962

Fair Trading Act 1987

Fertilisers Act 1985

Firearms Act 1996

First Home Owner Grant Act 2000

Fisheries Management Act 1994

Food Act 1989

Food Production (Safety) Act 1998

Forestry Act 1916

Freedom of Information Act 1989

Gas Supply Act 1996

Home Building Act 1989

Horticultural Stock and Nurseries Act 1969

Hunter Water Act 1991

Impounding Act 1993

Legal Profession Act 1987

Local Government Act 1993

Motor Dealers Act 1974

Motor Vehicle Sports (Public Safety) Act 1985

Mount Panorama Motor Racing Act 1989

Native Title Act 1994

Non-Indigenous Animals Act 1987

Nursing Homes Act 1988

Occupational Health and Safety Act 1983

Ombudsman Act 1974

Passenger Transport Act 1990

Pawnbrokers and Second-hand Dealers Act 1996

Pesticides Act 1999

Petroleum Product Subsidy Act 1997 s25

Plant Diseases Act 1924

Police Service Act 1990

Privacy and Personal Information Protection Act 1998

Private Hospitals and Day Procedure Centres Act 1998

Public Health Act 1991

Public Lotteries Act 1996

Rail Safety Act 1993

Registration of Interests in Goods Act 1986

Retail Leases Act 1994

Road and Rail Transport (Dangerous Goods) Act 1997

Road Transport (General) Act 1999

Road Transport (Vehicle Registration) Act 1997

Security Industry Act 1997

Stock (Artificial Breeding) Act 1985

Surveyors Act 1929

Sydney Water Act 1994

Sydney Water Catchment Management Act 1998

Taxation Administration Act 1996

Theatres and Public Halls Act 1908

Timber Marketing Act 1977

Tow Truck Industry Act 1998

Trade Measurement Act 1989

Travel Agents Act 1986

Veterinary Surgeons Act 1986

Vocational Education and Training Accreditation Act 1990

Veterinary Surgeons Act 1986

Weapons Prohibition Act 1998

Workplace Injury Management and Workers Compensation Act 1998

Youth and Community Services Act 1973